Docket #0770 Date Filed: 8/5/2014

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
MPM Silicones, LLC, *et al.*,	:	Case No. 14–22503 (RDD)
	:	
Debtors.	:	(Jointly Administered)

OBJECTION OF U.S. BANK NATIONAL ASSOCIATION AS INDENTURE TRUSTEE TO CONFIRMATION OF JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR MOMENTIVE PERFORMANCE MATERIALS INC.

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U.S. Bank National Association, as successor Indenture Trustee (in such capacity, "**U.S. Bank**") under the indenture (the "**Indenture**") dated as of December 4, 2006, among Momentive Performance Materials Inc., the Guarantors named in the Indenture, and Wells Fargo Bank, N.A. as initial trustee, governing the 11.5% Senior Subordinated Notes due 2016 (the "**Senior Sub Notes**"), respectfully objects to confirmation of the Joint Chapter 11 Plan of Reorganization (the "**Plan**") for Momentive Performance Materials Inc. ("**MPM**" or the "**Company**") and its Affiliated Debtors (collectively, the "**Debtors**"), and responds to the briefs of the Plan Proponents.[1]

I. PRELIMINARY STATEMENT

Holders of the Second-Priority Notes cannot receive *anything* on account of their *Indebtedness* – payment or otherwise – from the collateral securing both the Senior Lender Claims and the Second-Priority Notes, unless and until the Senior Lender Claims have been *paid in full*. The Second-Priority Notes are therefore Indebtedness that "by its terms is subordinate or junior in any respect" to the Senior Lender Claims. The Second-Priority Notes are not "Senior Indebtedness"[2] under the Indenture, and the Plan's treatment of those notes as if they were makes it unconfirmable.

Nothing could be more important to a lender than its ability to get paid. And where a lender must stand in line – and wait (indeed hope) to get paid a penny until after another party has been paid in full from a limited pot of assets – that lender's *indebtedness* is plainly subordinate and junior, and not just in some technical or theoretical respect. The lender who

[1] The Plan Proponents are the Debtors, Apollo, Wilmington Savings Fund Society, FSB, as successor indenture trustee to the Second-Priority Notes, and the Ad Hoc Committee of Second-Priority Noteholders. For ease of reference: the Debtors' Brief, Dkt No. 641, is referred to as "Debtors' Br."; the Apollo Brief, Dkt No. 634, as "Apollo Br."; and the Wilmington and Ad Hoc Committee Brief, Case No. 14-AP-8238-RDD, Dkt No. 33, as "Ad Hoc Br."

[2] Capitalized terms not otherwise defined herein have the same meanings as in the Indenture.

cannot get paid unless and until someone else does is subordinated in a way that goes to the very heart of the lender's economic interests (namely his indebtedness and recovery thereupon). While the Plan Proponents spend more than ninety pages trying to divert attention from this simple and indisputable fact, it is fatal to the Plan.

For the Plan to be confirmable, the Plan Proponents must establish that the Debtors' Second-Priority Notes fit within the Indenture's definition of Senior Indebtedness. That definition excludes any Indebtedness or obligation that "by its terms is subordinate or junior in any respect" to any other Indebtedness or obligation of the Debtors. Because the Second-Priority Notes are subordinate and junior to the Debtors' Senior Lender Claims, not just "in any respect," but in several significant respects, the Plan cannot be confirmed.

The subordinate and junior aspects of the Second-Priority Notes are concrete and clear. Most fundamentally, no principal, interest, or other indebtedness or obligations owing on account of the Second-Priority Notes can be paid from the collateral securing the Senior Lender Claims and Second-Priority Notes (the "**Common Collateral**"), unless and until the Senior Lender Claims have been *paid in full*. This means the Second-Priority Notes are subordinated and junior in terms of *recovery* from the Common Collateral – which, according to the Debtors, is a significant portion of the their assets. Nothing more is needed to conclusively prove that the Second-Priority Notes are subordinate and junior in a critical (let alone any) respect.

Plus, the Second-Priority Notes are subordinate and junior in additional and meaningful respects. For example, if the holders of the Second-Priority Notes receive any payments in violation of their contractual subordination, they must turn these payments over to the holders of Senior Lender Claims. They must do so even if the Senior Lender Claims or the liens securing them are unperfected, avoided, or otherwise *unenforceable*. Furthermore, the ability of the

holders of the Second-Priority Notes to exercise remedies against the Common Collateral and the Debtors generally is subordinate to the rights of the holders of the Senior Lender Claims.

A fundamental rule of contract interpretation is that the plain and unambiguous language controls. Here, the language is crystal clear: If Indebtedness or an obligation is "subordinate or junior ***in any respect***" – in right of payment or some other respect – it is not Senior Indebtedness. The Indenture uses the phrase "subordinate or junior in any respect" without any qualifier whatsoever only once in the entire document, as an exception to the definition of Senior Indebtedness, an important definition in any subordination instrument given its drastic consequences. In stark contrast, the Indenture elsewhere employs qualified terms like "in any *material* respect." And in no less than *twenty* instances, the Indenture references subordination only "in right of payment" when referring to the relevant rank of debt, including earlier in the very definition of Senior Indebtedness, and elsewhere in describing the putative payment subordination of the Senior Sub Notes themselves. The plain terms of the Indenture protected the Senior Sub Notes with broad language, and this plain language ends the analysis.

Although the plain language is decisive,[3] the Court also may consider contemporaneous industry publications which confirm that "in any respect" means exactly what it says.[4] Contrary to the Plan Proponents' protestations, it was not "absurd" to include this crystal clear phrase in the Indenture when it was prepared in 2006. Earlier in the same year that the Senior Sub Notes were issued, industry publications recognized that most existing indentures contained a

[3] U.S. Bank and the Plan Proponents have agreed that there will be neither fact nor expert testimony at the Confirmation Hearing with respect to whether the Second-Priority Notes are *pari passu* with the Senior Sub Notes. *See* Order Establishing a Timeline for Confirmation-and-Adversary Proceeding-Related Discovery at 4 n.3, June 26, 2014, Dkt No. 551.

[4] Contemporaneous industry publications and commentaries offer an "[a]ppropriate, and sometimes indispensable" interpretative aid and shed light on the context in which certain provisions operate and the circumstances in which a contract was drafted. *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 305 (7th Cir. 1994).

"loophole" that enabled financiers to "layer" multiple levels of secured debt ahead of senior subordinated debt. This loophole diluted the anti-layering protections built into those existing indentures, which were limited to debt that was subordinated "in right of payment." These publications proposed that future indentures could fix this problem – and strengthen the anti-layering protections – by using the phrase "subordinated in any respect" to protect lenders ***against layering of debt that is subject to lien subordination***. The Indenture sensibly adopted the language these publications recommended in order to address the "loophole." Although the Indenture did not prohibit all layering of secured debt outright, it *did* address layering by ensuring that such layered debt would not be treated as "Senior Indebtedness" and therefore not entitled to the benefits of subordination, including payover of recoveries. Thus, the Senior Sub Notes are not subordinated in right of payment to any form of layered debt, no matter how you slice it.

The ABA Model Covenants and contemporaneous indentures further confirm that the plain meaning of "in any respect" includes debt that is subordinated through lien subordination. The "in any respect" language in the definition of Senior Indebtedness is virtually identical to that proposed in the Model Covenants in 2006, just a few months before the Senior Sub Notes were issued. When the Debtors added the "in any respect" language to the Indenture, however, the Debtors conspicuously chose to omit another provision of the Model Covenants from the Indenture – a carve-out provision that would have narrowed the meaning of "in any respect" so that the phrase would have excluded lien subordination. Although the Debtors adopted ***virtually every other*** ABA Model Rule of Construction, they chose to omit the one that would have said "secured Indebtedness shall not be deemed to be subordinate or junior to any other secured

Indebtedness merely because it has a junior priority with respect to the same collateral."[5] This omitted Rule of Construction again confirms that the plain meaning of "in any respect" captures debt subordinated through lien subordination. And its omission in the Indenture is noteworthy not just because it is the only material Model Rule of Construction omitted, but because other contemporaneous indentures – including those used by Apollo in other deals – include the very ABA model language that could have been added to the Indenture's definition of Senior Indebtedness, but was not.

The Plan Proponents offer no reasonable competing interpretation of the Indenture's plain language. Instead, they propose that the "in any respect" exception to Senior Indebtedness is merely an extension of the exception which is expressly limited to indebtedness that is subordinated in right of payment – an extension designed to capture payment subordination provided for in intercreditor agreements as opposed to in the loan documents themselves. That construction does not work; it does not even attempt to explain the difference between the very broad words "in any respect" and the oft-repeated "in right of payment" used throughout the Indenture, including in the very same definition of Senior Indebtedness. The Plan Proponents fail even once to provide an intelligible alternative meaning for the words "in any respect": words that mean, quite plainly, in *any* respect.

Unable to credibly dispute that the Indenture means what it says, the Plan Proponents in reality are complaining that, *after* the plain language had already been agreed upon, Apollo and the Debtors later *chose to do something* which was inconsistent with it. They now want the contract rewritten to relieve them of the consequences of their voluntary actions. Specifically,

[5] *Model Negotiated Covenants and Related Definitions*, 61 BUS. LAW. 1439, 1500 (2006) (prepared and published by the ABA Section of Business Law). A copy is attached to the Declaration Of Susheel Kirpalani In Support Of Objection Of U.S. Bank National Association As Indenture Trustee To Confirmation Of Joint Chapter 11 Plan Of Reorganization For Momentive Performance Materials, Inc. (the "**Kirpalani Declaration**") as Ex. A.

with the "in any respect" language already in place, Apollo and the Debtors chose to issue layers of secured debt, precluding such layered debt from any entitlement to payover from the Senior Sub Notes based upon the Indenture's plain language that was always known to them. Now the Plan Proponents argue what Apollo, the Debtors, and the holders of Second-Priority Notes *chose to do* will make no sense – indeed will be "absurd" – unless the Court rewrites the contract to delete or narrow the phrase "in any respect," or to add a rule of construction from the ABA Model Covenants they chose not to include. Taking a junior security interest and giving up the benefit of contractual subordination was a choice, and it could have made all the sense in the world at the time. But the commercial reasonableness of the actions of the Plan Proponents is speculation and irrelevant. The fact that the Debtors or other Plan Proponents may not like all of the consequences of their own actions gives no basis in fairness or law to rewrite the contractual terms of someone else's investment.

The Plan is premised upon turning over the Senior Sub Notes' recovery to Apollo and other holders of Second-Priority Notes. Because the Senior Sub Notes are not subordinated in right of payment to the Second-Priority Notes under the terms of the Indenture, the Plan cannot be confirmed. This objection should be sustained.

II. STATEMENT OF FACTS

A. Background.

Apollo Global Management, LLC ("**Apollo**") acquired the Debtors from General Electric in 2006.[6] In connection with Apollo's leveraged buyout, MPM issued more than $3 billion of debt, guaranteed by the other Debtors.[7]

[6] Disclosure Statement (as defined below) at 18, Dkt No. 516.

[7] Momentive Performance Materials Inc., Registration Statement (Form S-4) at F-21 to F-23 (Sept. 14, 2007) (attached to the Apollo Brief as Ex. B). For the convenience of the Court and all parties, U.S.

This debt consisted of a senior secured credit facility and senior unsecured notes issued under three indentures, in addition to the Senior Sub Notes issued under the Indenture. The senior secured credit facility consisted of a $50 million revolving credit facility and approximately $1 billion under two term loans (one of which was denominated in Euros), all secured by first priority security interests in substantially all of MPM's assets.[8] Pursuant to the four indentures, MPM issued $765.0 million of senior notes, $300.0 million of senior toggle notes, €275 million of Euro senior notes, and $500.0 million of Senior Sub Notes, all of which was unsecured.[9] Importantly, under the terms of the Indenture, there was no layered debt of any kind, whether through right of payment or through lien subordination.

B. The Senior Sub Notes Indenture Defines Senior Indebtedness.

The Senior Sub Notes were issued by MPM on December 4, 2006.[10] The Indenture provided that the Senior Sub Notes will be subordinated "in right of payment . . . to the prior payment in full of all existing and future Senior Indebtedness of the Company . . .."[11] The Indenture clearly stated that "*only* . . . Senior Indebtedness of the Company shall rank senior to the [the Senior Sub Notes] . . .."[12]

The Indenture defined Senior Indebtedness as:

> [A]ll Indebtedness . . . of the Company or any Restricted Subsidiary . . . ***unless the Instrument creating or evidencing the same or pursuant to which the same***

Bank will, where possible, refer to the exhibits filed by the Plan Proponents rather than introduce an additional copy of the same document.

[8] Momentive Performance Materials Inc., Annual Report (Form 10-K) at 4 (Mar. 31, 2008). A copy is attached to the Kirpalani Declaration as Ex. B.

[9] *Id.*

[10] Various MPM subsidiaries and affiliates (the "**Guarantors**") guaranteed the Senior Sub Notes. *See* Indenture, a copy of which is attached to the Apollo Brief as Ex. A.

[11] *Id.* § 10.01 at 95.

[12] *Id.* (emphasis added). The Indenture has materially identical provisions with respect to the Guarantors. *Id.* § 12.01 at 103.

> ***is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness*** of the Company or such Restricted Subsidiary [the "**Payment Exception**"], as applicable; *provided*, *however*, that Senior Indebtedness shall not include, as applicable:
>
> . . .
>
> (4) ***any Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior in any respect to any other Indebtedness or obligation*** of the Company or such Restricted Subsidiary . . . [the "**In Any Respect Exception**"] . . ..[13]

Thus, ***any*** subordination or junior aspects of an Indebtedness or obligation of the Debtors, ***in any respect***, disqualifies that Indebtedness or obligation from Senior Indebtedness status. "Indebtedness" includes "the principal and premium (if any) of any indebtedness of such Person, whether or not contingent, (a) in respect of borrowed money, [or] (b) evidenced by bonds, notes, debentures or similar instruments or letters of credit or bankers' acceptances . . .."[14] The lower case term "obligations" is not defined in the Indenture, but is used throughout the Indenture to broadly refer to both monetary and non-monetary obligations and other duties.[15]

The In Any Respect Exception is unique in the Indenture because it is the ***only place in the entire Indenture*** where the broad phrase "in any respect" was used. The drafters of the Indenture certainly knew how to use narrower phrases to describe subordination – and they did so in many other places in the Indenture. There are *twenty* other references in the Indenture to subordination "in right of payment," including, most notably, the Payment Exception located

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[13] *Id.* § 1.01 at 32–33 (emphasis added).

[14] *Id.* § 1.01 at 19.

[15] *See, e.g.*, *id.* § 4.02(b) at 48–49 (referring to financial reporting "obligations"); *id.* § 4.08(k) at 71 (referring to the Debtors' "obligations" in the event of a change of control); *id.* § 4.14(b) at 72 (referring to the Debtors' "obligation" to maintain an office or agency where securities could be surrendered); *id.* § 7.02(g) at 84 (limiting "obligation" of the indenture trustee to act). Notably, the Indenture also defines upper case "Obligations" to include "any principal, interest, penalties, fees, indemnifications, reimbursements (including, without limitation, reimbursement obligations with respect to letters of credit and bankers' acceptances), damages and other liabilities payable under the documentation governing any Indebtedness," but that defined term is ***not*** used in the definition of Senior Indebtedness. *Id.* § 1.01 at 22.

within the very same definition.[16] Elsewhere, the Indenture defined "Subordinated Indebtedness" as Indebtedness that is "subordinated in right of payment." And "Pari Passu Indebtedness" is defined as Indebtedness that is "pari passu in right of payment.[17] Indeed, even when describing the extent to which the Senior Sub Notes themselves are subordinated to Senior Indebtedness, the Indenture uses the qualifier "in right of payment" rather than the broader, unqualified phrase "in any respect."[18]

Likewise, the Indenture uses the restrictive phrase "in any ***material*** respect" in multiple provisions.[19] By contrast, drafters of the Indenture chose to use the very broad phrase "in any respect" only one time, and in only one place – in the In Any Respect Exception to Senior Indebtedness.

The plain meaning of the phrase "in any respect" is confirmed by the way the drafters of the Indenture used the ABA Model Negotiated Covenants and Related Definitions (the "**ABA Model Covenants**"), which was released in August 2006 (a few months prior to the date of the Senior Sub Note Indenture).[20] The ABA Model Covenants contain an "in any respect" exception that is virtually identical to that contained in the Senior Sub Notes Indenture:

> Senior Indebtedness shall not include . . . any Indebtedness or other Obligation of such Person which is subordinate or junior in any respect to any other Indebtedness or other Obligation of such Person . . ..[21]

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[16] *Id.* §§ 1.01, 4.03, 4.12, 4.13, 10.01, 11.01, & 12.01.

[17] *Id.* § 1.01 at 23, 34.

[18] *Id.* § 10.01.

[19] *Id.* §§ 1.01, 4.02, 4.07, & 4.15.

[20] As noted below, courts often consider contemporaneous industry commentaries and models in interpreting contracts as a matter of law. *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 140 n.2 (2d Cir. 2005) (relying on American Bar Foundation Commentaries in interpreting X-Clause in indenture and noting that the Second Circuit frequently relies on those commentaries in interpreting indenture provisions).

[21] Kirpalani Decl., Ex. A, ABA Model Covenants, *supra* note 5, at 1492–93.

The ABA Model Covenants, however, also contain a "Rule of Construction" that would specifically limit the scope the of "in any respect" exception. Section 1.04(7) provides that:

> ***[S]ecured Indebtedness shall not be deemed to be subordinate or junior*** to any other secured Indebtedness merely because it has a ***junior priority with respect to the same collateral*** (emphasis added). [22]

The drafters of the Indenture conspicuously chose to ***omit*** this Rule of Construction, even though the Indenture incorporates ***virtually every other Rule of Construction from the ABA Model Covenants*** (and in the same order in which they appear in the Model).[23] *See* Annex 1 hereto (Comparison of ABA Model and the Indenture's Rules of Construction). Thus, while the Indenture otherwise follows the ABA's Model Covenants Rules of Construction nearly word-for-word, it excluded the one Model rule that would have prevented the In Any Respect Exception from treating junior-priority liens as subordinate or junior.

Separately, the Indenture further provides that MPM will pay – and the Guarantors will indemnify – the reasonable fees and expenses of the Indenture Trustee.[24] The Indenture expressly exempts the Indenture Trustee's fees and expenses from the subordination provisions of the Indenture.[25]

C. MPM Issues The Second-Priority Notes, Which Are Subordinate And Junior To Senior Lender Claims.

About four years after the issuance of the Senior Sub Notes, in November 2010, MPM issued approximately $1.161 billion of 9% Second-Priority Springing Lien Notes due 2021 and

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[22] *Id.* at 1500.

[23] The only other Model Rule of Construction omitted from the Indenture related to the construction of "Issue Date," which is addressed in other provisions of the Indenture (specifically, the definitions of "Issue Date" and "Original Securities").

[24] Indenture § 7.07 at 85.

[25] *See id.* § 10.09 at 98; *id* § 12.09 at 106.

€133 million of the euro-denominated 9.5% Second-Priority Springing Lien Notes due 2021 (together, the "**Second-Priority Notes**").[26]

From inception, the Second-Priority Notes were to be secured by a subordinate, second-priority lien on the same Common Collateral that secured senior first-lien creditors. The lien was to "spring" as soon as $200 million of pre-existing second-lien notes issued in 2009 (the "**Prior Second-Priority Notes**") were redeemed.[27] *Ab initio*, the Second-Priority Notes Indenture made clear that the security interest would be "a second-priority security interest on the Collateral" that, "pursuant to the Intercreditor Agreement, . . . will be [] junior in priority and subordinated to the Liens securing the First Priority Obligations."[28]

In November 2012, MPM redeemed the last remaining Prior Second-Priority Notes, and the springing, junior lien was triggered by the terms of the Second-Priority Notes.[29] At that time, the Debtors and The Bank of New York ("**BNY**"), the indenture trustee and collateral agent for the Second-Priority Notes, were subject to the preexisting obligation to "execute such Security Documents and the Intercreditor Agreement, make all filings . . . and take all other actions as are necessary or will be required by the Security Documents to maintain . . . the security interest

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[26] *See* Second-Priority Notes Indenture, a copy of which is attached to the Debtors' Brief as Ex. A.

[27] *Id.* § 1.01 at 36; *id.* § 11.01 at 100.

[28] Exhibit A-1 to the Second-Priority Notes Indenture: Form of Second-Priority Notes A-1-10, ¶ 9. *See also* Second-Priority Indenture § 10.01 ("Following the Springing Lien Trigger Date, the Intercreditor Agreement will define the relative rights of holders of Second Priority Liens and holders of Liens securing [Senior Lender Claims] . . .."). The Second-Priority Indenture further provided that the Intercreditor Agreement was to be "consistent with the terms contemplated by this [Second-Priority] Indenture and the description of the Intercreditor Agreement in the Offering Memorandum." Second-Priority Indenture, definition of Intercreditor Agreement at 22. The Offering Memorandum stated that the Intercreditor Agreement would provide that "[t]he holders of the first priority liens will receive all proceeds from any realization on the collateral or proceeds thereof in any insolvency proceeding, until the first lien obligations are paid in full in cash." *See* Exhibit M to Khalil Declaration in support Ad Hoc. Br. at 10. The Offering Memorandum also stated that the Second-Priority Notes "will continue to rank effectively junior in priority with respect to the right of holders of the Company's obligations under the Company's senior secured credit facilities . . . (to the extent of the value of such collateral) . . .." *Id.* at Cover. The Second-Priority Notes, as their name always reflected, were always subordinate and junior.

[29] Momentive Performance Materials Inc., Current Report (Form 8-K) (Nov. 16, 2012).

created by the Security Documents in the Collateral . . .."[30] The Debtors' obligations were expressly "subject to the terms of the Intercreditor Agreement."[31]

The Intercreditor Agreement governs the relative priorities and other rights of the holders of the Second-Priority Notes and the holders of the "**Senior Lender Claims**,"[32] which the Intercreditor Agreement refers to as the "Senior Lenders."[33] The Intercreditor Agreement subordinates the Second-Priority Notes to the Senior Lender Claims in a number of respects.

First and foremost, the Intercreditor Agreement provides that ***payment of all principal, interest, and other Indebtedness and obligations owing on account of the Second-Priority Notes is subordinated*** to the payment in full of the Senior Lender Claims, with respect to the Common Collateral or any proceeds thereof. In the event of a default of the Senior Lender Claims:

> [S]o long as the Discharge of Senior Lender Claims has not occurred, the Common Collateral or proceeds thereof received in connection with the sale or other disposition of, or collection on, such Common Collateral upon the exercise of remedies, ***shall be applied*** by the Intercreditor Agent ***to the Senior Lender***

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[30] Second-Priority Notes Indenture § 11.01 at 100.

[31] *Id. See* Intercreditor Agreement dated as of November 16, 2012, a copy of which is attached to the Kirpalani Declaration as Ex. C.

[32] The Intercreditor Agreement defines "Senior Lender Claims" as including "all First-Lien Indebtedness outstanding." *Id.* § 1.1 at 5. "First-Lien Indebtedness" includes "any Bank Indebtedness (as defined in the Second Lien Notes Indenture on the date hereof), including all Indebtedness incurred by the Company and its Subsidiaries pursuant to the Credit Agreement, First Lien Notes Indenture, 1-1/2 Lien Notes Indenture and the other Senior Lender Documents Indebtedness . . .." *Id.* § 1.1 at 3. The Second-Priority Notes Indenture defines "Bank Indebtedness" as:

> [A]ny and all amounts payable under or in respect of any Credit Agreement or the other Credit Agreement Documents . . ., including principal, premium (if any), interest (including interest accruing on or after the filing of any petition in bankruptcy or for reorganization relating to the Company whether or not a claim for post-filing interest is allowed in such proceedings), fees, charges, expenses, reimbursement obligations, guarantees and all other amounts payable thereunder or in respect thereof.

Second-Priority Notes Indenture § 1.01 at 5.

[33] Intercreditor Agreement § 1.1 at 6.

> ***Claims*** in such order as specified in the relevant Senior Lender Documents until the Discharge of Senior Lender Claims has occurred.[34]

Only after all of the Senior Lender Claims have been discharged (*i.e.*, they have received "payment in full in cash"[35]) may proceeds of the Common Collateral be applied "ratably to the Second-Priority Claims" to satisfy the Second-Priority Notes.[36] As noted, the Senior Lender Claims include "any and all amounts payable under or in respect of" the First-Priority Notes and the 1½-Lien Notes, "including principal, premium (if any), interest," and other Indebtedness and obligations.[37] Thus, until all Indebtedness and other obligations owing on account of the Senior Lender Claims ***are paid in full in cash***, ***no payment may be made on account of the Second-Priority Notes from the Common Collateral***.

Moreover, until the Senior Lender Claims have been paid in full in cash, the holders of the Second-Priority Notes are bound to pay over any proceeds they receive on account of the Common Collateral to the trustees for the Senior Lenders.[38] This subordination applies *regardless* of the validity or enforceability of the Senior Lenders' liens, regardless of whether the Debtors could assert defenses to the Senior Lender Claims, or even if the liens are not perfected under applicable state law.[39] ***The subordination of the Second-Priority Notes does not depend upon whether the Senior Lenders have legitimate, perfected secured claims or liens on anything***.

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[34] *Id.* § 4.1 at 10 (emphasis added).

[35] *Id.* § 1.1 at 3 (emphasis added) (defining "Discharge of Senior Lien Claims" as including "payment in full in cash . . . of (a) all Obligations in respect of all First-Lien Indebtedness . . ..").

[36] Intercreditor Agreement § 4.1 at 10.

[37] *See supra* note 32.

[38] Intercreditor Agreement § 4.2 at 10–11.

[39] *Id.* § 7.3(a), (e) at 19; *id.* § 4.1 (subordination exists until the Discharge of Senior Lender Claims; definition of Senior Lender Claims referring to the definition of First Lien Indebtedness, referring to Permitted Lien as defined in Second-Priority Indenture, defining Lien to include "any mortgage, lien . . . whether or not filed, recorded or *otherwise perfected under applicable law* . . .") (emphasis added).

In addition, until the Senior Lender Claims are paid in full, the holders of Second-Priority Notes are not subrogated to the claims or rights of the Senior Lenders against the Debtors, even if they have been required to pay over money received and applied to the Second-Priority Notes.[40] The subordination and pay-over provisions concerning the Second-Priority Notes continue even after the Senior Lender Claims are paid in full because, if the Senior Lenders are later required to disgorge any payments, the subordination of the Second-Priority Notes is reinstated.[41]

The Intercreditor Agreement subordinates the Second-Priority Notes in at least some respects even if they purport to act merely as unsecured creditors (*i.e.*, having nothing whatsoever to do with recovery on account of their consensual liens). If they obtain judgment liens on Common Collateral on account of such enforcement action, the Second-Priority Notes *still* cannot be satisfied through such unsecured creditor collection efforts. Instead the holders of the Second-Priority Notes are bound by the Intercreditor Agreement to pay-over any proceeds from judgment liens to and for the account of the Senior Lender Claims, until that Indebtedness is paid in full.[42] Similarly, the Intercreditor Agreement provides that if holders of the Second-Priority Notes obtain a lien on *any* property of a Debtor, even if it was not already subject to a lien securing the Senior Lender Claims, they will assign that lien to the holders of the Senior Lender Claims, precluding satisfaction of the Second-Priority Notes until the Senior Lender Claims are fully satisfied from any encumbered assets (that is, *even assets beyond the Common Collateral*).[43]

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[40] *Id.* § 8.5 at 21.

[41] *Id.* § 6.4 at 17.

[42] *Id.* § 5.4 at 13.

[43] *Id.* § 2.3 at 8.

Finally, the Intercreditor Agreement prohibits the holders of the Second-Priority Notes from seeking or exercising rights or remedies with respect to the Common Collateral while any Senior Lender Claims remain outstanding.[44] Thus, the Second-Priority Notes are subordinated and junior not only in lien priority and in right of payment of their Indebtedness from the Common Collateral (and potentially other assets), but they are also subordinated and junior in their right to exercise of remedies.[45]

D. The Debtors File For Bankruptcy And Propose The Plan.

The Debtors filed for chapter 11 on April 13, 2014.[46] In addition to $382 million in Senior Sub Notes,[47] the Debtors entered bankruptcy with the following outstanding debts:

- Approximately $166 million of revolver borrowings under the Asset-Based Revolving Credit Agreement (the "**ABL Facility**");
- Approximately $20.7 million under the Second Amended and Restated Credit Agreement (the "**Cash Flow Facility**");
- Approximately $1.1 billion of First-Priority Senior Secured Notes due 2020 (the "**First-Priority Notes**");
- Approximately $250 million of 10% Senior Secured Notes due 2020 (the "**1½-Lien Notes**"); and

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[44] *Id.* § 3.1(a)(i)(x)–(z), (c)(i) at 9–10.

[45] The Collateral Agreement governing the Debtors' pledge of collateral to secure the Second-Priority Notes (the "**Second-Priority Collateral Agreement**") provides that "the [Debtors] have agreed to grant a security interest in the Collateral for the benefit of the [Second-Priority Notes] Holders to secure the payment and performance of the Obligations, subject to the terms of the Intercreditor Agreement, including with respect to the relative rights and priorities in respect of the Collateral." Second-Priority Collateral Agreement at 5. A copy of the Second-Priority Collateral Agreement is attached to the Kirpalani Declaration as Ex. D. The Second-Priority Noteholders' security interest is "expressly subject and subordinate to the liens and security interests granted to" the Senior Lenders. *Id.* at 1. The Second-Priority Collateral Agreement further provides that "until the discharge of Senior Lender Claims" pledged collateral will be delivered to the Intercreditor Agent, rather than the Collateral Agent for the Second-Priority Notes. *Id.* § 2.02 at 8; § 2.03 at 10. The Second-Priority Collateral Agreement imposes numerous obligations on the Debtors, but every one of those obligations is subordinate to the Debtors' obligations to the Senior Lenders' senior rights and superior status under the Intercreditor Agreement. *Id.* § 6.17 at 34.

[46] Disclosure Statement at 78.

[47] *Id.* at 26–28.

- Approximately $1.161 billion and €133 million of Second-Priority Notes.

On May 12, 2014, the Debtors filed a proposed plan of reorganization (as revised June 23, 2014, the "**Plan**", Dkt No. 515) and disclosure statement (as revised June 23, 2014, the "**Disclosure Statement**", Dkt No. 516). According to the Disclosure Statement, the Plan was negotiated between the Debtors, their "ultimate equity holder" (Apollo), and a majority in amount of the Second-Priority Notes (also including Apollo).[48]

The Plan classifies the creditors and interest holders of the Debtors into eleven classes.[49] Class 6 consists of the claims of the Second-Priority Notes (excluding the claims of the Second-Priority Notes indenture trustee), Class 7 consists of General Unsecured Claims (as defined by the Plan, § 1.93 at 10), and Class 8 consists of the claims of the Senior Sub Notes (including the individual claims of U.S. Bank as Indenture Trustee).[50]

The Plan "provides for no recovery to the holders of Senior Subordinated Notes on account of the subordination provisions set forth in the [Indenture]."[51] By contrast, holders of General Unsecured Claims will be paid in full, and the holders of the Second-Priority Notes will receive equity in the reorganized Debtors, as well as the opportunity to acquire additional equity.[52] The Plan's sole justification for the disparate treatment of Senior Sub Notes is "Section 510 of the Bankruptcy Code and the provisions of the Senior Subordinated Indenture."[53] The Plan further states that, while the holders of the Second-Priority Notes will "forgo receiving certain value with respect to the unsecured amount of their Second Lien Note Claims," the

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48 *Id.* at 30.

49 Plan § 4.1 at 26, Dkt No. 515.

50 *Id.*

51 Disclosure Statement at 9.

52 *Id.*

53 Plan § 5.8 at 31.

purported subordination of the Senior Sub Notes will be fully enforced, and "the Plan shall effect, and the holders of the [Second-Priority Note] Claims shall not waive, the benefits of any and all subordination and 'pay over' provisions set forth in the [Indenture]. In addition the holders of the [Second-Priority Notes] shall . . . retain the right to be paid in full in Cash or otherwise prior to holders of the [Senior Sub Note] Claims receiving any payments or distributions from the Debtors or Reorganized Debtors."[54]

Separately, under the Plan, the claims of the indenture trustees for fees and expenses under the First-Priority Notes Indenture, the 1½-Lien Notes Indenture, and the Second-Priority Notes Indenture (collectively, the "**Indenture Trustee Claims**") will be fully paid as administrative expenses in the ordinary course of the Debtors' business.[55] In contrast, the Plan does not provide for the payment of any fees or expenses of U.S. Bank as Indenture Trustee under the Indenture (the "**U.S. Bank Trustee Claims**"), as either a General Unsecured Claim or an administrative expense.[56]

Finally, notwithstanding the Plan's failure to pay anything on account of the Senior Sub Notes and the Debtor-subsidiary guarantees thereof, the Plan provides that each Debtor's equity interest in the other Debtors (each an "**Intercompany Interest**") will not be cancelled or affected by the Plan.[57] Thus, the Plan provides that equity interests in the Debtor-subsidiaries survive, notwithstanding the failure to pay or otherwise satisfy the Senior Sub Note's guarantee claims against those same subsidiaries in full.

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[54] *Id.* § 5.6(d) at 30.

[55] *Id.* § 1.99 at 11; *id.* § 3.2 at 24.

[56] *See id.* § 1.180 at 19; *id.* § 5.8 at 31.

[57] *Id.* § 7.11 at 40; *id.* § 1.105 at 11.

III. ARGUMENT[58]

A. The Senior Sub Notes Are Not Subordinated To The Second-Priority Notes Under The Plain Language Of The Indenture.

1. The Senior Sub Notes Are Subordinated Only To Senior Indebtedness.

The Indenture provides that the Senior Sub Notes are "subordinated in right of payment to the extent and in the manner provided in" Article X thereof. The Indenture is explicit; the Senior Sub Notes are subordinated in right of payment ***only*** to "Senior Indebtedness" as defined in the Indenture. Indenture § 10.01 ("[O]nly Indebtedness of the Company that is Senior Indebtedness of the Company shall rank senior to the [Senior Sub Notes] in accordance with the provisions set forth herein."). Article XII provides mirror-image provisions with respect to the Debtor-subsidiary Guarantors.

2. The Second-Priority Notes Are Not Senior Indebtedness Under The Plain Language Of The Indenture.

(a) The Phrase "Subordinate Or Junior In Any Respect" Must Be Given Its Plain Meaning To Include Subordination Related To Payment From Common Collateral.

Under New York law, courts are required to give effect to "unequivocal language" in a contract. *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir. 1992). Here, the In Any Respect Exception broadly and unambiguously excludes from the definition of Senior Indebtedness "any Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior ***in any respect*** to any other Indebtedness or obligation of the Company or such Restricted Subsidiary . . .."

[58] As previously conveyed to the Court, U.S. Bank reserves all of its rights related to any future or amended plans of reorganization, including without limitation, issues related to valuation and issues similar to those raised in this objection vis-à-vis parties other than the holders of the Second-Priority Notes, if they may become relevant (whether based upon valuation and/or value allocation, or otherwise).

The terms subordinate and junior mean "placed in or belonging to a lower rank, class, or position," and "lower in rank or standing; subordinate," respectively. *See Black's Law Dictionary* 978, 1653 (10th ed. 2014).[59] Because the term "any" is unambiguously broad and all-encompassing, there need only be the slightest nexus or relationship between the subordination or junior status on the one hand, and the relevant Indebtedness or obligations on the other, to trigger the In Any Respect Exception. *See, e.g.*, *Zion v. Kurtz*, 50 N.Y.2d 92, 104 (N.Y. 1980) ("[T]he word 'any' means 'all' or 'every' and imports no limitation"); *Randall v. Bailey*, 288 N.Y. 280, 285 (N.Y. 1942) ("Any is an all-exclusive word"); *United States v. Cullen*, 499 F.3d 157, 163 (2d Cir. 2007) ("The word 'any' means 'without restriction or limitation.'"); *Mathews v. ABC Television, Inc.*, 88 CIV. 6031 (SWK), 1989 WL 107640, *6 (S.D.N.Y. Sept. 11, 1989) (describing phrase "in any manner with regard to the project" in a privacy release as "broad" and interpreting that phrase to require only any relation to the project); *cf. United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks omitted). Accordingly, *any* subordinate or junior aspect of the Second-Priority Notes will trigger the In Any Respect Exception, and thus exclude that debt from the Indenture's definition of Senior Indebtedness.

The Second-Priority Notes are subordinate and junior to the Senior Lender Claims in not just any respect, but in a significant – if not most significant – respect. It is without question that

[59] Contrary to the Plan Proponents' unsupported contentions, s*ee* Ad Hoc Br. at 21 n.32, the terms "subordinate" or "junior" are ***not*** "terms of art" which do not apply to payment priority through lien subordination. This Court knows from its own judicial experience and common sense that second-liens are often described as junior liens and that debt subject to lien subordination is often described as junior debt. Those terms must be given their plain and ordinary meaning, not some artful one preferred by the Plan Proponents. *Lichtenheld v. Juniper Features, Ltd.*, 95 CIV. 3377 (JSR), 1998 WL 790939, at *10 (S.D.N.Y. Nov. 13, 1998) ("Absent a clearly revealed intention to the contrary, the terms of a contract are to be given their plain, ordinary, popular and non-technical meanings.") (citations omitted). Indeed, the inclusion of the word "junior" (in addition to the word "subordinate") in the In Any Respect Exception only further evinces the fact that lien subordination subordinates the indebtedness.

the principal, interest, and other indebtedness and obligations evidenced by the Second-Priority Notes cannot be paid or otherwise satisfied by the Debtors from the Common Collateral or proceeds thereof until the Senior Lender Claims are paid in full in cash.[60] The holders of the Second-Priority Notes must wait in line behind (*i.e.*, in a lower rank, position, or class than) the Senior Lender Claims to have their respective Indebtedness satisfied by the Debtors from the Common Collateral. Thus, the Second-Priority Notes are plainly "subordinate debt" or "junior debt" in relation to the Senior Lender Claims. *See Black's Law Dictionary*, "Debt" 489 (10th ed. 2014) ("***subordinate debt.*** A debt that is junior or inferior to other types or classes of debt. Subordinate debt may be unsecured ***or have a low-priority claim against property secured by other debt instruments***. – Also termed ***junior debt***.") (emphasis added).

The holders of the Second-Priority Notes cannot receive any payment or other distribution whatsoever on account of their Indebtedness from a material portion of the Debtors' estate, unless and until the Senior Lenders' Indebtedness is paid in full. In fact, the Intercreditor Agreement precludes holders of the Second-Priority Notes from even commencing or participating in an effort to obtain payment on their Indebtedness from the Common Collateral before the Senior Lender Claims have been paid in full in cash. *See* BOKF Complaint ¶ 28(f) (citing Intercreditor Agreement § 3.2); *id.* ¶ 41.

The Plan Proponents ignore reality by arguing that only their "lien" is subordinate and junior, and that does not render their Indebtedness subordinate or junior in any respect. *See* Apollo Br. ¶¶ 24, 26. But, the concepts are not mutually exclusive – that their liens are junior

[60] If not by the Plan itself – which ranks the Second-Priority Notes junior to the Senior Lenders Claims – the fact that the Second-Priority Notes are subordinate or junior in some respect is perhaps best illustrated by the pending lawsuit filed by holders of Senior Lender Claims. *See* Complaint, *BOKF, NA v. JPMorgan Chase Bank, N.A.*, No. 651861/2014 (N.Y. Sup. Ct. June 18, 2014), ¶¶ 28, 39 n.4 (the "**BOKF Complaint**"). A copy of the BOKF Complaint is attached to the Kirpalani Declaration as Ex. E. Notably, no party disputes that the Intercreditor Agreement is a "*subordination* agreement," *see* 11 U.S.C. § 510(a), with respect to "Claims," each within the meaning of the Bankruptcy Code.

does not mean that their debt is not junior as well. The Plan Proponents ignore what it means to accept a junior lien. The Intercreditor Agreement, *inter alia*, expressly forbids *application* of proceeds on account of "*Second-Priority Claims*" until the "*Senior Lender Claims*" have been "pa[id] in full in cash."[61] The fact is that the Second-Priority Notes' *Indebtedness* cannot be paid from a substantial portion of the Debtors' assets unless and until the Senior Lender Claims are paid in full. That is subordination of *Indebtedness*, and the Second-Priority Notes' Indebtedness is subordinate or junior in this critical respect.

The Plan Proponents' only response to the plain language of the Indenture is to assert that the terms "Indebtedness" and "Lien" do not mean the same thing. Apollo Br. ¶ 26; Ad Hoc Br. ¶¶ 29–33; & Debtors' Br. ¶ 27. The question, however, is not whether a Lien and Indebtedness mean the same thing. It is whether the subordinate or junior status of the Second-Priority Notes with respect to, among other things, payment from the Common Collateral renders the "Indebtedness" or "obligations" underlying the Second-Priority Notes "subordinate or junior in any respect." Clearly, it does.[62]

In any event, the priority of a lien securing Indebtedness clearly is a "term" of that Indebtedness within the meaning of the In Any Respect Exception, no less so than the Indebtedness' interest rate or maturity. Indeed, the extent and priority of a security interest is one of the most important terms for a creditor. It is nonsensical for the Plan Proponents to

[61] Intercreditor Agreement § 4.1 (emphasis added).

[62] Similarly, the Plan Proponents assert that U.S. Bank's interpretation reads the word "Lien" into the In Any Respect Exception. *See, e.g.*, Debtors' Br. ¶ 26. That is not so. The In Any Respect Exception covers subordination or junior status of *Indebtedness or obligations* of any kind, including subordination with respect to satisfaction of that *Indebtedness* from collateral and including subordination as a result of contractual prohibitions restricting the enforcement of rights attendant to such *Indebtedness or obligations* against such collateral.

suggest that subordination of a creditor's security interest in a debtor's assets does not constitute the subordination of the *terms* of that creditor's indebtedness in at least some respect.

As noted above, the requisite nexus between the subordination and the Indebtedness or obligation need only be slight given the breadth of the phrase "in any respect." But here, the nexus goes directly to the most important aspect of the Indebtedness – recovery. The Indebtedness underlying the Second-Priority Notes ranks below the Senior Lender Claims, with regard to recovery from a material portion of the Debtors' assets. The Plan Proponents have no explanation why, as they assert, that does not render the Indebtedness underlying the Second-Priority Notes subordinate or junior in any respect to the Indebtedness underlying the Senior Lender Claims. Pointing out the difference between a lien and a debt does not answer the question whether the Second-Priority Notes indebtedness is subordinate or junior in any respect. The priority of payment of that indebtedness from the Debtors' assets clearly is a "respect" of the indebtedness, and the subordination of that priority clearly makes the indebtedness "subordinate or junior in any respect."

Intrinsically, ranking with respect to liens fundamentally affects (and creates a recovery ranking of) the underlying debt, subordinating the debt with the lower priority interest with respect to the collateral. *See Ion Media Networks, Inc. v. Cyrus Select Opportunities Master Fund, Ltd. (In re Ion Media Networks, Inc.)*, 419 B.R. 585, 595 (Bankr. S.D.N.Y. 2009) (holding that "[t]he ***claims*** of the First Lien Lenders are, therefore, entitled to ***higher priority***" against debtors owning assets defined as "collateral" under, and as a result of so-called lien subordination provided for in, an intercreditor agreement) (emphasis added).[63] It also renders the

[63] The fact that the intercreditor agreement in *Ion Media* expressly provided that the second lien claims "constitute[d] second priority claims" "in respect of the Collateral," is no substantive distinction. As discussed *supra*, the Second-Priority Notes Indenture, the Intercreditor Agreement, and the Second-Priority Collateral Agreement here undeniably subordinate and render junior the Second-Priority Notes'

debt with the inferior security interest ***junior***. *See Black's Law Dictionary* at 978 (10th ed. 2014) (defining "junior" as "lower in rank or standing; subordinate"). This is because recourse to a security interest undeniably and intrinsically impacts satisfaction of and recovery upon Indebtedness. *Cf. Good Hill Partners L.P. ex rel. Good Hill Master Fund, L.P. v. WM Asset Holdings Corp. CI 2007-WM2*, 583 F. Supp. 2d 517, 518–19 (S.D.N.Y. 2008) ("Since junior-lien loans are subordinated claims, senior-lien obligations ordinarily must be paid before any proceeds can be applied to related junior-lien loans. This creates a basic risk associated with holding junior-lien securities: that insufficient funds may be available to pay the junior lien-holders after the satisfaction of the related senior lien."); *Bank of Am. v. N. LaSalle St. P'ship (In re 203 N. LaSalle St. P'ship.)*, 246 B.R. 325, 329 (Bankr. N.D. Ill. 2000) ("The nonrecourse features of the loan simply impose a limitation on collection actions – with the Bank generally agreeing, in the absence of fraud, to restrict its recovery on the liability of the debtor and its land trust to the property that secures the loan."); *see also* American Bankruptcy Institute, *Bankruptcy Court Jurisdiction over Intercreditor Issues and Subordinate Financing Agreements*, Bankruptcy 2010 Views from the Bench, § I.C.1. at 37 (explaining, with respect to "lien subordination," that "upon the liquidation of the common collateral, the junior lenders receive nothing until the senior lenders have been paid in full . . .."). [64]

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claims to the Senior Lender Claims in respect of the Common Collateral. That is exactly what Judge Peck read the Ion Media agreement to do. For the same reason here, the claims of the holders of the Second-Priority Notes are lower priority – and therefore subordinate and junior – to the Senior Lender Claims.

[64] Available at www.abiworld.org/committees/newsletters/busreorg/vol9num9/juris.pdf.

Moreover, as set forth above in section II.C, the Second-Priority Notes are also subordinate or junior, by their terms,[65] to the Senior Lender Claims in numerous other important respects, including:

- The holders of the Second-Priority Notes must pay over any proceeds from the Common Collateral that they receive on account of the obligations prior to the full payment and discharge of every Senior Lender Claim;

- The duty to pay over Common Collateral proceeds applies to all collateral covered by the security agreements, regardless of the validity, perfection, avoidability, or enforceability of the Senior Lenders' liens, regardless of whether the Senior Lenders are secured or unsecured vis-à-vis that collateral in a bankruptcy case, and regardless of any potential defenses MPM or any other Debtor may have to the Senior Lender Claims;[66]

- Even when the Senior Lender Claims have been satisfied, in the event any prior payments to the Senior Lender Claims are disgorged, the subordination and junior status of the Second-Priority Notes is reinstated;

- The subordinate and junior status of the Second-Priority Notes applies ***even where the holders may seek to enforce rights as "unsecured creditors,"*** such that any recoveries as unsecured creditors that result of a judgment lien are subordinate and junior in the same fashion as otherwise provided for in the Intercreditor Agreement;[67]

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[65] The Plan Proponents agree that the "terms" of an "Indebtedness or obligation" include both those in "the 'instrument creating or evidencing' the Indebtedness or in another writing setting forth the terms of the Indebtedness" such as an intercreditor agreement. Ad Hoc Br. ¶ 35.

[66] Indeed, this type of subordination has been referred to as a form of "payment subordination." Thus, even under the Plan Proponents' faithless reading of the Indenture, that only payment subordination is carved-out from Senior Indebtedness, *the Second-Priority Notes are still not Senior Indebtedness*. *See* Kirpalani Decl., Ex. F, *Report of the Model First Lien/Second Lien Intercreditor Agreement Task Force*, 65 BUS. LAW. 809 (2010) (prepared by the Committee on Commercial Finance, ABA Section of Business Law), § 1.1 n. 6, 7 ("In practice, the view of the first lien lenders has typically prevailed on this issue although there is increasing recognition of the unintended ***'payment subordination' by the second lien lenders that may result if the first lien lapses or is avoided in bankruptcy***, and the second lien lenders are forced by their agreement to an 'absolute' priority provision to be subordinate to the now unsecured first lien lenders . . .. ***Payment subordination as described in this note can occur if . . . the lien securing first lien obligations maintains priority, and a turn-over right, under the intercreditor agreement even if invalid, unperfected, equitably subordinated, or avoidable*** . . .") (emphasis added).

[67] Intercreditor Agreement § 5.4 at 13. The Debtors cite this provision in support of their erroneous proposition that the Second-Priority Notes are "pari passu in right of payment to other Senior Indebtedness." Debtors' Br. ¶ 26. This is incorrect – not just because the provision says nothing of the sort – but, also in light of the fact that one of the most powerful enforcement remedies that would otherwise be available to the Second-Priority Notes in their capacity as "unsecured creditors" – attachment of assets through a judgment lien – is expressly subordinated to the Senior Lender Claims.

- Beyond the Common Collateral, the holders of the Second-Priority Notes must assign any liens they acquire in the *unencumbered* assets of MPM or any other Guarantor to the Senior Lenders;

- The Intercreditor Agreement prohibits the holders of the Second-Priority Notes from seeking or exercising any rights or remedies with respect to the Common Collateral until and unless the Senior Lender Claims have been paid in full;

- The Debtors' monetary and non-monetary obligations under the Second-Priority Collateral Agreement are expressly subordinate and subject to the Senior Lenders' senior rights under the Intercreditor Agreement; and

- The holders of the Second-Priority Notes are barred from asserting subrogation claims on account of the proceeds from the Common Collateral they have paid over to the Senior Lenders, unless and until the Senior Lender Claims are paid and discharged fully.

The conclusion that the Second-Priority Notes fall within the In Any Respect Exception, and thus are not Senior Indebtedness, stems from the plain and unambiguous language of the Indenture and the Intercreditor Agreement. Adherence to the plain language of the Indenture is critical in this context, because the scope of subordination of publicly traded debt is of "paramount importance to any potential lender" such that the "exact wording of the definition will determine the type and amount of senior debt which will be entitled to the benefits of subordination." American Bar Foundation, *Commentaries on Model Indenture Provisions 1965, Model Debenture Indenture Provisions 1967* (1971) at 567; *see also Subordination Clauses*, Practical Law, Thomson Reuters (2008) ("[S]enior debt will be exactly what it is defined to be in this definition **and no more** so it should be carefully drafted by counsel") (emphasis in original).[68]

Thus, with respect to the Common Collateral, the Indebtedness is subordinate and junior in several respects, *even* when the Second-Priority Note holders are acting as unsecured creditors. *See* SectionIII.B.4, *infra* pp. 51–53.

[68] A copy of relevant excerpts from the American Bar Foundation's *Commentaries* is attached to the Kirpalani Declaration as Ex. G. A copy of *Subordination Clauses* is attached to the Kirpalani Declaration as Ex. H.

Under the plain language of the Indenture, the Second-Priority Notes fall within the In Any Respect Exception, and thus they are not Senior Indebtedness entitled to the benefits of subordination vis-à-vis the Senior Sub Notes.

(b) A Complete Reading Of The Indenture Confirms That The Plain Meaning Of The In Any Respect Exception Includes Subordination Of The Second-Priority Notes' Indebtedness With Respect To Recoveries From Collateral.

The context of the Indenture as a whole confirms that the Second-Priority Notes are covered by the In Any Respect Exception.[69] The Plan Proponents urge this Court to read the broad phrase "in any respect" as if it instead says "in right of payment." But the drafters of the Indenture knew how to use narrower phrases to describe "payment subordination" when that is what they intended to accomplish – and that is exactly what they did in numerous other places in the Indenture. Indeed, this is demonstrated clearly in the very definition of Senior Indebtedness itself, in which the Payment Exception uses the narrower "in right of payment" to describe

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The Ad Hoc Committee cites an article written by Professor Marcel Kahan for the proposition that "highly literal" interpretations of indentures premised on "flaw or imprecision" are disfavored. Ad Hoc Br. ¶ 57, n.37. There is nothing, however, that is flawed or imprecise about the In Any Respect Exception – it clearly and unambiguously applies to any manner of subordination of debt, in any respect.

In any event, to the extent the Plan Proponents contend the language is somehow imprecise or ambiguous, any such ambiguity must be construed against subordination, which effectively is a waiver of a right to be paid what one is owed from one's obligor. *See In re Boston Generating, LLC*, 440 B.R. 302, 318–19 (Bankr. S.D.N.Y. 2010) (under New York law, waiver of rights must be evidenced in "some provision that reflects an express or intentional waiver of rights"); *DuQuoin Nat'l Bank v. Vergennes Equip., Inc.*, 599 N.E.2d 1367, 1371 (Ill. App. Ct. 1992) ("If a subordination agreement was intended, it must have been expressed in the agreement; a subordination agreement by implication is not recognized."); *W. Bank v. Matherly*, 738 P.2d 903, 906 (N.M. 1987) ("a subordination agreement by implication is not recognized"); *see also Chem. Bank v. First Trust of N.Y. Nat'l Assoc. (In re Se. Banking Corp.)*, 710 N.E.2d 1083 (N.Y. 1999) (refusing to subordinate debt to another creditor's post-petition interest in the absence of explicit language to that effect).

[69] *See, e.g., Currier, McCabe & Assocs., Inc. v. Maher*, 906 N.Y.S.2d 129, 131 (N.Y. App. Div. 3d Dep't 2010) ("[T]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.") (internal quotation marks omitted).

payment subordination, whereas the In Any Respect Exception uses the broader phrase "in any respect."

The Plan Proponents' proposed construction imposes an artificial restriction on the meaning of "in any respect" that is not in the Indenture. The In Any Respect Exception is not limited by the words "in right of payment" (as the Payment Exception is). In fact, it does not contain *any* limiting words. When the Indenture seeks to limit the breadth of a provision, it does so expressly by using qualified phrases. *See, e.g.*, Indenture § 1.01 (using the term "in any *material* respect" in defining "Acquisition Documents," "Disqualified Stock," and "Purchase Agreement"); *id.* §§ 4.02, 4.07, & 4.15 (using the phrase "in any *material* respect"). But it is not just that the In Any Respect Exception contains no limiting words. It is explicitly broad. The In Any Respect Exception is the only place in the Indenture that uses the phrase "in any respect."

Thus, while the Plan Proponents spend nearly ninety pages of briefing purporting to discuss the meaning of the phrase "subordinate or junior in any respect," they fail even once to address the words "in any respect." But the words "in any respect" must be given effect. *Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956) ("The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect.").

The contrast between the Payment Exception and the In Any Respect Exception does not end there. A comparison of the other language used in the Payment Exception versus the In Any Respect Exception shows that the drafters chose language that would make the latter much broader than the former:

Payment Exception	**In Any Respect Exception**
subordination is limited to "subordinated ***in right of payment***"	no limitation, need only be "subordinate or junior ***in any respect***"
"***instrument creating or evidencing***" the relevant obligations must "***expressly*** provide[]" for subordination	merely needs to be subordinate or junior "***by its terms***"
limited to "***subordinated***" only	includes "***subordinate* or *junior***"
limited to subordinated "***obligations***"	includes subordinate or junior "***Indebtedness or obligations***"

The Payment Exception thus is limited and narrower in various respects, and exempts from Senior Indebtedness only those obligations that are expressly subordinated in right of payment. The In Any Respect Exception, on the other hand, contains no such limitations and extends as broadly as possible, including to all Indebtedness ***and*** obligations that, by their terms, are subordinate ***or*** junior ***in any respect***. As noted above in section II.C, the Second-Priority Notes obligations are subordinated and junior to the Senior Lender Claims in multiple respects, including most fundamentally the right to satisfaction of those obligations through the application of proceeds from the Common Collateral.

The Plan Proponents concede that the In Any Respect Exception narrows the scope of the definition of "Senior Indebtedness" beyond that provided by the Payment Exception. However, the Plan Proponents' proposed interpretation of Senior Indebtedness only addresses *one* of the differences between the two Exceptions. Specifically, the Plan Proponents contend that the Payment Exception is limited to debt that is subordinated by the instrument that created the debt itself, while the In Any Respect Exception applies more broadly to debt that is subordinated by the "terms" of other agreements. *See* Debtors' Br. ¶ 30; Apollo Br. ¶ 25. But, even if the Plan Proponents are right that the Payment Exception does not cover subordination under the terms of

the underlying debt documents, the Plan Proponents' explanation fails to address the many other differences between the Payment Exception and the In Any Respect Exception.

The Plan Proponents fail to acknowledge, let alone explain, the In Any Respect Exception's use of the broad phrase "subordinate or junior ***in any respect***." Nor do the Plan Proponents explain how the In Any Respect Exception could be limited to types of payment subordination, when it makes no reference at all to "payment." The Plan Proponents also have no answer to why the Indenture refers to payment subordination *twenty times* elsewhere, including in the Payment Exception just above, but not in the In Any Respect Exception. The In Any Respect Exception clearly substitutes the more limiting term "payment" with the broader term "in any respect," but the Plan Proponents' only response to that fact is to ignore it.

The Plan Proponents make a final, half-hearted attempt to support their construction by asserting that the final phrase of the In Any Respect Exception – "including any Pari Passu Indebtedness" – somehow compels the conclusions "that right of payment is the focus of" the exception. Ad. Hoc. Br. ¶ 36. But, the fact that Pari Passu Indebtedness is an example of debt that may be "subordinate or junior" in some respect to other debt is unremarkable; it is by no means the only example. The Indenture expressly provides, as a Rule of Construction, that the term "'including' means including without limitation." *See* Indenture §1.04(d). Moreover, if the drafters of the Indenture wanted to limit the In Any Respect Exception to "Pari Passu Indebtedness" or solely to indebtedness just like it, they could have easily done so, and saved nearly 40 words in the process. The In Any Respect Exception includes ***any*** debt that is ***subordinate or junior in any respect*** (not just "in right of payment"). That is the point of the In Any Respect Exception.[70]

[70] The Ad Hoc Committee's reliance on the interpretive principle of *noscitur a sociis* – a doctrine with roots in statutory interpretation, not contractual – is misplaced. It does not come close to applying

Like the plain language of the In Any Respect exception, the terms of the Indenture as a whole demonstrate that the plain meaning of the In Any Respect Exception captures the Second-Priority Notes. The Court need not go any further to interpret the definition of Senior Indebtedness.[71]

(c) Contemporaneous Finance Industry Publications, Commentaries, And Similar Contracts Further Support That The Second-Priority Notes Fall Within The In Any Respect Exception To Senior Indebtedness.

In interpreting a contract as a matter of law, courts may rely upon industry commentaries, treatises, specialized dictionaries, and articles. *See, e.g.*, *Bank of N.Y. v. First Millennium, Inc.*, 598 F. Supp. 2d 550, 565 (S.D.N.Y. 2009), *aff'd*, 607 F.3d 905 (2d Cir. 2010) ("Reliance upon [the American Bar Foundation Model Debenture] commentary is consistent with the Second Circuit's approach of analyzing contracts, under New York law, as viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement

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here. That doctrine provides that "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990); *see also S.D. Warren Co. v. Me Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) ("The canon, *noscitur a sociis* . . . is invoked when a string of statutory terms raises the implication that the words grouped in a list should be given related meaning . . .."). The Plan Proponents cannot use the interpretive maxim to alter the meaning of an unambiguously and specifically broad phrase ("in any respect") that is neither contained within a list nor general or vague, but is instead followed by one non-exclusive example. *See, e.g.*, *Bilski v. Kappos*, 561 U.S. 593 (2010) ("[U]nder the doctrine of noscitur a sociis . . . an ***ambiguous*** term may be given more precise content by the neighboring words with which it is associated.") (emphasis added).

[71] The Plan Proponents cite caselaw for the proposition that "highly literal" or "purely semantic" interpretations should be disfavored, even where they seem plausible in isolation, but not when reading the contract as a whole. Ad Hoc Br. ¶ 57; Apollo Br. ¶ 21 (citing *Dura Automotive, Tribune, Envirodyne, and Metromedia*). U.S. Bank's construction, however, is entirely consistent with, and indeed cemented by, the Indenture read as a whole. Moreover, U.S. Bank's construction is supported by Fitch, the ABA Model Negotiated Covenants, and other indentures as interpretative aids. By contrast, each of the cases cited by the Plan Proponents concern hyper-technical interpretations of X-Clauses and arguments based on "the use of a semicolon and the word 'or' at the end of [a] phrase . . .." *Kurak v. Dura Auto. Sys., Inc. (In re Dura Auto. Sys., Inc.,)* 379 B.R 257, 267 (Bankr. D. Del. 2007). The courts in all instances found that the X-Clauses required the turnover of stock, rejecting arguments that priority "would depend entirely on the *form* of the distribution," because form would not matter given the agreed-upon and undisputed subordination generally. *In re Envirodyne Indus., Inc*., 29 F.3d 301, 305–06 (7th Cir. 1994) (emphasis added). Here, the dispute concerns the existence of subordination, not mere form.

and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.") (internal quotation marks omitted); *Silver Point Fin., LLC v. Deutsche Bank Trust Co. (In re K-V Discovery Solutions, Inc.)*, 496 B.R. 330, 335–36 (Bankr. S.D.N.Y. 2013) (relying upon ABA model indentures to conclude that practitioners would have been aware of the rule of explicitness for subordination to postpetition interest); *cf. Chem. Bank v. First Trust*, 710 N.E.2d at 1086 (considering "practical realities" of determining the subordination issue before the court in view of the recognitions of, and the market's assumed reliance upon, "leading authority and many commentators").

Judge Posner from the Seventh Circuit Court of Appeals aptly summarized the propriety of utilizing industry publications and commentaries in aid of interpreting contractual provisions, distinguishing such sources from extrinsic or parol evidence:

> But dictionaries, treatises, articles, and other published materials created by strangers to the dispute, like evidence of trade usage, which is also admissible because it is also evidence created by strangers rather than by a party trying to slip out of a contractual bind, do not present a similar danger of manufactured doubts and ***are therefore entirely appropriate for use in contract cases as interpretive aids***. Appropriate, and sometimes indispensable. It would be passing odd to forbid people to look up words in dictionaries, or to consult explanatory commentaries that, like trade usage, are in the nature of specialized dictionaries.

In re Envirodyne Indus., Inc., 29 F.3d 301, 305 (7th Cir. 1994) (emphasis added).[72] Thus, while the Court need not consider such materials to determine that the Second-Priority Notes do not qualify as Senior Indebtedness in view of the plain language of the Indenture, the Court also may consider contemporaneous industry publications to provide an interpretative aid in construing the Indenture.

[72] *See also In re Dura Auto. Sys., Inc.*, 379 B.R. at 265–66 n.7 (relying on industry commentaries to examine the purpose and meaning of indenture provisions at summary judgment, and rejecting argument that "the Court should not consider any source outside of the 'four corners' of the indenture").

Here, contemporaneous articles by such a "stranger to the dispute," a leading rating agency, Fitch Ratings ("**Fitch**"), eviscerates any doubt that the Second-Priority Notes fall squarely within the In Any Respect Exception. In a February 2006 article, published just months before the issuance of the Senior Sub Notes, Fitch reported on what it referred to as a "critical documentation 'loophole' . . . for issuers desirous of issuing meaningful levels of incremental debt in the anti-layering provisions of many bond indentures."[73]

Layering presents a material and distinct risk for subordinated noteholders. Generally, subordinated noteholders are protected against the incurrence of excessive senior debt by limitations on the borrower's capacity to incur more senior debt.[74] They similarly are protected from the incurrence of excessive subordinated debt, because an over-leveraged borrower would have difficulty raising junior debt that would share *pro rata* with existing subordinated debt. The "gap," however, is layered debt, which is palatable to senior lenders (because it is junior to them), but also attractive to new lenders (because it is senior to subordinated debt). Anti-layering provisions help to close this gap, by preventing companies from layering in debt between the senior debt and the subordinated debt.

As of early 2006, most – if not all – anti-layering provisions prohibited debt that was "subordinated in right of payment" (such as the Payment Exception here), but did not address

[73] *See* Kirpalani Decl., Ex. I, Fitch Ratings, *Overview of the U.S. Second Lien Loan Market* (Feb. 6, 2006) (the "**2006 Fitch Article**"), attached to presentation "Intercreditor Issues in Restructurings of First-Lien/Second Lien Debt," 050707 ABI-CLE 189 (9th Annual New York City Bankruptcy Conference, May 7, 2007). The Indenture contains such limitations in Section 4.03.

[74] Kirpalani Decl., Ex. J, Peter M. Gilhuly, Paul S. Aronzon, James Sprayregen, & Steven R. Strom, *Changing Roles in Commercial Cases: The Impact of Hedge Funds on the Restructuring Landscape*, SM084 ALI-ABA 449, 462 (ALI-ABA Course of Study Materials Apr. 2007) ("For many of these borrowers, their ability to raise additional financing depended on their ability to give the new lenders priority over existing subordinated debt – they had tapped out their senior borrowing capacity and could not raise junior debt if it had to share pro rata with an existing issue of subordinated debt.").

debt that was subordinated in any other respect, such as through lien subordination.[75] In other words, as Fitch explained in its February 2006 article, a borrower could evade the anti-layering protections in many unsecured bond indentures by issuing second-lien debt that would – by design – not be "subordinated in right of payment," but that would be subordinated to other debt with respect to payment from the proceeds of certain (and often substantially all) of the borrower's assets.[76]

In its 2006 article, Fitch questioned whether bond investors would revise anti-layering provisions in indentures to address second-lien indebtedness through the use of a broader phrase, *i.e*. "subordinated in any respect":

> It remains to be seen whether the definition for anti-layering provisions to be incorporated within future high yield notes offerings will be revised by strengthening the restriction to a prohibition of ***new debt that is 'subordinated in any respect,' and thereby capture any new debt to be structured with simply lien subordination***. Since anti-layering provisions are fairly standard covenant limitations present within most bond indentures, investors are undoubtedly carefully weighing the pros and cons of permitting issuers to originate what effectively constitutes a new layer of senior debt.[77]

Later, in Fitch's "2006 Year-End Update," Fitch recapped that the "loophole" in many bond indentures allowing for the second-lien debt (due to mere protection against payment

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[75] *See* Kirpalani Decl., Ex. I, 2006 Fitch Article, *supra* note 73, at 4–5.

[76] *Id.* In September 2006, others in the industry perceived the same loophole, opining that the "current wave" of second-lien debt – which was subject to lien subordination but not payment subordination – "trace[d] its origins to efforts to circumvent anti-layering covenants found in many high-yield public debt indentures." Kirpalani Decl., Ex. J, *Changing Roles in Commercial Cases*, *supra* note 74, at 461. Specifically, these authors shared their view that such second-lien debt "arose in the context of trying to create a mezzanine level of debt without violating the anti-layering covenants of existing public subordinated debt." *Id.* at 470 n.37. It is this loophole that the In Any Respect Exception addresses.

[77] Kirpalani Decl., Ex. I, 2006 Fitch Article, *supra* note 73, at 5 (emphasis added). Fitch was not the first sophisticated party to recognize the potential solution to the loophole. Leading practitioners had recognized that "in any respect" was designed to capture lien subordination. *See* Kirpalani Decl., Ex. K, *Everything You Always Wanted to Know About Second Lien Financings*, Latham & Watkins Presentation, May 19, 2004, at 21 (noting that whether anti-layering provisions in existing high yield debt reach "debt subordination and not lien subordination [d]epends on exact wording of covenant (***subordinated 'in right of payment' vs. 'in any respect'"***) (emphasis added).

subordination) may not last forever: "No clarity yet exists regarding whether the customary language within high yield indentures will eventually be revised to limit the incurrence of new debt tranches that are '***subordinated in any respect***,' as opposed to the currently accepted standard of '***subordinated in right of payment***.'"[78] When issued in December 2006 (after Fitch issued its initial report), the Senior Sub Note Indenture used "in any respect" language similar to that Fitch described.

The Plan Proponents contend that U.S. Bank's reliance on the Fitch report is in "error" because the "in any respect" language in the Senior Sub Notes Indenture is in the definition of "Senior Indebtedness," rather than in the separate provision in the Indenture (Section 4.13) that restricts certain (but not all) layering of debt. *See* Ad Hoc Br. ¶ 47; Apollo Br. ¶ 35. The argument misses the point.

First, there could be no better interpretative aid than Fitch for purposes of interpreting "in any respect." Fitch proposes the "in any respect" language as a fix *specifically* intended to address debt subordinated through lien subordination. Thus, Fitch is an objective and sophisticated party clearly endorsing and agreeing with U.S. Bank's plain language interpretation of the In Any Respect Exception – that "in any respect" would capture debt subordinated through lien subordination. This point is completely independent of *how* one might actually provide for anti-layering protections.

Second, Fitch articulated a developing concern with layering, the resolution of which Fitch recognized "remain[ed] to be seen." Although Fitch predicted that lenders might include the "in any respect" language in anti-layering covenants, that was not the only way to reduce the negative impacts of layering. Investors concerned with layering could respond by either

[78] Kirpalani Decl., Ex. L, Fitch Ratings, *The Evolution of the U.S. Second-Lien Leveraged Loan Market–2006 Year-End Update* at 205 (Jan. 17, 2007) (emphasis added).

(1) prohibiting the debtor from issuing any layered debt, including second-lien debt (which would have required a more robust anti-layering provision than is in Section 4.13 of the Senior Sub Notes Indenture), [79] or (2) allowing some layered debt, but limiting the scope of subordination such that the layered debt would not receive the benefits of subordination, including turnover of recoveries. The latter is exactly what the Indenture did. Through the In Any Respect Exception, the Indenture provides that, if the Debtors issued layered debt, the Senior Sub Notes would not be subordinated to such layered debt.[80] Thus, rather than preventing all layering outright, what the In Any Respect language does is ensure that, if layering takes place, the Senior Sub Notes will not end up at the bottom of a layered pile of debt and have to turnover their recoveries to such layered-in debt.

The contemporaneous industry publications thus confirm what is already clear from the plain language of the Indenture. The In Any Respect Exception prevents layered debt from having the benefits of Senior Indebtedness status. Indeed, such publications reflect the fact that the In Any Respect Exception was formulated as a result of, and specifically targets, second lien indebtedness, providing that the Senior Sub Notes will not be subordinated to multiple layers of debt whether subordinated in right of payment or through lien subordination.

The breadth of the "in any respect" language is further demonstrated by the ABA Model Negotiated Covenants and Related Definitions (the "**ABA Model Covenants**"), released in

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[79] Kirpalani Decl., Ex. J, *Changing Roles in Commercial Cases, supra* note 74, at 462 (anti-layering provisions may "prohibit the incurrence of debt junior to the senior debt facility (generally provided by a bank group) but senior to the subordinated high-yield debt").

[80] The Plan Proponents assert that even if Section 4.13, the anti-layering covenant, had included the "in any respect" language, it would not have prevented the issuance of "unlimited amounts of [unsecured] debt." Ad Hoc Br. ¶ 48. This is both incorrect and irrelevant. The Indenture imposes limits on the amount of debt that MPM could incur. *See* Indenture § 4.03 at 49. In addition, it misses the point of such a covenant. The purpose of an anti-layering covenant is not to prevent the incurrence of all future incremental indebtedness, but instead to ensure that the subordinated notes are subordinate (and therefore need to turn over their recoveries) to only one layer of debt, senior debt.

August 2006 (a few months prior to the date of the Senior Sub Note Indenture).[81] The ABA Model Covenants contain an "in any respect" exception that is virtually identical to that contained in the Senior Sub Notes Indenture:

> Senior Indebtedness shall not include . . . any Indebtedness or other Obligation of such Person which is subordinate or junior in any respect to any other Indebtedness or other Obligation of such Person . . ..[82]

The ABA Model Covenants, however, also offer a "Rule of Construction" that specifically limits the scope the of "in any respect" exception. Section 1.04(7) provides that:

> ***[S]ecured Indebtedness shall not be deemed to be subordinate or junior*** to any other secured Indebtedness merely because it has a ***junior priority with respect to the same collateral*** (emphasis added). [83]

The Senior Sub Notes Indenture ***excluded*** this Rule of Construction, even though it adopted ***virtually every other Rule of Construction from the ABA Model Covenants*** – and in the same order – including Section 1.04(6), which provides that "***unsecured Indebtedness*** shall not be deemed to be subordinate or junior to secured Indebtedness merely by virtue of its nature as unsecured Indebtedness." *See* Annex 1 hereto (Comparison of ABA Model and Momentive Rules of Construction). Thus, while the Senior Sub Notes Indenture otherwise followed the ABA's Model Covenants, it conspicuously omitted the one model covenant that would have prevented the In Any Respect Exception from treating junior-priority liens as subordinate or

[81] As noted above, courts often consider contemporaneous industry commentaries and models in interpreting contracts as a matter of law. *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 140 n.2 (2d Cir. 2005) (relying on the American Bar Foundation's *Commentaries* in interpreting an indenture's X-Clause and noting that the Second Circuit frequently relies on those commentaries in interpreting indenture provisions).

[82] Kirpalani Decl., Ex. A, ABA Model Covenants, *supra* note 5, at 1492–93.

[83] *Id.* at 1500.

junior. This is further compelling evidence confirming the plain language meaning of the In Any Respect Exception.[84]

Indeed, the one ABA Rule of Construction referencing the priority of secured debt that the Indenture did adopt further eliminates any contrived doubt that the In Any Respect Exception recognizes that the existence or priority of a security interest impacts the relative ranking of the underlying Indebtedness. The Rule of Construction in Section 1.04(6) of the Indenture would have no purpose unless the In Any Respect Exception to Senior Indebtedness included the relative ranking of secured debt. By providing that the mere granting of a lien to one creditor does not render all other unsecured creditors subordinate, Section 1.04(6) allows Senior Indebtedness to be either secured or unsecured (as indeed was the case when the Senior Sub Notes were issued in 2006). What the In Any Respect Exception does not allow – and what is confirmed by the absence of the other Model Rule of Construction – is for multiple layers of secured debt to all enjoy Senior Indebtedness status. Thus, Section 1.04(6) confirms the plain language reading of the In Any Respect Exception, and it cements the obvious truth that the existence of a security interest – or lack thereof – inherently impacts the ranking of the indebtedness in some respect.

In further confirmation of the foregoing, and in stark contrast to the Indenture, the drafters of other contemporaneous subordinated debt indentures specifically chose to limit the scope of the "in any respect" language, including, among other ways, by adopting ***both*** ABA Model Covenant Rules of Construction that relate to the relative priority of secured debt.

[84] Professor Kahan (upon whom the Ad Hoc Committee relies in its brief) has written that "courts should interpret customized terms in a particularized fashion with specific reference to the circumstances of the parties that have customized a term, ***including a presumptive intent to depart from the standard term***." Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "the Economics of Boilerplate")*, 83 VA. L. REV. 713, 764 (1997) (emphasis added). This is applicable here to the Indenture's exclusion of Section 1.04(7) from the ABA Model Covenants.

Consideration of such indentures as interpretative aids is appropriate under New York law. *See Quadrant Structured Prods. Co. v. Vertin*, __ N.E.3d __, 2014 N.Y. Slip Op. 04114, at *9, 2014 WL 2573378 (N.Y. June 10, 2014) ("[I]f parties to a contract omit terms – particularly, terms that are readily found in other, similar contracts – the inescapable conclusion is that the parties intended the omission. The maxim *expressio unius est exclusio alterius*, as used in the interpretation of contracts, supports precisely this conclusion.").[85]

Fewer than four months before MPM issued the Senior Sub Notes, TDS Investor Corporation (now known as Travelport LLC, "**Travelport**") issued subordinated notes under an indenture that is very similar to the Debtors' Senior Sub Note Indenture. Indeed, the definition of Senior Indebtedness in the Travelport indenture was nearly identical to the definition used in the Senior Sub Note Indenture, including the "in any respect" exception. The Travelport indenture, however, also included the Rule of Construction from the ABA Model Covenants that the Senior Sub Notes Indenture excludes: "[F]or the purposes of this Indenture . . . Senior Indebtedness is not deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral."[86]

Nevertheless, several years later, when Travelport was contemplating the issuance of second-lien debt, the parties amended the definition of Senior Indebtedness to obtain confirmation from the holders of Travelport's subordinated notes that they were agreeing to be subordinate in right of payment to Travelport's second-lien debt. Eliminating any doubt that the

[85] A copy of the decision is attached to the Kirpalani Declaration as Ex. M.

[86] Indenture dated as of August 23, 2006, Among TDS Investor Corporation, the Guarantors listed herein and The Bank of Nova Scotia Trust Company of New York, as Trustee, 11-7/8% Dollar Senior Subordinated Fixed Rate Notes Due 2016 and 10-7/8% Senior Subordinated Euro Fixed Rate Notes Due 2016 (Ex. 4.2 to Travelport Ltd. Form S-4 filed March 30, 2007) § 4.17 at 80–81. The Travelport indenture altered the ABA Model Covenants rule of construction slightly, replacing "secured indebtedness" with "Senior Indebtedness." Excerpts from this indenture are attached to the Kirpalani Declaration as Ex. N.

In Any Respect Exception otherwise captures second-lien debt, the Travelport definition of "Senior Indebtedness" was amended to add a carveout to the "subordinate or junior in any respect" exception (*i.e.*, the very clause at issue in this case), so that it read:

> Senior Indebtedness shall not include . . . (d) any Indebtedness or other Obligation of such Person which is subordinate or junior in any respect to any other Indebtedness or other Obligation of such Person (***other than Obligations with respect to Indebtedness outstanding under the Second Lien Credit Agreement or Indebtedness permitted to be incurred under the Second Lien Credit Agreement which is secured by a Lien which is pari passu to the Liens securing Indebtedness under the Second Lien Credit Agreement and permitted to be incurred hereunder***).[87]

Similarly, just four months after the issuance of the Senior Sub Notes, the very same private equity sponsor, Apollo, effected another leveraged buyout transaction, the $8.75 billion acquisition of Realogy Corp. ("**Realogy**"). Senior subordinated notes were issued as part of Apollo's financing package. The Realogy indenture was similar to the Senior Sub Notes Indenture in many ways, including the subordination provisions and definition of Senior Indebtedness.[88] However, the Realogy indenture was different in two critical respects. First, it contained an express carve-out for an existing intercreditor agreement for a secured financing facility.[89] Second, it contained the following Rule of Construction not contained in the Debtors'

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[87] Sixth Supplemental Indenture, dated as of March 25, 2013, between Travelport LLC (f/k/a TDS Investor Corporation), Travelport Holdings, Inc., and Computershare Trust Company, N.A. (as successor to The Bank of Nova Scotia Trust Company of New York) (Ex. 4.6 to Travelport Ltd. Form 8-K filed April 17, 2013) § 2(y) at 19–20. Excerpts from this supplemental indenture are attached to the Kirpalani Declaration as Ex. O.

[88] Indenture dated as of April 10, 2007, by and among Realogy Corporation, the Note Guarantors party thereto and Wells Fargo Bank, National Association, as trustee governing the 12.375% Senior Subordinated Notes due 2015 (Ex. 4.9 to Realogy Corp. Form S-4 filed December 18, 2007) § 1.01 at 33–34 (definition of "Senior Indebtedness"), § 10.01 (subordination of principal obligations), and § 12.01 (subordination of guarantees). Excerpts from this indenture are attached to the Kirpalani Declaration as Ex. P.

[89] *Id.* § 1.01 at 33–34 (excluding from the definition of "Senior Indebtedness" "any Indebtedness or obligation of the Issuer or any Note Guarantor that by its terms is subordinate or junior in any respect ***(excluding the intercreditor arrangements benefiting the lenders under the Apple Ridge Documents entered into in connection with the Transactions)*** to any other Indebtedness or obligation of the Issuer or

Senior Sub Note Indenture, which in substance incorporated the Rule of Construction from the ABA Model Covenants that had been excluded from the Senior Sub Notes Indenture:

> (1) unsecured Indebtedness shall not be deemed to be subordinated or junior to Secured Indebtedness merely because it is unsecured, [and] (2) ***Senior Indebtedness shall not be deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral*** . . . (emphasis added).[90]

Fewer than two months after Realogy entered into its indenture, another Apollo acquisition vehicle, Bauble Acquisition Corp., issued senior subordinated notes as part of Apollo's acquisition of Claire's Stores, Inc. ("**Claire's**"). As with Travelport and Realogy, the indenture for Claire's notes contains essentially the same In Any Respect Exception as the Senior Sub Notes Indenture.[91] However, it too contains an express carve-out for lien subordination, which is noticeably absent from the Senior Sub Notes Indenture in the Debtors' case:

> For the purposes of this Indenture, (1) Indebtedness that is unsecured is not deemed to be subordinated or junior to Secured Indebtedness merely because it is unsecured, [and] (2) ***Senior Indebtedness is not deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral*** . . . (emphasis added).[92]

Within a month of the execution of the Claire's indenture, KAR Holdings, Inc. entered into an indenture for senior subordinated notes. KAR Holdings' indenture also contains an exception to the definition of Senior Indebtedness that is substantially similar to the In Any

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such Note Guarantor, as applicable, including any Senior Subordinated Pari Passu Indebtedness)" (emphasis added).

[90] *Id.* § 1.04 at 41.

[91] Senior Subordinated Notes Indenture, dated as of May 29, 2007, between Bauble Acquisition Sub, Inc. and The Bank of New York, as Trustee (Ex. 4.3 to Claire's Stores, Inc. Form S-4 filed December 17, 2007) § 1.01 at 42–43 (definition of "Senior Indebtedness"), § 10.01 (subordination of principal obligations), and § 12.01 (subordination of guarantees). Excerpts from this indenture are attached to the Kirpalani Declaration as Ex. Q.

[92] *Id.* § 4.16 at 111.

Respect Exception.[93] In addition, in a fashion even more specific than the Rule of Construction from the ABA Model Covenants (refuting any doubt as to the plain language interpretation of the In Any Respect Exception), the KAR Holdings' indenture expressly directed that certain junior secured debt not be treated as subordinate or junior if it were subject to lien subordination under an intercreditor agreement:

> This Indenture will not treat . . . Senior Indebtedness as subordinated or junior to any other Senior Indebtedness ***merely because it has a junior priority with respect to the same collateral or by virtue of the fact that the holders of such Senior Indebtedness have entered into intercreditor or other arrangements giving one or more of such holders priority over the other holders in the collateral held by them.***[94]

A comparison of the Senior Sub Notes Indenture, the ABA Model Covenants, and the foregoing indentures is attached hereto as Annex 2.[95] The explicit provisions in the ABA Model Covenants and other, contemporaneous indentures implementing the specific Model Covenant – or some version thereof – stating that second-lien debt does not fall within the "in any respect" exception for purposes of those documents, combined with the total absence of any similar language in the Senior Sub Notes Indenture, is dispositive evidence that the plain terms of the Indenture mean what they say: The Second-Priority Notes do not constitute Senior Indebtedness because they are subordinate and junior to the Senior Lender Claims in any respect. Indeed, none of these explicit provisions would be necessary – and would all be wasted ink – if the In

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[93] Indenture dated as of April 20, 2007, between KAR Holdings, Inc., the Guarantors party thereto, and Wells Fargo Bank, National Association, as Trustee, 10% Senior Subordinated Notes Due 2015, § 101 at 32–33. Excerpts from this indenture are attached to the Kirpalani Declaration as Ex. R.

[94] *Id.* § 416 at 82.

[95] Apollo argues that the inclusion of the language from, or similar to, Section 1.04(7) of the ABA Model Covenants in these contemporaneous indentures merely "clarif[ies] that, notwithstanding the Fourth Proviso's use of the words 'in any respect,' parties employing that language still intended that debt ranking *pari passu* with other senior debt but secured by a junior lien would constitute Senior Indebtedness." Apollo Br. ¶ 36. That may be true for those indentures. The relevance here is the contrast to the Indenture, which contrast Apollo ignores.

Any Respect Exception would not capture second lien indebtedness. As explained by the New York Court of Appeals in *Quadrant*, the Court may consider those contemporaneous indentures – which objectively confirm the plain meaning of "in any respect" – in interpreting the Indenture as a matter of law and should reject the Plan Proponents' invitation to rewrite the Indenture to fit an argument that is belied by the text.

B. The Plan Proponents' Attempts To Evade The Plain Language Of The Indenture Must Fail.

In what amount to a series of tacit concessions that the Second-Priority Notes do not constitute Senior Indebtedness under the Indenture's plain language, the Plan Proponents advance several flawed arguments purporting to show that the Indenture cannot mean what it says. Apollo Br. ¶¶ 22–23, 25; Ad Hoc Br. ¶¶ 34–38; Debtors' Br. ¶¶ 25–31. But, as described below, none of the Plan Proponents' assertions permit them to evade the plain meaning of the In Any Respect Exception.

1. The Plain Meaning Of The In Any Respect Exception Does Not Lead To Absurd Results.

Unable to offer a reasonable construction of the definition of Senior Indebtedness, the Plan Proponents repeatedly assert that, if the plain meaning of the In Any Respect Exception is enforced, so as to exclude the Second-Priority Notes from Senior Indebtedness, it would lead to the "absurd" result that the First-Priority Notes, the ABL Facility, and the 1½-Lien Notes also are not Senior Indebtedness. *See, e.g.*, Apollo Br. ¶ 27; Ad Hoc Br. ¶¶ 39–52; Debtors' Br. ¶ 39.

The doctrine that "absurd" results are to be avoided focuses on ***what the drafters knew at the time the contract (the Indenture) was made.*** The doctrine asks whether, given the circumstances that existed *at the time* of drafting, a particular construction should be disfavored because it would (improperly) assume that the drafters intended something absurd given what

they knew at that time.[96] The Plan Proponents, however, attempt to distort and misuse this doctrine. Rather than focusing on facts in existence *in 2006* at the time the Indenture was made, the Plan Proponents ask this Court instead to focus on what happened *later* in time. In essence, the Plan Proponents argue "Years after the Indenture was drafted, the Debtors decided to issue debt that would not be Senior Indebtedness under the In Any Respect Exception. But since the Debtors (and Apollo and such creditors) *wanted* the debt to be Senior Indebtedness, the plain language of the In Any Respect Exception should be ignored." In other words, the Plan Proponents argue that the plain language of contracts can be ignored if, years after the fact, a party decides it no longer likes the deal. This, of course, has no basis in law.

The Plan Proponents ignore that in 2006 when the Indenture was being prepared, and when the Senior Sub Notes were issued, there was no layering: The Debtors had a Senior Secured Credit Facility that consisted of term loan tranches, a revolving credit facility, and a synthetic letter-of-credit facility.[97] All of this debt had equal ranking, in terms of both payment and lien priority, and there was no second-lien debt. Thus, the Senior Secured Credit Facility qualified as "Senior Indebtedness" under the Senior Sub Notes Indenture because none of it was subordinated to any other Indebtedness.

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[96] An alleged absurdity cannot be created based upon the after-the-fact conduct or desires of one of the parties. *See, e.g.*, *Croman v. Wacholder*, 2 A.D.3d 140, 145 (N.Y. App. Div. 1st Dep't 2003) ("If plaintiff assumed that Sellers would be able to convince the tenant to agree to the lease modification, it was that untested assumption that led to the 'absurd' result, not the written language in the agreement . . . and there is no basis to accept plaintiff's after-the-fact contention that the written agreement means something other than what it says."); *Elsky v. Hearst Corp*., 232 A.D.2d 310, 311 (N.Y. App. Div. 1st Dep't 1996) (putative commercial unreasonableness is based upon what was "contemplated by the parties ***upon execution of the agreement***"); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted ***when entering the contract***.") (emphasis added).

[97] *See* Kirpalani Decl., Ex. B, Annual Report, *supra* note 8, at F-23 to F-24 (showing outstanding long-term debt as of December 31, 2006 and December 31, 2007).

Similarly, in 2006, the Debtors also had three types of senior unsecured notes (senior dollar notes, senior euro notes, and senior toggle notes). And all of this debt was senior, *pari passu* in right of payment with each other and with the secured debt. Although the outstanding senior unsecured debt could otherwise have been considered "subordinated" or "junior" to the Senior Secured Credit Facility because of its unsecured status, the Rules of Construction in Section 1.04 of the Senior Sub Notes Indenture expressed a clear contrary intention. Thus, in 2006, when the Senior Sub Notes Indenture was drafted, even the Plan Proponents would agree that the definition of Senior Indebtedness was in perfect harmony with the Debtors' capital structure, and it neither created nor required any "absurd" results.

And in 2006, there was nothing absurd about including a provision that prevents second-lien debt from receiving the benefits of payment subordination and turnover of recoveries. As discussed above, in 2006 the market – evinced through ratings agencies, practitioners, and other indentures – recognized that the "in any respect" language helped to close a loophole that was allowing borrowers to issue second-lien debt in order to evade traditional anti-layering provisions, which provisions more narrowly targeted payment subordination, not lien subordination.[98]

Years later, after the Indenture had been drafted to close this loophole, Apollo and the Debtors made a choice. Specifically, they chose to have the Debtors issue layers of secured debt.

[98] The Ad Hoc Committee goes so far as to challenge anti-layering as a legitimate concern to subordinated note holders given that such debt is subordinated to unsecured senior indebtedness, asserting the Senior Sub Notes are not "disadvantaged" by the Second-Priority Notes because "[e]ither way, the interposed debt will be able to satisfy its claims in full from the Debtors' assets . . .." Ad Hoc Br. ¶ 43. Both the commentators (who have written extensively about the problem of "layering") and countless indentures (that prohibit or otherwise limit the effects of layering) belie the Ad Hoc Committee's assertions.

In any event, the Ad Hoc Committee ignores the obvious. Holders of Senior Sub Notes payover only to Senior Indebtedness. They are of course "disadvantaged" – and their contractual expectations upset – if they are forced to turnover their recoveries from unencumbered assets to holders of debt beyond what they bargained for – *i.e.*, to holders of debt that is not Senior Indebtedness.

The Plan Proponents now say that doing this was "absurd," because it placed at risk the priority status of even so-called first-lien debt. *See, e.g.*, Apollo Br. ¶ 27; Ad Hoc Br. ¶¶ 50–52; Debtors' Br. ¶ 39.

As a threshold matter, any "risk" to the first-lien debt is purely hypothetical, since so long as the valuation of the Common Collateral exceeds the amount of the First-Priority Notes, the first-lien debt will be paid in full. Moreover, to the extent there is "risk" to the priority status of any secured creditors in the Debtors' capital structure, it is not because the Indenture was written to require results that are absurd. Rather, this "risk" is due to the Debtors' and such creditors' own voluntary choices.

First, in 2006, the Debtors had available to them the ABA Model Covenants, and they could have included the Model Rule of Construction that would have specifically scaled-back "in any respect" to have the meaning the Debtors now urge.[99] Indeed, Apollo did just that in other deals such as Realogy and Claire's. Instead, in 2006, when the Debtors included all of the other material Model Rules of Construction, they chose to exclude that particular provision. If in negotiations the Debtors were unable to procure agreement to this provision, the Debtors could have walked away from the bargaining table and declined to enter into the transaction at all. They cannot, however, now retrade for a provision that was clearly available to them in 2006, but which they agreed not to include.

Second, in 2010, the Debtors could have structured their financing in such a way as to provide creditors with Senior Indebtedness status in accordance with the plain language of the Indenture. Or, they could have asked the holders of the Senior Sub Notes for an amendment, as

[99] The Debtors could have followed the advice of commentators, but chose not to: "[W]hile [the in any respect language] appears in many definitions [of Senior Indebtedness] as an 'anti-sandwich' provision, it would be preferable for the lenders to include the concept in a separate covenant rather than this definition. **The risk to lenders is that if one lien is subordinated, the entire loan could lose its senior status**." Kirpalani Decl., Ex. H, *Subordination Clauses*, *supra* note 68 (emphasis added).

happened in Travelport. Instead, the Debtors chose to do neither, and simply issued debt that they declared to be "senior" without regard to the actual language in the Senior Sub Notes Indenture. None of these choices by the Debtors renders the language that was agreed upon in 2006 absurd.

The Ad Hoc Committee continues its "absurdity" campaign by arguing that the "springing of a lien in 2012 clearly had been bargained for to improve the position" of the Second-Priority Notes, not to render them "some form of subordinated debt *pari passu* in right of payment with" the Senior Sub Notes. Ad Hoc Br. ¶ 46. As an initial matter, it is of course irrelevant what the basis of *that* bargain was or whether the Second-Priority Notes' determination to take a lien in the Common Collateral was commercially reasonable or not. The *terms of the Indenture* are at issue here, and those terms cannot be altered by the prudence or imprudence of any actions by the Debtors or the holders of the Second-Priority Notes. In any event, there is a litany of reasons why agreeing to become a secured creditor (and thereby giving up the benefits of payment subordination and turnover of recoveries in exchange) was something less than "absurd," including, *inter alia*:

- If the Second-Priority Notes did not take the second-priority lien, another creditor could have, rendering the Second-Priority Notes even more junior with respect to the collateral;
- If the Second-Priority Notes elected instead to be unsecured senior indebtedness, they would be subject to dilution via the issuance of additional unsecured senior indebtedness, which dilution they would otherwise be insulated from with respect to the collateral; and
- Taking a property interest affords myriad incremental benefits, including under the Bankruptcy Code, *see, e.g.*, 11 U.S.C. §§ 361, 506(b), and 1129(b).

The Plan Proponents' argument that it is absurd or commercially unreasonable to trade the benefits of contractual subordination in exchange for a lien ignores the value of a security interest. *See, e.g.*, Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and*

Priorities Among Creditors, 88 YALE L.J. 1143, 1147–61 (1978) (describing the economic value of a security interest).[100]

Finally, the Plan Proponents assert that in 2009, some holders of the Senior Sub Notes exchanged their notes at a 60% discount for Prior Second-Priority Notes, and this "would have made no sense" under a plain language reading of Senior Indebtedness. Ad Hoc. Br. ¶ 67; *see also* Apollo Br. ¶ 38 (stating that the fact that holders of Senior Sub Notes agreed to exchange at a discount of at least 60% "defies credulity"); Debtors' Br. ¶ 39 (describing "gaining a junior lien and one percentage point of interest as compensation for the 60% discount" as a "commercially unreasonable decision"). Again, these arguments are misplaced because they focus on irrelevant conduct as opposed to whether the terms of the Indenture are independently reasonable or not.

[100] Apollo muses that it could "simply have released the lien and regained their senior status (and could still do so now)." Apollo Br. ¶ 31. The notion that Apollo can "unring the bell" is untrue for several reasons, even assuming *arguendo* the Second-Priority Notes were Senior Indebtedness prior to the springing of the lien. *First*, lien or no lien, so long as the Second-Priority Notes are subject to the Intercreditor Agreement, they are subordinate and junior to the Senior Lender Claims for the myriad reasons discussed *supra*. Far from being released, the Second-Priority Notes have been sued to enforce the terms of the Intercreditor Agreement. *Second*, in any event, 100% of the holders of Second-Priority Notes would have to agree to release their interest in collateral. *See* Second-Priority Indenture, § 11.04(c) (providing that "at any time when a Default or Event of Default has occurred and is continuing and the maturity of the Notes has been accelerated (whether by declaration or otherwise) and the Trustee has delivered a notice of acceleration to the Collateral Agent, no release of Collateral pursuant to the provisions of this Indenture or the Security Documents will be effective as against the Holders . . .."). Any attempt to decelerate the Second-Priority Notes would be futile. Apollo has already conceded that the automatic stay would preclude this. *See* Apollo Opening "Makewhole" Br., Dkt No. 635, at ¶ 34 ("where lifting the stay for the purpose of deceleration would serve only to increase the size of a movant's claim, the requested relief should be denied."). *Third*, even if 100% of the holders of Second-Priority Notes sought to cause such a release, it would be too little too late for the Second-Priority Notes. They chose – and would likely choose again if time were rewound – to take their lien, and having entered bankruptcy with it, their rights were frozen vis-à-vis other creditors as of the Petition Date. *See United States v. Marxen*, 307 U.S. 200 (1939) (USA's post-petition assertion of priority over other creditors was rejected "for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy . . . both as to the bankrupt and among themselves . . . . [the] assets at that time are segregated for the benefit of creditors [and the] transfer of the assets to someone for application to 'the debts of the insolvent, as the rights and priorities of creditors may be made to appear,' takes place as of that time").

There are a number of reasons why creditors may have reasonably opted for the Prior Second-Priority Notes. Most notably, they got access to collateral, and in that respect primed more than $1 billion in existing senior unsecured notes. *See* Debtors' Br. ¶ 10. Moreover, the 2009 exchange of Senior Sub Notes for the Prior Second-Priority Notes occurred when business conditions for the Company were so dire that unless they "meaningfully improve[d] in fiscal 2009, [the Company] will likely need to pursue additional cost saving measures, restructuring initiatives or other business or capital structure optimization measures available to us to remain in compliance with [a loan] covenant, and there can be no assurance that any such measures will be successful."[101] Indeed, the Company was not in compliance with certain coverage ratios,[102] which limited the kind of new debt it could issue. Thus, creditors were highly incentivized to do the 2009 exchange in order to get valuable collateral, and regardless of whether they would also have the benefits of subordination from the Senior Sub Notes. *See* Robert L. Cunningham & Yair Y. Galil, *Lien Subordination and Intercreditor Agreements*, 25 REV. BANKING & FIN. SERVS. 49 (2009) ("Notable in this context is the current trend allowing unsecured, even payment subordinated, creditors to move up the capital structure to senior, second lien creditor status (whether pursuant to an exchange offer or a negotiated refinancing) to avoid an imminent payment or covenant default under the existing debt. Such transactions can require the implementation of lien subordination intercreditor agreements on an expedited basis with little time for negotiation.").

The plain language of the Indenture cannot now be avoided because the Plan Proponents did not think through the consequences – or did, but now seek to enhance their "trade" in any event.

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[101] Momentive Performance Materials, Inc., Current Report (Form 8-K) (May 12, 2009), at 2.

[102] *Id.*

2. The Indenture's Subordination Provisions Do Not Conflict With The Definition Of "Permitted Liens" Or The "Equal And Ratable" Lien Covenant.

Forced to look elsewhere, the Plan Proponents assert that the plain meaning of the In Any Respect Exception is inconsistent ("clashes") with other provisions of the Indenture – the provisions that "expressly allow the granting of liens to secure Senior Indebtedness." Ad Hoc. Br. ¶ 59; Apollo Br. ¶ 32. More specifically, the Plan Proponents contend that it is internally inconsistent for the Indenture to provide both that (1) Senior Indebtedness may elect to take a junior lien but (2) if they choose to do so, there will be two consequences, namely, (a) the Indebtedness will no longer deemed Senior Indebtedness, and (b) the Debtors must grant the Senior Sub Notes an equal and ratable lien. But as a matter of logic, common sense, and law, there is simply nothing inconsistent about permitting the Debtors and the holders of Second-Priority Notes to choose to do an act – take a junior lien – which carries with it specific consequences that are designed to protect the economic interests of the Senior Sub Notes. While the Plan Proponents may regret it now, that is precisely what they chose to do, and there is no basis to relieve them of the clear contractual consequences of their choice.[103]

To be clear, not only is there no conflict between the plain language of Section 4.12[104] and the definition of Permitted Lien with Senior Indebtedness, they further the same anti-

[103] Other types of liens could have been granted that would not have these consequences. For example, a first-priority Permitted Lien that is not junior or subordinate to any other lien would have allowed senior unsecured debt to retain its Senior Indebtedness status. Or liens that would have qualified for one or more of the ***26 other*** versions of Permitted Liens under the Indenture could be granted to Senior Indebtedness. For example, "second" liens could be granted securing $30 million of obligations incurred in the ordinary course of business, Hedging Obligations, accounts receivable and related assets, "any refinancing, refunding, extension, renewal . . . Indebtedness secured by any [first] Liens" existing on the Issue Date, on assets, property or shares of stock of a Person at the time such Person becomes a Subsidiary, or Liens on assets or property at the time the Debtors acquired the assets or property, or equipment. *See, e.g.*, Indenture § 1.01, "Permitted Liens," ¶¶ 7–9, 11, 16, 20–21, 27.

[104] Capitalized references to "Section __" or "Article __" refer to the specific section or article of the Indenture so referenced.

layering cause. The definition of Senior Indebtedness protects the Senior Sub Notes by ensuring layered secured debt is not entitled to payover. Section 4.12 and the definition of Permitted Liens similarly address layering by requiring an equal and ratable lien where the Debtors issue layered secured debt – subject to the 26 other forms of Permitted Liens. The sections work together, guarding against the "loophole" second-lien debt was specifically designed to exploit. Layering is permitted, but there are consequences, including that layered debt shall not benefit from turnover from subordination.

3. The Indenture's Subordination Provisions Do Not Conflict With Section 10.16.

The Plan Proponents likewise misplace reliance on Section 10.16 of the Indenture. The Plan Proponents assert that Section 10.16 permits a holder of Senior Indebtedness to "deal in any way with property securing such Senior Indebtedness." Ad Hoc. Br. at ¶ 63; Apollo Br. at ¶ 31. But this gets the Plan Proponents nowhere, because the rights under Section 10.16 are enjoyed only by persons that qualify as "holders of Senior Indebtedness" under the Indenture's definition of "Senior Indebtedness."[105] Section 10.16 simply does not apply to a person who never was a holder of Senior Indebtedness – or who is no longer the holder of Senior Indebtedness as a result of taking acts that have stripped him of any such putative status.[106] Such acts include exactly

[105] It has been noted that provisions such as Section 10.16 may only be necessary "where the subordination is to a specified senior indebtedness [and not] when the subordination is to any and all indebtedness . . .." Dee M. Calligar, *Subordination Agreements*, 70 YALE L.J. 376, 393–94 (1961). This point illustrates that the benefits of Section 10.16 are tailored to and intended solely for the agreed-upon beneficiaries of subordination. Where the beneficiaries of subordination are boundless, a debt holder would simply "re-qualify" as Senior Indebtedness notwithstanding any action it might take, and Section 10.16 would be unnecessary. Where only specific debt is intended to receive the benefits of subordination, however, only that specific debt should continue to receive it. Here, that specific debt is Senior Indebtedness as defined. The operation of Section 10.16 could be relevant if the subordination provisions in the Indenture were afforded to the Second-Priority Notes *personally*. But they are not; the benefits of subordination are afforded exclusively to Senior Indebtedness, the terms of which were defined years before the Second-Priority Notes were incurred.

[106] Provisions like Section 10.16 operate as waivers of potential suretyship and guaranty defenses that the holders of Senior Sub Notes might assert to escape from the terms of subordination captured in the Indenture based upon acts taken by holders of Senior Indebtedness (so long as they remain holders of

what the Second-Priority Note holders chose to do here, which was to secure their debt with a junior lien.

4. Apollo's Argument That It Has A "Deficiency Claim" Constituting Senior Indebtedness Is Fundamentally Flawed.

Apollo argues in passing that if the Second-Priority Notes are not Senior Indebtedness because of their junior lien, their "deficiency claim" is nevertheless Senior Indebtedness because it is not subordinated to any other claims. Apollo Br. ¶ 42. This argument is flawed, however, for several reasons.

First, there is no basis in the Indenture to split the Second-Priority Notes Indebtedness into two. Apollo confuses the Indebtedness represented by the Second-Priority Notes (which is not bifurcated into "secured" and "unsecured" portions) and a legal fiction implemented by the Bankruptcy Code. In bankruptcy, a creditor's claim is bifurcated for purposes of allowance and treatment based on the value of the collateral securing the claim. *See* 11 U.S.C. § 506(a). This bifurcation, however, is simply a mechanism of bankruptcy law to limit certain rights to the extent of a creditor's security (such as postpetition interest), and to otherwise give the claims of undersecured creditors treatment as unsecured creditors with respect to their deficiency claims. It is not a tool for post-hoc alteration of the rights and nature of the underlying debt.[107] Indeed, Bankruptcy Code section 510(a) makes clear that bankruptcy does not alter a creditor's senior or subordinated status. *Id.* § 510(a) ("A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.").

Senior Indebtedness and therefore are entitled to the benefits). *See* Kirpalani Decl., Ex. G, American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions 1965, Model Debenture Indenture Provisions 1967* (1971) at 572–73 ("[A] change in the senior debt without the consent of the subordinator might release him from the subordination agreement.").

[107] Notably, the Plan does not recognize a separate class for the Second-Priority Notes' "deficiency claim," which is receiving the exact same treatment for its secured and "deficiency" claims (other than the purported – and erroneous – status as "Senior Indebtedness").

The Second-Priority Notes represent one "Indebtedness" for purposes of the Indenture and, as shown above, that entire Indebtedness is not Senior Indebtedness.

Second, the argument that any deficiency claim is not subordinate or junior ignores its own foundational premise. Any unsecured claim held on account of the Second-Priority Notes is only what is left after giving effect to the subordinate and junior rights against the Common Collateral. If such claims were not subordinate and junior to the Senior Lender Claims, they would share *pro rata* with the Senior Lender Claims (in sharp contrast to the Debtors' Plan, for example). It is far too cute to assert that a deficiency claim is not junior or subordinate when its very existence is as a result of its junior and subordinate nature. There is no plausible way to divorce, for purposes of construing the In Any Respect Exception, the Second-Priority Notes from the satisfaction of that Indebtedness out of or from the Common Collateral. If anything, the deficiency claim may best illustrate the subordinate and junior aspect of the Second-Priority Notes.

Third, assuming *arguendo* it were proper under the Indenture to focus solely on the legal fiction that is the "deficiency" claim (it is not), and ignore the legal and factual predicates creating said deficiency claims, the Second-Priority Notes' "deficiency" claims *still* are undeniably subordinated and junior to Senior Lender Claims. A judgment lien is one of the most important remedies an unsecured creditor has vis-à-vis a debtor. *See In re Siegel*, 2014 Bankr. LEXIS 2942, at *10 (Bankr. S.D.N.Y. July 9, 2014) (an unsecured creditor can "leap ahead of other unsecured creditors by obtaining a judgment lien"). However, under the Intercreditor Agreement, even when the holders of Second-Priority Notes are acting solely as "unsecured creditors," if they were to obtain a judgment lien on Common Collateral, they would be required to tender any proceeds received on account of Common Collateral over to the Senior Lender

Claims.[108] In this critical respect, the subordination of the Second-Priority Notes' "deficiency" claim renders it inferior to that of other unsecured creditors (including trade creditors) who can realize the full benefit of any judgment lien. Moreover, unlike other unsecured creditors, if the holders of the Second-Priority Notes were to obtain a lien on *unencumbered collateral*, they would be required to immediately assign it for the benefit of the Senior Lenders.[109] Finally, the Second-Priority Notes remain subject to limitations in their ability to exercise rights both in and out of bankruptcy, including subrogation rights, unless and until the Senior Lender Claims are paid in full. Thus, even to the extent the Second-Priority Notes are deemed "unsecured," they nonetheless are subordinate or junior to the Senior Lender Claims in at least some respects (and indeed, very material respects).

5. A Putative "Historical Default" Is Irrelevant To Interpretation Of The Indenture And, In Any Event, Does Not Support The Plan Proponents' Arguments.

The Plan Proponents assert that, if the Second-Priority Notes are not Senior Indebtedness, the granting of the lien securing the Second-Priority Notes in November 2012, without equally and ratably securing the Senior Sub Notes, gave rise to a default under the Indenture. *See* Debtors' Br. ¶¶ 39, 43; Ad Hoc Br. ¶¶ 55–56. Premised on the foregoing, the Plan Proponents argue that the fact that neither BNY (the Indenture Trustee under the Senior Sub Notes and the

[108] Intercreditor Agreement § 5.4 at 13. The Debtors cite this provision in support of the proposition that the Second-Priority Notes are "pari passu in right of payment to other Senior Indebtedness." Debtors' Br. ¶ 26. This is incorrect – the Intercreditor Agreement nowhere states that the Second-Priority Notes are "pari passu" with any other debt. The section referenced by the Debtors merely provides that the holders of the Second-Priority Notes may assert rights as unsecured creditors notwithstanding the other provisions of the Intercreditor Agreement. Moreover, as discussed in text, even this limited provision qualifies itself, restricting the Second-Priority Notes' ability to obtain a judgment lien, and preserving the indisputable fact that, with respect to the Common Collateral, the Second-Priority Notes' Indebtedness remains subordinate and junior in several respects, *even* when the Second-Priority Note holders are acting as unsecured creditors. That is all that is needed to render the debt subordinate and junior in any respect.

[109] Intercreditor Agreement § 2.3

Second-Priority Notes at the same time), U.S. Bank (which succeeded to its role post-petition), nor any Senior Sub Note holder took any action in response to these facts somehow militates against U.S. Bank's reading of the Indenture. *See* Debtors' Br. ¶¶ 39, 43; Ad Hoc Br. ¶¶ 56, 61; Apollo Br. ¶ 28.

The Plan Proponents' argument has no merit for two independent reasons, in each case assuming *arguendo* a default under the Indenture was triggered upon the springing of the lien in 2012. First, under well-settled New York law, whether BNY, U.S. Bank, or any holder took any steps to enforce a possible default is irrelevant to the task before the Court – determining whether the Senior Sub Notes are subordinated to the Second-Priority Notes by interpreting the plain terms of the Indenture. Second, even if the putative historical default were somehow relevant, other terms of the Indenture reflect the fact that the alleged inaction on the part of BNY was entirely unremarkable, lending no inference whatsoever in favor of the Plan Proponents' reading and not prejudicing U.S. Bank's rights under the Indenture in any way.

(a) The Parties' Conduct Concerning A Putative Default Under The Indenture Is Irrelevant.

Only where a court finds that a contract is ambiguous may it consider evidence of the parties' intent based upon the parties' actions that purportedly demonstrate what they believed the terms of the contract meant. *N.Y. Skyline, Inc. v. Empire State Bldg. Co. L.L.C. (In re N.Y. Skyline, Inc.)*, 497 B.R. 700, 709 (Bankr. S.D.N.Y. 2013); *see also Portsmouth Baseball Corp. v. Frick*, 278 F.2d 395, 401 (2d Cir. 1960) ("To show a practical construction by acts there must have been conduct by the one party expressly or inferentially claiming as of right *under the*

doubtful provision, coupled with knowledge thereof and acquiescence therein, express or implied, by the other.") (emphasis added).[110]

All parties to this dispute concur that the terms of the Indenture are unambiguous. *See* Ad Hoc Br. ¶ 2; Apollo Br. ¶ 34; Debtors' Br. ¶ 26. Thus, it would be improper for this Court to consider the Plan Proponents' practical construction argument predicated on the putative default under Section 4.12 and the parties' conduct in relation to that putative default.

(b) The Parties' Conduct Does Not Override The Plain Language Of The Indenture.

To establish a practical construction of a contract, the Plan Proponents must show that a party to the contract (here, the Debtors) engaged in conduct demonstrating its understanding of an ambiguous term that is accepted or acquiesced in by the other party (here, the holders of Senior Sub Notes). *New York Skyline*, 497 B.R. at 709–10. The Plan Proponents offer zero evidence of any conduct reflecting a mutual understanding as to whether the granting of the "springing lien" would or would not require an equal and ratable lien to secure the Senior Sub Notes in order to avoid a default under Section 4.12 of the Indenture. The absence of such evidence is not surprising; several other terms of the Indenture demonstrate why no steps may have been taken.

As an initial matter, no party waived or allowed any claim under the Indenture to lapse with the passage of time. With respect to the ability of the indenture trustee or any holders to call a default under the Indenture, New York's six-year statute of limitations for breach of contract actions applies. *See* N.Y. C.P.L.R. § 213(2) (McKinney 1991); *Cruden v. Bank of New*

[110] The rule concerning practical construction contrasts with courts' consideration of contemporaneous treatises, articles, and other materials created by non-parties to the dispute, which are distinguishable from extrinsic evidence, such as the Fitch Report and the ABA Model Negotiated Covenants. *See* Section III.A.2(c), *supra* pp. 31–32.

York, 957 F.2d 961, 968 (2d Cir. 1992) (applying New York's six-year statute of limitations to breach of indenture claim).[111] Moreover, Section 6.03 of the Indenture provides that a "delay or omission by the Trustee or any Holder in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default." In addition, Section 6.04, in conjunction with Section 9.02, provides that neither the indenture trustee nor the holders of the Senior Sub Notes have the ability to waive any default concerning subordination under the Indenture or that would "impair the right of any Holder to receive payment of principal of or premium . . . on or after the due dates therefor or to institute suit for the enforcement of any payment on or with respect to such Holder's Securities . . .." *See* § 9.02 (vi)–(vii). Thus, the Indenture precludes the drawing of any inference from the supposed conduct (or lack thereof) of BNY or the Senior Sub Note holders.[112]

There are other reasons why it is unremarkable that BNY did not raise this issue. First, the Indenture provides that the indenture trustee is to rely upon *the Debtors* to report any default. *See* Indenture § 4.09 ("The Company shall deliver to the Trustee within 120 days after the end of each fiscal year . . . an Officer's Certificate stating that in the course of the performance by the signer of his or her duties as an Officer . . . he or she would normally have knowledge of any Default and whether or not the signer knows of any Default that occurred during such period."). There is no evidence that the Debtors reported any such default to BNY (or any holder at the time). Indeed, they were taking the opposite position.

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[111] The Indenture is governed by New York law. Indenture § 13.09; *see also* Ad Hoc Br. ¶ 39 n.34; Apollo Br. ¶ 19.

[112] *Cf. Bank of New York Mellon Trust Co., N.A. v. Miller* (*In re Franklin Bank Corp.*), Civil Action No. 13-1713-RGA, 2014 WL 3611596 (D. Del. July 21, 2014), Mem. Op. at 7 (finding that even where BONYM should have timely filed its claims, its "failure to act did not rise to the level of a clear manifestation of intent to relinquish a contractual protection, nor did it constitute a knowing, voluntary and intentional abandonment of its contractual rights") (internal citation omitted).

Second, BNY's hypothetical understanding is irrelevant – neither it nor its predecessor negotiated the Indenture. Even if BNY mistakenly believed there was no default when one actually existed, that should not under any circumstances affect the Court's interpretation of the Indenture concerning subordination – an entirely separate issue. No legal doctrine provides as much, and it would be grossly inequitable to punish the holders of Senior Sub Notes for BNY's failure to perceive a default.[113]

Fundamentally, whatever inference might hypothetically be drawn from the fact that no party identified a breach of Section 4.12 has no bearing on any party's view of the operation of Article X under the Indenture. The subordination provisions of the Indenture take effect only upon "a total or partial liquidation or a total or partial dissolution . . . or in a bankruptcy, reorganization, insolvency, receivership or similar proceeding . . .." Indenture § 10.02. Section 6.03 provides that "[n]o remedy is exclusive of any other remedy. To the extent required by law, all available remedies are cumulative." Until the Petition Date, there was no reason for, nor expectation that, any party would be called upon to reaffirm any provision of Article X.

In sum, whether there was and continues to be a default under Section 4.12 is legally irrelevant to the dispute before the Court. Even if the Court were to consider the fact that no party complained prior to the Petition Date, it does not lead to (or even support) the conclusion the Plan Proponents advance. The failure to assert a default under Section 4.12 does not provide

[113] Indeed, in an article cited by the Ad Hoc Committee (Ad Hoc Br. at 30 n.37), Professors Marcel Kahan and Edward Rock debunk the Plan Proponents' argument based upon purported breaches of the Indenture that were not pursued, noting the practical reality that "many violations of bondholder rights have remained undetected and unsanctioned" due to collective action issues related to the dispersion of bondholders and the complexity of bond indentures. Marcel Kahan & Edward Rock, *Hedge Fund Activism in the Enforcement of Bondholder Rights*, 103 NW. U. L. REV. 281, 284 (2009). As recognized by Professor Kahan, "[h]edge funds have been able to greatly ameliorate the historic underenforcement problem." Kahan & Rock, *supra*, at 284.

any evidence concerning the issue before the Court – the proper interpretation of the definition of Senior Indebtedness for purposes of subordination under Article X.

6. The Debtors' Subsequent Statements Are Irrelevant To Interpreting The Indenture And Do Not, In Any Event, Support Any Application Of Laches Or Estoppel.

Much of the Plan Proponents' efforts focus on subsequent statements made by the Debtors, none of which purport to amend or modify the governing terms of the Indenture. *See* Apollo Br. ¶¶ 37–38; Ad Hoc Br. ¶¶ 50–53, 62, 65, 68–70, 72; Debtors' Br. ¶ 44. All of these statements are inherently extrinsic to the Indenture and are therefore legally irrelevant.[114] In any event, the last-resort arguments premised on these statements – laches and/or estoppel, are without merit and do not apply to the facts in this case.

As a threshold matter, the argument that the Debtors' statements concerning purported subordination of the Senior Sub Notes made in certain offering memoranda – none of which purports to actually amend the Indenture – are somehow relevant has been decisively rejected by Judge Gropper of this Court. In *In re K-V Discovery Solutions, Inc.*, 496 B.R. 330 (Bankr. S.D.N.Y. 2013), several parties attempted to rely upon materials other than the governing document, which itself provided for the putative subordination. The Court refocused the legal analysis, stating:

> [T]o determine the extent of any subordination clause, one has to look at the agreement of the creditor who agreed to the subordination, not to the debt instrument of the senior creditor. . . . ***[A] statement by [the issuer] cannot bind***

[114] The Ad Hoc Committee's reliance on *In re WorldCom, Inc. Securities Litigation*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004), is misplaced. Essentially, they assert that their contractual interpretation must be correct because any statements the Debtor made in securities filings years later must surely have been accurate. Nothing in *WorldCom* relates remotely to contractual interpretation. And the argument that "it was said, so it must be true" would eviscerate securities negligence and fraud altogether. If misstatements were made, securities fraud claims may be assertable. Those claims, however, would most likely be owned by the holders of the Second-Priority Notes – but not Apollo – and would be statutorily subordinated in bankruptcy. 11 U.S.C. § 510(b).

> ***the [subordinated noteholders] if the subordination is not provided for in their Indenture***.

Id. at 340. Thus, the Debtors' public statements and conduct are irrelevant; it is the Indenture from which any subordination is created, and it is the Indenture – exclusively – which controls the extent of any such subordination.[115] Nevertheless, even if the Debtors' subsequent statements regarding the Second-Priority Notes were relevant to the terms of the Sub Note Indenture, which they are not, the doctrines of laches and estoppel would not save the Debtors from the plain terms of the Indenture.

The doctrine of laches is wholly inapplicable here.[116] "Laches is an equitable defense based on the maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who sleep on their rights). It bars a plaintiff's equitable claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997). Significantly, the doctrine of laches traces its "historical pedigree" to before the "the statutory enactment of periods of limitations." *Id.* Although the doctrine has survived "as a further limitation upon granting relief in equity," the Supreme Court has held that it has no application "within the term

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[115] The Plan Proponents' discussion of a May 2013 prospectus for certain Senior Sub Notes is no more relevant than statements made in connection with the issuance of other debt. Apollo Br. ¶ 37 (final bullet); Ad Hoc Br. ¶ 72. These were statements Apollo caused the Debtors to make that could not – and did not even purport to – amend the Indenture. Moreover, this prospectus concerned solely Senior Sub Notes owned by Apollo. Indeed, it is surprising that Apollo draws the Court's attention to its efforts to liquidate its Senior Sub Notes into the public market so close in time to leading negotiations for a plan under which it agreed to take no recovery on account of its Senior Sub Notes. *See* Subordinated Notes Resale Prospectus of Momentive Performance Materials, Inc., dated May 13, 2013 (Attached to the Ad Hoc. Br. as Exhibit W).

[116] The Ad Hoc Committee also asserts that Section 10.16 of the Indenture imposes "a clear duty for the Subordinated Notes Indenture Trustee and the Subordinate Noteholders to contradict the express statements by MPM regarding the subordinated nature of the Subordinated Notes." Ad Hoc Br. ¶ 84. As an initial matter, even if Section 10.16 imposes any duty – and it says nothing of the sort – the "duty" would require disclosure solely to holders of Senior Indebtedness. Thus, the Ad Hoc Committee's argument assumes the very issue they are trying to prove.

of the statute of limitations." *Id.* (citing *United States v. Mack*, 295 U.S. 480, 489 (1935) and *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985)). Thus, "[i]t is well-established" that laches does not apply to claims asserted within the statute of limitations. *In re Jemal*, 496 B.R. 697, 703 (Bankr. E.D.N.Y. 2013); *see also In re Liquidation of Am. Druggists' Ins. Co.*, 789 N.Y.S.2d 483 (N.Y. App. Div. 1st Dep't 2005) (dealing with a cause of action for breach of an "investor bond agreement," and holding that "[t]he defense of laches is unavailable in an action at law commenced within the period of limitation").

The claim at issue here is the Senior Sub Note holders' right to be paid principal, premium, and interest from the Debtors on account of the Senior Sub Notes. That claim matured under the Indenture upon acceleration on the Petition Date when such amounts became "due and payable." § 6.02. Moreover, any putative subordination would not be triggered until a "liquidation, dissolution, [or] bankruptcy." § 10.02. As discussed above, these contractual – and inherently legal – rights are subject to New York's six-year statute of limitations. Thus, laches is inapplicable.[117]

The Plan Proponents' estoppel argument is equally unavailing. Under New York law, the party asserting estoppel must show that the party alleged to be estopped (1) engaged in conduct

[117] Moreover, even if a laches defense were available to U.S. Bank's right to payment, it would fail on the merits. Laches bars the enforcement of a right where (1) there has been an unreasonable and inexcusable delay that (2) results in prejudice to a party, which prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay. *Skrodelis v. Norbergs*, 707 N.Y.S.2d 197, 198 (N.Y. App. Div. 2d Dep't 2000). "[A] mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *See generally Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 816 (N.Y. 2003). In addition, there must be a change in circumstances making it inequitable to grant the relief sought. *Markell v. Markell*, 938 N.Y.S.2d 117, 119 (N.Y. App. Div. 2d Dep't 2012). The Plan Proponents have failed to make out either element. Significantly, they cannot prove that holders of the Second-Priority Notes would have refused to accept the granting of the liens – a highly improbable notion in any event given the potential for significant dilution with other unsecured debt or priming by other second priority debt. Moreover, the terms of Indenture, and the limited benefits of subordination it afforded third party beneficiaries, were and always have been public. If the Plan Proponents feel surprised, they only have their own incorrect reading of the Indenture's plain terms to blame.

amounting to a false representation or concealment of material facts; (2) intended that such conduct would be acted upon by the other party; and (3) knew the real facts. *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 301–02 (2d Cir. 1996). Moreover, the party asserting estoppel must also show that it (1) lacked knowledge of the true facts; (2) relied upon the conduct of the party it seeks to estop; and (3) as a result, it made a prejudicial change of position. *Id.*

The Plan Proponents have not proven any of these elements. First, they cannot identify any false statement or concealment by any party of any sort (other than their own legal conclusions). Indeed, the Indenture has been available to the public since inception. *See Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, 957 F. Supp. 2d 316, 373 (S.D.N.Y. 2013) ("Chesapeake did not conceal any material facts from BNY Mellon. Quite the contrary: ***The Supplemental Indenture was available to the trustee and to the noteholders***.") (emphasis added). Moreover, there is nothing at all in the record even suggesting that any party acted with the *intent* that the Second-Priority Notes would act upon such (nonexistent) actions.[118]

Second, with respect to the parties asserting estoppel – the Plan Proponents – they cannot seriously contend that they lacked knowledge of the true facts when not only was the Indenture and its plain terms publicly available since inception, but the indenture trustee for the Second-Priority Notes was also the indenture trustee for the Senior Sub Notes.[119]

[118] To the extent estoppel has any application here, it applies among and between the Plan Proponents. It was the Debtors (controlled by Apollo), and not any indenture trustee or Senior Sub Note holder, who made the statements focused on by the Plan Proponents.

[119] As discussed above, moreover, it strains credulity for the Plan Proponents to suggest that somehow the holders of the Second-Priority Notes made a prejudicial change of position, asserting that they would have forgone their lien and potentially been primed by another creditor who might step into a second-lien position. *See* Apollo Br. ¶ 31; Ad Hoc Br. ¶ 46; Debtors' Br. ¶ 39.

In sum, the Plan Proponents have fallen well short of establishing the elements required for application of laches or estoppel, doctrines that do not apply to the circumstances here.

7. The Industry Publications Relied Upon By Plan Proponents Are Irrelevant Post-Hoc Legal Analyses And Are Deeply Flawed.

As explained above, the Court may properly consider the 2006 Fitch Article, ABA Model Covenants, and the other *contemporaneous* industry sources cited herein in construing the plain language of the Indenture. These sources provide an objective interpretation, as well as context for the origins and purpose, of the "in any respect" language, and the market circumstances that existed at the time of the execution of the Indenture. *See supra* § III.A.2(c). Moreover, they show alternative language that the Indenture *could have* included, but did not, if the Indenture was intended to achieve the results that the Plan Proponents now claim.

U.S. Bank's reliance on these contemporaneous sources stands in stark contrast to the Plan Proponents' reliance on an April 25, 2014 research note by the Covenant Review (the "**Covenant Review Note**") and an April 21, 2014 research note by Xtract Covenant Intelligence (the "**Xtract Note**"). *See e.g.*, Ad Hoc Br. ¶¶ 74–77. The Plan Proponents do not rely on these post-petition analyst reports to provide any context for interpreting the plain language of the Indenture. Instead, the Covenant Review Note and the Xtract Note purport to conduct a *post-hoc* legal interpretation of the Indenture itself for the purposes of secondary market trading. Because the Court has the exclusive role of interpreting the Indenture as a matter of law, such post-hoc interpretations (which are really nothing more than present-day legal arguments) are entirely irrelevant.

Even if the Court were to consider the Covenant Review Note and the Xtract Note, their purported legal analyses are wrong. Both publications make the same arguments that the Plan

Proponents are asserting, and thus, are flawed for the same reasons the Plan Proponents' arguments fail.

In addition, the arguments in both the Covenant Review Note and the Xtract Note reveal their unreliability. The Covenant Review Note, for example, is premised on its assumption that debt that "is not subordinated in right of payment to any other debt of that entity" is "commonly referred to as senior debt." This extra-contractual opinion assumes away the question that Covenant Review purported to be answering without any attempt to reconcile itself to what Senior Indebtedness was defined to mean in the Indenture. And this Court's own judicial experience tells it that second-lien debt – which may not be "subordinated in right of payment to any other debt" – is *not* "commonly referred to as senior debt." *See Ion Media Networks, Inc. v. Cyrus Select Opportunities Master Fund, Ltd. (In re Ion Media Networks, Inc.)*, 419 B.R. 585, 595 (Bankr. S.D.N.Y. 2009).

Similarly, the Xtract Note states that if the Second-Priority Notes were not Senior Indebtedness, it "would be an odd result to put it mildly: senior secured debt recovering equally with senior subordinated debt." But this analysis is flawed because it (i) ignores the impact of collateral upon recoveries, a choice the Second-Priority Notes did not ignore when they bargained for their springing lien, and (ii) relies upon labels, not contractual substance, as its guiding "logic," assuming that the Second-Priority Notes are "senior secured debt" relative to the Senior Sub Notes, preordaining the very question Xtract is purporting to answer.

The Xtract Note goes on to severely discredit the quality of its own analysis by referencing several other indentures, which it claims contain "very similar language." However, as indicated in Annex 3, the Xtract Note completely overlooks the fact that three of the five indentures it cites contain a carve out for junior lien debt (like that in the ABA Model Covenants

and other indentures discussed above). The other two indentures were in capital structures that did not have layered debt. All of this, however, appears to have been missed by Xtract. Similarly, the Xtract Note bases most of its reasoning on the Rule of Construction in the Indenture, but completely ignores the distinction between – indeed the existence of – the other Rule of Construction in the ABA Model Covenants that *actually does* what the Xtract Note argues the included Rule *should do, but which was excluded from the Senior Sub Notes Indenture.*

Both the Xtract Note and Covenant Review Note also rely on after-the-fact disclosures by the Debtors to construe the Indenture. But as described above in section III.B.6, those disclosures have no bearing on, and certainly do not change, the plain meaning of the Indenture. Neither publication offers any opinion as to what sort of "odd results" might develop if parties were able to unilaterally alter contractual terms by making contrary statements to third-parties.

At bottom, to put it mildly, the Covenant Review Note and the Xtract Note add nothing to the proper construction of the Indenture. They are not contemporary, interpretative aids nor evidence of industry circumstances at the time of the Indenture, and their post-hoc legal analyses are flawed and irrelevant.

C. The Plan Cannot Be Confirmed.

1. The Plan Improperly Classifies And Treats The Senior Sub Notes As Subordinated To The Second-Priority Notes.

(a) The Plan Is Unconfirmable Because It Is Based On The False Premise That The Second-Priority Notes Are "Senior Indebtedness."

The Plan is based on the false premise that the Senior Sub Notes are subordinated to the Second-Priority Notes. The Plan is not fair and equitable to, and unfairly discriminates against, the Senior Sub Notes by providing them with no recovery whatsoever. The Plan also violates Bankruptcy Code section 510(a) by disregarding the plain language of the Indenture.

A plan of reorganization can be confirmed only when it complies with the "applicable provisions" of the Bankruptcy Code and is proposed in good faith. 11 U.S.C. § 1129(a)(1) & (3). As to a rejecting class, the Plan also must satisfy the "cram down" requirements of section 1129(b), including providing both "fair and equitable" treatment to, and not unfairly discriminating against, the dissenting class. The Plan fails all of these requirements.

(b) The Plan Improperly Attempts To Expand The Indenture's Subordination Provisions.

The Plan attempts to subordinate the Senior Sub Notes' claims to the *pari passu* claims of general unsecured creditors and the Second-Priority Notes. Bankruptcy Code section 510(a) provides that a subordination agreement is enforceable in bankruptcy "to the same extent that such agreement is enforceable under applicable nonbankruptcy law." *See Ion Media Networks*, 419 B.R. at 595 (intercreditor agreements are enforceable contracts under § 510(a), "and the Court will not disturb the bargained-for rights and restrictions governing the second lien debt"). Because the Indenture provides that the Senior Sub Notes are subordinated only to Senior Indebtedness, which the Second-Priority Notes are not, the Plan's purported subordination of the Senior Sub Notes to the Second-Priority Notes exceeds the subordination that the Senior Sub Notes accepted under the Indenture.

(c) The Plan Unfairly Discriminates Against And Is Not Fair And Equitable As To The Senior Sub Notes.

Bankruptcy Code section 1129(b) requires that a plan "not discriminate unfairly," and also be "fair and equitable," as to each dissenting class. Although section 1129(b)(2)(B)(ii) sets forth the minimum statutory requirements for cram down under the "absolute priority" rule, the law is clear that the statute merely establishes a floor. *In re 20 Bayard Views, LLC*, 445 B.R. 83, 105 (Bankr. E.D.N.Y. 2011) (holding that "satisfaction of these statutory requirements does not

guarantee that the plan will meet the fair and equitable standard"); *see also* 11 U.S.C. § 1129(b)(2) (fair and equitable "includes the following requirements").

The Plan's treatment of the Senior Sub Notes violates section 1129(b)(1) because the Senior Sub Notes will receive nothing under the plan, while the Second-Priority Notes and other unsecured creditors will receive significant distributions. *See In re Young Broad., Inc.*, 430 B.R. 99, 140 (Bankr. S.D.N.Y. 2010) (denying confirmation of a plan because the plan treated similarly situated classes of unsecured creditors differently). The Plan denies the holders of the Senior Sub Notes any recovery by subordinating their claims to the Second-Priority Notes' deficiency claim. By contrast, the Second-Priority Notes will receive substantial distributions, and General Unsecured Claims will effectively be unimpaired. There is no legitimate basis for this unfair and discriminatory treatment.

Moreover, the Plan is not "fair and equitable" under section 1129(b)(2)(B)(ii), which requires that all claims (including allegedly "subordinated" ones) in a rejecting class be paid in full before equity may receive or retain any value. The Plan violates the fair and equitable requirement, because MPM and other Debtors will retain "Intercompany Interests" in their Debtor-subsidiaries (*see* Plan § 7.11 at 40), even though the holders of the Senior Sub Notes will not be paid in full on account of their guarantee claims against those same Debtor-subsidiaries.

The Debtors have articulated no basis for violating the absolute priority rule, and none exists. The Plan does not purport to substantively consolidate the Debtors, and thus the Senior Sub Notes' guarantee claims against the Debtor-subsidiary Guarantors are entitled to fair and equitable treatment at each Debtor-subsidiary level.[120] The Debtors' claims that the stock is "worthless," or that it is being retained for "administrative convenience," do not override the

[120] Disclosure Statement at 32.

mandate of section 1129(b). *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207–08 (1988). Nor does the Plan purport to comply with the requirements of a "new value" plan. *See Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999). Finally, the Debtors cannot justify the retention of equity in the Debtor-subsidiaries based upon "gifting" by their secured creditors. *See Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 100 (2d Cir. 2010) (rejecting "gifting" doctrine, even for secured creditors). Thus, there is no basis for MPM and the other Debtors to retain any ownership interests in their Debtor-subsidiaries when the Senior Sub Note's guarantee claims against those subsidiaries are not being paid in full.

2. The Plan Improperly Subordinates U.S. Bank's Fees And Expenses.

The Plan is unconfirmable for a separate reason. In addition to inappropriately subordinating the Senior Sub Notes as described above, the Plan also misclassifies and mistreats U.S. Bank's claim for of fees and reimbursement of expenses under the Indenture (the "**U.S. Bank Trustee Claim**").

The U.S. Bank Trustee Claim for payment of fees and reimbursement of expenses arises under section 7.07 of the Indenture, which provides in relevant part:

> SECTION 7.07. **Compensation and Indemnity**. The Company shall pay to the Trustee from time to time reasonable compensation for its services. The Trustee's compensation shall not be limited by any law on compensation of a trustee of an express trust. The Company shall reimburse the Trustee upon request for all reasonable out-of-pocket expenses incurred or made by it, including costs of collection, in addition to the compensation for its services. Such expenses shall include the reasonable compensation and expenses, disbursements and advances of the Trustee's claim (whether asserted by the Company, any Guarantor, any Holder or any other Person). The obligation to pay such amounts shall survive the payment in full or defeasance of the Securities or the removal or resignation of the Trustee. . . .

See Indenture, at § 7.07.[121] Under the Indenture this obligation is expressly exempted from the subordination of the Senior Sub Notes: "***Nothing in this Article 10 [Subordination of the Securities] shall apply to claims of, or payments to, the trustee under or pursuant to Section 7.07 or any other Section of this Indenture***." *See* Indenture § 10.09 (emphasis added); *see also id.* § 12.09 (same with respect to guarantees).

The law is well established within this circuit that U.S. Bank's entitlement to payment of fees and reimbursement of expenses under the Indenture is an allowable general unsecured claim under 11 U.S.C. § 502(a) whether or not the fees and expenses in question were incurred pre or postpetition. In *Ogle v. Fidelity & Deposit Co. of Md.*, 586 F.3d 143 (2d Cir. 2009), the Second Circuit considered whether an unsecured claim for postpetition attorneys' fees asserted on the basis of a prepetition contract was permissible in bankruptcy. *Id.* at 145. In adopting the Ninth Circuit's reasoning in *SNTL Corp. v. Ctr. Ins. Co. (In re SNTL Corp.),* 571 F.3d 826, 842–43 (9th Cir. 2009), the Second Circuit held that the Bankruptcy Code did not "bar an unsecured claim for post-petition attorneys' fees authorized by a prepetition contract valid under state law." *Ogle*, 586 F.3d at 146.[122]

As noted above, the Bankruptcy Code requires, as a prerequisite to confirmation, that substantially similar claims be classified together and that such similar claims receive similar treatment. *See* 11 U.S.C. §§ 1129(a), 1122. In addition, for a plan to be confirmed over the

[121] In Article 11 of the Indenture, the other Debtors, as guarantors of the Company's obligations to U.S. Bank, also agree to pay its fees and expenses as indenture trustee to the same extent.

[122] Indenture trustees have additional rights in certain circumstances to the administrative expense status under 11 U.S.C. § 503(b)(5) upon a showing of a substantial contribution and may also have trustee lien rights in funds held or collected by it, but such rights are in addition to its basic right to assert an unsecured claim against the Debtors. *See Mfrs. Hanover Trust Co. v. Bartsh (In re Flight Trans. Corp. Sec. Litig.),* 874 F.2d 576, 583 (8th Cir. 1989) (recognizing that an indenture trustee may assert a claim under section 503(b)(5) to the extent it made a "substantial contribution" in the debtor's case, as well as having an allowable unsecured claim under section 502(a) for its contractual "right of payment" under a prepetition indenture).

rejection of any impaired class, that class's treatment must be fair and equitable and not unfairly discriminatory. *Id.* § 1129(b).

On July 11, 2014, U.S. Bank timely filed unsecured proofs of claim for the U.S. Bank Trustee Claim in each of the Debtors' cases in the liquidated amount of $1,080,753.49 estimated as of June 30, 2014, plus unliquidated amounts.[123] Notwithstanding the Indenture's clear language, the Plan classifies the expressly unsubordinated U.S. Bank Trustee Claim, together with other claims under the Indenture, as one that "arises under the Senior Subordinated Indenture," treating it as subordinated to the Second-Priority Notes, and provides that it shall receive nothing. *See* Plan §§ 1.167, 5.8(a). The Plan excludes the U.S. Bank Trustee Claim from the definition of "Indenture Trustee Claims," which includes the individual claims of all other indenture trustees, all of which would be paid in full. *See* Plan §§ 1.99, 3.2(b). The Plan likewise excludes the U.S. Bank Trustee Claim from the definition of "General Unsecured Claims," which would also be paid in full. *See* Plan §§ 1.93, 5.7(a).

Under all circumstances, as an *unsubordinated* unsecured claim, the U.S. Bank Trustee Claim should have been included in Class 7 (General Unsecured Claims) along with the claims of the Debtors' prepetition trade creditors and other unsecured creditor claims. The indefensible misclassification, and resulting nonpayment, of the U.S. Bank Trustee Claim violates sections 1122 and 1129 of the Bankruptcy Code and is an independent failure to meet the standards for confirmation. As a result of this misclassification, the Debtors have deprived U.S. Bank of its right to vote the U.S. Bank Trustee Claim, and the Plan is thus not confirmable on the

[123] U.S. Bank as indenture trustee also timely filed separate proofs of claim in each of the Debtors' cases for claims held by it on behalf of the Holders of the Senior Sub Notes. *See* KCC Claims Register for Debtors' Cases, at Claim Nos. 670, 671, 673, 676, 687, 688, 690, 691, 692, 695, 696, 697, 698, 699, 700, 701, 702, 704, 705, 707, 709, 710 and 713.

additional ground that it unfairly discriminates against U.S. Bank and is not fair and equitable within the meaning of Bankruptcy Code section 1129(b).

IV. CONCLUSION

For the reasons set forth above, U.S. Bank's Objection to Confirmation should be sustained, and confirmation of the Plan should be denied.

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August 5, 2014

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

/s/ Susheel Kirpalani

Susheel Kirpalani
Benjamin I. Finestone
David L. Elsberg
Robert Loigman
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
susheelkirpalani@quinnemaunel.com
benjaminfinestone@quinnemaunel.com
davidelsberg@quinnemanuel.com
robertloigman@quinnemanuel.com

K. John Shaffer
Matthew R. Scheck
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
johnshaffer@quinnemanuel.com
matthewscheck@quinnemanuel.com

- and -

MASLON EDELMAN BORMAN
& BRAND, LLP
Clark Whitmore
Ana Chilingarishvili
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 672-8200
Facsimile: (612) 672-8397
clark.whitmore@maslon.com
ana.chilingarishvili@maslon.com

Attorneys for U.S. Bank National Association, as Indenture Trustee

ANNEX 1

COMPARISON OF ABA MODEL AND THE INDENTURE'S RULES OF CONSTRUCTION

ANNEX 1: COMPARISON OF ABA MODEL AND MOMENTIVE RULES OF CONSTRUCTION

ABA Model Negotiated Covenants (August 2006) **Section 1.04. Rules of Construction**	**Momentive Senior Sub Notes Indenture (December 2006)** **Section 1.04. Rules of Construction** **(blacklined to ABA Model)**
Unless the context otherwise requires: (1) a term has the meaning assigned to it; (2) an accounting term not otherwise defined has the meaning assigned to it in accordance with GAAP; (3) "or" is not exclusive; (4) "including" means including without limitation; (5) words in the singular include the plural and words in the plural include the singular; (6) unsecured Indebtedness shall not be deemed to be subordinate or junior to secured Indebtedness merely by virtue of its nature as unsecured Indebtedness; **(7) secured Indebtedness shall not be deemed to be subordinate or junior to any other secured Indebtedness merely because it has a junior priority with respect to the same collateral;** (8) the principal amount of any noninterest bearing or other discount security at any date shall be the principal amount thereof that would be shown on a balance sheet of the issuer dated such date prepared in accordance with GAAP; (9) the principal amount of any Preferred Stock shall be (A) the maximum liquidation value of such Preferred Stock or (B) the maximum mandatory redemption or mandatory repurchase price with respect to such Preferred Stock, whichever is greater; and (10) all references to the date the Securities were originally issued shall refer to the Issue Date.	Unless the context otherwise requires: (~~1~~a) a term has the meaning assigned to it; (~~2~~b) an accounting term not otherwise defined has the meaning assigned to it in accordance with GAAP; (~~3~~c) "or" is not exclusive; (~~4~~d) "including" means including without limitation; (~~5~~e) words in the singular include the plural and words in the plural include the singular; (~~6~~f) unsecured Indebtedness shall not be deemed to be subordinate or junior to ~~s~~Secured Indebtedness merely by virtue of its nature as unsecured Indebtedness; ~~**(7) secured Indebtedness shall not be deemed to be subordinate or junior to any other secured Indebtedness merely because it has a junior priority with respect to the same collateral;**~~ (~~8~~g) the principal amount of any non-interest bearing or other discount security at any date shall be the principal amount thereof that would be shown on a balance sheet of the issuer dated such date prepared in accordance with GAAP; (~~9~~h) the principal amount of any Preferred Stock shall be (~~A~~i) the maximum liquidation value of such Preferred Stock or (~~B~~ii) the maximum mandatory redemption or mandatory repurchase price with respect to such Preferred Stock, whichever is greater; ~~and~~ ~~(10) all references to the date the Securities were originally issued shall refer to the Issue Date.~~ *[this was addressed through the definitions of "Issue Date" and "Original Securities"]* i) unless otherwise specified herein, all accounting terms used herein shall be interpreted, all accounting determinations hereunder shall be made, and all financial statements required to be delivered hereunder shall be prepared in accordance with GAAP;

	(j) "$" and "U.S. Dollars" each refer to United States dollars, or such other money of the United States of America that at the time of payment is legal tender for payment of public and private debts; and (k) whenever in this Indenture or the Securities there is mentioned, in any context, principal, interest or any other amount payable under or with respect to any Securities, such mention shall be deemed to include mention of the payment of Additional Interest, to the extent that, in such context, Additional Interest are, were or would be payable in respect thereof.

ANNEX 2

COMPARISON OF ABA MODEL NEGOTIATED COVENANTS, CONTEMPORANEOUS INDENTURES, AND MOMENTIVE SENIOR SUB NOTES INDENTURE

ANNEX 2: COMPARISON OF ABA MODEL NEGOTIATED COVENANTS, CONTEMPORANEOUS INDENTURES, AND MOMENTIVE SENIOR SUB NOTES INDENTURE (highlighting major distinctions)

	ABA Model Negotiated Covenants[1]	**Realogy Indenture[2] (Apollo LBO)**	**Bauble (Claire's) Indenture[3] (Apollo LBO)**	**Momentive Senior Sub Notes Indenture[4] Apollo LBO)**
Date	August 2006	April 2007	May 2007	December 2006
In Any Respect Subordination Exception	Senior Indebtedness shall not include . . . (4) any Indebtedness or other Obligation of such Person which is **subordinate or junior in any respect** to any other Indebtedness or other Obligation of such Person; -61 BUS. LAW. at 1492.	Senior Indebtedness shall not include . . . (4) any Indebtedness or obligation of the Issuer . . . that by its terms is **subordinate or junior in any respect** (***excluding the intercreditor arrangements benefiting the lenders under the Apple Ridge Documents*** . . .) to any other Indebtedness or obligation of the Issuer . . .. -§ 1.01 at 33-34.	Senior Indebtedness shall not include . . . (h) any Indebtedness or obligation of the Issuer . . . that by its terms is **subordinate or junior in any respect** to any other Indebtedness or obligation of the Issuer . . .. -§ 1.01 at 43.	Senior Indebtedness shall not include . . . (4) any Indebtedness or obligation of the Company . . . that by its terms is **subordinate or junior in any respect** to any other Indebtedness or obligation of the Company . . .. -§ 1.01 at 32-33.
Carve Out Of Lien Priority From In Any Respect Subordination Exception	***secured Indebtedness shall not be deemed to be subordinate or junior to any other secured Indebtedness merely because it has a junior priority with respect to the same collateral*;** - 61 BUS. LAW. at 1500.	***Senior Indebtedness shall not be deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral*** . . .. § 1.04(ix) at 41.	***Senior Indebtedness is not deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral*** . . .. -§ 4.16 at 111.	**No similar provision**

	ABA Model Negotiated Covenants	**Travelport Indenture[5] (as amended by the Sixth Supplemental Indenture[6])**	**KAR Holdings Indenture[7]**	**Momentive Senior Sub Notes Indenture Apollo LBO)**
Date	August 2006	August 2006 (Supp. 2013)	April 2007	December 2006
In Any Respect Subordination Exception	Senior Indebtedness shall not include . . . (4) any Indebtedness or other Obligation of such Person which is **subordinate or junior in any respect** to any other Indebtedness or other Obligation of such Person; -61 BUS. LAW. at 1492.	Senior Indebtedness shall not include . . . (d) any Indebtedness or other Obligation of such Person which is **subordinate or junior in any respect** to any other Indebtedness or other Obligation of such Person (***other than Obligations with respect to Indebtedness outstanding under the Second Lien Credit Agreement or Indebtedness permitted to be incurred under the Second Lien Credit Agreement*** . . .). - § 1.01 at 19 (per 2013 Supp.).	Senior Indebtedness shall not include . . . (d) any Indebtedness or other Obligation of such Person which is **subordinate or junior in any respect** to any other Indebtedness or other Obligation of such Person . . .. -§ 101 at 33.	Senior Indebtedness shall not include . . . (4) any Indebtedness or obligation of the Company . . . that by its terms is **subordinate or junior in any respect** to any other Indebtedness or obligation of the Company . . .. -§ 1.01 at 32-33.
Carve Out Of Lien Priority From In Any Respect Subordination Exception	***secured Indebtedness shall not be deemed to be subordinate or junior to any other secured Indebtedness merely because it has a junior priority with respect to the same collateral*;** - 61 BUS. LAW. at 1500.	***Senior Indebtedness is not deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral***. -§ 4.17 at 80-81 (per original Aug. 2006 indenture).	***This Indenture will not treat . . . Senior Indebtedness as subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral or by virtue of the fact that the holders of such Senior Indebtedness have entered into intercreditor or other arrangements giving one or more of such holders priority over the other holders in the collateral held by them***. -§ 416 at 82.	**No similar provision**

Sources:

[1] *Model Negotiated Covenants and Related Definitions*, 61 BUS. LAW. 1439 (2006). A copy is attached to the Kirpalani Declaration as Ex. A.

[2] Senior Subordinated Notes Indenture, dated as of April 10, 2007, among Realogy Corporation, the Note Guarantors Named on the Signature Pages Hereto, and Wells Fargo Bank, National Association, as Trustee, Ex. 4.9 to Realogy Corp. Form S-4 filed December 18, 2007 (http://www.sec.gov/Archives/edgar/data/888138/000119312507267402/dex49.htm).

[3] Senior Subordinated Notes Indenture, dated as of May 29, 2007, between Bauble Acquisition Sub, Inc. and The Bank of New York, as Trustee, Ex. 4.3 to Claire's Form S-4 filed December 17, 2007 (http://www.sec.gov/Archives/edgar/data/34115/000089109207005424/e29054_ex4-3.txt).

[4] Senior Subordinated Notes Indenture, dated as of December 4, 2006, between Momentive Performance Materials Inc., the Guarantors named herein, and Wells Fargo Bank, National Association, as Trustee, Ex. 4.3 to Momentive Performance Materials, Inc. Form S-4 filed September 14, 2007 (http://www.sec.gov/Archives/edgar/data/1405041/000119312507201528/dex43.htm).

[5] Senior Subordinate Notes Indenture, dated as of August 23, 2006, among TDS Investor Corporation, the Guarantors listed herein, and the Bank of Nova Scotia Trust Company of New York, as Trustee, Ex. 4.2 to Travelport Ltd. Form S-4 filed March 30, 2007 (http://www.sec.gov/Archives/edgar/data/1004120/000104746907002376/a2173366zex-4_2.htm).

[6] Sixth Supplemental Indenture, dated as of March 25, 2013, between Travelport LLC (f/k/a TDS Investor Corporation, Travelport Holdings, Inc., and Computershare Trust Company, N.A., as Successor Trustee, Ex. 4.6 to Travelport LLC Form 8-K filed April 17, 2013 (http://www.sec.gov/Archives/edgar/data/1386355/000119312513158989/d521394dex46.htm).

[7] Senior Subordinated Notes Indenture, dated as of April 20, 2007, between KAR Holdings, Inc., the Guarantors from time to time parties hereto, and Wells Fargo Bank, National Association, as Trustee, Ex 4.3 to KAR Holdings, Inc., S-4 filed January 25, 2008 (http://www.sec.gov/Archives/edgar/data/880026/000119312508011728/dex43.htm).

ANNEX 3

COMPARISON OF INDENTURES CITED BY XTRACT COVENANT INTELLIGENCE IN THE XTRACT NOTE

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COMPARISON OF INDENTURES CITED BY XTRACT COVENANT INTELLIGENCE IN THE XTRACT NOTE

	Bauble (Claire's) Indenture (Apollo LBO)[1]	**SunGard Data Systems, Inc. Indenture[2]**	**First Data Corp. Indenture[3]**	**Denbury Resources Inc. Indenture[4]**	**WideOpenWest, Finance, LLC Indenture[5]**
Date	May 2007	November 2012	May 2013	December 2005	July 2012
Carve Out Of Second-Priority Secured Debt From "In Any Respect" Exception To Definition Of Senior Indebtedness	For the purposes of this Indenture . . . ***Senior Indebtedness is not deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral*** . . .. -§ 4.16 at 111.	For the purposes of this Indenture . . . ***Senior Indebtedness is not deemed to be subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral.*** -§ 4.16 at 79.	***Senior Indebtedness will not be treated as subordinated or junior to any other Senior Indebtedness merely because it has a junior priority with respect to the same collateral.*** -§ 4.16 at 84.	**No similar provision, but the company does not have second-lien debt outstanding.** -10-Q filed May 12, 2014 at 9.[6]	**No similar provision, but the company does not have second-lien debt outstanding.** -10-Q filed May 9, 2014 at 9-10.[7]

Sources:

[1] Senior Subordinated Notes Indenture, dated as of May 29, 2007, between Bauble Acquisition Sub, Inc. and The Bank of New York, as Trustee, Ex. 4.3 to Claire's Form S-4 filed December 17, 2007 (http://www.sec.gov/Archives/edgar/data/34115/000089109207005424/e29054_ex4-3.txt).

[2] Senior Subordinated Notes Indenture, dated as of November 1, 2012, between SunGard Data Systems, Inc., the Guarantors Named on the Signature Pages Hereto, and the Bank of New York Mellon, as Trustee, Ex. 4.1 to SunGard Data Systems, Inc. Form 8-K filed November 7, 2012 (http://www.sec.gov/Archives/edgar/data/789388/000119312512456790/d433744dex41.htm).

[3] Senior Subordinated Notes Indenture, dated as of May 30, 2013, among First Data Corporation, the Guarantors Named on Schedule I Hereto, and Wells Fargo Bank, National Association, as Trustee, Ex. 4.1 to First Data Corp. Form 8-K filed May 30, 2013 (http://www.sec.gov/Archives/edgar/data/883980/000110465913045791/a13-14052_1ex4d1.htm).

[4] Senior Subordinated Notes Indenture, dated as of December 7, 2005, between Denbury Resources Inc. and JPMorgan Chase Bank, National Association, as Trustee, Ex. 4 to Denbury Resources Inc. Form 8-K filed December 7, 2005 (http://www.sec.gov/Archives/edgar/data/945764/000095012905011770/h31138exv4w1.htm).

[5] Senior Subordinated Note Indenture, dated as of July 17, 2011, by and among WideOpenWest Finance, LLC, WideOpenWest Capital Corp., and the guarantors specified therein, and Wilmington Trust, National Association, as trustee, Ex. 4.3 to WideOpenWest Finance, LLC, Form S-4 filed April 10, 2013 (http://www.sec.gov/Archives/edgar/data/1048932/000104746913004205/a2213735zex-4_3.htm).

[6] Denbury Resources Inc. Form 10-Q filed May 12, 2014 (http://www.sec.gov/Archives/edgar/data/945764/000094576414000033/dnr-20140331x10q.htm).

[7] WideOpenWest Finance, LLC, Form 10-Q filed May 9, 2014 (http://www.sec.gov/Archives/edgar/data/1571833/000104746914004793/a2219987z10-q.htm).