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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
MPM Silicones, LLC, et al.,[1]	:	Case No. 14-22503
	:	(RDD)
Debtors.	:	(Jointly Administered)
	:	
	:	
MOMENTIVE PERFORMANCE MATERIALS INC., MOMENTIVE PERFORMANCE MATERIALS WORLDWIDE INC., MOMENTIVE PERFORMANCE MATERIALS USA INC., JUNIPER BOND HOLDINGS I LLC, JUNIPER BOND HOLDINGS II LLC, JUNIPER BOND HOLDINGS III LLC, JUNIPER BOND HOLDINGS IV LLC, MOMENTIVE PERFORMANCE MATERIALS QUARTZ, INC., MPM SILICONES, LLC, MOMENTIVE PERFORMANCE MATERIALS SOUTH AMERICA INC., MOMENTIVE PERFORMANCE MATERIALS CHINA SPV INC.	:	Adversary Proceeding No. 14-08227 (RDD)
Plaintiffs/Counterclaim-Defendants,	:	
v.	:	

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Juniper Bond Holdings I LLC (9631), Juniper Bond Holdings II LLC (9692), Juniper Bond Holdings III LLC (9765), Juniper Bond Holdings IV LLC (9836), Momentive Performance Materials China SPV Inc. (8469), Momentive Performance Materials Holdings Inc. (8246), Momentive Performance Materials Inc. (8297), Momentive Performance Materials Quartz, Inc. (9929), Momentive Performance Materials South America Inc. (4895), Momentive Performance Materials USA Inc. (8388), Momentive Performance Materials Worldwide Inc (8357), and MPM Silicones, LLC (5481).

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., solely as Trustee for the MPM Escrow LLC and MPM Finance Escrow Corp. 8.875% First Priority Senior Secured Notes due 2020,	:
Defendant/Counterclaim-Plaintiff.	:

---------- X

BOKF, NA's MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO THE DEBTORS' PROPOSED JOINT CHAPTER 11 PLAN OF REORGANIZATION AND PLAN CONFIRMATION WITH RESPECT TO THE APPLICABLE PREMIUM

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STATEMENT OF THE CASE

BOKF, NA, as successor (the "**First Lien Trustee**") to The Bank of New York Mellon Trust Company, N.A., as trustee under that certain indenture dated as of October 25, 2012 (as further modified, supplemented or amended and in effect on the date hereof, the "**Indenture**") for the 8.875% First-Priority Senior Secured Notes due 2020 (the "**First Lien Notes**") issued by Debtor Momentive Performance Materials Inc. ("**MPM**") and guaranteed by certain of the above-captioned debtors and debtors in possession (collectively with MPM, the "**Debtors**"), hereby files this objection (this "**Objection**") to confirmation of the *Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials Inc. and its Affiliated Debtors* [Dkt. No. 515] (the "**Plan**")[2] on the basis that it contemplates disallowance of the Applicable Premium due to the First Lien Trustee on behalf of the holders of the First Lien Notes through the Adversary Proceeding[3] (the "First Lien **Noteholders**"), and respectfully represents as follows:

PRELIMINARY STATEMENT

In the Adversary Proceeding and the Plan, MPM disavows its plain and unmistakable obligation to pay the Applicable Premium -- a sum of over two hundred million dollars -- owed to the First Lien Noteholders by virtue of MPM's refinancing of the First Lien Notes under the Plan and discharge of its obligations thereunder. Applicable law does not permit MPM, under the cloak of voluntary bankruptcy, to evade its contractual obligation to compensate the First Lien Noteholders for its early redemption of the First Lien Notes, and to improperly shift value to subordinated and junior creditors. Simply put, the Plan should not be confirmed unless the Plan is amended to expressly provide for the payment of the Applicable Premium to the First Lien Noteholders.

---

[2] Each capitalized term that is not otherwise defined shall have the meaning ascribed to it in the Plan.

[3] "Adversary Proceeding" means the action commenced by the Debtors against the First Lien Trustee, in *Momentive Performance Materials, Inc. v. The Bank of New York Mellon Trust Co., N.A.*, Adv. Pro. No. 14-08227.

This case is primarily one of contractual interpretation. On October 25, 2012, the parties entered into the 8.875% Indenture, which was drafted by MPM. Contrary to MPM's contentions, the Indenture's provisions operate interdependently to provide for the Applicable Premium upon redemption of the First Lien Notes before October 15, 2015, and upon the acceleration pursuant to a voluntary bankruptcy filing. First, Section 5 of the First Lien Notes (the "**Optional Redemption**" clause) grants MPM the "option" to redeem the First Lien Notes prior to October 15, 2015 at a "redemption price" equal to the full principal, plus interest, and the Applicable Premium. The clause requires payment of the Applicable Premium upon MPM's election to redeem the First Lien Notes prior to *that specific date*, not merely to payments made prior to "maturity." Also in Section 5, a "no-call" provision prohibits MPM from otherwise redeeming the First Lien Notes except as set forth therein. Accordingly, the First Lien Indenture and the First Lien Notes are crystal clear that if MPM were to "call" back the First Lien Notes prior to October 15, 2015, regardless of the reason, it must pay the agreed-upon price.

Second, the Indenture contains an Acceleration provision (Section 6.02), which states that upon a voluntary bankruptcy, the "principal, premium, if any, and interest" would become immediately due and payable. If the intent was to negate that the "Applicable Premium" was owed upon the commencement of a voluntary bankruptcy, this provision was precisely the place to make that clear. MPM chose not to do so. Instead, the drafters of the Indenture used the phrase "premium, if any," to refer to the various premiums available to the First Lien Noteholders under the relevant circumstances, including the Applicable Premium.

Neither the Indenture nor the case law supports the Debtors' and Apollo's contention that, by definition, MPM has not chosen to "redeem" the First Lien Notes. Notably, the Indenture provides no cogent definition of the word "redemption," nor does it define the

operative phrase "may redeem" in the Optional Redemption provision. The Court accordingly must afford this phrase its plain and ordinary meaning in the corporate finance context -- that "may redeem" means beginning the process of repaying the First Lien Notes and discharging MPM's obligations thereunder. The mere commencement of a voluntary bankruptcy does not change the meaning of this phrase nor render it inapplicable. The Plan plainly states that MPM will discharge its obligation under the First Lien Notes by paying the First Lien Noteholders either cash, if they agree to waive the Applicable Premium, or providing replacement notes, if they do not so agree. Indeed, the Debtors have committed exit financing to repay the First Lien Notes. By entering into the RSA and Plan, and commencing a voluntary bankruptcy case in accordance with the RSA, MPM initiated the process of redeeming or "repurchasing" the First Lien Notes pursuant to the Plan and acted voluntarily within the scope and meaning of the Optional Redemption clause. Any conclusion to the contrary would be just wrong.

Moreover, in construing the contract the Court must consider standards of commercial reasonableness, which include customs and practices of the trade that here counsel strongly against MPM's interpretation of the First Lien Indenture. When the First Lien Notes were issued, the vast majority of high-yield bond offerings included "no-call" and so-called "make-whole" provisions, and the First Lien Noteholders had every reason to expect that those provisions applied in bankruptcy. The purpose of a "make-whole" provision is to ensure that First Lien Noteholders receive the yield they expected to receive through a date certain, and to serve as liquidated damages in the event of the issuer's default. It defies the Indenture's plain language, common sense, and commercial expectations to contend that the "premium" applicable in the event of a voluntary bankruptcy would in any way exclude or be distinct from the "Applicable Premium" triggered were MPM to otherwise redeem the First Lien Notes. Such an

approach would provide issuers with the perfect incentive to file for bankruptcy to reduce noteholders' claims, and would therefore deter noteholders from entering the market in the first place. Should the Court, however, determine that the Indenture is ambiguous as to whether the Applicable Premium applies here where MPM is redeeming the First Lien Notes as part of its bankruptcy process, the Court should construe that ambiguity against MPM, as the drafter of the Indenture.

Even if this Court were to find that the Applicable Premium was not due (which it should not), the First Lien Trustee is entitled to an unsecured claim against MPM for its expectation damages resulting from the breach of the "no call" provision.

Moreover, as an oversecured creditor, as asserted by the Debtors, the First Lien Trustee is entitled to "reasonable" fees and expenses (including attorney and financial advisor fees) incurred in connection with the Adversary Proceeding and the Plan. In addition, the Debtors' financial advisor has testified that the claims of the First Lien Trustee are oversecured. Therefore, the reimbursement of the First Lien Trustee's reasonable fees and expenses is required under the terms of the Indenture, as well as Section 506(b) of the Bankruptcy Code.

In sum, the Indenture and applicable law require a declaration that MPM's refinancing of the First Lien Notes triggered an obligation of the Debtors to pay the Applicable Premium, or an equivalent sum, plus all other amounts due and owing upon Confirmation of the Plan.

ARGUMENT

Pursuant to the Bankruptcy Code, a creditor has a "claim" if it has a "right to payment" under substantive law. *See* 11 U.S.C. § 101(5). Accordingly, for an indenture trustee or noteholders to recover a make-whole premium provided under an indenture, that claim must be enforceable under state law. 11 U.S.C. § 502(b)(1); *Travelers Cas. & Surety Co. v. Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1205 (2007) ("[T]he 'basic federal rule' in bankruptcy is that state

law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'"); *In re United Merchs. & Mfrs.*, 674 F.2d 134, 141 (2d Cir. 1982). Here, the plain and unambiguous language of the Indenture and the First Lien Notes, the parties' commercially reasonable expectations, and fundamental bankruptcy policy concerns clearly demonstrate that MPM owes the First Lien Noteholders the bargained-for benefits of the Applicable Premium.

I. APPLICABLE LEGAL STANDARD

Under New York law, the interpretation of an indenture is a matter of basic contract law. *In re AMR Corp.*, 730 F.3d 88, 98 (2d Cir. 2013). "'[W]hen parties set down their agreement in a clear, complete document,' the New York Court of Appeals has said, 'their writing should as a rule be enforced according to its terms.'" *Id.* The "essence of contract interpretation . . . is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract." *VTech Holdings Ltd. v. Lucent Techs. Inc.*, 172 F. Supp. 2d 435, 441 (S.D.N.Y. 2001). Accordingly, "the tests to be applied [to determine intent] . . . are common speech . . . and the reasonable expectation and purpose of the ordinary business[person] in the factual context in which terms of art and understanding are used, often also keyed to the level of business sophistication and acumen of the particular parties." *In re Calpine Corp.*, No. 07 Civ. 8493, 2007 WL 4326738, at *8 (S.D.N.Y. Nov. 21, 2007).

"Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous." *S. Rd. Assocs. LLC v. Int'l Bus. Machs. Corp.*, 826 N.E.2d 806, 809 (N.Y. 2005). If the court determines that the contract terms are ambiguous, it may "accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract." *The Bank of New York Trust Co., N.A. v.*

Franklin Advisers, Inc., 726 F.3d 269, 276 (2d Cir. 2013). "Contract language is unambiguous when it has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Revson* v. *Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000). The language of a contract is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist when one party's view "'strain[s] the contract language beyond its reasonable and ordinary meaning.'" *Bethlehem Steel Co. v. Turner Constr. Co.*, 141 N.E.2d 590, 593 (N.Y. 1957).

II. PURSUANT TO THE INDENTURE, THE APPLICABLE PREMIUM APPLIES HERE, WHERE THE FIRST LIEN NOTES ARE REDEEMED PRIOR TO OCTOBER 15, 2015

A. Pursuant to a Plain Reading of Section 5 of the First Lien Notes, MPM Has Elected To Redeem The First Lien Notes

1. The Applicable Premium Is Intended To Protect First Lien Noteholders' Right to the Investment Yield They Bargained For

The First Lien Notes require payment of the principal sum "on October 15, 2020." First Lien Notes Ex. B-2.[4] Thus, on October 15, 2020, assuming MPM had not redeemed the First Lien Notes prior to that date, MPM was required to repay the principal and any accrued and unpaid interest to the First Lien Noteholders. To the extent MPM seeks to redeem the First Lien Notes, that redemption is governed by Article III of the Indenture and Section 5 of the First Lien Notes incorporated thereunder. Section 5 of the First Lien Notes contains what is typically referred to as a "no call" provision, which provides that "[e]xcept as set forth [therein], the Notes shall not be redeemable at the option of MPM prior to October 15, 2015."[5] Section 5, however, grants MPM the right to redeem the First Lien Notes prior to October 15, 2015 "at a redemption

[4] The First Lien Indenture and First Lien Notes are attached to the Declaration of Mauricio A. España ("**España Declaration**") as Exhibit TTX025. All references to "Exhibit" or "Ex." refer to the exhibits attached to the España Declaration.

[5] Although the Debtors and Apollo take the surprising position that the Indenture did not contain a "no-call" provision, for the reasons discussed *infra*, Part III, their argument is indefensible and wholly without merit.

price equal to 100% of the principal amount of the Notes redeemed, plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to the applicable redemption date."[6] Thus, as long as MPM pays the Applicable Premium, in addition to principal and interest, it *may* redeem the First Lien Notes before October 15, 2015.

The Applicable Premium is commonly referred to as a "make-whole premium." "Make-whole and no-call provisions in bond indentures protect lenders' right to the yield that was expected at the time that they made their loans," and serve as liquidated damages. *In re Chemtura Corp.*, 439 B.R. 561, 596 (Bankr. S.D.N.Y. 2010); *In re Calpine Corp.*, 365 B.R. 392, 399 (Bankr. S.D.N.Y. 2007). Thus, "[w]hen a loan is redeemed before maturity *or (sometimes) upon default*, a make-whole provision requires a borrower to pay a premium to compensate the lender for the loss of anticipated interest that might result -- as, for example, the loss that a lender might suffer if the bond were redeemed in an environment where prevailing interest rates are lower than those the parties bargained for at the time the bond was issued. Similarly, a no-call provision prohibits the borrower from prepaying the indenture obligations at all, again protecting the lender's yield." *In re Chemtura Corp.* 439 B.R. at 596 (emphasis added);

[redacted]

[6] The "Applicable Premium" is defined in Section 1.1 of the Indenture as "the greater of: (1) 1% of the then outstanding principal amount of such Note; and (2) the excess of: (a) the present value at such redemption date of (i) the redemption price of such Note, at October 15, 2015 (such redemption price being set forth in paragraph 5 of the applicable Note) plus (ii) all required interest payments due on such Note through October 15, 2015…."

[redacted] Here, as Section 5 of the First Lien Notes plainly states, the Applicable Premium was intended to protect the First Lien Noteholders' right to their bargained for yield in the event MPM chose to redeem the First Lien Notes at any time prior to October 15, 2015. The Applicable Premium also serves as a valid measure of liquidated damages.[7]

2. The Treatment of the First Lien Notes Under the Plan Constitutes a Redemption

The Indenture's call and make-whole premiums were intended to apply to circumstances such as this one when MPM, the issuer, seeks to redeem the First Lien Notes in order to take advantage of the current "environment where prevailing interest rates are lower than those the parties bargained for at the time the bond was issued." *In re Chemtura Corp.*, 439 B.R. at 596. As the discovery obtained in this proceeding makes clear, MPM's conduct prior to, and contemporaneous with, its filing for bankruptcy protection amount to what is essentially an attempt to refinance its $1.1 billion of First Lien debt, currently at 8.875% interest rate, at a lower interest rate that would reduce its overall costs. [redacted]

[7] Neither the Debtors nor Apollo assert that the Applicable Premium would constitute an unreasonable penalty. The Applicable Premium here is a reasonable stipulated damages provision that reasonably estimates the loss First Lien Noteholders would incur in the event MPM redeems the First Lien Notes prior to October 15, 2015. *See In re Trico Marine Services*, 450 B.R. 474, 481 (Bankr. D. Del. 2011) (make-whole premiums are "akin to a claim for liquidated damages, not a claim for unmatured interest."). The New York Court of Appeals has "cautioned generally against interfering with parties' agreements" and has noted a trend toward "enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation." *Nw.Mut. Life Ins. Co. v. Uniondale Realty Assocs.*, 11 Misc. 3d 980, 986 (N.Y. Sup. Ct. 2006)(citing *JMD Holding Corp. v. Congress Financial Corp.*, 795 N.Y.S.2d 502 (2005)).

[redacted]

Indeed, the Debtors' fast track Chapter 11 cases are designed only to refinance the First Lien and 1.5 Lien debt, equitize the Second Lien debt, and cancel the subordinated debt. General unsecured claims are being paid in full, and the Debtors are not conducting an operational restructuring. Any argument that the Chapter 11 cases are about anything more than effectuating a premeditated refinancing of the Debtors' capital structure begs credulity.

In determining whether the First Lien Noteholders are entitled to recover the Applicable Premium, the Court must determine whether MPM's restructuring of the First Lien Notes constitutes a redemption pursuant to Section 5 of the First Lien Notes. Because neither the Indenture nor the First Lien Notes explicitly defines the term "redemption," the Court must afford it its "plain and ordinary meaning." *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 120 (2d Cir. 2010) (quoting *Mazzola v. Cnty. of Suffolk*, 533 N.Y.S.2d 297, 297 (1988)) ("[I]t is common practice for the courts of [New York] State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract."); *Gallo v. Travelers Prop. Cas*, 801 N.Y.S.2d 849, 850 (App. Div. 4th Dep't 2005).

"[T]o redeem," "as defined in dictionaries, and as customarily used in the securities industry . . . ordinarily and customarily refers to the act of paying a noteholder in exchange for his or her note." *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 957 F. Supp. 2d 316, 335 n.15 (S.D.N.Y. 2013). Similarly, "redemption" is defined as the "repayment of a debt security or a preferred stock issue, at or before maturity." Barron's Dictionary of Finance &

Investment Terms 587 (8th ed. 2010); [redacted] The ultimate effect of an issuer redeeming its notes is the discharge of its obligation to noteholders by paying them a stipulated amount. It is irrefutable that here, as a result of MPM's voluntarily refinancing of the First Lien Notes, MPM will discharge its obligation under the First Lien Notes by either providing the First Lien Noteholders a cash payment in the amount of the principal and interest due under the First Lien Notes or by providing them with replacement notes that purport to be the indubitable equivalent of their Allowed Claim. *See* Plan, Dkt. No. 515, at 28.

Specifically, the Plan states that "[o]n the Effective Date . . . each holder of an Allowed First Lien Note Claim shall receive, subject to the terms of this Plan, *in full satisfaction, settlement, release and discharge of, and in exchange for, such Claim*, its Pro Rata Share of" either cash or replacement notes. Plan §4.3, Dkt. No. 515 (emphasis added). The Plan also plainly states that "on the Effective Date all agreements, instruments, and other documents evidencing, related to or connected with any Claim or Interest (including the Second Lien Notes Intercreditor Agreement), other than Intercompany Interests, and any rights of any holder in respect thereof, *shall be deemed cancelled, discharged and of no force or effect*." *Id.* at § 7.3 (emphasis added). There also is no dispute that the First Lien Notes will be discharged before October 15, 2015, the call date, if the Plan goes effective.

The inescapable conclusion is that MPM has voluntarily elected to discharge its obligations under the First Lien Notes by repaying the First Lien Noteholders either in cash or in replacement notes. Pursuant to the plain and unambiguous language of the Indenture, MPM's entry into the RSA and the Plan to discharge its obligation under the First Lien Notes constitutes

[8] [redacted]

a redemption of the First Lien Notes pursuant to Section 5 and requires MPM to pay the First Lien Noteholders the Applicable Premium, in addition to the principal and interest. [redacted]

3. The Parties Reasonably Believed Bankruptcy Would Not Preclude Payment of the Applicable Premium

Section 5 plainly demonstrates that the parties to the Indenture intended to limit MPM's ability to redeem the First Lien Notes prior to a date certain -- October 15, 2015. In no uncertain way did the parties intend for MPM's voluntary bankruptcy to be wielded as an end-run around these clear contractual constraints. Neither Section 3.02 of the Indenture nor Section 5 of the First Lien Notes state that the Applicable Premium does not apply in the event MPM files for bankruptcy. MPM's Offering Circular relating to the First Lien Notes, which the Court must read together with the Indenture in construing the terms of the Indenture, is particularly instructive. *See The Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 915 n.1 (2d Cir. 2010) (considering offering memoranda in conjunction with the Indenture language to determine the parties' intent regarding an Indenture provision); *Wells Fargo Bank, N.A. v. Cede & Co.*, 12-0083-cv, 2012 U.S. App. LEXIS 24909, at *2-3 (2d Cir. Dec. 5, 2012) (rejecting "argument that the district court erred in considering, in interpreting the PSA, the Prospectus Supplement and other transaction documents related to the PSA. Under New York law, which governs the PSA, the district court properly considered all writings forming part of a single transaction. . . ."); *PETRA CRE CDO 2007-1, Ltd v. Morgans Grp. LLC*, 84 A.D.3d 614, 615 (1st Dep't 2011).

When an Offering Circular contains affirmative representations about the risks of investing, the duty arises to "ensure that those statements were accurate and complete." *See*

[9] [redacted]

Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 538 F. Supp. 2d 662, 669 (S.D.N.Y. 2008) ("[R]isk disclosures must accurately characterize the scope and specificity of the risk, as understood at the time the statements are made."). MPM's Offering Circular, pursuant to which MPM was required to disclose to potential investors the objectives, risks, and terms of the bond offering, does not disclose to potential investors that the Applicable Premium would not apply in the event of MPM's bankruptcy. [redacted]

B. The Acceleration Provision Reflects The Parties' Intent That MPM Pay the Applicable Premium Upon A Voluntary Refinancing Of The First Lien Notes

Section 6.02 of the Indenture (also referred to as the "Acceleration Provision") also plainly and unambiguously demonstrates that MPM's voluntary filing for bankruptcy, and

[10] *See also* 15 U.S.C. § 77l(a)(2) (imposing liability on "[a]ny person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading."); *Globus v. Law Research Serv.*, 418 F.2d 1276 (2d Cir. 1969) (affirming jury finding of issuer's liability for misrepresentations in offering circular); *In re Am. Int'l Grp. Inc., 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 531 (S.D.N.Y. 2010) ("[G]eneric risk disclosures are inadequate to shield defendants from liability for failing to disclose known specific risks."). The issuer's assertions that the Applicable Premium is not owed as a result of bankruptcy is particularly troubling in light of the disclosures in the Offering Circular. As such, the Debtors' officers and directors who may have personal liability to the First Lien Noteholders cannot be released under the Plan.

related repayment or replacement of the First Lien Notes, triggered its obligation to pay the First Lien Noteholders the Applicable Premium. Section 6.02 of the Indenture specifically provides, in relevant part, that "[i]f an Event of Default specified in Section 6.01(f) or (g) with respect to MPM occurs [including MPM's voluntary bankruptcy], the principal of, *premium, if any,* and interest on all the Notes shall *ipso facto* become and be immediately due and payable without any declaration or any part of the Trustee or any Holders." (emphasis added).

Because the term "premium," like "redemption," is not explicitly defined in the Indenture the Court must afford it its plain and ordinary meaning. Black's Law Dictionary defines a "premium" as "[t]he amount by which a security's market value exceeds its face value." BLACK'S LAW DICTIONARY 1219 (8th ed. 2004). That definition is consistent with the understanding of the parties to the Indenture. [redacted] Thus, construing Section 6.02 on its face and giving meaning and effect to every provision in that section and the Indenture, as the Court must, this Court can reach only one conclusion regarding the "premium, if any," that becomes immediately due and payable in the event of MPM's bankruptcy. That conclusion is that the "premium" referred to therein must necessarily include the "Applicable Premium" and any other "premium" that may apply under the relevant circumstances. A contrary reading fails to give meaning and effect to the fact that the "Applicable Premium" is indeed one of the premiums provided to First Lien Noteholders under the Indenture.[12] *See Chesapeake Energy*

[11] [redacted]

[12] As the Debtors acknowledge, there are a variety of premiums provided for under the Indenture and First Lien Notes, including, but not limited to those relating to redemptions, change of control, or tender offers. *See* First Lien Notes § 5 (redemption premium), Indenture §§4.08 (change of control premium), 4.03(b)(xiv) ("tender premiums" in connection with refinancing Subordinated Indebtedness); 4.04(b)(iii)(1) ("tender premiums" in connection with refinancing Subordinated Notes); 9.02 ("tender offers").

Corp. v. The Bank of N.Y. Mellon Trust Co., N.A., 957 F.Supp.2d 316, 334 (S.D.N.Y. 2013) ("'An interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided."). This reading is consistent with the understanding of the investors who originally purchased the First Lien Notes. [redacted]

The Debtors, however, attempt to subvert the canon of construction that "specific language controls over general language" into the notion that the Court should altogether disregard general language where specific language is absent. *See* Br. at 17-19. This canon of construction, however, does not permit the Court to disregard (as the Debtors propose) the all-inclusive umbrella term "premium" merely because Section 6.02 does not also reference a more specific term -- the "Applicable Premium" -- that is encompassed within the general term.

Courts generally enforce the payment of make-whole premiums that are triggered by an issuer's default and acceleration so long as the relevant provision makes clear that the make-whole premium is owed to holders in the event of a default and acceleration. *See HSBC Bank USA, Nat'l Assoc. v. Calpine Corp.*, No. 07 Civ 3088, 2010 WL 3835200, at *4 (S.D.N.Y. Sept. 15, 2010) [Hereinafter "*Calpine II*"] (the notes must "provide[] for the payment of premiums in the event of payment pursuant to acceleration"); *In re AMR*, 485 B.R. 279, 300 n.19 (S.D.N.Y. 2013) (the language should provide "explicitly for a premium"); *Nw. Mut. Life Ins. Co.*, 11 Misc. 3d at 985 (noting requirement of "an explicit agreement to allow a premium" after acceleration).

Notably, however, courts do not require that a contractual provision be drafted "optimally or with perfect clarity" to be enforceable, as long as the construction of the provision is reasonable. *Chesapeake Energy Corp.*, 957 F.Supp.2d at 336 ("failure to draft §1.7(b) optimally

or with perfect clarity does not make its construction unreasonable. A provision, even if clumsily drafted, may still be subject to a single reasonable interpretation."). Contrary to the Debtors' and Apollo's contentions, Section 6.02 contains the "common element" found in those enforceable provisions: namely, it explicitly provides that "[t]he premium or its equivalent becomes due upon default and acceleration." *See Nw. Mut. Life Ins. Co.*, 11 Misc. 3d at 989. The decision by the drafters of the Indenture to broaden the scope of Section 6.02 by referring to "premium, if any," rather than limiting it to a specific premium demonstrates that they understood MPM could not use a bankruptcy filing to avoid its obligation to compensate the First Lien Trustee for the loss incurred by MPM's early payment.

Indeed, the First Lien Trustee's interpretation of the Indenture is buttressed by Section 9.02(iv), which states that without the holders' consent, no amendment may "reduce the *premium* payable upon the *redemption* of any Note . . . in accordance with Article III." (emphasis added). *See Eastman Kodak Co. v. Altek Corp.*, 12 Civ. 0246, 2013 WL 1285293, at *7 (S.D.N.Y. Mar. 29, 2013) ("When considering the meaning of a contract term in the larger context of an entire agreement, a Court 'may presume that the same words used in different parts of a writing have the same meaning'"). Section 9.02's reference to a "premium" refers unmistakably to the Applicable Premium provided to First Lien Noteholders pursuant to Article III. This reflects that the drafters of the Indenture showed a propensity to use the word "premium" in a broader context to include "Applicable Premium." [redacted]

Several other provisions of the Indenture further reinforce the notion that the drafters of the Indenture used the word "premium" in a broader context to include, among others, the "Applicable Premium":

- Section 6.01(b) refers to a "default in payment of principal or premium, if any, . . . when due upon optional redemption," which can only be referring to the Applicable Premium provided pursuant to Section 5 of the First Lien Notes titled "Optional Redemption."

- Section 8.02(a)(ii) referring to MPM's legal defeasance options, which includes as the part of the obligations it would defease the potential payment of the Applicable Premium, refers only to MPM's ability to "pay principal, premium, if any, and interest when due on all the First Lien Notes to maturity or redemption, as the case may be . . . ."

- Section 11.01(a) lists the obligations of MPM that are secured by the Security Documents and identifies only "premium, if any," and not the "Applicable Premium." The Debtors' assertion that "premium, if any," does not include the "Applicable Premium" rings hollow in light of its prior representations that the Collateral also secures its obligation to pay the Applicable Premium, if allowed by the Court. *See* Final DIP Order, Dkt. No. 253, at ¶¶ 4(g), (h).

- Section 12.01 identifies all of the obligations that MPM TopCo released on the Assumption Date and that were subsequently guaranteed and assumed by each Note Guarantor. In identifying the obligations that were released by MPM TopCo, and subsequently assumed by the Note Guarantors, Section 12.01 only identifies the "premium, if any" and not the Applicable Premium. If MPM TopCo was released of its obligation to pay the Applicable Premium, then MPM cannot assert that the identical language does not include the Applicable Premium when used in Section 6.02.

Other provisions in the Indenture reflect that the drafters knew to exclude the reference to a "premium" or "Applicable Premium" when they intended for First Lien Noteholders to receive only principal and interest, as the Debtors and Apollo purport is the case here. For instance, in the event of a "Special Mandatory Redemption," which is triggered if certain escrow conditions are not met, the Indenture requires a mandatory redemption at the Escrow Redemption Price, which is defined as "as a price equal to par plus accrued and unpaid interest." Indenture § 3.09; "Escrow Redemption Price" definition. Notably, the Escrow Redemption Price does not include a reference to a "premium" or "Applicable Premium" since it unequivocally reflects the intention of the drafters that MPM only pay principal and interest to First Lien Noteholders in the event of

a Special Mandatory Redemption. Thus, had the drafters of the Indenture intended for MPM not to be liable for the Applicable Premium, or any other premium, in the event of MPM's default and acceleration, they certainly could have chosen not to include the reference to a "premium, if any" in Section 6.02 as they chose to do so in the case of a Special Mandatory Redemption. The failure to do so is indicative of their intent that all premiums should be paid to the First Lien Noteholders in the event of a default and due acceleration.[13]

C. The Debtors' and Apollo's Arguments That A Redemption Has Not Occurred Because Neither MPM's Bankruptcy Nor Its Refinancing Was Voluntary Are Unavailing

The Debtors and Apollo contend that redemption, pursuant to Section 5, has not occurred because their "voluntary" filing for Chapter 11 protection, and their "voluntary" repayment of the First Lien Notes pursuant to the Plan, cannot be considered a voluntary act sufficient to constitute an Optional Redemption. *See* Br. At 15-17; Apollo Br. at 15-17. The Debtors also contend that their failure to provide notice, in the form required by Section 5, precludes a finding that a redemption pursuant to Section 5 of the First Lien Notes has occurred. The Debtors' and Apollo's arguments do not withstand scrutiny.

1. Amidst Other Options, MPM Elected To Refinance The First Lien Notes Through The Restructuring Process

The Debtors contend that their "repayment" of the First Lien Notes pursuant to the Plan cannot constitute a voluntary act because their filing for bankruptcy protection triggered Section 6.02's acceleration clause, which makes any payment that is thereby accelerated "involuntary."

[13] The drafters also showed a propensity to qualify no fewer than six provisions with the phrase "For avoidance of doubt" when they wanted to make it clear that a provision or condition did not apply. *See, e.g.,* Indenture at p. 25 ("For the avoidance of doubt, an ABL Facility may not be a Designated Credit Agreement."); p. 47 ("Permitted liens means . . . Liens existing on the Issue Date (excluding, for the avoidance of doubt, Liens securing Bank Indebtedness…."); § 3.09 ("However, for the avoidance of doubt, the notice provisions . . . shall not apply to any special mandatory redemption."). Notably, they did not use this phrase in Section 6.02 to exclude payment of the Applicable Premium. *Cf. In re AMR Corp.,* 730 F.3d at 99 ("all other amounts due thereunder (*but for the avoidance of doubt, without Make-Whole Amount*), shall immediately and without further act become due and payable….")) (emphasis added).

Br. at 15-17. Not only did MPM initiate the restructuring process on its own accord, *see infra* Part II-C, but it also voluntarily elected to redeem, *i.e.*, repay, replace or discharge, the First Lien Notes amidst other options available to it, including reinstating the First Lien Notes. [redacted] The extent of the Debtors' deliberations as to the treatment of the First Lien Notes belies the Debtors' argument that the "options available to the Debtor . . . were limited." *See* Br. at 12. Ultimately, by filing the Petition and seeking to refinance the First Lien Notes, pursuant to the RSA and the Plan, MPM voluntarily, and in a calculated manner, elected to initiate the First Lien Notes' redemption and thereafter redeem such notes. [redacted]

2. MPM's Filing For Bankruptcy Was Voluntary

In a further effort to distract the Court's attention from the pertinent issue -- whether MPM elected to refinance the First Lien Notes -- the Debtors contend that redemption, pursuant

to Section 5, could not have occurred because its decision to file for bankruptcy protection was effectively involuntary due to external conditions. Because the Court's focus is on whether MPM's redemption, *i.e.*, its refinancing of the First Lien Notes, was voluntary, whether MPM voluntarily filed for bankruptcy is irrelevant. Nevertheless, "[t]he question of whether a particular bankruptcy proceeding does or does not result in a 'voluntary' or 'involuntary' redemption . . . is not a sterile theoretical analytical activity under the case law. The courts actually engage in a fact-specific inquiry into the particular circumstances . . . involved." *In re Pub. Serv. Co. of N.H.*, 114 B.R. 813, 818 (Bankr. D.N.H. 1990). *In re Pub. Serv.Co. of N.H.*, relied upon by the Debtors in support of their flawed argument is inapposite. *See id.* at 815-16 ("Since the Debtor was a *regulated utility* whose sole source of income was subject to regulatory decisions . . . it can be said that the Debtor *in this unique circumstance* was in fact forced to come into the federal bankruptcy court.").

By contrast, here MPM is not a regulated utility -- and its over-levering and need to obtain additional liquidity do not render the Chapter 11 filings "involuntary," as the Debtors contend. This was a calculated, premeditated refinancing pursuant to the RSA. Moreover, in *In re Pub. Serv.Co. of N.H.*, any notion of the voluntariness of redemption was undermined by the conduct of the indenture trustee, which made acceleration demands and "other conduct indicating immediate cash payment [was] desired." *Id.* at 818; *see also In re LHD Realty Corp.*, 726 F.2d 327, 333 (7th Cir. 1984) ("National [the secured creditor] fired the first shot and is bound thereby."). Here, MPM -- not the First Lien Trustee -- fired the "first shot" by filing for bankruptcy, executing the RSA, and electing to discharge the First Lien Notes by either repaying

them, in cash, or replacing them. *See Sharon Steel Corp. v. The Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1053 (2d Cir. 1982).[14]

3. Section 5's Notice Condition Does Not Preclude A Finding That MPM Redeemed the First Lien Notes

The Debtors argue that an Optional Redemption has not occurred because MPM failed to comply with the notice requirements set forth in Section 5. *See* Br. at 13-14. MPM has provided more than adequate notice to the First Lien Noteholders and the First Lien Trustee of its election to redeem the First Lien Notes through the disclosures contained in the RSA motion, the Backstop Commitment Agreement, the Disclosure Statement, and the Plan (including section 3.05). Moreover, the formalities of Section 5's notice provision inure solely to the benefit of the First Lien Noteholders and the First Lien Trustee who have the right to waive that condition. The First Lien Trustee, on behalf of the First Lien Noteholders, has indeed waived the condition that MPM comply with those notice formalities. *See* Answer & Counterclaims (Dkt. No. 21) ¶¶ 32-34; *In re Nemko, Inc.*, 143 B.R. 980 (Bankr. E.D.N.Y. 1992) ("A condition in a contract may be waived when that condition is solely for the benefit of the party waiving it.") (citing John D. Calamari & Joseph M. Perillo, The Law of Contracts 494 (3d ed. 1987); *see also In re Stowell*, 232 B.R. 823, 827 n.4 (Bankr. N.D.N.Y. 1998).

D. The Debtors' and Apollo's Argument That Acceleration Of The Maturity Date Precludes A Finding That The Applicable Premium Is Owed To First Lien Noteholders Does Not Withstand Scrutiny

[14] The Indenture also indicates that the term "redemption" has an expansive reach. Section 3.02 states that "[r]edemption of the Notes *at the election* of the Issuer *or otherwise*, as *permitted or required* by any provision of this Indenture, shall be made in accordance with such provision and [Article III]." The clear implication of this language is that the Indenture contemplates few restraints, if any, on the applicability of a "redemption," which may occur either voluntarily or by compulsion, by operation of law or pursuant to the terms of the Indenture. Therefore, even if the Court were to determine that MPM's redemption was not optional as a result of its filing for bankruptcy (which is not the case), Section 3.02 permits the Court to grant the Applicable Premium to the First Lien Noteholders, as it became automatically due upon acceleration.

The Debtors and Apollo further contend that the acceleration of the maturity date precludes a finding that a redemption occurred because MPM's providing either cash or replacement notes to First Lien Noteholders after the Petition Date could only constitute a "repayment" and not a "prepayment." Br. at 8 ("there can be no Optional Redemption or prepayment where, as here, the Notes' Maturity Dates have already occurred."); *see also* Apollo Br. at 15 ("[A]utomatic acceleration . . . precludes a finding that the Debtors' repayment of the Notes is voluntary."). That argument lacks any merit.

1. The Indenture's Call Date of October 15, 2015, Not "Maturity," Governs The First Lien Noteholders' Redemption Rights

The Debtors' and Apollo's assertion that the First Lien Notes' automatic acceleration makes payment of the Applicable Premium "impossible" because there can be no optional redemption or prepayment is unavailing. The Debtors rely on easily distinguishable case law holding that once a maturity date is accelerated to the present, "it is no longer possible to prepay the debt before maturity." *Id.* at 8-9 (citing *Nw. Mut. Life Ins. Co.*, 11 Misc. 3d 980 at 982-83). Contrary to the Debtors' contentions, however, sophisticated parties consider "prepayment" to be a term of art that encompasses payment anytime before an *original* maturity date -- not the accelerated date. *See, e.g., United Merchs. &Mfrs., Inc. v. Equitable Life*, 674 F.2d at 144 (enforcing a loan provision entitling the lender to a "prepayment" charge resulting from the lender's acceleration of the note); *In re Skyler Ridge*, 80 B.R. 500, 507 (Bankr. C.D. Cal. 1987) (concluding that the "automatic acceleration of a debt upon the filing of a bankruptcy case is not the kind of acceleration that eliminates the right to a *prepayment* premium.") (emphasis added)).

Moreover, the Debtors' substantial reliance on the legal distinction between "prepayments" and "repayments" is a red herring intended to distract the Court from the plain language of the Indenture. Section 5 omits any mention of the word "prepayment," which, in

fact, is absent from the *entirety of the Indenture*. Rather, Section 5 requires payment of the Applicable Premium upon *any* election by MPM to redeem the First Lien Notes prior to *October 15, 2015* -- and not to "prepayments" made prior to "maturity." First Lien Notes § 5; *see also* Indenture § 3.02 (noting that redemption can occur at the issuer's election "*or otherwise*") (emphasis added).

The Debtors and Apollo fail to grasp that the notion of "maturity" is simply irrelevant here, and is no obstacle whatsoever to the First Lien Noteholders' recovery of the Applicable Premium. The bargain that the First Lien Noteholders agreed to was a protection of their yield and liquidated damages through a date certain, October 15, 2015, and not the maturity date, which is five years later. That the Indenture includes a specific date, prior to which the First Lien Notes may not be redeemed absent payment of the Applicable Premium, refutes the Debtors' and Apollo's flawed contention that acceleration of the maturity date precludes any redemption of the First Lien Notes.[15]

In *In re Chemtura Corp.*, the notes at issue permitted redemption at any time prior to the "Maturity Date," at the "Make-Whole Price plus accrued and unpaid interest to the date of redemption." 439 B.R. at 596. There, the court found it significant that the notes referred to redemption prior to a specific maturity date: "The Notes could have made the Make-Whole applicable to payment before 'Maturity', but instead referred to payment before the 'Maturity Date'." *Id.* at 601. Although the committee of unsecured creditors in that matter argued that the make-whole premium should not apply because the "Maturity Date" was altered by the separate

[15] As MPM points out in the context of its dispute with the indenture trustee for the subordinated notes, "[C]ourts must reject contract interpretation dependent on 'formalistic literalism,' [which] ignores common sense, and could lead to absurd results…." Debtors' Br. re: Subordinated Debt, Dkt. 641, at 15 (citing *Greenwich Capital Fin. Prods., Inc.*, 903 N.Y.S.2d 346, 348 (1st Dep't 2010)). An interpretation of the First Lien Indenture which mandates that after a bankruptcy acceleration of the First Lien Notes, there can be no redemption of such notes -- even if payment and discharge would occur *before* the no-call date, October 15, 2015 -- would be just that: an absurd result which ignores common sense and is dependent solely on formalistic literalism.

definition of "Maturity" in the indenture, and then by operation of law through acceleration, the Court deemed the argument "weak" as a matter of contractual interpretation because of the indenture's reference to a specific date that would trigger the payment of the make-whole premium rather than merely requiring redemption "before Maturity." *Id.*

Here, not only does Section 5 refer to MPM's redemption of the First Lien Notes prior to a specific date (October 15, 2015), it goes further than the notes addressed in *In re Chemtura Corp.* by omitting all mention of the word "maturity." Thus, even if MPM's bankruptcy filing resulted in an immediate acceleration of the First Lien Notes' Maturity Date, Section 5 still applies and MPM's repayment of the First Lien Notes constitutes a redemption that triggered payment of the Applicable Premium.

2. In re Soluti*a and* In re AMR *Are Inapposite*

The Debtors' reliance on *In re Solutia* and *In re AMR* is also misplaced. Br. at 9-10. In *In re Solutia*, the Court rejected the payment of the make-whole premium because (i) "all optional redemption periods with respect to the 2009 Notes . . . expired"; (ii) the court rejected the noteholders' "struggle to imply a no-call provision"; and (iii) the court believed that the indenture's acceleration clause accelerated the maturity date and precluded any "prepayment." 379 B.R. 473 (Bankr. S.D.N.Y. 2007). Conversely, here, the Indenture plainly contains a "no-call" provision and the redemption period (October 15, 2015) has not yet expired. *See supra* Part II-A. Furthermore, as the court in *In re Chemtura Corp.* noted in distinguishing the applicability of *In re Solutia*, the "prepayment" and "maturity date" concerns do not arise here where the Applicable Premium is triggered by redemption before a date certain and not simply prior to "Maturity." *In re Chemtura Corp.*, 439 B.R. at 601 (stating that the Indenture's reference to payment before the "Maturity Date" "distinguish[es] the present case from cases like *Solutia*, where the contractual drafting was inadequate.").

Likewise, the Debtors cannot rely on *In re AMR* to deny the First Lien Noteholders' entitlement to the Applicable Premium because the factual predicate of that case is simply inapposite. As stated previously, *supra* Part II-B, the Indenture is "explicit" in requiring the payment of a "premium," which undoubtedly encompasses the Applicable Premium.[16] The Debtors, however, conveniently omit the text of the AMR indenture that gave rise to the court's conclusion in that case. *See* Br. at 14, 17. There, the indenture was explicit that *no* make-whole was owed upon certain kinds of default.[17] Here, the parties bargained for payment of various "premiums" upon acceleration and default, and chose not to expressly exclude payment of the Applicable Premium.

3. MPM Redeemed On The Petition Date When It Began The Redemption Process

Furthermore, because, pursuant to the Plan, the First Lien Notes will inevitably be "redeemed" prior to October 15, 2015, *i.e.*, "repurchased" or "received back by paying the obligation," the Debtors cannot reasonably deny that a redemption occurred. Because MPM's "redemption" of the First Lien Notes is inextricably tied to MPM's refinancing of the First Lien Notes, which will not take place until at least four months after the Petition Date, the best reading of Section 5 is to construe the words "may redeem" therein to mean "may commence the

[16] Apollo contends that the Court in *In re AMR* cites the "*Anchor Resolution* Language" as an "example of an express provision entitling holders to a prepayment premium." Apollo Br. at 18-19 ("If the maturity of any Series B Note shall be accelerated . . . there shall become due and payable . . . as compensation to the holders . . . a premium equal to the Make-Whole Amount."). However, the Court cites *Anchor Resolution* as the last example among numerous others in a footnote, *see* 485 B.R. at 303 n.23, and the case law simply does not render the umbrella language "premium (if any)" automatically inoperative, especially when that Indenture language is paired with an Optional Redemption and no-call provision, as is the case here.

[17] Specifically, the Indenture in *AMR* read as follows: "If an Event of Default shall have occurred . . . the aggregate unpaid principal amount of all Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder (*but for the avoidance of doubt, without Make-Whole Amount*), shall immediately become due and payable."). *In re AMR*, 485 B.R. 279, 285 (Bankr. S.D.N.Y. 2013) (citing text of indenture)); *see also id.* at 303-304 (noting that "the cases cited by U.S. Bank are not enlightening, as none contain contractual language *specifically excluding* the payment of a make whole amount," and rather than bargain for such a provision, "the parties bargained for the exact opposite result.").

redemption process."[18] *See Chesapeake Energy Corp.*, 957 F.Supp.2d at 336. Like the word "redemption," the two-word phrase "may redeem" in Section 5 "is not a defined term carrying a fixed and determinate meaning." *Id.* In discerning a reasonable interpretation of these words the Court, therefore, should reject the Debtors' circular reasoning that redemption is inextricably linked to a "payment made after a default," which they argue "is, by definition, 'involuntary'." Br. at 11. Rather, precisely by seeking to refinance and discharge the First Lien Notes on the Petition Date and through its Plan, MPM "commence[d] the redemption process," and triggered the make-whole requirement of Section 5. *See id*.

The Debtors' argument also fails to account for the fact that the act triggering redemption, MPM's refinancing of the First Lien Notes; the act triggering acceleration of the maturity date, MPM's voluntary filing for bankruptcy; and the acceleration of all amounts due and payable, including principal, interest, and the Applicable Premium, could all have simultaneously occurred on the Petition Date. Instead, the Debtors posit the unsubstantiated argument that the phrase "if any" in Section 6.02 limits the availability of premiums provided under the Indenture to situations where there is a gap between the date of the act that triggers the obligation to pay that premium and the date on which that premium is actually payable, the latter of which occurs after MPM files for bankruptcy. Br. at 16. In other words, they contend that the phrase "premium, if any," only applies in two situations: "where an acceleration occurs after a 'premium' has already been triggered and where it has not" and, without any basis or legal authority, excludes other reasonable instances where the "premium" may apply. *Id.* For instance, as discussed above, it is more than plausible for all of the relevant acts to occur

[18] The actual redemption of notes will not occur, of course, until the Plan is confirmed. Thus, the Debtors' post-petition entry into the RSA and Plan may be reasonably read to constitute the initiation of the redemption process, giving rise to the First Lien Trustee's claim to the Applicable Premium in the Adversary Proceeding.

simultaneously upon the filing of the Petition and there is no basis to exclude here instances where redemption occurs after acceleration.

The words "if any" are also necessary to account for the possibility that no premium is applicable, which is the reading that makes the most sense, and the *only* reading that is common sense. The "if any" language leaves open the possibility that the Debtors, upon filing for bankruptcy and entering into the Plan, might reinstate the First Lien Notes rather than opting to redeem them with cash or replacement notes, which would not trigger a redemption or the Applicable Premium. Additionally, had MPM filed for bankruptcy on January 1, 2018 and also sought to refinance the First Lien Notes, pursuant to Section 5, the First Lien Noteholders would not be entitled to a make-whole premium. *See* Note § 5 (stating, if MPM redeems on "2018 and thereafter" the redemption price is "100.000%"). Accordingly, the Court should reject the Debtors' flawed construction of the "if any" language because its flawed reading would render this provision of the Indenture superfluous.[19]

4. The First Lien Noteholders' Remedies Under Acceleration and Redemption Are Not Mutually Exclusive Under The Indenture

The Debtors' contention that the First Lien Trustee conflates the terms "redemption" and "acceleration" and that the "Indenture repeatedly distinguishes acceleration from redemption" also fails. *See* Br. at 13 (citing, *e.g.*, § 11.01(a) ("The payment of the principal of, accrued and unpaid interest, if any, and premium, if any, on the Notes when due, whether on an interest payment date, at maturity, by acceleration, repurchase, redemption or otherwise")). As discussed above, Section 11.01(a), among others, merely lends further credence to the First Lien Trustee's contention that the Indenture uses the term "premium" to broadly refer to the Applicable

[19] Because the most reasonable interpretation of the Indenture, even under the Debtors' construction, is that that the initiation of the redemption process occurred on the Petition Date, the First Lien Noteholders' entitlement to the Applicable Premium should be calculated as of that date.

Premium and any other premiums provided under the Indenture. The expansive list of Section 11.01(a), followed by the words "or otherwise," also reflects that there are various circumstances under which a premium can become due. It does not, however, specifically distinguish *among* those circumstances. *See also* § 3.02 (noting that "redemption" itself can occur either at the election of the Issuer "*or otherwise*, as *permitted or required* by any provision of this Indenture.") (emphasis added).

Moreover, contrary to the Debtors' contention (Br. at 13), Section 5 of the First Lien Notes and Section 6.02 of the Indenture operate together to clearly demonstrate the parties' manifested intent that the Applicable Premium is due to the First Lien Noteholders here, where MPM's bankruptcy filing triggered the initiation of the redemption process of the First Lien Notes prior to October 15, 2015. *See JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009) (contract provisions are not to be considered in isolation "but in the light of the obligation as a whole and the intention of the parties as manifested thereby."). To be clear, these two provisions, and the concepts of "acceleration" and "redemption" embodied therein, are not mutually exclusive, but rather are explicitly permissive and cumulative. *See* Indenture § 6.03.

The Second Circuit's decision in *Sharon Steel* is particularly instructive. In *Sharon Steel*, the relevant indenture contained a redemption provision that required the issuer to pay a make-whole premium in the event it redeemed the notes prior to the maturity date and also contained a provision triggering acceleration in the event of a default. *Sharon Steel*, 691 F.2d at 1042-43. After the debtor's redemption obligation was triggered it voluntarily defaulted and argued that the indenture trustee was not entitled to the make-whole premium because acceleration was purportedly the exclusive remedy available to holders in the event of a default. *Id.* at 1053. Although the district court agreed, the Second Circuit reversed and held that "[t]he acceleration

provisions of the indentures are explicitly permissive and not exclusive of other remedies" because the indentures provide that "[a]ll powers and remedies given . . . to the Trustee or to the Debentureholders shall, to the extent permitted by law, be deemed cumulative and not exclusive of any thereof or of any other powers and remedies available to the Trustee or the holders of the Debentures . . . ." *Id.* at 1043 n.3, 1053. Here, as in *Sharon Steel*, the Indenture explicitly states that the remedies provided to the First Lien Trustee and the First Lien Noteholders are cumulative and not mutually exclusive. *See* Indenture § 6.03 ("No remedy is exclusive of any other remedy. To the extent required by law, all available remedies are cumulative.").[20]

E. Denial of the Applicable Premium Would Defy Commercial Reasonableness

In determining whether MPM's refinancing of the First Lien Notes constitutes a redemption, pursuant to Section 5 of the First Lien Notes, the Court must consider whether the language "is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and *who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business*.'" *Revson*, 221 F.3d at 66 (emphasis added). The Court must also avoid interpreting a contract in a manner that would be "absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." *Landmark Ventures v. Wave Sys. Corp.*, No. 11 Civ. 8440, 2012 WL 3822624, at *3 (S.D.N.Y. Sept. 4, 2012) (quoting *In re Lipper Holdings, LLC*, 766 N.Y.S.2d 561, 561 (1st Dep't 2003)).

As the Court in *In re Calpine Corp.*, 365 B.R. at 398 noted "[m]odern indentures generally provide for prepayment provisions or penalties *even during a no-call period or if the*

[20] Apollo argues that because Section 6.03, which governs alternative remedies available to the Trustee upon a default, does not mention the word "premium," the omission "evidences that the drafters did not intend for the Optional Redemption Provisions to apply after acceleration." *See* Apollo Br. at 21-22. A fair reading of the provision does not support this view, however. Beyond providing that available remedies are cumulative, Section 6.03 provides that the Trustee may pursue any available remedy "to collect the payment of principal of or interest on the Notes *or to enforce the performance of any provision of the Notes [or] this Indenture*." (emphasis added).

facility is accelerated.") (emphasis added). The First Lien Trustee's experts, two qualified and experienced industry experts who are intimately familiar with make-whole premiums from the perspective of investors, [redacted]

[redacted]

In light of the deterioration in MPM's financial performance in the years prior to the issuance of the First Lien Notes, when the First Lien Notes were issued a reasonable investor would have fully understood the substantial likelihood of a pre-maturity bankruptcy filing. [redacted] Thus, the reasonable expectation of potential First Lien Noteholders at the time of issuance would have been that the make-whole provision, embodied in Section 5 of the First Lien Notes, would protect their bargained for benefits upon acceleration in the event MPM filed for bankruptcy. It defies credibility and commercial reasonableness to contend otherwise. If the Court were to fail to consider the customs and practices in the industry in construing the Indenture and in a commercially reasonable way, it would have significant dire consequences for the high yield bond industry as it would incentivize issuers to evade its obligation under the Indenture by refinancing their obligations through bankruptcy without appropriate disclosure to investors.

F. Should The Court Determine That The Indenture Is Ambiguous, It Must Construe That Ambiguity Against MPM

"Under New York law, equivocal contract provisions are generally to be construed against the drafter." *Revson*, 221 F.3d at 67. "[I]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." *67 Wall St. Co. v. Franklin Nat'l Bank*, 333 N.E.2d 184, 187 (N.Y. 1975). New York courts, however, construe ambiguities against the drafter "only as a matter of last resort after all aids to construction have been employed without a satisfactory result . . . ." *Albany Sav. Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997). Accordingly, in the event that the Court determines that the Indenture is ambiguous (which is not the case), the

Court should construe that ambiguity against MPM, as the drafter of the Indenture, and favorably to the First Lien Noteholders who had no voice in the selection of the language in either Section 5 of the First Lien Notes or Section 6.02 of the Indenture.

The expedited discovery process in this proceeding has revealed that the form used to prepare the Indenture was MPM's template that it had customarily used in its prior bond offerings. [redacted] MPM's form, which it proposed, contained the provisions of the Indenture and Note at issue here, *i.e.*, Section 6.02 of the Indenture and Section 5 of the Notes. [redacted] Accordingly, although MPM, who prepared the form Indenture, had every opportunity to clarify that the Applicable Premium would not be paid in the event it filed for bankruptcy protection, the current First Lien Noteholders -- who had no role in the preparation of the Indenture -- purchased the First Lien Notes subject to the language that had already been

accepted by MPM and the underwriters. Here, where extrinsic evidence reveals that the parties did not negotiate or discuss the relevant provisions, the Court should construe any ambiguity as against MPM, the drafter of the Indenture.

III. EVEN IF THE FIRST LIEN TRUSTEE IS NOT ENTITLED TO A SECURED CLAIM (WHICH IS NOT THE CASE), THE TRUSTEE HAS AN ALLOWED UNSECURED CLAIM AGAINST MPM BASED ON EXPECTATION DAMAGES, IN THE AMOUNT OF THE APPLICABLE PREMIUM

As discussed above, *supra* Part II, the First Lien Trustee is entitled to a secured claim *pari passu* for the Applicable Premium. However, even if the Court determines that the First Lien Trustee is not entitled to a secured claim (which is not the case), the Trustee has an unsecured claim against MPM for expectation damages in the amount of the Applicable Premium resulting from MPM's breach of the Indenture's no-call provision.

Under New York law, a party injured by a breach of contract must be placed in the "same position as it would have been in had the contract been performed." *Teachers Ins. & Annuity Assoc. of Am. v. Butler*, 626 F. Supp. 1229, 1236 (S.D.N.Y.1986) (finding the claimant was "thus entitled to damages equal to the discounted present value of the incremental interest income [it] would be expected to lose as a result of the breach."). Even agreements that "do not provide a premium or liquidated damages for repayment" do not preclude "an unsecured claim for damages for the Debtors' breach of the agreements." *See In re Calpine Corp.*, 365 B.R. at 399. "The unavailability of specific performance as a remedy . . . [does] not prohibit the allowance of an award of expectation damages to the Claimants as an alternative remedy for breach of the No-Call Provision, as an unsecured claim." *In re Premier Entm't Biloxi LLC*, 445 B.R. 582, 636 (Bankr. S.D. Miss. 2010).

Surprisingly, both Apollo and the Debtors refuse to acknowledge the existence of a no-call provision, stating that the First Lien Trustee "struggle[s] to imply" one where none exists. Br. at 21 (citing *In re Solutia*, 379 B.R. at 488); Apollo Br. at 8 n.16 (dismissing any claim to the

existence of a no-call as a "blatant misrepresentation of the language of the Indentures."). But this argument cannot withstand any measure of scrutiny, since the first sentence of Section 5 unequivocally provides for one: "Except as set forth [herein], the Notes shall not be redeemable at the option of MPM prior to October 15, 2015." First Lien Notes § 5 (emphasis added).

The discovery record in this proceeding, including the deposition testimony of MPM's outside counsel and corporate representative, also unequivocally reflects the existence of a no-call provision. [redacted] Furthermore, despite the Debtors' attempt to invent a rule of law requiring only "pure" no-call provisions, no such rule of law exists. *Cf. In re Chemtura*, 439 B.R. at 602.

Contrary to the Debtors' contention, (Br. at 27), absent payment of the Applicable Premium or its equivalent, the First Lien Trustee has been deprived of the benefit of its bargain under the Indenture and First Lien Notes. "Parties frequently provide for damages in these situations precisely because acceleration deprives borrowers of the payment streams for which they contracted." *Calpine II*, 2010 WL 3835200 at *4. The Debtors, however, sidestep the

ultimate issue by citing to *In re Solutia* for the proposition that by contracting for automatic acceleration, a lender elects "to give up [its] future income stream in favor of having an immediate right to collect [its] entire debt." Br. at 27. The question, however, is whether the First Lien Noteholders' "entire debt" upon acceleration includes a premium -- and the plain language of the Indenture, coupled with the intent of the parties and accepted standards of commercial reasonableness, suggest the answer is undoubtedly, yes. *See supra* Part II.

The Debtors also contend that the no-call prohibition would be "unenforceable in bankruptcy in any event." Br. at 21 (citing, *e.g.*, *Cont'l Sec. Corp. v. Shenandoah Nursing Home P'ship*, 188 B.R. 205, 214 (Bankr. W.D. Va. 1995) (holding that "it would violate the purpose behind the Bankruptcy Code to deny a debtor the ability to reorganize because a creditor has contractually forbidden it.")). They confuse the issue at hand, however, as the First Lien Trustee does not contest the right of the Debtors to reorganize due to the no-call provision. Unlike the circumstances in *Calpine II*, the First Lien Trustee here does not argue that the existence of the no-call alone, followed by a bankruptcy filing, triggers its right to expectation damages. In *Capline II*, the court denied the Trustee's expectation damages because the no-call provision was "completely uncoupled from some sort of damages provision." *Calpine II*, 2010 WL 3835200, at *4 (citing *Cont'l Sec. Corp.*, 193 B.R. at 777). Conversely, here, the no-call provision is integrated into Section 5 of the First Lien Notes, which specifically provides for damages in the event of redemption prior to the date certain of October 15, 2015, in the amount of the Applicable Premium. Moreover, as discussed *supra* Part II-B, Section 6.02 explicitly provides for payment of a "premium, if any," upon a voluntary bankruptcy filing. The Acceleration provision, combined with the no-call provision's close proximity to the damages calculation, yields the conclusion that the drafters considered the Applicable Premium amount to be a

reasonable proxy, at the very least, for the damages to be awarded upon a breach of the no-call provision. *See* Indenture § 6.02; First Lien Notes § 5.[21] Moreover, payment of the Applicable Premium would not prevent the Debtor from reorganizing, and as oversecured creditors, the First Lien Noteholders are entitled to the benefit of their bargain.

IV. THE FIRST LIEN DOCUMENTS CONSTITUTE A SECURITIES CONTRACT THAT IS NOT SUBJECT TO THE AUTOMATIC STAY[22]

On October 25, 2012, the Debtors agreed to issue and sell to the Initial Purchasers the 8.875% First-Priority Senior Secured Notes, which the parties identified as the "Offered Securities." [redacted]; First Lien Notes Ex. B-2. The parties also entered into a collateral agreement that created a valid security interest in the specified collateral for the benefit of the First Lien Noteholders. *Id.* at 11. Pursuant to the First Lien Documents as a whole and the Notes Purchase Agreement in particular, the parties agreed that the Offered Securities would be sold to the Initial Purchasers, who would then offer and sell the securities to market pursuant to Rule 144A of the Securities Act. *Id.* at 13.

A. The First Lien Documents are Securities Contracts Under the Safe Harbor Provisions

In 2005, the Bankruptcy Code was amended to include certain safe harbor provisions intended to protect non-debtor parties to security contracts. Specifically, Section 555 of the Bankruptcy Code provides that:

> The exercise of a contractual right of a stockbroker, financial institution,[23] financial participant, or securities clearing agency *to cause the liquidation,*

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[21] The Debtors also argue that expectation damages cannot be awarded here because debtors have been "solvent" in cases awarding such damages. Br. at 22. As the Debtors themselves have confirmed in these proceedings, the Trustee and First Lien Noteholders are oversecured, so overall solvency is not dispositive. *See* DIP Motion (Dkt. No.13) at 7.

[22] [redacted]

> *termination, or acceleration of a securities contract*, as defined in section 741 of this title, because of a condition of the kind specified in section 365 (e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title….

11 U.S.C. §555 (emphasis added). Section 741 of the Bankruptcy Code defines a securities contract as, among other things, "a contract for the purchase, sale, or loan of a security,[24] ... including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant." 11 U.S.C. §741.

In interpreting these provisions, the Second Circuit has expressly required courts to follow the express and unambiguous language of the Bankruptcy Code when making any determination as to whether the safe harbor provisions apply. *See In re Enron Creditors Recovery Corp. v. Alfa S.A.B. de C.V.*, 651 F.3d 329, 335 (2d. Cir. 2010) (rejecting any proposed limitations on the interpretation of the safe harbor provisions where there was nothing in the Bankruptcy Code or the relevant case law that supported such limitations).

The Second Circuit revisited the question of the interpretation of the safe harbors in *In re Quebecor World (U.S.A.) Inc.*, 719 F.3d 94 (2d Cir. 2013). In that case, the Second Circuit held that a note purchase agreement was a "securities contract" entitled to the protection of the safe harbor provisions of the Bankruptcy Code. *Id.* at 100. Moreover, the Second Circuit held that where the financial participant is the trustee under the indenture, that is sufficient for the safe harbor provisions. *Id.*

Based upon the express and unambiguous language of the Bankruptcy Code and the controlling precedent of the Second Circuit concerning the interpretation of the safe harbor provisions, the First Lien Documents constitute a protected securities contract because the First

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[23] The term "financial institution" means, among other things, "a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity…." 11 U.S.C. § 101.

[24] Section 101(49) of the Bankruptcy Code defines "security" to include a note, bond, or debenture. *Id.*

Lien Documents provide for the purchase and sale of notes which are *expressly defined* as a security under Section 101(49) of the Bankruptcy Code. Specifically, the First Lien Documents provide for the purchase of the First Lien Notes, first by the Initial Purchasers and then a resale of the First Lien Notes pursuant to Rule 144A. *See* 17 C.F.R. § 230.144A. In addition, the First Lien Documents clearly provide for the redemption of the Notes by the Debtors which is occurring in these cases. As such, the First Lien Documents indisputably provide for the purchase and sale of a classified security under the Bankruptcy Code. *See Enron*, 651 F.3d at 339 (safe harbors applied to commercial paper, as a classified security under the Bankruptcy Code); *Quebecor*, 719 F.3d at 100 (a note purchase agreement was a securities contract).[25]

B. The First Lien Trustee is Not Stayed From Causing Liquidation, Termination, or Acceleration Under the First Lien Documents

Since the First Lien Documents are securities contracts, Section 555 of the Bankruptcy Code permits the First Lien Trustee as a financial participant[26] to exercise its contractual right under the First Lien Documents to liquidate its claim against the Debtors. 11 U.S.C. § 555. While there is limited case law on the definition of liquidation in the context of the safe harbor provisions, *In re Am. Home Mortg., Inc.*, 379 B.R. 503 (Bankr. D. Del. 2008) is instructive. In that case, the term "liquidation" was defined for purposes of Section 555 to entail the "termination or cancellation of the contract, fixing of the damages suffered by the nondefaulting party based on market conditions at the time of the liquidation, and accelerating the required payment date of the net amount of the remaining obligations and damages." *Id.* at 513.

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[25] Only one case has addressed the issue of whether an indenture for notes constituted a securities contract. *See in re Quimonda Richmond, LLC*, 467 B.R. 318 (Bankr. D. Del. 2012). Although the *Quimonda* court stated that it was not persuaded that the indenture constituted a securities contract, the court offered no legal analysis or explanation as to why that was the case. Accordingly, the *Quimonda* opinion offers no persuasive authority whatsoever. Moreover, the *Quimonda* opinion is in complete conflict with the binding Second Circuit decision in *Quebecor*, which held a Note Purchase Agreement for private placement notes (like the first Lien Notes) was a securities contract for the purpose of the safe harbor provisions of the Bankruptcy Code.

[26] The First Lien Trustee is a National Bank under the National Bank Act.

On August 5, 2014, the First Lien Trustee delivered to the Debtors Notices of Rescission of Acceleration (collectively, the "**Rescission Notice**") signed by over 50% of the beneficial holders of the First Lien Notes as permitted under Section 6.02 of the First Lien Indenture.[27] *See* Ex. F. In delivering the Rescission Notice, the First Lien Trustee is seeking to exercise its contractual right to decelerate the notes so that it can liquidate the full amount of its claim (including the make-whole amount) against the Debtors in the event this Court were to conclude -- which it should not -- that the automatic acceleration under the Indenture would render the First Lien Trustee unable to assert its make-whole claim against the Debtors. Accordingly, the Court should confirm that the automatic stay does not preclude the Rescission Notice and the First Lien Trustee should be permitted to liquidate its full claim (including the make-whole amount) against the Debtors.[28]

V. THE FIRST LIEN TRUSTEE IS ENTITLED TO ITS REASONABLE FEES AND EXPENSES

The Debtors do not disagree that pursuant to the Section 7.07 of the Indenture, MPM agreed to indemnify the First Lien Trustee for the reasonable fees and expenses it incurred in enforcing its rights and remedies and defending against claims in these proceedings, including those brought by the Debtors. Br. at 23-24. The Debtors, however, contend that the fees incurred by the First Lien Trustee in connection with this adversary proceeding are not reasonable because of the purportedly "(a) [] clear legal authority . . . that an Optional Redemption of the Notes did not occur as a result of the Debtors' bankruptcy filing and cannot occur in the future, in light of that filing's acceleration of the Notes' Maturity Dates and (b) the

[27] The effectiveness of the Rescission Notice is expressly conditioned on the Court confirming that the automatic stay does not apply to the rescission of acceleration or the Court granting the First Lien Trustee relief from the automatic stay to rescind the acceleration.

[28] The First Lien Trustee also has joined in the motion for relief from stay filed by the 1.5 Lien Trustee and to the extent the Court determines the automatic stay applies, it should grant the stay relief motion for the reasons stated therein. If the court determines that the automatic stay applies and does not grant such motion to rescind the acceleration of the First Lien Notes, the First Lien Trustee should be entitled to adequate protection in an amount equal to the Applicable Premium.

lack of any contractual or legal support for the various theories of liability asserted by the Trustees." *Id.* at 24-25.

In determining what amounts to a reasonable fee, courts have recognized that "[i]t is clear that creditors are entitled to engage counsel and pay for constant, comprehensive, and aggressive representation." *In re Mills*, 77 B.R. 413, 419 (Bankr. S.D.N.Y. 1987) (citing *In re Wonder Corp. of Am.* 72 B.R. 580, 591 (Bankr. D. Conn. 1987)). It is only "where services are not reasonably necessary or where action is taken because of an attorney's excessive caution or overzealous advocacy, [do] courts have the right and duty, in the exercise of their discretion, to disallow fees and costs under § 506(b)." *Id.*

Here, as discussed above, the contractual and economic support for the First Lien Trustee's position is significant. As an initial matter, the Debtors commenced this adversary proceeding against the predecessor to the First Lien Trustee and cannot now claim that it was unreasonable for the First Lien Trustee to defend itself. Even assuming the First Lien Trustee had tenable alternatives in the face of the Debtors' Adversary Complaint (which it did not), the Debtors have not persuaded the Court that it was required to take any of those alternatives, "such that [the] decision to defend this lawsuit . . . was an act of negligence of willful misconduct." *See Chesapeake Energy Corp. v. The Bank of New York Mellon Trust Co.*, No. 13 Civ. 1582, 2013 WL 5432331, at *10 (S.D.N.Y. Sep. 30, 2013). *Chesapeake Energy Corp.* is instructive in that the issuer there "had drafted an unusual, and imperfectly drafted, supplemental indenture provision," and the trustee "reached a different conclusion from Chesapeake as to the [redemption] notice deadline." *Id.* at *10-11. In concluding that the trustee was entitled to indemnification for reasonable fees, the Court opined that the trustee "had *good reasons* to defend its conclusion in court . . . BNY Mellon had an interest, as trustee, in assuring that the

correct outcome as to the indenture deadline was reached, through vigorous, high-quality litigation." *Id.* at *11 (emphasis added). The court further stated that "[a]lthough BNY Mellon's understanding of [the redemption provision] was later held incorrect, its refusal to assist in Chesapeake's redemption at par arose from its attempt as trustee to *abide* by the terms of the . . . Indenture as it understood them. It was not a deliberate attempt to flout a known legal duty or a negligent disregard of one." *Id.* at *9 (emphasis added). Finally, the Court held that it was not aware of any authority "requiring an indenture trustee to passively participate, as if a bump on a log, in a process of redemption that it regards, even incorrectly, as unlawful." *Id.*

The same holds true here. Although the First Lien Trustee believes the First Lien Indenture is unambiguous and runs in its favor, at worst, MPM has drafted an unusual and imperfect Indenture, cannot affirmatively disavow its obligation to provide the Applicable Premium and cannot expect the First Lien Trustee simply to do nothing, regardless of how this Court ultimately rules. By any measure, it is simply disingenuous to posit that the First Lien Noteholders' clearly supportable entitlement to recovery of the Applicable Premium is altogether devoid of "any contractual or legal support." Br. at 25. Accordingly, the First Lien Trustee's request for a declaratory judgment that it is entitled to payment of reasonable expenses and attorneys' fees should be granted.

JOINDER AND RESERVATION OF RIGHTS

The First Lien Successor Trustee hereby joins in the Opposition Brief of the 1.5 Lien Trustee to the Debtors' Opening Brief.[29] Additionally, the First Lien Trustee reserves any and all rights to advance additional arguments with respect to the Plan at any time prior to confirmation of the Plan and to respond to any arguments made by any other parties.

[29] Notwithstanding such joinder, the First Lien Trustee takes no position at this time as to whether the 1.5 Lien Notes are oversecured, and reserves its rights with respect thereto.

CONCLUSION

For the foregoing reasons, the First Lien Trustee respectfully requests that the Court grant the following relief: (a) a judgment declaring that the obligations of MPM and the Note Guarantors to pay the Applicable Premium or an equivalent sum, together with principal and interest, are due and owing; (b) a judgment declaring that the Debtors must bear reasonable expenses and attorneys' fees incurred by the First Lien Trustee and Note Holders in connection with this Adversary Proceeding; (c) dismissal with prejudice of all claims for declaratory judgment asserted by the Debtors in this Adversary Proceeding; and (d) any further relief in favor of the First Lien Trustee that the Court deems just and proper.

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Respectfully submitted,

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