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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
MPM Silicones, LLC, et al.,[2]	:	Case No. 14-22503 (RDD)
	:	
Debtors.	:	(Jointly Administered)

[1] Dechert is appearing on this brief solely with respect to Section D hereof.

[2] 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).

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OBJECTION OF BOKF, NA, AS FIRST LIEN SUCCESSOR TRUSTEE, TO THE DEBTORS' JOINT CHAPTER 11 PLAN

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BOKF, NA, as successor (the "**First Lien Successor 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 "**First Lien 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**")[3] and respectfully represents as follows:[4]

PRELIMINARY STATEMENT

1. In short, the First Lien Successor Trustee objects to the Plan insofar as it interferes with its rights vis-à-vis its non-debtor contract counter-parties. This improper use of the Plan process is particularly egregious in these cases as the Debtors proposing such plans are controlled by Apollo (at the Board and shareholder level) which is one of the non-debtor contract parties and as the obligations the Debtors attempt to eliminate for the benefit of its controlling parties were relied upon by the parties represented by the First Lien Successor Trustee in making their investments. Indeed, the only possible impact on the Debtors from maintenance of the status qou is the possible effect of a theoretical action for indemnity supported only by the Debtors' intentional post-petition decision to accept such liability should a claim be asserted.

[3] Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Plan.

[4] The First Lien Successor Trustee will be filing separate briefs related to the make-whole dispute and cram-down issues under the Plan in accordance with this Court's *Order Establishing a Timeline for Confirmation-and Adversary Proceeding-Related Discovery* [Dkt. No. 551].

Indeed, the state court action the Debtors/Apollo seek to undermine does not even seek any redress against the Debtors.

2. Nonetheless, in an attempt to improperly shield themselves from their express contractual liability to the First Lien Successor Trustee, the ICA Defendants (defined below) have caused the Debtors to include provisions in the Plan that provide for the cancellation and discharge of the Second Lien ICA (defined below) as it relates to the ICA Defendants' obligations to the First Lien Successor Trustee in the ICA Action (defined below), and the release and exculpation of the ICA Defendants' liability to the First Lien Successor Trustee in the ICA Action (defined below) under the Second Lien ICA. These Improper Release Provisions (as defined below) render the Plan unconfirmable as a matter of law as they run completely afoul of the express provisions of title 11 of the United States Code (the "**Bankruptcy Code**") and the law of the Second Circuit and this District.

3. Because the Plan contains the Improper Release Provisions it cannot be confirmed for the following five reasons: First, section 510(a) of the Bankruptcy Code unequivocally provides that subordination agreements, like the Second Lien ICA, are enforceable in bankruptcy. A finding by this Court that the Second Lien ICA shall be cancelled, discharged, and of no force and effect as is set forth in Section 7.3 of the Plan would be contrary to section 510(a) of the Bankruptcy Code and, thus, is not appropriate or permitted.

4. Second, there is no provision in the Bankruptcy Code or applicable case law that permits the Debtors to cancel, discharge and render of no force and effect any of the Debtors' contracts and to nullify a non-debtor party's state law contractual rights against other non-debtor parties pursuant to a chapter 11 plan or otherwise.[5] Instead, section 365 of the

[5] Although it is a litigable question as to whether the Plan can be confirmed under section 1129(b) of the Bankruptcy Code because the Plan does not comport with the express terms of the Second Lien ICA, the First

Bankruptcy Code permits the Debtors to reject executory contracts, which only results in the debtor's breach, and not a termination, of the contract. Consequently, even if the Debtors were to reject the Second Lien ICA, the rights, obligations and liabilities between the non-debtor parties to the Second Lien ICA would remain in full force and effect.

5. Third, to the extent involuntary third-party releases would be appropriate in these cases (which the First Lien Successor Trustee submits they are not) such releases can only apply to claims belonging to the bankruptcy estate or claims affecting the *res* of the estate. Any release of broader scope is outside of this Court's jurisdiction. Here, the First Lien Successor Trustee's claims asserted in the ICA Action against the ICA Defendants are state law contract claims that belong solely to the First Lien Successor Trustee.

6. Since the First Lien Successor Trustee's claims are direct contractual claims against the ICA Defendants, the claims asserted in the ICA Action have no legitimate bearing on the *res* of the Debtors' estates. The Debtors should not be able to point to their manufactured post-petition indemnity obligations under the Backstop Commitment Agreement as affecting their estates and as a basis for this Court's jurisdiction as that position was recently rejected by Judge Lane in In re Genco Shipping & Trading Ltd. In that case, Judge Lane expressly held that an indemnification obligation manufactured pursuant to a restructuring support agreement cannot serve as the basis for an involuntary third-party release. In re Genco Shipping & Trading Ltd., Case No. 14-11108, 2014 Bankr. LEXIS 2854, at *107 (Bankr.

Lien Successor Trustee is not objecting to confirmation on that basis. Instead, the First Lien Successor Trustee submits that there can be no dispute under 1129(b) that if the Plan were to be confirmed without giving effect to the express terms of the Second Lien ICA, that the rights, obligations and liabilities among the non-debtor parties to the Second Lien ICA survive confirmation of the plan and should be determined by the state court in which the ICA Action was filed.

S.D.N.Y. July 2, 2014) ("Genco"). That is especially true where, as here, the obligation was undertaken to create the very argument the Debtors now advance.

7. Fourth, the Second Circuit held that non-consensual releases of non-debtor parties' claims against each other and injunctions to enjoin a claimant from bringing an action against a non-debtor party are "proper only in rare cases" or "truly exceptional circumstances." Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d Cir. 2005) ("Metromedia"). In this case, non-debtor defendants to a lawsuit brought in state court based on state law breach of contract claims have compelled the Debtors to include in their reorganization plan a provision that purports to terminate such defendants' contractual obligations to other non-debtor parties and to extinguish any potential liability that they may have to those non-debtor parties in that lawsuit. These chapter 11 cases do not give rise to the level of "unique circumstances" that are required by the Second Circuit for this Court to approve involuntary third-party releases in favor of the ICA Defendants. Simply put, the ICA Defendants have taken actions in these cases that are nothing more than self serving enhancements to, or protections of, their investments in the Debtors – none of which are "unique" in any sense of the word.

8. For example, although the ICA Defendants have agreed to equitize their claims, that would be the result in any event based on the enterprise valuation submitted by the Debtors in connection with the Plan. By equitizing their claims, the ICA Defendants are now in a position to capture the equity upside in the reorganized Debtors. In addition, although the ICA Defendants have made financial commitments to the reorganized Debtors under the Backstop Commitment Agreement, such commitments are on terms so attractive to the ICA Defendants that similarly situated creditors were required to object to the approval of the Backstop

Commitment Agreement to obtain the ability to participate thereunder. Finally, although the Plan provides for the payment in full of allowed general unsecured claims, the payment of such claims is also for the benefit of the ICA Defendants in their capacity as the proposed owners of the reorganized Debtors. If this were solely for the benefit of the Debtors' estates, the ICA Defendants would have included distributions to the holders of subordinated debt claims. In short, there is nothing unique about the facts of these chapter 11 cases which could justify the release of the First Lien Successor Trustee's state law contract claims against the ICA Defendants.

9. In evaluating involuntary third-party releases, this Court should look to the purpose of an involuntary third-party release: to prevent third parties who have claims against the debtor that are discharged under a chapter 11 plan from asserting frivolous claims against third parties in an attempt to obtain an improper recovery. The Improper Release Provisions, however, do not comport with this purpose and are intentionally designed to insulate the ICA Defendants from their contractual liability to the First Lien Successor Trustee, which exceeds the scope of this Court's jurisdiction. Indeed, the Improper Release Provisions are the exact form of abuse that concerned the Second Circuit in Metromedia.

10. If this Court were to confirm the Plan and insulate the ICA Defendants from their obligations and liabilities to the First Lien Successor Trustee, the Court would be establishing a rule of law in this District that a party is free to disregard its contractual obligations under an intercreditor agreement (or any third party contract) to non-debtor parties so long as it is first to a deal with the debtor and agrees to enter into self-serving financial commitments. That cannot be the law.[6]

[6] For example, the debtor could be used to interfere with insurance contracts, indemnification agreements, guarantees and subordination agreements, the existence of which allow greater investor participation and lower

11. Fifth, if the Court were to determine that the Second Lien ICA could be terminated and that the ICA Defendants could be released and exculpated from their liability to the First Lien Successor Trustee, this Court could not enter a final order confirming the chapter 11 plan under Stern v. Marshall. The First Lien Successor Trustee's claims against the ICA Defendants are non-core contractual state law claims. As such, this Court lacks constitutional jurisdiction to enter an order confirming the Plan so long as such provisions are included in the Plan.

12. Accordingly, the First Lien Successor Trustee submits that the Plan cannot be confirmed as a matter of law, that the Improper Release Provisions exceed this Court's jurisdiction and that this Court does not have Constitutional jurisdiction to enter an order confirming the Plan as long as it contains the Improper Release Provisions.

FACTUAL BACKGROUND

A. Restructuring Support Agreement and "Cram-Down" of the First Lien Notes Under the Plan

13. On April 13, 2014 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. In the period leading up to the Petition Date, the Debtors negotiated and entered into a restructuring support agreement (the "**RSA**") with Apollo (*i.e.*, the Debtors' ultimate equity holder) and the Ad Hoc Committee of Second Lien Noteholders. Pursuant to the terms of the RSA, the Debtors, Apollo and the Ad Hoc Committee of Second Lien Noteholders agreed to support a pre-negotiated plan of reorganization, consistent with the term sheet annexed to the RSA (the "**Term Sheet**"). The Term Sheet served as the basis for the Plan.

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pricing in financings.

14. The Term Sheet and the Plan contemplate a Rights Offering whereby holders of the Second Lien Notes (the "**Second Lien Noteholders**") will have the right to purchase shares of the Debtors' reorganized equity in an aggregate amount of $600 million at a price per share determined by using the pro forma capital structure and enterprise value of $2.2 billion and applying a 15% discount to the equity value thereto. See *Disclosure Statement For Joint Chapter 11 Plan of Reorganization For Momentive Performance Materials Inc. and Its Affiliated Debtors* [Dkt. No. 516] (the "**Disclosure Statement**"), p. 9. On June 23, 2014, this Court entered its *Order Authorizing the Debtors to Assume the Restructuring Support Agreement* [Dkt. No. 507], which approved the Debtors' entry into the RSA with certain modifications.

15. Also on June 23, 2014, this Court entered its *Order Authorizing and Approving the Debtors' (I) Entry Into and Performance Under the Backstop Commitment Agreement, (II) Payment of Related Fees and Expenses, and (III) Incurrence of Certain Indemnification Obligations* [Dkt. No. 509] (the "**Backstop Order**"), which authorized the Debtors' entry into the Backstop Commitment Agreement. To resolve certain objections relating to the Debtors exclusion of certain parties from participation in the financial upside in the Backstop Commitment Agreement, certain Second Lien Noteholders[7] were added as parties to the Backstop Commitment Agreement and the RSA (collectively with Apollo and the Ad Hoc Committee of Second Lien Noteholders, the "**RSA Parties**" or the "**ICA Defendants**"). As a result of adding these additional parties, approximately 90% of the Second Lien Noteholders are now parties to the Backstop Commitment Agreement and are entitled to receive their pro rata share of a $30 million commitment premium thereunder. See Disclosure Statement, p. 9, n.6.[8]

[7] These Second Lien Noteholders were identified as (i) Fortress Investment Group LLC, (ii) D.E. Shaw Galvanic Portfolios, L.L.C. and (iii) Napier Park Global Capital US L.P. See Backstop Order ¶ 7.

[8] Any party that is not a Backstop Party is not entitled to receive a release under the Plan.

16. In addition, after objections were raised, paragraph 24 of the Backstop Order now expressly provides that no aspect of that Order affects the rights of any party in interest under that certain Intercreditor Agreement dated as of November 16, 2012 (the "**Second Lien ICA**"):

> For the avoidance of doubt, nothing in this Order is intended to prejudice the rights of any party in interest (i) relating to any litigation or settlement with respect to whether any make-whole claim, prepayment penalty or Applicable Premium is allowable or (ii) under the certain Intercreditor Agreement dated as of November 16, 2012, to which MPM is party.

Backstop Order ¶ 24.

17. Consistent with the Term Sheet to the RSA, the Plan provides for the cram-down of the Claims arising under the First Lien Indenture and the First Lien Notes in the event the holders of such notes (the "**First Lien Noteholders**") vote to reject the Plan. Specifically, the Term Sheet and the Plan threaten to cram-down the First Lien Noteholders with "Replacement First Lien Notes" instead of payment in full in cash on account of their Claims:

> **If Class 4 votes to reject the Plan**: Replacement First Lien Notes with a present value equal to the Allowed amount of such holder's First Lien Note Claim (which may include, in addition to the First Lien Note Claims Allowed pursuant to Section 5.4(a) hereof, any applicable make-whole claim, prepayment penalty, or Applicable Premium to the extent Allowed by the Bankruptcy Court).

Plan § 5.4(b)(ii).

18. As described in the Disclosure Statement, the Plan proposes that the Replacement First Lien Notes (i) "will bear interest at a rate per annum equal to the Treasury Rate plus 1.50%, or such greater rate determined by the Bankruptcy Court is necessary to satisfy the provisions of the Bankruptcy Code" and (ii) will have a maturity date of 7 years. Disclosure Statement, Exhibit 7 ("Replacement First Lien Notes Term Sheet").

B. Non-Debtor ICA Defendants' Liability Arising Under the Second Lien ICA

19. On June 18, 2014, the First Lien Successor Trustee filed an action (the "**ICA Action**")[9] in the Supreme Court of the State of New York for the County of New York (the "**State Court**") against the ICA Defendants for violations under the Second Lien ICA. The ICA Action is a state law action for breach of contract and declaratory relief arising out of the ICA Defendants' actual and threatened breaches of their obligations under the Second Lien ICA, including, among other things, (i) supporting a Plan that does not pay any and all claims in respect of the First Lien Notes in full in cash, (ii) taking the Debtors' assets for themselves before the Senior Lender Claims[10] have been discharged as provided for in the ICA, (iii) interfering with the Senior Lenders'[11] rights with respect to the Debtors' assets, (iv) interfering with the Senior Lenders' rights in connection with the Debtors' bankruptcy proceeding and (v) interfering with the Senior Lenders' requests for adequate protection.[12] The Debtors are not parties to the ICA Action.

20. On July 8, 2014, Apollo served a notice to remove the ICA Action to the United States District Court for the Southern District of New York for automatic referral to this Court as an adversary proceeding in these chapter 11 cases. See BOKF, NA v. JPMorgan Chase Bank, N.A., Adv. Pro. No. 14-08247 (RDD) (Bankr. S.D.N.Y. July 8, 2014) [Dkt. No. 1]. On July 22, 2014, the First Lien Successor Trustee filed its motion to remand the ICA Action to the State Court. See id. at [Dkt. No. 2] (the "**Motion to Remand**").

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[9] The case caption for the ICA Action is BOKF, N.A. v. JPMorgan Chase Bank, N.A., Index No. [651861/2014].

[10] See Second Lien ICA § 1.1 (definition of "Senior Lender Claims").

[11] See Second Lien ICA § 1.1 (definition of "Senior Lenders").

[12] See Second Lien ICA §§ 3.1, 4.1. On information and belief, the ICA Defendants contested the request made by the predecessor to the First Lien Successor Trustee for additional adequate protection in the form of, among other things, payment of certain fees relating to Rothschild, Inc. (as financial advisor).

21. On July 16, 2014, the 1.5 Lien Indenture Trustee filed a substantially similar complaint against certain of the RSA Parties in the State Court for breach of the Second Lien ICA.[13] Apollo removed this case as well on July 23, 2014. [S.D.N.Y. Case No. 14 CV 5636].

C. Relevant Plan Provisions

i. Cancellation of the Second Lien ICA

22. The Plan was amended on June 23 [Dkt. No. 515] and now purports to discharge the contractual rights of various non-debtor third parties under the Second Lien ICA in an effort to moot the ICA Action. Specifically, section 7.3 of the Plan provides for the cancellation the Second Lien ICA on the Effective Date:

> Except for the purpose of evidencing a right to distribution under this Plan, including the enforcement of any subordination and 'pay over' provisions in the Senior Subordinated Notes Indenture, and except as otherwise set forth herein, 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),[14] other than Intercompany Interests, and any rights of any holder in respect thereof, shall be deemed cancelled, discharged and of no force or effect. The holders of or parties to such cancelled instruments, securities and other documentation will have no rights arising from or relating to such instruments, securities and other documentation or the cancellation thereof, except the rights provided for pursuant to this Plan . . . .

Plan § 7.3. Nothing in the Plan specifically indicates what rights, if any, remain following cancellation, and presumably the Debtors intend that no rights, in fact, remain.

23. Moreover, consistent with the cancellation of the Second Lien ICA under section 7.3 of the Plan, section 5.6(a) of the Plan provides that "[o]n the Effective Date, the Second Lien Note Claims . . . shall not be subject to any . . . subordination (whether equitable,

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[13] The case caption is Wilmington Trust, N.A. v. JPMorgan Chase Bank, N.A., Index No. [652181/2014].

[14] Although "Second Lien Notes Intercreditor Agreement" is not defined under the Plan, the Plan provides a definition of "Second Lien Intercreditor Agreement," which is identified as the Second Lien ICA. See Plan § 1.166 (definition of "Second Lien Intercreditor Agreement").

contractual, or otherwise)." Plan § 5.6(a). Section 5.5(a) of the Plan also provides this same language regarding subordination as to the "1.5 Lien Note Claims." Plan § 5.5(a).[15] Lastly, section 2.1 of the Plan represents that "[t]he treatment of Claims and Interests under this Plan represents, among other things, the settlement and compromise of certain potential inter-creditor disputes." Plan § 2.1.[16]

ii. Third-Party Releases, Exculpations and Related Injunctions

24. In addition to the improper cancellation and discharge of the Second Lien ICA, the Plan provides for broad third-party releases, exculpations and related injunctions (collectively, the "**Improper Release Provisions**") in favor of the "Released Parties," which are defined in the Plan to include the ICA Defendants.[17] Section 12.5 of the Plan provides for non-consensual third-party releases in favor of the ICA Defendants for, among other things, their violations of the Second Lien ICA that were incurred in connection with the RSA and the Plan:

> Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date . . . (iii) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, all holders of Claims and Interests, in consideration for the obligations of the Debtors and Reorganized Debtors under this Plan, the Plan Consideration and other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, and each entity (other than the Debtors) that has held, holds or may hold a Claim or Interest, as applicable, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities (other than the right to enforce the obligations of any party under this Plan and the contracts, instruments, releases, agreements and

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[15] The 1.5 Lien Indenture Trustee and the holders of the 1.5 Lien Notes are not currently named as defendants to the ICA Action.

[16] The First Lien Successor Trustee does not consent to the cancellation of the Second Lien ICA or the Improper Release Provisions. Accordingly, there is no "settlement and compromise."

[17] See Plan § 1.147 (definition of "Released Parties"). In addition to the ICA Defendants as currently named in the ICA Action, Schedule 1 to the Plan provides that the Improper Release Provisions would broadly apply to (i) ". . . any Person who is a member of the Ad Hoc Committee of Second Lien Noteholders or a Backstop Party that is at any time named as a defendant in [the ICA Action] . . . ." See *Notice of Filing of Plan Supplement Related to Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials Inc. and Its Affiliated Debtors* [Dkt. No. 707], Exhibit 7 ("Schedule 1 of the Plan (Certain Unenumerated Released Parties").

> documents delivered under or in connection with this Plan) against the Released Parties . . . . that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Reorganization Cases, or this Plan or the Disclosure Statement.

Plan § 12.5(b).

25. Moreover, section 12.6 of the Plan provides for exculpation and limitation of liability to third parties in favor of the Released Parties, including the ICA Defendants:

> To the extent permissible under applicable law, none of the Released Parties shall have or incur any liability to any holder of any Claim or Interest or any other Person for any act or omission in connection with, or arising out of the Debtors' restructuring, including without limitation, the negotiation, implementation and execution of this Plan, the Reorganization Cases, the Disclosure Statement, the solicitation of votes for and the pursuit of confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or the property to be distributed under this Plan, including, without limitation, all documents ancillary thereto, all decisions, actions, inactions and alleged negligence or misconduct relating thereto and all activities leading to the promulgation and confirmation of this Plan except for gross negligence or willful misconduct, each as determined by a Final Order of the Bankruptcy Court.

Plan § 12.6.

26. Finally, section 12.7 of the Plan provides for an injunction related to the third-party releases and exculpations:

> The Confirmation Order shall permanently enjoin the commencement or prosecution by any Person or entity, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released pursuant to this Plan, including but not limited to the claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released in Sections 12.5 and 12.6 of this Plan.

Plan § 12.7.

OBJECTION

A. There is no justification for cancelling the Second Lien ICA under the Plan.

27. The Plan cannot be confirmed because it impermissibly seeks to cancel the Second Lien ICA and discharge the ICA Action. The Debtors have offered no legal basis for the cancellation and discharge of the Second Lien ICA as it relates to non-debtor parties under the Plan and indeed none exists. To the extent that the Debtors misguidedly rely on 1129(b) of the Bankruptcy Code as a basis to cancel and discharge the Second Lien ICA, the First Lien Successor Trustee submits that there is no authority under the plain language of section 1129(b)(1) of the Bankruptcy Code, any other section of the Bankruptcy Code or the case law that would permit the Plan to discharge contractual rights as between various non-debtor third parties. Moreover, even if the Debtors were to reject the Second Lien ICA in accordance with section 365 of the Bankruptcy Code, such rejection would only be a breach of the Second Lien ICA by the Debtors and not a termination of the contract. Finally, any reliance on section 105(a) of the Bankruptcy Code would also be misplaced because no other section of the Bankruptcy Code authorizes the cancellation and discharge of the Second Lien ICA.

28. As an initial matter, section 510(a) of the Bankruptcy Code specifically provides that contractual subordination agreements, such as those commonly found in intercreditor agreements, are enforceable in bankruptcy cases to the same extent as under applicable non-bankruptcy law. See 11 U.S.C. § 510(a); see also In re Kors, Inc., 819 F.2d 19, 24 (2d Cir. 1987) ("[S]ubordination agreements are uniformly upheld by the courts."); In re Ion Media Networks, Inc. v. Cyrus Select Opportunities Master Fund, LTD. (In re Ion Media Networks), 419 B.R. 585, 595 (Bankr. S.D.N.Y. 2009) ("The [i]ntercreditor [a]greement is an enforceable contract under section 510(a), and the [c]ourt will not disturb the bargained-for rights and restrictions governing the second lien debt . . . .").

29. In Ion, Cyrus Select Opportunities Master Fund Ltd. ("Cyrus"), an investor in distressed securities, purchased certain deeply discounted second lien debt of ION Media Networks, Inc. ("ION") for pennies on the dollar. See id. at 588. ION filed for bankruptcy, and Cyrus challenged the rights of the first lien lenders to recover the enterprise value attributable to ION's FCC broadcast licenses. Id. The bankruptcy court held, however, that Cyrus lacked standing to challenge the first lien lenders' lien rights and priority status because of the commitments that it had made to the first lien lenders in the intercreditor agreement. Id. at 595. As in ION, the ICA Defendants (through the Debtors) are attempting to use the bankruptcy process and bankruptcy litigation tactics not just to alter but to completely eliminate the promises that they made to the senior lenders in the Intercreditor Agreement. As in ION, the Court should reject that tactic and allow the resolution of the parties' rights through an unfettered litigation process.

30. Moreover, section 1129(b)(1) of the Bankruptcy Code cannot be read to permit the termination of rights vis-à-vis non-debtor third-parties under an intercreditor agreement. Section 1129(b)(1) of the Bankruptcy Code provides as follows:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

31. The phrase "[n]otwithstanding section 510(a) of this title," as it is used in section 1129(b)(1) of the Bankruptcy Code, can **at most** be read to permit the confirmation of a cram-down plan despite distributions or class classification issues under the plan that might be inconsistent with the terms of an intercreditor agreement. Compare In re Tribune Co., 472 B.R.

223, 241 (Bankr. D. Del. 2012) (finding that chapter 11 plan could be confirmed even if it did not comply with applicable subordination agreement), with In re Consul Restaurant Corp., 146 B.R. 979, 988-89 (Bankr. D. Minn. 1992) (holding that the cram-down of senior lenders in violation of the terms of an intercreditor agreement was not "fair and equitable" because such violation shifted the bargained-for risk of loss as between the lenders).

32. The First Lien Successor Trustee is not seeking this Court's resolution of the foregoing issue. Instead, all the First Lien Successor Trustee is seeking is that its rights and claims against the ICA Defendants be preserved. In In re TCI 2 Holdings, LLC, 428 B.R. 117 (Bankr. D.N.J. 2010) ("TCI 2"), the debtors' first lien lenders filed an action pre-confirmation against certain second lien lenders for the breach of an intercreditor agreement. Id. at 140. Similar to the Plan here, the debtors' plan in TCI 2 attempted to discharge claims arising under the intercreditor agreement in that case.[18] At plan confirmation, the first lien lenders argued that the debtors' plan "could not be confirmed because it violate[d] the [i]ntercreditor [a]greement and [was] therefore inconsistent with section 510(a) of the Bankruptcy Code." Id. at 139. The bankruptcy court disagreed and confirmed the plan. Id. at 141, 184. In doing so, the bankruptcy

[18] In TCI 2, the releases in the debtors' plan provided in relevant part that:

> Notwithstanding anything contained herein to the contrary, all Plan distributions made to creditors holding Allowed Claims in any Class take into account the relative priority and rights of the Claims and the Equity Interests in each Class in connection with any contractual, legal and equitable subordination rights relating thereto whether arising under general principles of equitable subordination, section 510 of the Bankruptcy Code or otherwise, and are intended to be and shall be final, and no Plan distribution to the holder of a Claim in one Class shall be subject to being shared with or reallocated to the holders of any Claim in another class by virtue of prepetition collateral trust agreement, shared collateral agreement, subordination agreement or other similar intercreditor arrangement. As of the Effective Date, any and all contractual, legal and equitable subordination rights, whether arising under general principles of equitable subordination, section 510 of the Bankruptcy Code or otherwise, relating to the allowance, classification and treatment of all Allowed Claims and their respective distributions and treatments hereunder are settled compromised, terminated, and released pursuant hereto[.]

Id. at 141, n.31.

court reasoned that the phrase "notwithstanding section 510(a) of this title" permitted confirmation despite any potential violation of the intercreditor agreement. Id. at 141. Critically, however, despite confirming the debtors' plan, the bankruptcy court declined to release the second lien lenders from any liability under the relevant intercreditor agreement and therefore the first lien lender's lawsuit remained pending after the confirmation date. Id. at 141-42; cf. In re Freedom Communs. Holdings, Inc., Case No. 09-13046 (BLS) (Bankr. D. Del. Aug. 30, 2010) [Dkt. No. 1706; Related to Dkt. Nos. 1392, 1488, 1681] (declining jurisdiction post-effective date to hear dispute between lender and agent to syndicated credit facility relating to the proper distribution of plan proceeds in respect of such facility and finding that "the interest of the parties, and principles of judicial economy, will best be served by allowing the dispute to be heard and disposed of in the New York Litigation (consistent with the terms of the Credit Agreement) . . . ."). Here, the First Lien Successor Trustee similarly seeks to preserve its day in court.

33. In addition, even if the Debtors were to reject the Second Lien ICA under section 365 of the Bankruptcy Code, such rejection would only be a breach of the Second Lien ICA by the Debtors and not a termination of the contract. See Medical Malpractice Ins. Ass'n v. Hirsch (In re Lavigne), 114 F.3d 379, 387 (2d Cir. 1997) (noting that "breach is not termination of [a] contract because, among other reasons, 'if rejection terminates the contract . . . such termination may have consequences that affect parties other than [the parties] to the contract'" (quoting 3 Collier on Bankruptcy (Lawrence P. King, et al. eds., 15th ed. 1996) (Collier) § 365.09[3])); see also Eastover Bank for Sav. v. Sowashee Venture (In re Austin Dev. Co.), 19 F.3d 1077, 1084 (5th Cir. 1994) (holding third-party beneficiary of lease retained contractual rights against lessor despite debtor-lessee's rejection of the lease). As such, the rights,

obligations and liabilities among the non-debtor parties to the Second Lien ICA would still be in full force and effect following any rejection by the Debtors.

34. Finally, any reliance by the Debtors on section 105(a) of the Bankruptcy Code would be misplaced because no other section of the Bankruptcy Code authorizes the cancellation and discharge of the Second Lien ICA. Notwithstanding this Court's equitable powers, section 105(a) of the Bankruptcy Code is limited in scope and applicability, and does not authorize this Court "to create substantive rights that would otherwise be unavailable under applicable law." Metromedia, 416 F.3d at 142 (quoting New England Dairies, Inc. v. Dairy (In re Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 92 (2d Cir. 2003)); see also Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC), 423 F.3d 166, 184 (2d Cir. 2005) (finding 11 U.S.C. § 105(a) inapplicable where no provision of the Bankruptcy Code could be invoked to support appellant's claim for relief).

35. Accordingly, the Plan cannot be confirmed because there is no valid basis under the Bankruptcy Code for cancelling the Second Lien ICA and effectively discharging the ICA Action, which is a legal action relating solely to the state law contractual rights of non-debtor third parties against each other under the Second Lien ICA.

B. The Improper Release Provisions cannot be approved.

36. The Improper Release Provisions in the Plan are overbroad and over-inclusive, and cannot be approved to the extent they purport to release the ICA Defendants from any and all liability in the ICA Action and under the Second Lien ICA. As a threshold matter, the Improper Release Provisions found in the Plan extend beyond this Court's jurisdiction. Moreover, even if jurisdiction were not lacking, there are no unique circumstances present in this case that could possibly justify the Improper Release Provisions under the Second Circuit's decision in Metromedia. Finally, under the case law in this District, this Court should not defer

judgment on the Improper Release Provisions and should decide on their permissibility in connection with plan confirmation, notwithstanding that the Improper Release Provisions are qualified in the Plan by the phrase "to the fullest extent permissible under applicable law . . . ."

i. This Court lacks jurisdiction to grant the Improper Release Provisions to the extent such provisions purport to release the ICA Defendants of any and all liability under the Second Lien ICA.

37. A threshold issue is the jurisdiction of this Court to grant the Improper Release Provisions found in the Plan. In Johns-Manville, the Second Circuit held that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." Travelers Cas. & Surety Co. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 66 (2d Cir. 2008) ("Johns-Manville"), vacated & remanded on other grounds, 557 U.S. 137 (2009), jurisdictional holding reaffirmed on remand, 600 F.3d 135 (2d Cir. 2010); see also Metcalfe & Mansfield Alternative Investments, 421 B.R. 685, 695 (Bankr. S.D.N.Y. 2010) (noting the "jurisdictional limits Manville imposes on a bankruptcy court"). Where parties "make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate," bankruptcy courts lack jurisdiction to enjoin a claim. Johns-Manville, 517 F.3d at 65.

38. This Court does not have jurisdiction to grant the Improper Release Provisions to the extent such releases, exculpations and related injunctions seek to release the ICA Defendants from any and all liability under the Second Lien ICA. The ICA Action is a state law action for breach of contract and declaratory relief arising out of the ICA Defendants' actual and threatened breaches of their obligations under the Second Lien ICA. As further described in the ICA Action, the first through fourth causes of action in the complaint relate to actions taken by the ICA Defendants in direct breach of the Second Lien ICA, which is a contract governed by New York law and which was entered into over a-year-and-a-half before the Petition Date.

Further, the fifth cause of action does not seek to prevent the Second Lien Noteholders from **receiving** any distribution under the Plan; it simply seeks to prevent such parties from **retaining** any distribution unless and until the "Discharge of Senior Lender Claims" has occurred under the Second Lien ICA. As such, this Court lacks jurisdiction to grant the Improper Release Provisions because the ICA Action is independent of these chapter 11 cases and does not seek direct claims against the Debtors or their estates.

39. Moreover, any potential indemnification obligations of the Debtors under the Backstop Commitment Agreement cannot cure this jurisdictional defect. A party "cannot manufacture federal jurisdiction by a document of its own making . . . ." Greene v. Nationwide Mut. Ins. Co., Civil Action No. 5:10CV104, 2011 U.S. Dist. LEXIS 6514, at *7 (N.D. W. Va. 2011); cf. Genco, 2014 Bankr. LEXIS 2854, at *103-04 (refusing to permit non-consensual third-party releases based on indemnification obligations that arose out of a court-approved restructuring support agreement or plan negotiations and reasoning that "[t]he [d]ebtors and the [r]eleased [p]arties should not be able to create indemnification obligations simply to gain the protection of a third party release."). In this case, the beneficiaries of the change, the ICA Defendants, were in a position to have the Debtors do their bidding and add a provision actually harmful to the Debtors.

40. As the Second Circuit emphasized in Johns-Manville, non-debtor third parties such as the ICA Defendants cannot create jurisdiction where it otherwise would not exist:

> It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate. If that were possible, a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

Johns-Manville, 517 F.3d at 66. Thus, the ICA Defendants should not be permitted to manufacture jurisdiction by way of potential indemnification obligations under the Backstop Commitment Agreement because such obligations were created and demanded by the ICA Defendants themselves.

41. Second, this Court has already determined in the Backstop Order that nothing in that Order would affect the rights of the parties under the Second Lien ICA:

> For the avoidance of doubt, nothing in this Order is intended to prejudice the rights of any party in interest (i) relating to any litigation or settlement with respect to whether any make-whole claim, prepayment penalty or Applicable Premium is allowable or (ii) under the certain Intercreditor Agreement dated as of November 16, 2012, to which MPM is party.

Backstop Order ¶ 24. Yet, that is exactly what the Debtors now seek to accomplish through the Plan.

42. Third, for the reasons set forth more fully in the Remand Motion submitted by the First Lien Successor Trustee, even if it were appropriate to permit the ICA Defendants to manufacture jurisdiction where it otherwise does not exist, the indemnification provision is not sufficient to confer "related to" jurisdiction over the ICA Action because any potential indemnification obligations are not automatic and would therefore require a separate lawsuit by the ICA Defendants to enforce any indemnity against the Debtors. See Remand Motion, pp. 15-19.

43. Accordingly, this Court lacks jurisdiction to grant the Improper Release Provisions to the extent such provisions seek to release the ICA Defendants from any and all liability in the ICA Action and under the Second Lien ICA.

ii. Even if jurisdiction existed, the Improper Release Provisions are impermissible under *Metromedia / Drexel*.

44. Even if jurisdiction existed (which the First Lien Successor Trustee submits it does not), non-debtor third-party releases are generally disfavored and are "proper only in rare cases." Metromedia, 416 F.3d at 141.

45. Congress has expressly authorized such non-debtor releases and injunctions in only one circumstance: to enjoin asbestos tort claimants from asserting claims against the reorganized debtor and against third parties, and then only in connection with the implementation of a settlement trust. See 11 U.S.C. § 524(g)(2). Based on this, "[t]he Ninth and Tenth Circuits have held that nondebtor releases are prohibited by the Code, except in the asbestos context." Metromedia, 416 F.3d at 141-42 (citing Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401–02, 1402 n. 6 (9th Cir.1995); and Landsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, 600–02 (10th Cir.1990) (per curiam).). See generally Halebian & Feffer v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 211-215 (3d Cir. 2000) (generally discussing Circuit authority concerning non-debtor releases and holding that plan's release of shareholder claims was not supported by sufficient evidentiary and legal basis, and violated Bankruptcy Code by relieving non-debtor parties of liabilities).

46. In Metromedia, the Second Circuit stated that non-debtor releases are appropriate only in "rare" and "unique" circumstances. Id. There, the court rejected an attempt by the debtors to include in their reorganization plan a provision releasing senior creditors from claims by junior creditors and, in doing so, explained:

> a nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the

> safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.

Id. at 142.

47. The court in Metromedia expressly held that whether a non-debtor release was appropriate was "not a matter of factors and prongs." Id. Notably, however, the only situations in which the Second Circuit has approved third-party releases are those involving obtaining releases and permanent injunctions of widespread claims against co-liable parties. See Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 960 F.2d 285, 293 (2d Cir. 1992); Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 640, 649 (2d Cir. 1988). These cited cases are similar to the mass-tort asbestos cases in which Congress has authorized non-debtor releases and, of course, are much different from this case.

48. There are no unique circumstances present in this case that could possibly justify the Improper Release Provisions found in the Plan to the extent that they would insulate the ICA Defendants from liability in connection with the ICA Action or the Second Lien ICA. This is true for the following reasons:

49. First, the First Lien Successor Trustee does not consent to the Improper Release Provisions and cannot be deemed to consent because there is no mechanism for the First Lien Successor Trustee to "opt-out" of such third-party releases, exculpations and injunctions under the Plan. See Genco, 2014 Bankr. LEXIS 2854, at *103-04 (finding equity holders did not consent to third-party releases where there was no opt-out mechanism for purposes of plan voting and analyzing permissibility of such releases under Metromedia).

50. Second, the ICA Defendants' participation in these chapter 11 cases does not support the broad Improper Release Provisions found in the Plan. An agreement by a

released party to support a chapter 11 plan is not a valid basis for approving a non-consensual third-party release of obligations owed to another non-debtor party. See In re Chemtura Corp., 439 B.R. 561, 611 (Bankr. S.D.N.Y. 2010) (striking third-party releases from chapter 11 plan and reasoning that such releases "don't become acceptable because they were part of the Global Settlement").

51. Third, the ICA Defendants cannot justify the Improper Release Provisions, as they relate to the ICA Action or the Second Lien ICA, based on any "material contribution" to the Debtors and their estates. Here, the $600 million Rights Offering under the Backstop Commitment Agreement represents a "sweetheart" deal for the ICA Defendants (which include certain of the Debtors' insiders). This fact is best demonstrated by the numerous objections initially filed against the Backstop Commitment Agreement by various Second Lien Noteholders who were originally shut out of the deal but later cut in on substantially the same terms. See, e.g., *Objection of Fortress Investment Group LLC to Debtors' Motion for Orders (I) Authorizing the Debtors to Assume the Restructuring Support Agreement and (II) Authorizing and Approving the Debtors' (A) Entry Into and Performance Under the Backstop Commitment Agreement, (B) Payment of Related Fees and Expenses, and (C) Incurrence of Certain Indemnification Obligations* [Dkt. No. 330].

52. Indeed, the demand for the Debtors' reorganized equity on the terms outlined in the Rights Offering is so great that approximately 90% of the Second Lien Noteholders have agreed to backstop it. The proper reward for the ICA Defendants efforts in these chapter 11 cases is a Plan that maximizes their return or otherwise satisfies the requirements of the Bankruptcy Code. See In re Adelphia Communs. Corp., 368 B.R. 140, 268-69 (Bankr. S.D.N.Y. 2007) ("Adelphia") ("In the case of creditors, even those that are Settling

Parties, they were merely striking the kinds of deals with respect to their share of the pie that chapter 11 contemplates . . . . But that's not unique. It's something creditors have to do in every chapter 11 case, at the risk of destroying themselves (or their recoveries in the case) with their own requests for incremental recoveries."); cf. In re Dana Corp., 390 B.R. 100, 108 (Bankr. S.D.N.Y. 2008) (denying claim for substantial contribution under section 503(b) of the Bankruptcy Code and reasoning in part that "[i]nherent in the term 'substantial' is the concept that the benefit received by the estate must be more than an incidental one arising from activities the applicant has pursued in protecting his or her own interests"); In re Granite Partners, 213 B.R. 440, 446 (Bankr. S.D.N.Y. 1997) (denying substantial contribution claim under section 503(b) of the Bankruptcy Code and reasoning in part that "[s]ervices calculated primarily to benefit the client do not justify an award even if they also confer an indirect benefit on the estate").[19] Thus, the everyday deal-making by the ICA Defendants in these chapter 11 cases cannot be considered "unusual" or "rare" for purposes of Metromedia.[20]

53. Fourth, the Improper Release Provisions cannot be supported by any potential indemnification obligations under the Backstop Commitment Agreement because such obligations were created and demanded by the ICA Defendants. See Genco, 2014 Bankr. LEXIS 2854, at *107 (finding "[t]he [d]ebtors and the [r]eleased [p]arties should not be able to create indemnification obligations simply to gain the protection of a third party release." (citing

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19 The First Lien Successor Trustee submits that the test for "substantial contribution" under section 503(b) of the Bankruptcy Code, which considers self-interest as a factor against finding substantial contribution, is persuasive to the analysis under Metromedia and in these chapter 11 cases. There is nothing "unusual" or "rare" about creditors seeking to maximize their own recoveries in a chapter 11 case out of economic self-interest.

20 With respect to Apollo, in particular, funding the backstop is a means for Apollo to maintain a substantial stake in a pre-existing Apollo investment that generates synergies with its ongoing ownership of the Debtors' sister companies, Momentive Specialty Chemicals Holdings, LLC and its subsidiaries. (See, e.g., Disclosure Statement at 24-26). While the right to participate in the backstop opportunity appears to be valuable consideration flowing from the Debtors to Apollo, Metromedia requires the opposite: that substantial consideration flow to the Debtors from the released parties. The BCA does not do that.

Adelphia, 368 B.R. at 268-69 ("Nor can I accept the notion that the releases pass muster under Metromedia because the Settling Parties elected to make them an element of their deal . . . . It would set the law on its head if parties could get around it by making a third party release a *sine qua non* of their deal, to establish a foundation for an argument that the injunction is essential to the reorganization, or even 'an important part' of the reorganization.")).

54. Accordingly, the Improper Release Provisions in the Plan cannot be approved to the extent they seek to release the ICA Defendants from any and all liability in connection with the ICA Action or under the Second Lien ICA.

iii. This Court cannot defer judgment on the propriety of the Improper Release Provisions found in the Plan.

55. In apparent recognition that the non-consensual third-party releases are not permissible under Second Circuit law, the Plan provides that such releases apply only "to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date." Plan ¶ 12.5(b). Similarly, the non-consensual exculpations provide that such exculpations are "[t]o the extent permissible under applicable law." Plan ¶ 12.6. However, neither phrase renders these provisions nor the related injunction acceptable or otherwise permits this Court to defer judgment on their propriety. See Genco, 2014 Bankr. LEXIS 2854, at *105-06 (finding certain third-party releases impermissible under Metromedia notwithstanding that such releases were qualified by the phrase "to the extent permissible under applicable law"); Adelphia, 368 B.R. at 268-79 (finding that, despite use of the phrase "to the fullest extent permissible under applicable law," bankruptcy court had to determine the extent to which releases were permissible in connection with plan confirmation, and ultimately rejecting all but one non-consensual third-party release included in the chapter 11 plan); see also U.S. Bank. Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.), 426 B.R. 114, 143-44 (Bankr.

D. Del. 2010) (finding third-party releases impermissible and concluding that validity of such releases had to be analyzed in connection with plan confirmation, even though such releases were qualified by the phrase "to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the [e]ffective [d]ate").

56. Accordingly, this Court must decide the permissibility of the Improper Release Provisions in connection with confirmation of the Plan.

C. This Court lacks constitutional jurisdiction under Stern v. Marshall to enter a final confirmation order so long as the Improper Release Provisions remain.

57. What the Debtors and the ICA Defendants have done through the improper releases is to put this Court in the position where it cannot enter a final confirmation order under Stern v. Marshall, 131 S. Ct. 2594 (2011). The ICA Action is a purely state law action for breach of contract and declaratory relief between various non-debtor third parties. As stated in the Supreme Court's decision in Stern v. Marshall, bankruptcy courts lack constitutional jurisdiction under Article III of the U.S. Constitution to enter final judgment on a state law cause of action that is not resolved in the process of ruling on a creditor's proof of claim. Stern, 131 S. Ct. at 2618 (finding bankruptcy lacked constitutional jurisdiction to enter final judgment on a state law counterclaim); see also Dynegy Danskammer, L.L.C. v. Peabody COALTRADE Int'l Ltd., 905 F. Supp. 2d 526, 531-32 (S.D.N.Y. 2012) (finding bankruptcy court lacked constitutional authority to enter final order on state law breach of contract claim under Stern v. Marshall and withdrawing the reference from the bankruptcy court). For this reason, the First Lien Successor Trustee submits that this Court lacks constitutional jurisdiction to enter a final confirmation order so long as the Improper Release Provisions remain in the Plan.

D. The Debtors have not provided sufficient evidence to support the feasibility of the Plan for purposes of the Bankruptcy Code.

58. The Plan also is unconfirmable as a matter of law in the event that this Court determines that the Claims of the First Lien Successor Trustee and First Lien Noteholders can be crammed down at a rate higher than the rate proposed by the Debtors in the Plan, which the First Lien Successor Trustee submits that the Court will be required to apply. As described in the Disclosure Statement, the Plan proposes that the Replacement First Lien Notes (i) "will bear interest at a rate per annum equal to the Treasury Rate plus 1.50%, or such greater rate determined by the Bankruptcy Court is necessary to satisfy the provisions of the Bankruptcy Code" and (ii) will have a maturity date of 7 years. Disclosure Statement, Exhibit 7 ("Replacement First Lien Notes Term Sheet").

59. The Debtors' Chief Financial Officer and financial advisor have each testified in their respective depositions that the Debtors have undertaken no analysis to determine whether the Plan would be feasible if the First Lien Successor Trustee was successful in obtaining a ruling from this Court that the appropriate cram-down rate was higher than the rate proposed in the Plan. To the extent the First Lien Successor Trustee is successful in obtaining a higher interest rate, which it should be, the Debtors should be prohibited from introducing any evidence in support of feasibility unless the First Lien Successor Trustee is first provided with appropriate discovery and an opportunity to conduct a supplemental deposition of the Debtors and their financial advisor.[21]

E. Proposed changes to language in the Plan.

60. In accordance with paragraph 15 of this Court's *Order: (I) Approving Disclosure Statement; (II) Establishing Date of Confirmation Hearing; (III) Establishing*

[21] The Trustee will be asserting its position concerning the rate obligations in its cram-down brief.

Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, Including (A) Approving Form and Manner of Solicitation Packages, (B) Approving Form and Manner of Notice of the Confirmation Hearing, (C) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots, and (F) Approving Procedures for Vote Tabulations; (IV) Establishing Deadline and Procedures for Filing Objections to Confirmation of Plan; (V) Approving Rights Offering Procedures and (VI) Granting Related Relief [Dkt. No. 508], the First Lien Successor Trustee hereby submits the following proposed language revisions necessary to address the objections raised herein relating to the cancellation of the Second Lien ICA and the Improper Release Provisions:

a. Section 5.5(a) of the Plan should be revised as follows:

> On the Effective Date, the 1.5 Lien Note Claims shall be deemed Allowed Claims in the amount of $250,000,000, plus any accrued and unpaid interest from the Petition Date through the Effective Date at the non-default interest rate provided under the 1.5 Lien Indenture, and shall not be subject to any avoidance, reductions, setoff, offset, recoupment, recharacterization, subordination (whether contractual, equitable, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment objection, or any other challenges under any applicable law or regulation by any Person**; provided, however, that any distributions under the Plan in respect of the 1.5 Lien Note Claims shall be subject, immediately after the Effective Date, to subordination arising under, in connection with or relating to any applicable intercreditor or subordination agreement or in any legal or equitable action arising under, in connection with or relating to such intercreditor or subordination agreement**.

b. Section 5.6(a) of the Plan should be revised as follows:

> Allowance: On the Effective Date, the Second Lien Note Claims shall be deemed Allowed Claims for all purposes in an amount of no less than $1,161,000,000 plus €133,000,000 (plus any accrued and unpaid interest arising prior to the Petition Date), and shall not be subject to any avoidance, reductions, setoff, offset, recoupment, recharacterization, subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment, objection, or any other challenges under any applicable law or regulation by any Person**; provided, however, that any distributions under the Plan in respect**

of the Second Lien Note Claims shall be subject, immediately after the Effective Date, to subordination arising under, in connection with or relating to the Second Lien Intercreditor Agreement or the ICA Action (as it presently exists or as it may be amended, modified or supplemented prior to, on or after the Effective Date).

c. Section 7.3 of the Plan should be revised as follows:

Except for the purpose of evidencing a right to distribution under this Plan, including the enforcement of any subordination and "pay over" provisions in the Senior Subordinated Notes Indenture, and except as otherwise set forth herein, 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**; provided, however, that the Second Lien Intercreditor Agreement and any and all documents entered into in connection therewith and that are necessary for the enforcement thereof, and any applicable intercreditor or subordination agreement with respect to the 1.5 Lien Note Claims and any and all documents entered into in connection therewith and that are necessary for the enforcement thereof, shall not be deemed cancelled, discharged or of no force or effect** . . . .

d. Section 12.5(b) of the Plan should be revised as follows:

Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date . . . (iii) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, all holders of Claims and Interests, in consideration for the obligations of the Debtors and Reorganized Debtors under this Plan, the Plan Consideration and other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, and each entity (other than the Debtors) that has held, holds or may hold a Claim or Interest, as applicable, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities (other than the right to enforce the obligations of any party under this Plan and the contracts, instruments, releases, agreements and documents delivered under or in connection with this Plan) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Reorganization Cases, or this Plan or the Disclosure Statement**; provided, however, that any and all claims, demands, debts, rights, Causes of Action and liabilities against non-debtor third parties shall not be released to the extent such claims, demands, debts, rights, Causes of Action and liabilities**

arise under, relate to or are connected with (i) the ICA Action (as it presently exists or as it may be amended, modified or supplemented prior to, on or after the Effective Date) or (ii) the Second Lien Intercreditor Agreement (including any and all documents entered into in connection therewith and that are necessary for the enforcement thereof).

e. Section 12.6 of the Plan should be revised as follows:

To the extent permissible under applicable law, none of the Released Parties shall have or incur any liability to any holder of any Claim or Interest or any other Person for any act or omission in connection with, or arising out of the Debtors' restructuring, including without limitation, the negotiation, implementation and execution of this Plan, the Reorganization Cases, the Disclosure Statement, the solicitation of votes for and the pursuit of confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or the property to be distributed under this Plan, including, without limitation, all documents ancillary thereto, all decisions, actions, inactions and alleged negligence or misconduct relating thereto and all activities leading to the promulgation and confirmation of this Plan except for gross negligence or willful misconduct, each as determined by a Final Order of the Bankruptcy Court**; provided, however, that non-debtor third parties shall not be exculpated for any and all liability arising under, in connection with or relating to the ICA Action (as it presently exists or as it may be amended, modified or supplemented prior to, on or after the Effective Date) or the Second Lien Intercreditor Agreement (including any and all documents entered into in connection therewith and that are necessary for the enforcement thereof)**.

JOINDER AND RESERVATION OF RIGHTS

61. The First Lien Successor Trustee hereby joins in the 1.5 Lien Trustee Objection. Additionally, the First Lien Successor 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, including the Debtors or the ICA Defendants.

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CONCLUSION

WHEREFORE, the First Lien Successor Trustee respectfully requests that this Court grant relief to the First Lien Successor Trustee as requested herein and as it otherwise deems just and proper.

Dated: New York, New York
July 28, 2014

DECHERT LLP

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