ROPES & GRAY LLP
Mark R. Somerstein
Mark I. Bane
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

Stephen Moeller-Sally (*pro hac vice*)
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

Counsel to Wilmington Trust, National Association, as Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
	)	
	)	Case No. 14-22503 (RDD)
MPM Silicones, LLC, et al.,[1]	)	(Jointly Administered)
	)	
Debtors.	)	
	)	
Momentive Performance Materials Inc., Momentive Performance Materials Worldwide Inc., Momentive Performance Materials USA Inc., Juniper Bond Holdings	)	

[1] The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) Juniper Bond Holdings I LLC (9631); (ii) Juniper Bond Holdings II LLC (9692); (iii) Juniper Bond Holdings III LLC (9765); (iv) Juniper Bond Holdings IV LLC (9836); (v) Momentive Performance Materials China SPV Inc. (8469); (vi) Momentive Performance Materials Holdings Inc. (8246); (vii) Momentive Performance Materials Inc. (8297); (viii) Momentive Performance Materials Quartz, Inc. (9929); (ix) Momentive Performance Materials South America Inc. (4895); (x) Momentive Performance Materials USA Inc. (8388); (xi) Momentive Performance Materials Worldwide Inc. (8357); and (xii) MPM Silicones, LLC (5481). The Debtors' executive headquarters are located at 260 Hudson River Road, Waterford, NY 12188.

I LLC, Juniper Bond Holdings II LLC, Juniper Bond Holdings III LLC, Juniper Bond Holdings VI LLC, Momentive Performance Materials Quartz, Inc., MPM Silicones, LLC, Momentive Performance Materials South America Inc., Momentive Performance Materials China SPV Inc.,	)	Adversary Proceeding No. 14-08228 (RDD)
Plaintiffs,	)	
v.	)	
Wilmington Trust, N.A., solely as Trustee for the Momentive Performance Materials Inc. 10% Senior Secured Notes due 2020,	)	
Defendant.	)	

REPLY OF WILMINGTON TRUST, NATIONAL ASSOCIATION TO (I) DEBTORS' OPENING BRIEF IN SUPPORT OF PLAN CONFIRMATION AND DECLARATORY JUDGMENT ACTIONS, (II) APOLLO GLOBAL MANAGEMENT, LLC AND CERTAIN OF ITS AFFILIATED FUNDS' OPENING BRIEF IN SUPPORT OF A DETERMINATION THAT NO OPTIONAL REDEMPTION PREMIUMS ARE DUE TO THE FIRST LIEN NOTEHOLDERS OR THE 1.5 LIEN NOTEHOLDERS, AND (III) AD HOC COMMITTEE OF SECOND LIEN NOTEHOLDERS' JOINDER IN DEBTORS' OPENING BRIEF IN SUPPORT OF PLAN CONFIRMATION AND DECLARATORY JUDGMENT ACTIONS

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page

Page

Page

STATUTES

Page

OTHER AUTHORITIES

Pursuant to this Court's *Order Establishing a Timeline for Confirmation and Adversary Proceeding Related Discovery* [ECF No. 551], defendant Wilmington Trust, National Association, solely as Trustee (the "Indenture Trustee") for the Momentive Performance Materials Inc. 10% Senior Secured Notes due 2020 (the "1.5 Lien Notes") under the Indenture, dated as of May 25, 2012, by and between Momentive Performance Materials Inc. and The Bank of New York Mellon Trust Company, National Association (as amended and supplemented from time to time, the "Indenture"), by and through its undersigned counsel, hereby submits this reply (the "Reply Brief") to (i) the Opening Brief in Support of Plan Confirmation and Declaratory Judgment Actions of the above-captioned debtors (the "Debtors"), (ii) the Opening Brief in Support of a Determination that No Optional Redemption Premiums are Due to the First Lien Noteholders or the 1.5 Lien Noteholders of Apollo Global Management, LLC and Certain of Its Affiliated Funds (collectively, "Apollo"), and (iii) the Joinder in Debtors' Opening Brief in Support of Plan Confirmation and Declaratory Judgment Actions of the Ad Hoc Committee of Second Lien Noteholders (the "Ad Hoc Committee"). In support of this Reply Brief, the Indenture Trustee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The redemption of the 1.5 Lien Notes in connection with the Debtors' Joint Chapter 11 Plan of Reorganization, filed on June 23, 2014 [ECF No. 515] (the "Plan")[2] requires the payment of a premium by these estates to the holders of the 1.5 Lien Note Claims (the "1.5 Lien Noteholders"). Pursuant to the terms of the Indenture and the

[2] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

1.5 Lien Notes, the Debtors are not permitted to redeem the 1.5 Lien Notes prior to October 15, 2015 (the "No-Call Date") without payment of a redemption premium (defined in the Indenture as the "Applicable Premium"). The parties intended the Applicable Premium as liquidated damages to compensate the holders of the 1.5 Lien Note Claims for the loss of their bargain to receive coupon payments at an annual rate of 10% through the stated maturity of the 1.5 Lien Notes.

2. There is no dispute that make-whole amounts such as the Applicable Premium are permissible under both the Bankruptcy Code and New York law (which governs the Indenture and the 1.5 Lien Notes). Moreover, in no manner do the Indenture or the 1.5 Lien Notes provide that the Debtors' filing of bankruptcy cases, and the attendant automatic acceleration of the 1.5 Lien Notes, relieve the Debtors of their obligation to pay the Applicable Premium. In fact, under the terms of the Indenture, the Applicable Premium is expressly due upon any redemption prior to the No-Call Date, whether or not there has been an acceleration of any type.

3. The Debtors and Apollo misrepresent the terms of the agreement between the 1.5 Lien Noteholders and the Debtors, as reflected in the Indenture. They suggest that the 1.5 Lien Noteholders somehow bargained away their right to the Applicable Premium in consideration of the Debtors conceding to include in the Indenture an automatic acceleration of obligations under the 1.5 Lien Notes upon a bankruptcy filing. This suggestion is untrue, not supported by either the language of the Indenture or fundamental principles of law, and simply illogical. First, the Indenture makes clear that the Applicable Premium is due upon a redemption even subsequent to an acceleration of

any type. Moreover, even if, as a general rule, a declared acceleration would eliminate the Applicable Premium obligation, which it would not under the Indenture, a bankruptcy acceleration is different.

4. In the event of a borrower's default, an indenture typically affords the lender the opportunity to decide whether to accelerate its debt. As such, in many indentures, unlike the Indenture, the lenders are occasionally afforded the choice of accelerating the obligations and foregoing a prepayment premium, or declining to accelerate and thereby retain the premium. This choice is both logical and appropriate because the premium is intended as liquidated damages in the event that the obligations are satisfied earlier than the lenders would prefer and had bargained for. An automatic bankruptcy acceleration is different. A bankruptcy acceleration does not provide the lender with such a choice since the lender takes no affirmative action to accelerate and thus in no manner indicates a preference to get paid immediately rather than retain its premium protection. In fact, a bankruptcy acceleration itself does not even afford the lender the choice of an immediate payment since a bankruptcy acceleration merely accelerates the lender's entitlement to assert a claim, but in no manner ensures an immediate payment. Indeed, no fact pattern better evidences the inability of a bankruptcy acceleration to ensure lenders of immediate payment of the monies they are owed than this case. Absent the lenders' affirmative choice to accelerate and get paid, it is illogical to impute to lenders a waiver of the premium. The very fact that the Debtors are seeking to impose upon the lenders new notes under the Plan illustrates that a bankruptcy acceleration is clearly not a proper trade off for waiver of a premium.

5. Not only does the Indenture include the Applicable Premium as an accelerated obligation prior to the No-Call Date, but as further protection of the 1.5 Lien Noteholders' right to the Applicable Premium, the Indenture expressly provides that the lenders may rescind the bankruptcy acceleration, allowing the lenders to further express their preference of retaining the Applicable Premium rather than any theoretical benefits of a bankruptcy acceleration.

6. The Debtors argue that a premium is due only when the redemption occurs prior to maturity. Such a formulation may be correct when an indenture provides that a premium is due upon a prepayment, signifying that the premium is not due once a maturity of any kind has occurred. The Indenture, however, is quite different. The Indenture provides for the premium to be paid if redemption occurs prior to the No-Call Date, rather than prior to a maturity. Further, the Debtors argue that the premium is due only when a redemption is voluntarily pursued by the Debtors. This argument is wrong. As is logical, and since the premium is compensation to the lenders, the Applicable Premium is due when the redemption is not voluntarily triggered by the lenders.

7. Moreover, even if the Debtors were correct in arguing that the Applicable Premium should be due only when they themselves affirmatively choose to prepay their obligations, in this situation the redemption of the 1.5 Lien Notes under the Plan is, in fact, wholly voluntary by the Debtors. First, the Bankruptcy Code provides the Debtors with the option to reinstate the notes, and thereby avoid any redemption. Moreover, the Debtors could have consented to the stay relief requested by the Indenture Trustee to rescind acceleration, and the Debtors could have thereby avoided the prepayment.

8. In any event, whether the acceleration is voluntary or involuntary, the Debtors must pay the Applicable Premium because, upon acceleration, the plain language of the Indenture expressly provides for the payment of *any* premium, in addition to principal and interest. The Indenture's incorporation of the phrase "premium, if any" as an obligation upon acceleration upends any argument that acceleration excuses payment of a redemption premium. The Debtors' suggested notion that the generic term "premium" necessarily excludes the defined term "Applicable Premium" is illogical and defies all principles of contractual interpretation. If the Debtors and Apollo intended to eliminate the obligation to pay the Applicable Premium, or any other premium, following acceleration, they could have – and should have – so stated explicitly in the Indenture. But they did not.

9. Further, the 1.5 Lien Noteholders enjoy an independent right to recover the Applicable Premium for breach of the no-call provision. The sole two exceptions to the prohibition against redemption of the 1.5 Lien Notes prior to October 15, 2015, the No-Call Date, both require the payment of a premium: the Applicable Premium is due upon an optional redemption, and a redemption price of 110% is payable upon the exercise of the equity claw.

10. The Debtors argue the Applicable Premium obligation has not been triggered because they are not complying with the optional redemption procedures set forth in the Indenture. It is absurd for the Debtors to suggest that a party can be relieved of its contractual obligations simply by breaching the procedural covenants associated with that obligation. For example, outside of bankruptcy the Debtors could not escape

the obligation to pay the Applicable Premium simply by paying principal and accrued interest to the Indenture Trustee without following the Indenture's protocols. There is no reason why the Debtors should be permitted to do so while in bankruptcy.

11. Were this Court to decide that the Applicable Premium is not due as a consequence of the automatic acceleration of the 1.5 Lien Notes, such acceleration may be rescinded, and the acceleration's consequences reversed. This right is unambiguously provided to the 1.5 Lien Noteholders under the terms of the Indenture. Therefore, regardless of any bankruptcy implications, the 1.5 Lien Noteholders enjoy the state law right to receive payment of the Applicable Premium following a rescission (to the extent that right was ever lost as a result of the acceleration, which it was not).

12. Though the entitlement to the Applicable Premium is not affected by a bankruptcy acceleration, should an actual rescission of the bankruptcy acceleration be required, the Indenture Trustee respectfully submits that the automatic stay does not bar the delivery of the formal notice of rescission from the 1.5 Lien Noteholders to the Indenture Trustee. First, the automatic stay is a procedural remedy intended to ensure equality of distribution and to provide a debtor with breathing space to accomplish a reorganization. The stay does not, and should never substantively, impair a creditor's claims against the debtor. Second, the *Solutia* case, on which the Debtors and Apollo heavily rely, addresses wholly different circumstances, analyzes the stay in *dicta* and arrives at its conclusion based on a superficial and incorrect reading of section 362 of the Bankruptcy Code. The leading Second Circuit case (*AMR*) cites the *dicta* from *Solutia* on this issue without analysis and affirms the bankruptcy court's decision not to lift the

automatic stay on the grounds that to do so would result in a perversion, since the *AMR* parties explicitly agreed under the applicable indenture that no make-whole premium would be payable upon acceleration. Because the Indenture here clearly allows for post-acceleration rescission and payment of the Applicable Premium, there is no legal or equitable justification to apply the automatic stay to the delivery of a rescission notice by the 1.5 Lien Noteholders. And, even if this Court were to decide that the automatic stay bars the delivery of the rescission notice in this case, "cause" exists to lift the automatic stay for the reasons set forth in the Indenture Trustee's *Protective Motion (I) for Relief from the Automatic Stay to Permit Rescission of Acceleration or, Alternatively, (II) for Adequate Protection* [ECF No. 463].

13. Moreover, even if this Court determines that the bankruptcy acceleration relieves the obligation to pay the Applicable Premium absent rescission and further finds that the stay applies to the rescission and declines to grant relief from stay to allow for rescission, the 1.5 Lien Noteholders will, at least, be entitled to a damages claim against these estates for the deprivation of the rights provided under the Indenture, and that claim must be satisfied in the identical manner as general unsecured claims under the Plan.

14. Finally, the Indenture Trustee is entitled to satisfaction by these estates of its fees and expenses in connection with, among other things, the litigation over the Applicable Premium. The Indenture is crystal clear that the Debtors must reimburse the Indenture Trustee for its reasonable out-of-pocket expenses incurred, including the fees and expenses of counsel and experts retained to assist in collection. If the Debtors believed that the issue of the redemption premium was so cut and dried in their favor as

to make the Indenture Trustee's effort to enforce it unreasonable, why did they deem it necessary to seek a declaratory judgment from this Court? And why, if the result were so obvious as to make the collection of the Applicable Premium an impossibility, did Apollo and the Ad Hoc Committee exercise their judgment to expend the resources related to their joining in the action initiated by the Debtors? Further, the Debtors, Apollo and the Ad Hoc Committee invited this dispute by offering the 1.5 Lien Noteholders alternate plan treatment, one that excluded the Applicable Premium and one that left the issue to litigation. In these circumstances, and based on the merits of the arguments advanced in this Reply Brief, it was and is eminently reasonable for the Indenture Trustee to incur costs and expenses to defend the entitlement of the 1.5 Lien Noteholders to the Applicable Premium.

BACKGROUND

A. *The Indenture and the 1.5 Lien Notes.*

15. On or about May 25, 2012, substantially prior to the Debtors' bankruptcy filings, the 1.5 Lien Notes were issued pursuant to the Indenture.

16. The Indenture prohibits the Debtors from redeeming the 1.5 Lien Notes prior to the No-Call Date, subject to only two exceptions. First, the Debtors may exercise a customary equity claw at a redemption price of 110% (the "Equity Claw"). Second, the Debtors may redeem the 1.5 Lien Notes, in whole or in part at their option, so long as they pay the Applicable Premium, which includes a fixed redemption price plus a make-whole:

> [P]rior to October 15, 2015, the Company may redeem the Notes at its option, in whole at any time or in part from

> time to time, . . . at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to, the applicable redemption date (subject to the right of the Holders of record on the relevant record date to receive interest due on the relevant interest payment date).

Indenture, Ex. A & B (Form of 1.5 Lien Notes) ¶ 5; Indenture § 3.01 (incorporating Form of Notes ¶ 5 by reference). Under the Indenture, the term "Applicable Premium" is defined as the greater of:

> (1) 1% of the then outstanding principal amount of such Note; and
>
> (2) the excess of:
>
> (a) the present value at such redemption date of (i) the redemption price of such Note, at October 15, 2015 (such redemption price being set forth in paragraph 5 of the applicable Note) plus (ii) all required interest payments due on such Note through October 15, 2015 (excluding accrued but unpaid interest), computed using a discount rate equal to the Treasury Rate as of such redemption date plus 50 basis points; over
>
> (b) the then outstanding principal amount of such Note.

Indenture § 1.01.[3] The Applicable Premium, excluding accrued and unpaid interest, was $52.9 million as of the Petition Date. *See* Declaration of Christopher J. Kearns In Opposition to Debtors' Claims in Adversary Complaint and in Support of the Defenses and Counterclaims of Wilmington Trust, National Association, as Indenture Trustee,

[3] After October 15, 2015, the Debtors are obligated to pay redemption prices (expressed as a percentage of principal amount) plus any accrued and unpaid interest and Additional Interest (as defined in the Indenture) to the redemption date of: 107.5% from until October 15, 2016; 105% until October 15, 2017; and 102.5% until October 15, 2018. From and after October 15, 2018, the 1.5 Lien Notes are redeemable at par with no premium payable.

dated July 14, 2014, ¶ 8(a), a true and correct copy of which is attached hereto as Exhibit A.

17. Pursuant to the terms of the Indenture, a voluntary bankruptcy filing by the Debtors, such as the commencement of these chapter 11 cases, automatically accelerates all of Momentive's obligations under the 1.5 Lien Notes, and such acceleration includes the acceleration of the obligation to pay any premium:

> If an Event of Default specified in Section 6.01(f) or (g) [bankruptcy defaults] occurs, the principal of, *premium, if any*, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.

Indenture § 6.02 (emphasis added); *accord* Form of 1.5 Lien Notes ¶ 15.[4] The continuing post-acceleration obligation to pay any premium due on the 1.5 Lien Notes is reaffirmed in Indenture Section 6.10 which describes the waterfall of distributions from collections by the Indenture Trustee or the Collateral Agent, whether from the exercise of remedies or otherwise:

> [I]f the Trustee or the Collateral Agent, as the case may be, collects any money or property pursuant to this Article 6 (including proceeds from the exercise of any remedies on the Collateral), they shall pay out the money or property in the following order:
>
> * * *
>
> SECOND: to the Holders for payment of amounts due and unpaid on the Notes for principal, *premium, if any*, interest

[4] The obligations under the 1.5 Lien Notes, including any premium, may likewise be accelerated by declaration: "If an Event of Default (other than [a bankruptcy default]) occurs and is continuing, the Trustee or the Holders of at least 25% in principal amount of outstanding Notes, by notice to the Company may declare the principal of, *premium, if any*, and accrued but unpaid interest on all the Notes to be due and payable." *Id.* (emphasis added).

> and Additional Interest, if any, ratably, without preference or priority of any kind, according to the amounts due and payable on the Notes for principal, premium, if any, and interest and Additional Interest, if any, respectively . . . .

Indenture § 6.10 (emphasis added).

18. Under the terms of the Indenture, the Debtors have expressly agreed that any acceleration may be rescinded by written notice to the Indenture Trustee from a majority of 1.5 Lien Noteholders. The Indenture is unambiguous in stating that this right of rescission applies not only to a declared acceleration, but also to an automatic acceleration arising from a bankruptcy filing:

> If an Event of Default specified in Section 6.01(f) or (g) [*i.e.*, bankruptcy defaults] occurs, the principal of, premium, if any, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders. The Holders of a majority in principal amount of outstanding Notes by notice to the Trustee may rescind *any such acceleration* with respect to the Notes and its consequences.

Id. § 6.02 (emphasis added).

19. In fact, as set forth in the Declaration of Geoffrey J. Lewis, Assistant Vice President of the Indenture Trustee, in Support of the Reply Brief (filed contemporaneously herewith), the Indenture Trustee has received a conditional rescission notice from holders of a majority in aggregate principal amount of the 1.5 Lien Notes. The effectiveness of the rescission notice is expressly conditioned upon either a declaration by this Court that the automatic stay does not prohibit the delivery of the notice or, in the alternative, an order of this Court lifting the automatic stay to permit delivery of the notice.

20. The Debtors have granted senior liens to secure the obligations due under the 1.5 Lien Notes, including the obligation to pay the Applicable Premium. *See* Collateral Agreement § 1.02 (defining "Obligations" to include "all principal of and interest (including any postpetition interest) and premium (if any) on all indebtedness under the Indenture"). The collateral securing the 1.5 Lien Notes consists of (i) a pledge of Debtors' equity interests in its subsidiaries, certain debt securities issued to the Debtors, payments of dividends, principal, interest and other distributions on the foregoing, and the proceeds thereof and (ii) certain other personal property. *See id.* §§ 2.01, 3.01. The collateral covered by these liens includes postpetition distributions since prepetition liens extend to proceeds of collateral pursuant to section 552 of the Bankruptcy Code. The Debtors have stipulated that the 1.5 Lien Noteholders are oversecured: "the 1.5 Lien Noteholders are also protected through the existence of an 'equity cushion' in their collateral." Declaration of William Q. Derrough, ¶ 21 [ECF No. 14].

B. *The Plan.*

21. On June 23, 2014, the Debtors filed the Plan, and the Court entered an order on that date authorizing the Debtors to solicit votes on the Plan [ECF No. 508].

22. Section 5.5 of the Plan provides that holders of Allowed Class 5 Claims (which include 1.5 Lien Noteholders) shall receive either: (i) if Class 5 accepts the Plan, cash in an aggregate amount equal to such holder's pro rata share of the principal plus accrued interest due on the Notes (expressly waiving any make-whole claim, prepayment penalty, or similar claim) or (ii) if Class 5 rejects the Plan, a replacement note with a

present value equal to the allowed amount of such holder's 1.5 Lien Note Claim (i.e., principal plus accrued interest), which may also include any applicable make-whole claim, prepayment penalty, or Applicable Premium, to the extent allowed by the Bankruptcy Court.

23. Section 5.7 of the Plan provides that holders of allowed general unsecured claims shall either be reinstated or shall receive payment in full in cash, plus postpetition interest. Plan § 5.7.

24. On July 18, 2014, this Court entered an order authorizing the Debtors to enter into a commitment letter for a $250 million bridge financing (the "Bridge Financing"). The Debtors propose to use the proceeds of the Bridge Financing to fund the payment of principal and accrued interest on the 1.5 Lien Notes if the 1.5 Lien Noteholders vote as a class to accept the Plan.

25. Thus, pursuant to the Plan, the 1.5 Lien Notes will be redeemed in exchange for either (i) the cash proceeds of the Bridge Financing absent the Applicable Premium or (ii) the Replacement 1.5 Lien Notes.

C. *The Make-Whole Litigation.*

26. On May 9, 2014, the Debtors commenced an adversary proceeding against the Indenture Trustee seeking, *inter alia*, declaratory judgment that the commencement of these chapter 11 cases did not trigger an obligation for the Debtors to pay the Applicable Premium under the 1.5 Lien Indenture and the 1.5 Lien Notes.[5] *See Momentive*

[5] The Debtors commenced a separate adversary proceeding on May 9, 2014 against the First Lien Indenture Trustee seeking substantially the same relief with respect to the First Lien Indenture and the First Lien Notes. *See Momentive Performance Materials Inc. v. The Bank of New York Mellon Trust Co., N.A.*

Performance Materials Inc. v. Wilmington Trust, N.A. (In re MPM Silicones, LLC), Adv. Pro. No. 14-08228 (RDD) (Bankr. S.D.N.Y. May 9, 2014) [Adv. Pro. ECF No. 1] (the "Adversary Complaint"). On June 25, 2014 and June 30, 2014, the Ad Hoc Committee and Apollo, respectively, intervened as plaintiffs in the adversary proceeding against the Indenture Trustee. *See* Adv. Pro. ECF Nos. 29 & 31.

27. On June 18, 2014, in response to the Adversary Complaint, the Indenture Trustee filed an answer, affirmative defenses and counterclaims [Adv. Pro. ECF No. 24], in which it opposed the relief sought in the Adversary Complaint and sought, *inter alia*, declaratory judgment that the Applicable Premium is due, that the automatic stay does not stay the delivery of a notice rescinding acceleration of the Debtors' obligations under the Indenture and the 1.5 Lien Notes, and certain other relief.

ARGUMENT

I. THE TREATMENT OF THE 1.5 LIEN NOTES UNDER THE PLAN IS A REDEMPTION THAT REQUIRES PAYMENT OF THE APPLICABLE PREMIUM

A. *"Redemption" in Its Ordinary Usage Means Payment in Exchange for a Security.*

28. New York State law governs the Indenture as well as the 1.5 Lien Notes which are expressly "incorporated by reference and made a part of" the Indenture. Indenture §§ 3.01, 13.09; Note ¶ 20. Under New York State law, analysis of an indenture "begin[s] with the text . . . , which [a court will] interpret applying basic contract law." *U.S. Bank Trust Nat'l Ass'n v. AMR Corp. (In re AMR Corp.)*, 730 F.3d 88, 102–03 (2d

---

(In re MPM Silicones, LLC), Adv. Pro. No. 14-08227 (RDD) (Bankr. S.D.N.Y. May 9, 2014) [Adv. Pro. ECF No. 1].

Cir. 2013) ("*AMR*"). Under New York law, courts will give terms not otherwise defined in the relevant agreement the ordinary and customary definition and usage of those terms. *See Fed. Ins. Co. v. Am. Home Assurance Co.*, 639 F.3d 557, 568 (2d Cir. 2011) (giving an undefined contract term its ordinary meaning); *see also Meda AB v. 3M Co.*, No. 11 Civ. 412 (AJN), 2013 WL 4734811 (S.D.N.Y. Sept. 2, 2013) (employing ordinary meaning of phrases not fully defined in a contract).

29. Neither the 1.5 Lien Notes nor the Indenture define the words "redeem" or "redemption." However, case law in this jurisdiction has held these terms "as defined in dictionaries, and as customarily used in the securities industry . . . ordinarily and customarily refers to the act of paying a noteholder in exchange for his or her note." *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 957 F. Supp. 2d 316, 335 n.15 (S.D.N.Y. 2013). More specifically, dictionaries define the word "redeem" as meaning "to buy back: Repurchase" or "to remove the obligation by payment." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). This definition in no way is conditioned upon the timing of the payment. Indeed, Barron's Dictionary of Finance and Investment Terms expressly defines "redemption" as the "repayment of a debt security or a preferred stock issue, at or before maturity." BARRON'S DICTIONARY OF FINANCE & INVESTMENT TERMS 587 (8th ed. 2010).

30. The treatment of the 1.5 Lien Notes under the Plan falls squarely within the plain meaning of the word "redemption." The Indenture provides for the payment of the Applicable Premium upon a redemption and, pursuant to Section 5.5(b) of the Plan, the Debtors will make a payment to the 1.5 Lien Noteholders in exchange for their 1.5

Lien Notes. Specifically, the Plan provides for the proposed alternative treatments to be "in full satisfaction, settlement, release and discharge of, and *in exchange for*," the 1.5 Lien Notes. Plan § 5.5(b) (emphasis added). Along with all other securities of the Debtors, the 1.5 Lien Notes shall be deemed cancelled and discharged on the Plan's Effective Date. Plan § 7.3. The Plan thus clearly provides for the redemption of the 1.5 Lien Notes.

B. *The Indenture Provides for Payment of the Applicable Premium if the 1.5 Lien Notes Are Redeemed Prior to a Date Certain, Not Upon Prepayment Prior to Maturity.*

31. The Debtors and Apollo improperly attempt *ex post facto* to insert into the Indenture new conditions for the payment of the Applicable Premium. The Indenture states clearly that the obligation to pay the Applicable Premium arises in connection with a redemption prior to a date certain (in this case, October 15, 2015). Indenture Ex. B, ¶ 5. In no manner does the Indenture tie the payment of the Applicable Premium to a maturity date. Nevertheless, rather than construing the Indenture on its own terms, and with no basis in fact or law, the Debtors and Apollo assert that the Applicable Premium is due only if the notes are prepaid prior to maturity.

32. This argument is blatantly incorrect under the plain language of the Indenture, which makes clear that a redemption premium is always due *at maturity* and not prior to maturity. Section 3.06 of the Indenture indicates that the effect on maturity of a notice of redemption is identical to the effect of a declared acceleration or a bankruptcy acceleration under Section 6.02: "Once notice of redemption is delivered in accordance with Section 3.05, Notes called for redemption *become due and payable on*

the redemption date and at the redemption price stated in the notice . . . ." Indenture § 3.06 (emphasis added). *Cf. id.* § 6.02 ("If an Event of Default specified in Section 6.01(f) or (g) with respect to the Company occurs, the principal of, premium, if any, and interest on all the Notes shall ipso facto *become and be immediately due and payable* . . . .") (emphasis added).

33. Further, bankruptcy courts in this District have acknowledged the critical distinction between indentures that provide for redemption prior to a fixed date and those addressing prepayment prior to maturity. In *In re Chemtura Corp.*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010), a decision that analyzed the reasonableness of a proposed settlement of a make-whole dispute, Judge Gerber distinguished the indenture in question, which provided for a redemption prior to a fixed date (defined therein as the "Maturity Date"), with an indenture that called for payment of a premium prior to maturity: "The Notes could have made the Make-Whole applicable to payment before 'Maturity,' but instead referred to payment before the 'Maturity Date.' And it's obvious that the indentures drafters considered it appropriate to provide separate definitions of these terms." *Id.* at 600-01. On this basis, Judge Gerber concluded that the bondholder proponents of the make-whole "would have substantially the better argument as to this issue." *Id.*

34. Ironically, the cases relied upon by the Debtors and Apollo to supposedly evidence that the Applicable Premium is due only prior to a maturity are actually consistent with the *Chemtura* analysis. In each cited case the court was considering an indenture that provided for the premium to be due upon any "***prepayment***," and not for payments made prior to a date certain. In fact, each of these cases traces back to the

Seventh Circuit's decision in *In re LHD Realty Corp.*, 726 F.2d 327 (1984) where the indenture similarly provided for a premium "[i]n the event of prepayment in full only." *Id.* at 329 n.1 (emphasis added). On this basis, the Seventh Circuit determined that acceleration "advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity." *Id.* at 330-31 (emphasis added). The discussion of "prepayment" in *LHD Realty* has no bearing on this case where the premium is instead triggered by a "redemption" prior to a date certain.[6] The interpretation of the word "prepayment" has no bearing on "redemptions."

35. The Debtors and Apollo erroneously rely on *In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007), in which Judge Beatty adjudicated a proof of claim filed by an indenture trustee that included a claim for expectation damages comprised of interest accruing *post-confirmation* between the expected effective date of the plan of reorganization and the stated maturity of the bonds. *Solutia*, 379 B.R. at 480-81. The case before this Court, however, presents an entirely different issue. Here, the Indenture Trustee is seeking to enforce the Debtors' express obligation under the Indenture to pay a premium for redeeming the 1.5 Lien Notes during an express no-call period.[7] In *Solutia*,

---

[6] Even if the reasoning of *LHD Realty* regarding acceleration was applicable to the Indenture, the Seventh Circuit concluded that "[e]ven after acceleration, a lender may be able to regain its right to a premium by revoking its acceleration and reinstating the mortgage prior to detrimental reliance by the borrower on the acceleration." *LHD Realty*, 726 F.2d at 331 n.4. A majority of holders of the 1.5 Lien Notes may rescind acceleration and its consequences by notice to the trustee, Indenture § 6.02, and have, in fact, done so.

[7] [redacted]

the court did not address an express no-call provision, or even an optional redemption premium or a prepayment premium. Rather, the *Solutia* indenture trustee argued that there was an "implied" no-call provision supporting its claim for expectation damages. *Id.* at 488-89. In denying damages on the "implied" no-call theory, the *Solutia* bankruptcy court cited *LHD Realty* for the statement that "[p]repayment can only occur prior to the maturity date." *Id.* at 488 (emphasis in original). However, this statement, and the reference to *LHD Realty*, were entirely unnecessary to the *Solutia* holding since no prepayment provision was involved.

36. The Second Circuit's *AMR* decision is inapplicable for the same reason as *LHD Realty* and *Solutia*: the operative terms of the indenture were dramatically different than the facts before this Court. In *AMR*, the indenture's waterfall provision expressly provided that there would be no premium due after default and acceleration, exactly the opposite of the Indenture in this case. Section 3.03 of the applicable *AMR* indentures "expressly provide[d], regarding continuing Events of Default in the context of accelerated debt, that '[n]o Make-Whole Amount shall be payable on the Equipment Notes as a consequence of or in connection with an Event of Default or acceleration of

---

[redacted]

A true and correct copy of (i) [redacted] is attached hereto as Exhibit B; (ii) [redacted] is attached hereto as Exhibit C; (iii) the [redacted] is attached hereto as Exhibit D; and (iv) the [redacted] is attached hereto as Exhibit E.

the Equipment Notes.'" *AMR*, 730 F.3d at 94. Further, the bankruptcy default provision stated that "the unpaid principal amount of the Equipment Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder (*but for the avoidance of doubt, without Make–Whole Amount*), shall immediately and without further act become due and payable . . ." *Id.* at 94-95. The court denied a premium based on this express carve-out. *Id.* at 103-05, 104 n.17. In support of its reading of the indenture, the *AMR* court cited *Solutia*'s statement that "[p]repayment can only occur prior to the maturity date." *Id*. at 103. As discussed above, this statement from *Solutia* (an "implied no-call" case) is based on *LHD Realty* (a prepayment case). In other words, both the language of the indenture and the authority relied on by the Second Circuit do not apply to this case.[8]

37. In summary, none of the cases cited by the Debtors and Apollo on "prepayment" are applicable to the premium triggered by "redemption" in the Indenture. Here, the Debtors intend to redeem the 1.5 Lien Notes prior to the No-Call Date, and, therefore, under the terms of this Indenture, are obligated to pay the Applicable Premium.

[8] *Calpine II* and *South Side* similarly address distinguishable circumstances and rely on the same inapplicable authority for the proposition that "prepayment" can only occur prior to acceleration. *HSBC Bank USA, N.A. v. Calpine Corp.*, No. 07 Civ. 3088 (GBD), 2010 WL 3835200, at *5 (S.D.N.Y. Sept. 15, 2010) ("*Calpine II*") (citing *LHD Realty* in discussion of no-call provision for the proposition that "repayment of the notes also did not occur prior to maturity, because accelerated debts are mature"); *In re S. Side House, LLC*, 451 B.R. 248, 268 (Bankr. E.D.N.Y. June 27, 2011) (discussing the prepetition acceleration by the lender of a debt and citing *Solutia* for the proposition that "repayment following acceleration of the due date of a loan is not a prepayment of the obligation before it is due, so a prepayment term does not apply").

C. *Nowhere Does the Indenture State that the 1.5 Lien Noteholders Lose Their Entitlement to the Applicable Premium in a Bankruptcy.*

38. Nothing in the Indenture divests the 1.5 Lien Noteholders of their entitlement to the Applicable Premium after the Debtors' bankruptcy filing. Indeed, the arguments of Apollo and the Debtors are contrary to one of the fundamental principles of bankruptcy law. "[T]he basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Travelers Cas. & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S. Ct. 1199, 1205 (2007) (internal citation omitted). "[U]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* (quoting *Butner v. United States*, 440 U.S. 48, 57 (1979)).

39. On this point, the Indenture is clearly distinguishable from the indentures analyzed in *AMR* because, as cited above, the language of the *AMR* indentures expressly precluded a make-whole premium in the event of a bankruptcy default. *U.S. Bank Trust Nat'l Ass'n v. Am. Airlines, Inc. (In re AMR Corp.)*, 485 B.R. 279, 289 (Bankr. S.D.N.Y. 2013), *aff'd sub nom. U.S. Bank Trust Nat'l Ass'n v. AMR Corp. (In re AMR Corp.)*, 730 F.3d 88 (2d Cir. 2013).

40. [redacted]

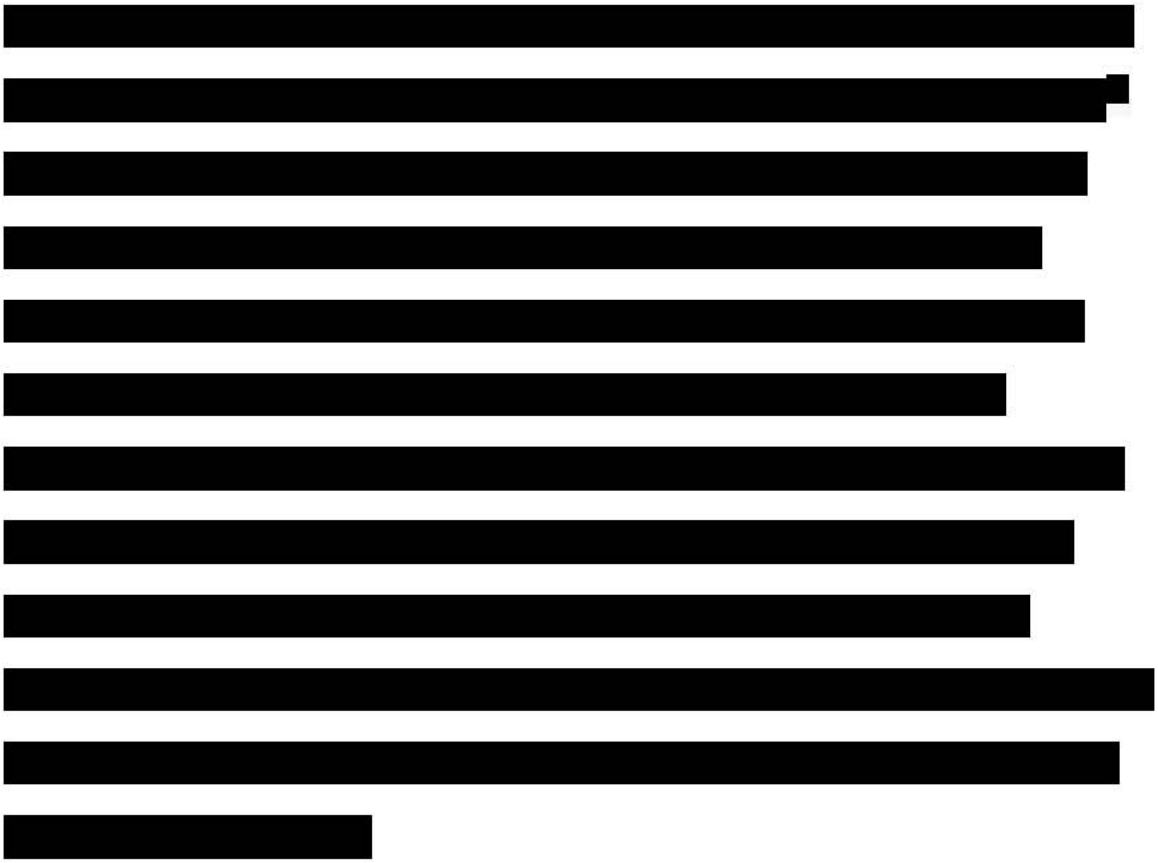
[9] A true and correct copy of the [redacted] is attached hereto as Exhibit F.

[redacted] *Cf.* *Mayo v. Royal Ins. Co. of Am.*, 242 A.D.2d 944, 945 (N.Y. App. 1997) ("[E]xtrinsic matters such as letters and other instruments may be construed as part of a contract where they are referred to therein or annexed thereto.") (internal quotation and citation omitted); *US Oncology, Inc. v Wilmington Trust FSB*, 34 Misc. 3d 1229(A), 1229A (N.Y. Sup. Ct. 2012), *aff'd* 102 A.D.3d 401 (1st Dep't 2013) (considering "the related offering memorandum, the registration statement, as well as the public SEC filings (Form 8-K and Form 10-Q) for the Securities/Note" to help construe make-whole provision in an indenture).

[redacted]

[10] A true and correct copy of the [redacted] is attached hereto as Exhibit G.

[11] A true and correct copy of the [redacted] is attached hereto as Exhibit H.



42. The Debtors' position simply makes no sense, particularly in the absence of any language in the Indenture in their support. If the Debtors had refinanced the 1.5 Lien Notes one day prior to the Petition Date there is no dispute that the Applicable Premium would be due. If the Debtors were to reinstate the 1.5 Lien Notes under the Plan and redeem the notes even a single day after emerging from bankruptcy, there can hardly be a dispute that the Applicable Premium would be due. Under applicable state law there is no basis to deny obligation of the Applicable Premium and no provision of the Bankruptcy Code that overrides those state rights.

[12] A true and correct copy of the [redacted] is attached hereto as Exhibit I.

D. *The Acceleration of the 1.5 Lien Notes Does Not Preclude a Redemption*

43. The Debtors and Apollo incorrectly argue that the automatic acceleration of the 1.5 Lien Notes upon the Debtors' bankruptcy filing and the obligation of the Debtors to pay the Applicable Premium when the 1.5 Lien Notes are redeemed under the Plan are mutually exclusive provisions. This position is not supported either by the plain language of the Indenture or by applicable case law. Moreover, even if the bankruptcy acceleration and the redemption are necessarily two independent occurrences, that is not inconsistent with the Debtors' obligation to honor the Applicable Premium because the premium is not due upon the bankruptcy acceleration, but rather because the Debtors have chosen to redeem the 1.5 Lien Notes under the Plan.

44. The Debtors' obligation to pay the Applicable Premium is not subject to any exception if they redeem the 1.5 Lien Notes after acceleration, whether automatic or by declaration. As described above, paragraph 5 of the 1.5 Lien Notes sets forth a no-call provision that prohibits any redemption of the 1.5 Lien Notes at the option of the Debtors prior to the No-Call Date, subject to two express exceptions. The first exception requires payment of the Applicable Premium, the second, not relevant here, is the Equity Claw. There is no additional exception in paragraph 5 or in the Indenture permitting the redemption of the 1.5 Lien Notes upon prior to October 15, 2015. The clear intent of the Indenture and the 1.5 Lien Notes is that the Applicable Premium is due and payable upon *any* redemption of the 1.5 Lien Notes, including a redemption in bankruptcy, unless the redemption is made pursuant to the Equity Claw.

45. The rights of the 1.5 Lien Noteholders to enforce payment of the Applicable Premium is not exclusive of any other right or remedy. To the contrary, Section 6.03 of the Indenture expressly provides that, upon an Event of Default, "the Trustee may pursue *any available remedy* at law or in equity to collect the payment of principal of or interest on the Notes or to enforce the performance of any provision of the Notes, the Indenture or the Security Documents." Indenture § 6.03 (emphasis added). Section 6.03 further provides that "[n]o remedy is exclusive of any other remedy." *Id.* The argument advanced by the Debtors and Apollo that the omission of the word redemption from this section of the Indenture reflects the parties' intent that no premium would be payable after an Event of Default is nonsensical. First, the obligation to pay the redemption premium is obviously "a provision of the Notes" that the Indenture Trustee is entitled to enforce. Second, this interpretation would render meaningless the clear rights of the 1.5 Lien Noteholders to call a default for failure to pay a premium. Indenture § 6.01(b).

46. The fact that the terms "redemption" and "acceleration" appear together in several provisions of the Indenture does not render them mutually exclusive. Certainly courts, applying New York law, will avoid construing words in a series as "mere redundancies." But the words "redemption" and "acceleration" are not mere redundancies. Further, New York courts have recognized that terms in an enumerated list may be overlapping. *See Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V.*, 836 N.Y.S.2d 160, 165 (N.Y. App. Div. 2007) (canon of construction that different words used in a series should not be construed as mere redundancies does not preclude words in

a list having overlapping meanings). Here it is clear that "redemption" refers to a payment of the 1.5 Lien Notes prior to the No-Call Date, which may be either prior to or following an acceleration.

47. Moreover, a bankruptcy acceleration, itself, does not actually create a true payment obligation. First, the automatic stay precludes the secured creditor from taking any action to enforce payment until a plan of reorganization is confirmed or stay relief granted. It is thus ludicrous to consider a bankruptcy acceleration to be a repayment event.

48. Second, under the provisions of the Bankruptcy Code, a debtor may elect to propose a plan of reorganization that seeks to repay a fully secured creditor in cash, or that distributes to the secured creditor alternative value equal to the value of the secured claim, or that reinstates the claim under its original terms. This third option of reinstatement is clearly not a redemption. Consequently, pending confirmation of a plan of reorganization, it is unknown whether a bankruptcy acceleration will translate into a redemption by a debtor.

49. In this case, the Debtors' decision to forgo its option to reinstate the 1.5 Lien Notes under the Plan deems confirmation of the Plan to be a redemption, quite separate and apart from the bankruptcy acceleration.

II. ANY "RULE OF EXPLICITNESS" RELATING TO THE PAYMENT OF REDEMPTION PREMIUMS DOES NOT APPLY TO AN AUTOMATIC "BANKRUPTCY" ACCELERATION

A. *The New York Common Law Rule Regarding the Waiver of Prepayment Premiums Hinges on a Voluntary Choice of a Lender to Exercise Remedies.*

50. The Debtors and Apollo assert that there is no obligation to honor the Applicable Premium because the Indenture did not expressly state that the Applicable Premium is due subsequent to a bankruptcy filing. This assertion mischaracterizes New York law and is simply incorrect. Quite distinct from our case, the New York law referenced by the Debtors addresses the affirmative choice of secured lenders to accelerate debt and enforce remedies against collateral prior to a borrower's bankruptcy filing.

51. New York common law provides that when a lender makes an affirmative choice to accelerate debt, the lender has waived its right to a prepayment premium since it has voluntarily accelerated the loan and pursued collection remedies. *See, e.g.*, *George J. Nutman, Inc. v. Aetna Bus. Credit, Inc.*, 453 N.Y.S.2d 586, 587 (N.Y. Sup. Ct. 1982) ("The election by the [lender] herein to accelerate the mortgage and to treat the mortgage debt as due was not a voluntary act by the [borrower] to bring the prepayment penalty into operation."). This common law rule applies, however, only because by voluntarily accelerating the debt and seeking to compel immediate payment through the enforcement of remedies, a lender is choosing by its own acts to sacrifice the corresponding premium for early payment.

52. This rule, of course, has no bearing on the circumstances before the Court. Not only is a bankruptcy acceleration not triggered by an affirmative act of the lenders, but the 1.5 Lien Noteholders are actually prevented from pursuing remedies against the collateral by the automatic stay and are bound to the Debtors' timeline for payment by virtue of the Debtors' period of exclusivity. This consequence of the bankruptcy acceleration hardly reflects a choice of lenders to pursue immediate payment.

53. In fact, the automatic bankruptcy acceleration in Section 6.02 of the Indenture, like the so-called automatic acceleration pursuant to section 502 of the Bankruptcy Code, is a provision for administrative convenience, not to provide a remedy to the lenders. Each of these accelerations is effected with no act of the lenders and neither is effectuated for the purpose of compelling immediate payment or exercising remedies, as noted above. Consequently, in this context it is illogical to suggest that the 1.5 Lien Noteholders have somehow elected acceleration over the payment of the Applicable Premium.

B. *The Case Law Cited by the Debtors and Apollo Is Irrelevant Because It Does Not Address an Involuntary Acceleration in Bankruptcy.*

54. As noted, the purported "rule of explicitness" advanced by the Debtors and Apollo is based on inapposite cases involving lenders that affirmatively took action to accelerate debt pre-bankruptcy, and thereby to compel payment.[13] This misplacement

[13] Apollo also cites to *Anchor Resolution Corp. v. State Street Bank & Tr. Co. of Conn. (In re Anchor Resolution Corp.)*, 221 B.R. 330 (Bankr. D. Del. 1998), a bankruptcy court decision from the District of Delaware, as establishing an "archetype" of sufficiently explicit indenture language necessary to satisfy its alleged rule of explicitness. *See* Apollo Opening Brief ¶ 26. However, the *Anchor Resolution* decision does not purport to establish a standard for explicitness, and the subsequent decisions cited by Apollo do not rely on it as establishing an archetype or baseline for explicitness necessary to recover a make-whole premium. *See, e.g.*, *In re Anchor Resolution Corp.*, 221 B.R. at 333-34; *see also In re AMR*

is reflected in the Debtors' heavy reliance on a single case, *South Side*, in which the borrower filed for bankruptcy after having defaulted on its mortgage and the lender having accelerated the debt and commenced foreclosure action. *In re S. Side House*, 451 B.R. at 255. Absent a contract provision to the contrary, the *South Side* lender was found to have waived its right to the premium under New York law by affirmatively accelerating the debt and seeking involuntary payment. *Id.* at 268. This decision, of course, has no bearing on a postpetition automatic bankruptcy acceleration where the lender takes no affirmative steps to force an immediate payment.

55. The initial case upon which this New York common law principle is based traces back to the 1905 New York Court of Appeals case, *Kilpatrick v. Germania Life Ins. Co.*, 75 N.E. 1124 (N.Y. 1905). There, the mortgage granted the lender a right to accelerate upon default, as well as entitlement to payment of a premium if repaid prior to a date certain. The New York Court of Appeals determined that the lender voluntarily waived its right to the premium by bringing suit to foreclose. "**[T]he right to exact the [premium] of one thousand dollars departed from the [lender], because it had voluntarily waived it by bringing suit to foreclose the mortgage, and expressly alleging its election in the complaint.**" *Id.* (emphasis added). *Kilpatrick*'s focus on the voluntary pursuit of remedies by the lender remains the law in New York. *See, e.g.*, *George J. Nutman, Inc.*, 453 N.Y.S.2d at 587 (citing *Kilpatrick*).

56. Unlike the lenders in *South Side* and *Kilpatrick*, the Indenture Trustee and the 1.5 Lien Noteholders have not waived the right to the Applicable Premium by

---

Corp., 485 B.R. at 303; *In re Calpine Corp.*, 365 B.R. 392, 398 (Bankr. S.D.N.Y. 2007). *Anchor Resolution* simply does not support the sweeping proposition for which it is cited.

pursuing foreclosure or other collection actions. Nor have the Debtors relied to their detriment on any collection action. Instead, it is the Debtors that seek to repay the debt without the Applicable Premium against the will of the 1.5 Lien Noteholders. The Debtors' argument turns the rationale of *Kilpatrick* upside down. New York law focuses on whether the lender voluntarily waived its right to the premium through pursuit of collection actions, which is not the case here.

57. This principle is similarly reflected in the recent New York State decision in *Northwestern Mutual Life Ins. Co. v. Uniondale Realty Associates*:

> Lenders have attempted to recover prepayment premiums after default and acceleration in order to preserve an income stream, **and absent any "voluntary" prepayment**. A prepayment premium will not be enforced under default circumstances in the absence of a clause which so states.

Nw. Mut. Life Ins. Co. v. Uniondale Realty Assocs., 816 N.Y.S. 2d 831, 835 (N.Y. Sup. Ct. 2006) (emphasis added).

58. Bankruptcy defaults, however, are not the "default circumstances" that the state trial court refers to. *Northwestern*, and every other applicable New York State case, deals with lenders that pursued foreclosure or other collection remedies at state law after default. State trial courts simply have no occasion to address automatic bankruptcy defaults.

59. In contrast, a bankruptcy default effects an acceleration without affirmative action of the lenders. In fact, the borrower is the party choosing to affect acceleration. The Debtors argue that bankruptcy is not a voluntary act of the borrower, and that may or may not be true. But, the Debtors are unquestionably electing to affect

acceleration in two substantive regards. First, the Debtors have adamantly refused to allow the Indenture Trustee and 1.5 Lien Noteholders to rescind the acceleration. Second, the Debtors have refused to reinstate the Notes under the Plan, as expressly allowed under the Bankruptcy Code. *See, e.g.*, *Imperial Coronado Partners, Ltd. v. Home Fed. Sav & Loan Ass'n (In re Imperial Coronado Partners, Ltd.)*, 96 B.R. 997, 1000 (B.A.P. 9th Cir. 1989) ("With respect to reinstatement, the question is not whether [the debtor] could, as a practical matter, afford to exercise its right, but whether it had the right to reinstate the loan. It did. . . . In our view, the decision to sell the property and pay off the loan was voluntary, and the prepayment premium is therefore enforceable."); *In re 433 S. Beverly Drive*, 117 B.R. 563, 568-69 (Bankr. C.D. Cal. 1990), *abrogated by Gen. Elec. Capital Corp. v. Future Media Prods. Inc.*, 536 F.3d 969 (9th Cir. 2008), *abrogated by Gen. Elec. Capital Corp. v. Future Media Prods., Inc.*, 547 F.3d 956 (9th Cir. 2008) ("The Debtor has not offered any showing of an inability to reinstate the loan under either California law or to decelerate the loan under bankruptcy law. Therefore, the court concludes that there is no per se invalidity of the provision for the Prepayment Premium in this case."); *see also* Scott K. Charles & Emil A. Kleinhaus, *Prepayment Clauses in Bankruptcy*, AM. BANKR. INST. L. REV. 537, 552 (2007). It is thus clear that the Debtors, rather than the lenders, are choosing acceleration.

60. The Seventh Circuit's decision in *LHD Realty* further illustrates that any waiver by a lender of a prepayment premium arises only when lenders affirmatively seek foreclosure and other remedies upon acceleration. In *LHD Realty*, the borrower filed for bankruptcy and the lender sought stay relief to pursue foreclosure remedies. The Seventh

Circuit concluded that the lender waived its right to a premium by seeking foreclosure through the stay relief motion. *In re LHD Realty*, 726 F.2d at 331. Though the *LHD Realty* lender's actions took place in the context of a bankruptcy case, the Seventh Circuit focused on the lender's affirmative waiver of the premium in favor of early repayment through foreclosure in the context of bankruptcy.

61. Nearly every other court has contrasted automatic bankruptcy acceleration with declared defaults, and concluded that automatic bankruptcy accelerations do not constitute a waiver of the right to a premium even where the agreement is not explicit with respect to post-acceleration. For example, a Bankruptcy Court in this district recently confirmed this principle, holding "the automatic acceleration of debt occasioned by a bankruptcy filing may not result in a forfeiture [of a prepayment premium, but] a motion for relief from stay may have that effect."). *In re Granite Broad. Corp.*, 369 B.R. 120, 144 (Bankr. S.D.N.Y. 2007) (citing *LHD Realty*); *see also Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1053 (2d Cir. 1982) (stating, in connection with a default arising from a purported assignment of bonds to a successor: "The acceleration provisions of the indentures are explicitly permissive and not exclusive of other remedies. We see no bar, therefore, to the Indenture Trustees seeking specific performance of the redemption provisions where the debtor causes the debentures to become due and payable by its voluntary actions."); *see also United Merchs. & Mfrs., Inc. v. Equitable Life Assurance Society (In re United Merchs. & Mfrs., Inc.),* 674 F.2d 134, 143-44 (1982); *In re Skyler Ridge*, 80 B.R. 500, 507 (Bankr. C.D. Cal. 1987).

III. THE DEBTORS' OBLIGATION TO PAY THE APPLICABLE PREMIUM WAS ACCELERATED ON THE PETITION DATE

62. The Debtors must pay the Applicable Premium whether an acceleration is voluntary or involuntary, because the plain language of the Indenture expressly provides for the acceleration of the obligation to pay *any* premium simultaneously with the other payment obligations under the Indenture. Section 6.02 of the Indenture provides that, upon the occurrence of a bankruptcy default, "the principal of, *premium, if any,* and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders." Indenture § 6.02 (emphasis added).

63. In their hollow effort to introduce a rule of explicitness into requiring express language in the Indenture to compel the premium obligation while the Debtors are in bankruptcy, the Debtors and Apollo argue that the use of the generic term "premium" cannot be understood to encompass the defined term "Applicable Premium." However, as the Debtors themselves admit, the Indenture provides for various premiums, and the Debtors fail to offer any principled reason to exclude the Applicable Premium from the accelerated obligations referenced in the Indenture, which includes premiums. *See* Indenture, § 6.02.

64. The Debtors incorrectly argue that the phrase "if any" applied to premiums only makes sense if the term "premium" refers strictly to a premium that has been triggered earlier but has not yet paid. This interpretation, however, is flawed. The actual application of the term "if any" addresses the time frame within which the redemption takes place.

65. Paragraph 5 of the 1.5 Lien Notes sets forth a schedule of redemption prices that are payable if the 1.5 Lien Notes are redeemed prior to a range of specific dates. Subsequent to October 15, 2018, the 1.5 Lien Notes may be redeemed at par, with no premium. If the Debtors had filed for bankruptcy in April 2019, instead of April 2014, no premium would have been payable and no obligation to pay a redemption premium would have been accelerated. Consequently, in the context of the redemption premiums under the Indenture, the phrase "if any" logically applies to the time periods when a redemption premium (including the Applicable Premium) is payable or not payable. Further, if, as the Debtors contend, the term "premium" in Indenture Section 6.02 can only refer to a premium that has been triggered and not yet paid, then presumably the rule of explicitness that the Debtors so dearly embrace would have required the Indenture to specify "defaulted premium" as the only accelerated obligation under the Indenture. It does not. Rather, the Indenture uses the generic term "premium" which naturally encompasses the obligation to pay the Applicable Premium if the 1.5 Lien Notes are redeemed prior to October 15, 2015.

66. At most, the use of the generic term "premium" in Section 6.02 of the Indenture is ambiguous. To the extent it is ambiguous, it is appropriate to construe the term against the Debtors, who drafted the Indenture. [redacted]

[redacted]

14 [redacted]

[redacted]

[redacted] New York contract law holds that, pursuant to the doctrine of *contra proferentem*, any ambiguities in a contract will be construed against the drafter. *See Morgan Stanley Grp. Inc. v. New Eng. Ins. Co.*, 225 F.3d 270, 279 (2d Cir. 2000). As one New York court explained:

> [W]here one party has only slight participation in the process by which the agreement is drafted, the court may decline to consider extrinsic evidence and further decline to search out the meaning of ambiguous language, instead reaching a coherent and reasonable interpretation of the ambiguity by construing the agreement against the drafter. As a corollary to the general rule, a contract drawn by one party must be construed, if its meaning is doubtful, most favorably to the other party.

Oakgrove Constr., Inc. v. Genesee Valley Nurseries, Inc., 809 N.Y.S.2d 482, 486 (N.Y. Sup. Ct. 2005) (quoting 22 N.Y. JUR. 2D, CONTRACTS § 200).

67. Courts applying New York law have expressly applied this doctrine when interpreting indentures. The Second Circuit's opinion in *Columbia Gas Sys., Inc. v. United States* is particularly instructive. The Second Circuit construed the indenture against the drafter because "[t]he preferable solution is to charge this ambiguity against [the issuer], as the one responsible for the wording of the clause and the indenture." *Id.* at 1249. *See, e.g.*, *Prescott, Ball & Turben v. LTV Corp.*, 531 F. Supp. 213, 217 (S.D.N.Y. 1981); *Sass v. New Yorker Towers, Ltd.*, 258 N.Y.S.2d 765 (N.Y. App. Div. 1965).

[redacted]

15 [redacted]

IV. FAILURE OF THE DEBTORS TO HONOR THE INDENTURE'S REDEMPTION PROTOCOL OBLIGATIONS GIVES RISE TO EITHER THE APPLICABLE PREMIUM OBLIGATION OR TO A DAMAGE CLAIM FOR DEBTORS' FAILURE TO ABIDE BY SUCH OBLIGATIONS

68. The Debtors' attempt to redeem the 1.5 Lien Notes without paying the Applicable Premium is a breach of the Indenture. Such breach gives rise to a claim in the amount of the Applicable Premium.

69. The Debtors argue that they have no obligation to pay the Applicable Premium because they are not complying with the optional redemption procedures set forth in the Indenture. It is absurd to suggest that a party can be relieved of its contractual obligations simply by breaching the procedural covenants associated with that obligation. If the Debtors had not filed for bankruptcy surely they would not escape their obligation to pay the Applicable Premium simply by paying principal and accrued interest to the Indenture Trustee in a manner inconsistent with the redemption protocols set forth in the Indenture. There is no reason why the Debtors should be permitted to do so while in bankruptcy.

70. Under the Indenture, the Applicable Premium is the stipulated damage payment for violation of the Debtors' no-call obligation. It is important to recognize that certain courts in this District and elsewhere have awarded damages for breaches of no-call provisions, even in cases where the parties did not stipulate make-whole damages for the no-call period. For example, in *In re Calpine Corp.*, 365 B.R. 392 (Bankr. S.D.N.Y. 2007) ("*Calpine I*"), Judge Lifland held that the automatic acceleration of the debt did not nullify the lenders' rights to damages for the debtors' breach of the no-call provisions that

prohibited repayment before April 1, 2007, a date prior to the time a schedule of make-whole premiums went into effect. *Id.* at 398.[16] On appeal — in the case commonly referred to as *Calpine II* — District Judge Daniels disagreed, reasoning that "Debtor's bankruptcy filing rendered the no-call provision in the notes unenforceable" and thus no liability could be incurred pursuant to that provision. *HSBC Bank USA, N.A. v. Calpine Corp.*, 07 Civ. 3088, 2010 WL 3835200, at *4 (S.D.N.Y. 2010).[17] However, Judge Daniels acknowledged that where — as here — the redemption occurs during the period for which the parties had stipulated damages, the debtor would indeed be obligated to pay a make-whole premium. *Id.* at *5.

71. In *Premier Entertainment Biloxi*, the United States Bankruptcy Court for the Southern District of Mississippi addressed circumstances nearly identical to the *Calpine* cases. Like Judge Lifland in *Calpine I*, the court concluded that no-call provisions, while not specifically enforceable in bankruptcy, give rise to damages if the debtors repaid the bonds during the no-call period. *Premier Entm't Biloxi LLC v. U.S. Bank. Nat'l Ass'n (In re Premier Entm't Biloxi LLC)*, 445 B.R. 582, 635 (Bankr. S.D. Miss. 2010). Accordingly, just as in *Calpine*, the bondholders in *Premier Entertainment Biloxi* were entitled to damages for the debtors' cash out of the bonds during the no-call

[16] Judge Lifland concluded that the lenders in *Calpine I* were not entitled to include their damages for the debtors' breach of the no-call provision as part of their ***secured*** claim —he instead allowed the lenders an ***unsecured*** claim — because there was no operative formula "in the underlying agreement" for calculating the damages as Judge Lifland believed was necessary under Section 506(b) of the Bankruptcy Code. *In re Calpine Corp.*, 365 B.R. at 398-99. Whether or not that conclusion is correct is irrelevant in this case. The Indenture here provides a formula for calculating the redemption premium for any redemption before October 15, 2015 and thus that redemption premium should be included in the Holders' secured claim.

[17] During a further appeal to the Second Circuit, the parties settled the issue. *See Mfrs & Traders Trust Co. v. Calpine Corp. (In re Calpine Corp.)*, Case No. 10-4302-bk (2d Cir.).

period. *Id.* at 636.[18] In *Chemtura*, Judge Gerber cited *Premier Entertainment Biloxi*, favorably in contrast to *Calpine II*, which he criticized as "overly broad." *In re Chemtura*, 439 B.R. at 604.

V. FRUSTRATION OR DENIAL OF THE 1.5 LIEN NOTEHOLDERS' RIGHT TO RESCIND ACCELERATION CREATES AN INDEPENDENT DAMAGE CLAIM IN THE AMOUNT OF THE APPLICABLE PREMIUM

72. Even if this Court concludes that the Debtors' bankruptcy filing triggered an acceleration that precludes an obligation to honor the Applicable Premium, the Indenture also expressly provides the 1.5 Lien Noteholders with an unambiguous right to rescind the acceleration triggered by the Debtors' bankruptcy. *See* Indenture § 6.02. Further, as described above, a majority of 1.5 Lien Noteholders has already elected to rescind the acceleration, subject to a clarification of the application of the automatic stay.

73. To be clear, as set forth above, the Applicable Premium is payable according to the terms of the Indenture and applicable law independent of acceleration or rescission of acceleration. However, the fact that the redemption premium would unquestionably be payable if this rescission right were exercised demonstrates that, even if the right cannot be exercised through the imposition of the automatic stay, this right to rescind acceleration gives rise to a "claim" for the redemption premium within the meaning of section 101(5) of the Bankruptcy Code.

---

[18] As in *Calpine I*, because there was no liquidated damages provision "provided for under the agreement" in connection with the no-call provision, as (in the court's view) Section 506 of the Bankruptcy Code required, the court awarded the bondholders an unsecured claim. *Id.* at 635-36. As noted above, the Indenture here does provide such a formula with respect to any cash out that occurs before October 15, 2015, and thus the Momentive 1.5 Lien Holders would be entitled to a secured claim for the make whole amount.

74. The frustration or denial of any of the holders' rights under the Indenture gives rise to a claim by the holders against these estates. Damages, if any, incurred as a result of denial of this right of rescission is part of the holders' prepetition claim. *See* 11 U.S.C. § 101(5) (expansively defining "claim" to include any "right to payment, whether or not such right is . . . fixed, contingent, matured, unmatured, disputed, [or] undisputed."). As the Supreme Court has recognized, the Bankruptcy Code's definition of "claim" is the "broadest possible." *F.C.C. v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 303 (2003) (citations omitted); *see also Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) ("[I]t is apparent that Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision to contracts when it desired to do so.") (citing 11 U.S.C. § 365).

75. The Indenture Trustee asserts that the Applicable Premium is due absent rescission, or, if necessary, rescission may be effected despite the automatic stay, as discussed below. If, however, the Court determines otherwise, and the Court further denies the request for stay relief, the resulting damages are allowed claims against these estates. The Debors, of course, have deliberately refused to grant the request of the 1.5 Lien Noteholders for consent to stay relief to file for rescission. Indeed, creditors are entitled to "claims" even when their contractual rights are not specifically enforceable in bankruptcy. *See, e.g.*, *Chemtura*, 439 B.R. at 603-04 (discussing no-call provision); *see also* 11 U.S.C. § 101(5)(B) (defining claim to include "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such

right to an equitable remedy is reduced to judgment, fixed, contingent, matured, [or] unmatured . . .").

76. The fact that the notice of rescission of acceleration would be sent after the bankruptcy filing does not deny a damage claim in the amount of the Applicable Premium arising from any denial of this right. Indeed, "contingent" claims in bankruptcy by their very nature are dependent on postpetition events. *See, e.g., United States v. Gerth*, 991 F.2d 1428, 1433 (8th Cir. 1993) ("[D]ependency on a postpetition event does not prevent a debt from arising prepetition."); *see also MBNA Am. Bank v. Trans World Airlines, Inc.* (*In re Trans World Airlines, Inc.*), 275 B.R. 712, 723-24 (Bankr. D. Del. 2002) ("Once the contingency occurs, even if it occurs postpetition, the contingent claim simply becomes a liquidated one . . . .") (citing *In re Chateaugay Corp.*, 102 B.R. 335, 352 (Bankr. S.D.N.Y. 1989).

77. Bankruptcy cases are replete with prepetition claims that are contingent on postpetition events. For example, a creditor's prepetition claim can include amounts for postpetition attorneys' fees. *See, e.g., Ogle v. Fid. & Deposit Co. of Md.*, 586 F.3d 143, 146 (2d Cir. 2009). Also, a non-debtor counterparty may claim damages for contract extensions or renewals that such party would have been entitled to exercise postpetition. *See In re W. Chestnut Realty of Haverford, Inc.*, 177 B.R. 501, 506 (Bankr. E.D. Pa. 1995) ("The measure of the damages of a party to a rejected executory contract is a question of state law."); *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, No. 95-1376, 1998 WL 721081, at *14 (E.D. Pa. Oct. 14, 1998) (nonbreaching party awarded damages for the renewal period under state law because "there was evidence sufficient

for a jury to conclude by a preponderance of the evidence that [the nonbreaching party] would have exercised its option" to renew the contract); *Coinmach Corp. v. Marion Cnty. Hous. Auth.*, No. 05-CV-852-WDS, 2006 WL 742030, at *1 (S.D. Ill. Mar. 17, 2006) (nonbreaching party's claim for damages properly included damages under state law for the renewal period where the nonbreaching party's anticipated renewal of the lease was not "speculative and conclusory"). The contractual right to rescind acceleration by written notice is analytically identical.

78. While the filing of a bankruptcy petition gives rise to the automatic stay, the stay does not divest a non-debtor contract counterparty of the benefit of its bargain. As mentioned above, state law governs the substance of a creditor's claims unless some federal rule provides otherwise. *Travelers*, 549 U.S. 443, 450-51 (2007); *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 20 (2000) (citations omitted). There is no provision of the Bankruptcy Code that limits a lender's state law rights to rescind acceleration or restrains the assertion of claims based on such rights. Congress enacted an entire section of the Bankruptcy Code – section 502(b) – that imposes these federal limits on specific types of claims, for a very limited number of situations. For example, Congress limits lease rejection damages under section 502(b)(6). *See* 11 U.S.C. § 502(b)(6). "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Accordingly, the redemption premium is payable as a claim in bankruptcy if the 1.5 Lien Noteholders are denied the right to rescind despite the right to rescind acceleration being enforceable

under state law. There is no basis to suggest – and no party has – that the right to rescind acceleration is unenforceable at state law.

VI. THE AUTOMATIC STAY DOES NOT PROHIBIT THE DELIVERY OF THE RESCISSION NOTICE TO THE INDENTURE TRUSTEE

79. There is no reason that the automatic stay of Bankruptcy Code section 362 should bar the contractually entitled deacceleration of a debtor's obligations. Such deacceleration is not an action that violates any of the restrictions set forth in the statute.

80. Certain courts in this Circuit have (incorrectly) reasoned that the deacceleration of a debtor's obligations by a creditor is an attempt to "assess" a claim against the estate in violation of section 362(a)(6). That Bankruptcy Code section stays "any act to collect, *assess*, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6) (emphasis added); *see Solutia*, 379 B.R. at 485 & n.8; *AMR*, 485 B.R. at 294 (relying on *Solutia*). The *Solutia* and *AMR* courts have also (again, incorrectly) construed section 362(a)(3) as prohibiting acts to obtain, or exercise control over, property of the estate, and 362(a)(4) and (5) as staying acts to "create, perfect or enforce" a lien, as a general bar against deacceleration by creditors.

81. These courts are simply incorrect in their interpretation of the Bankruptcy Code. The rescission of acceleration is not an "assessment" within the meaning of Bankruptcy Code section 362(A)(6). The plain language of section 362(a)(6) makes clear that "assess" refers to collection activity. This is obvious when the word "assess" is read in its context, rather than in a vacuum. That context is a list of stayed actions – "collect, assess or recover" a claim. First, fundamental canons of statutory interpretation

dictate that a word that could have a broad or "general" meaning, when found in a list of specific words, is read narrowly with its meaning illuminated by the surrounding words. *See, e.g.*, *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (applying *ejusdem generis* to a statutory list of terms in the Bankruptcy Code). Courts frequently invoke this canon when interpreting the Bankruptcy Code. *See, e.g.*, *id*.; *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012). Second, the entirety of section 362(a) concerns itself with collection enforcement actions, not the determination of claims (contingent or otherwise), and that word's positioning within the statute informs the meaning. *See, e.g.*, *Bullock*, 133 S. Ct. at 1760 (also invoking *noscitur a sociis*); *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 258 (3d Cir. 2000) (same).

82. Further, the word "assess" must be read as it is used throughout the Bankruptcy Code. Repeatedly, the word assess is used to refer to the collection of taxes. It is, therefore, incorrect to apply the word to the deacceleration of obligations by a creditor or the assertion of any other claim.

83. The use of the word assess as referencing tax collections is found in section 362, itself. *See* 11 U.S.C. § 362(b)(9)(D) (referring to "the making of an assessment for any tax and issuance of a notice and demand for payment of any such assessment") and 11 U.S.C. § 362(b)(18) (referring to "the creation or perfection of a lien for an ad valorem property tax, or a special tax or special assessment on real property") (emphasis added).

84. Consistent with the other activities listed in section 362(a) and thereby subject to the automatic stay, in the context of taxes the act of assessment is, in fact, an act of collection. The assessment of a tax is the formal act of making an entry on the books and records of the U.S. Government that a tax is owed. *LA Dept. of Revenue & Tax. v. Lewis (In re Lewis)*, 199 F.3d 249, 252 & n.13 (5th Cir. 2000); *Maali v. United States (In re Maali)*, 432 B.R. 348, 352 (B.A.P. 1st Cir. 2010); *O'Connell v. Minn. Dep't of Revenue (In re O'Connell)*, 246 B.R. 332, 334 (B.A.P. 8th Cir. 2000). But it is also far more than a bookkeeping entry. The assessment is not the mere calculation and assertion of a claim owed and notice to the taxpayer of a dispute. Those acts are encompassed within the concepts of a tax "audit" and/or "notice of deficiency," procedural steps that are expressly not barred by the automatic stay. 11 U.S.C. § 362(b)(9). Rather, the assessment begins both the process of collection and the existence of a tax lien. The IRS sends a separate "notice of demand for payment" that gives rise to the tax lien, which "relates back" to the date of assessment. The act of assessment has legal significance, but it is not a typical act to collect or recover, or the granting of a lien. Thus, Congress inserted the tax-specific term "assess" into section 362(a)(6).

85. The rescission of acceleration of the obligations under the Indenture and the 1.5 Lien Notes is also not an act to exercise control over property of the estate within the meaning of section 362(a)(3). Section 362(a)(3) allegedly precludes rescission because rescission "is a direct attempt to get more property from the debtor and the estate, either through simple increase in the amount of a pro-rata plan distribution or though recovery of a greater amount of the collateral which secured the claim." *Solutia*,

379 B.R. at 485; *AMR*, 730 F.3d at 103 (citing *Solutia*). But rescission of acceleration does not "extract" any property from the estate. There is no debate that contingent claims are allowable, and that contingencies may actually occur during the pendency of a bankruptcy case resulting in the creation of valid and allowable damage claims that may accrue against a bankruptcy estate due to postpetition events.

86. In fact, every creditor in a bankruptcy case who prosecutes a claim, disputes a reorganization plan, or otherwise participates in the proceedings, is trying to increase its pro rata share of the limited pie at its tier of recoveries, and/or to increase the claim for which it has collateral or priority. These actions are not stay violations since they are not attempts to collect or seize property of the estate, or to otherwise "extract" assets from the bankruptcy estate. Asserting a creditor's contractual rights (which form the basis of any allowable claim) within an organized and centralized chapter 11 case is the core of what bankruptcy is, not what it prevents.

87. It is improper to construe the findings of *AMR* and *Solutia* as articulating rules of general application to all indentures since a debtor's contractual rights are necessarily framed by the language of the specific contract and the intent of the parties expressed thereby. In this respect, the delivery of a rescission notice under the Indenture and the 1.5 Lien Notes differs starkly from the agreements and actions taken by the parties in *AMR* and *Solutia*. As discussed above, these cases addressed vastly different circumstances and agreements.

88. In *Solutia*, the indenture trustee, despite there being no contractual right to rescind a bankruptcy acceleration, in part based its claim for expectation damages on a

rescission notice and waiver of defaults delivered by the bondholders to the company and the indenture trustee four years after the commencement of the bankruptcy cases. 379 B.R. at 479. Against this backdrop, the *Solutia* court found the bondholders' attempt to deliver a deceleration notice to be ineffective and void, inter alia, because such deacceleration was prohibited by the automatic stay. *See id*. at 484-86. This finding regarding the automatic stay, however, was wholly unnecessary and redundant, because the holders were not entitled to rescind a bankruptcy acceleration under the plain language of the applicable indenture. *See id*. at 483. Further, the "expectation damages" claimed by the *Solutia* indenture trustee were clearly not provided for in the indenture. The conclusions of the *Solutia* court were thus clearly driven by the efforts of the indenture trustee and the noteholders to enhance their claim by rewriting the indenture: "The time and place to have obtained the additional rights the 2009 Noteholders seek was at the bargaining table." *Id*. at 489. In this case, by contrast, all the rights being pursued by the Indenture Trustee are explicitly and unequivocally set forth in the Indenture.

89. In *AMR*, the Second Circuit addressed a similar effort to use deacceleration to rewrite the terms of a prepetition agreement. As discussed above, *AMR* involved an indenture that expressly precluded any obligation to pay a make-whole amount after a bankruptcy acceleration. *See AMR*, 730 F.3d at 94, 105. When the Debtors filed a motion to obtain postpetition financing and to use the proceeds to repay certain secured obligations, the indenture trustee objected and filed a motion for relief from stay to rescind the automatic bankruptcy acceleration to the extent it was enforceable. The bankruptcy court denied the motion for relief from stay, finding that a

"deceleration of these notes would have the effect of assessing the Debtors with a Make-Whole not currently owed under the Indentures, and thwart the Debtors' reliance on the Indentures as written." *AMR*, 485 B.R. at 294. The Second Circuit agreed: "American had the contractual right, pursuant to the Indenture, to repay its accelerated debt without the Make-Whole Amount" and that "any effort to rescind acceleration now—after the automatic stay has taken effect—is an effort to affect American's contract rights." *AMR*, 730 F.3d at 102.

90. The case before this Court, however, is clearly distinguishable from *Solutia* and *AMR*. Here, the Indenture Trustee and the 1.5 Lien Noteholders are asserting a claim for amounts that are expressly provided for under the Indenture. The redemption premium is not an "implied" obligation, but is rather expressly set forth in Section 5 of the 1.5 Lien Notes. Unlike the other cases, the Indenture does not preclude the payment of a premium upon acceleration. On the contrary, Section 6.02 of the Indenture expressly provides for acceleration of that obligation upon a bankruptcy default. Finally, the 1.5 Lien Noteholders have an unambiguous contractual right to rescind any acceleration, including an automatic bankruptcy acceleration. In contrast to *Solutia* and *AMR*, the rescission of acceleration under this Indenture is fully consistent with the Indenture and the 1.5 Lien Notes and, therefore, cannot be construed as an attempt to affect the Debtors' contract rights or otherwise to exercise control over the Debtors' property. Consequently, the rescission of acceleration also does not interfere with the Debtors' chapter 11 cases.

91. Sections 362(a)(4) and (5) also cannot prohibit rescission of acceleration of the claim of the Indenture Trustee. These provisions bar only the imposition of liens.

Solutia implies that the stay prevents rescission of acceleration to assert a redemption premium, because it somehow "triggers" a lien. Of course, the lien securing the claim for redemption premium is valid and was fully perfected long before the rescission, so this point is simply incorrect. And such a conclusion would lead to a bizarre consequence: unsecured notes with redemption premium provisions would have broader rescission rights than secured creditors with redemption premiums and constitutionally protected property rights in their collateral. That cannot be.

92. Finally, the automatic stay does not preclude deacceleration because the Indenture and 1.5 Lien Notes are securities contracts that are not subject to the automatic stay pursuant to section 555 of the Bankruptcy Code. Section 555 of the Bankruptcy Code provides that the automatic stay does not prevent a party from liquidating, accelerating, or terminating a securities contract as defined in section 741 of the Bankruptcy Code. *See* 11 U.S.C. §§ 555. Section 741 of the Bankruptcy Code defines a securities contract as, among other things, "a contract for the purchase, sale, or loan of a security . . . including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant." 11 U.S.C. § 741.

93. The 1.5 Lien Notes were issued under the Indenture and sold pursuant to a purchase agreement with the underwriters. *See* Offering Circular at 131. The Indenture and 1.5 Lien Notes fit within the definition of securities contracts under section 741, and therefore are not subject to the automatic stay. *See 11 U.S.C. §§ 555, 741; Enron Creditors Recovery Corp. v. Alfa S.A.B. de C.V.*, 651 F.3d 329, 339 (2d Cir. 2010) ("The

payments at issue were made to redeem commercial paper, *which the Bankruptcy Code defines as a security* . . . . Because we reach this conclusion by looking to the statute's plain language, we decline to address Enron's arguments regarding legislative history, which, in any event, would not lead to a different result.") (emphasis added); *see also Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94, 100 (2d Cir. 2013) (holding that a note purchase agreement was a securities contract).

VII. CAUSE EXISTS TO LIFT THE AUTOMATIC STAY, TO THE EXTENT IT APPLIES, TO THE RESCISSION OF ACCELERATION UNDER THE INDENTURE

94. Even if this Court were to decide that the automatic stay prevents the delivery of the rescission notice in this case, "cause" exists to lift the automatic stay for the reasons set forth in the Indenture Trustee's *Protective Motion (I) for Relief from the Automatic Stay to Permit Rescission of Acceleration or, Alternatively, (II) for Adequate Protection* [ECF No. 463].

VIII. THE INDENTURE TRUSTEE IS ENTITLED TO THE PAYMENT OF ITS COSTS AND EXPENSES INCURRED IN CONNECTION WITH THE DISPUTE OVER THE APPLICABLE PREMIUM.

95. The Indenture unambiguously provides that the Indenture Trustee is entitled to reimbursement by the Debtors of "all reasonable out-of-pocket expenses incurred or made by it including costs of collection, in addition to the compensation for its services." Indenture § 7.07. Both the Debtors and Apollo allege, in purely conclusory fashion, that it is unreasonable for the Indenture Trustee to incur fees and expenses to litigate the entitlement of the 1.5 Lien Noteholders to the Applicable Premium. They

ignore the salient facts and instead merely refer to the arguments in their respective briefs on legal issues that have yet to be decided.

96. First, the Debtors, Apollo and the Ad Hoc Committee put the issue of the Applicable Premium in play through their proposed treatment of the 1.5 Lien Note Claims. They offered alternative treatments of these claims: if the class accepts, the 1.5 Lien Noteholders are paid in cash but deprived of the Applicable Premium; if the class rejects, the 1.5 Lien Noteholders receive replacement notes and are invited to litigate their entitlement to the Applicable Premium. Having a duty to protect the interests of all the 1.5 Lien Noteholders, it was reasonable for the Indenture Trustee to accept this invitation and defend their entitlement.

97. Second, the Debtors joined the battle by filing a declaratory judgment action against the Indenture Trustee. Apollo and the Ad Hoc Committee quickly piled on and intervened in the Adversary Proceeding. Apparently, these intervening parties found the issues to be sufficiently substantive to justify their allocation of time and resources to the litigation. It was reasonable for the Indenture Trustee to defend itself in litigation for the benefit of the 1.5 Lien Noteholders.

98. Third, as set forth in this Reply Brief, the Indenture Trustee has meritorious arguments in support of the entitlement to the Applicable Premium. It is reasonable for the Indenture Trustee to pursue these arguments in litigation for the benefit of the 1.5 Lien Noteholders.

99. The Debtors, Apollo and the Ad Hoc Committee should not be permitted to impose costs on the Indenture Trustee in contravention of the express provisions of the Indenture for a dispute of their own making.

CONCLUSION

100. WHEREFORE, the Indenture Trustee respectfully requests that the Court (i) deny the relief requested in the Adversary Complaint, (ii) grant the relief requested in the Indenture Trustee's Answer, Affirmative Defenses and Counterclaims, and (iii) grant the Indenture Trustee such other and further relief as it deems just and proper.

Dated: August 5, 2014
New York, New York

By: */s/* Mark R. Somerstein

ROPES & GRAY LLP
Mark R. Somerstein
Mark I. Bane
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

-and-

Stephen Moeller-Sally (*pro hac vice*)
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

Counsel to Wilmington Trust, National Association, as Trustee

Certificate of Service

I certify that on August 5, 2014, I caused true and correct copies of this document to be served on counsel of record in the above-captioned adversary proceeding by email and first-class mail.

/s/ Mark R. Somerstein

Mark R. Somerstein

Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
	Case No. 14-22503 (RDD)
MPM Silicones, LLC, et al.,[1]	(Jointly Administered)
Debtors.	
Momentive Performance Materials Inc., Momentive Performance Materials Worldwide Inc., Momentive Performance Materials USA Inc., Juniper Bond Holdings I LLC, Juniper Bond Holdings II LLC, Juniper Bond Holdings III LLC, Juniper Bond Holdings VI LLC, Momentive Performance Materials Quartz, Inc., MPM Silicones, LLC, Momentive Performance Materials South America Inc., Momentive Performance Materials China SPV Inc.,	Adversary Proceeding No. 14-08228 (RDD)
Plaintiffs,	
v.	
Wilmington Trust, N.A., solely as Trustee for the Momentive Performance Materials Inc. 10% Senior Secured Notes due 2020,	
Defendant.	

[1] The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) Juniper Bond Holdings I LLC (9631); (ii) Juniper Bond Holdings II LLC (9692); (iii) Juniper Bond Holdings III LLC (9765); (iv) Juniper Bond Holdings IV LLC (9836); (v) Momentive Performance Materials China SPV Inc. (8469); (vi) Momentive Performance Materials Holdings Inc. (8246); (vii) Momentive Performance Materials Inc. (8297); (viii) Momentive Performance Materials Quartz, Inc. (9929); (ix) Momentive Performance Materials South America Inc. (4895); (x) Momentive Performance Materials USA Inc. (8388); (xi) Momentive Performance Materials Worldwide Inc. (8357); and (xii) MPM Silicones, LLC (5481). The Debtors' executive headquarters are located at 260 Hudson River Road, Waterford, NY 12188.

DECLARATION OF CHRISTOPHER J. KEARNS IN OPPOSITION TO DEBTORS' CLAIMS IN ADVERSARY COMPLAINT AND IN SUPPORT OF THE DEFENSES AND COUNTERCLAIMS OF WILMINGTON TRUST, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE

I. Introduction and Expert Qualifications

1. I have been retained by Ropes & Gray LLP to prepare this declaration and provide expert testimony (if necessary) on certain topics and issues related to the above-captioned adversary proceeding, on behalf of its client, Wilmington Trust, National Association, in its capacity as (i) indenture trustee (the "Indenture Trustee") under that certain indenture dated May 25, 2012 (as amended or supplemented, the "Indenture") among Momentive Performance Materials Inc. ("MPM"), the Note Guarantors (as defined in the Indenture) and The Bank of New York Mellon Trust Company, N.A., as former indenture trustee ("BNY Mellon") pursuant to which MPM issued those certain 10% Senior Secured Notes due 2020 (the "1.5 Lien Notes") and (ii) collateral agent (the "Collateral Agent", and together with the Indenture Trustee, the "Trustee") under that certain Collateral Agreement (as amended, restated, supplemented, or otherwise modified from time to time, the "Collateral Agreement" and, together with the Indenture, the "1.5 Lien Documents") by and between MPM and BNY Mellon as initial collateral trustee dated as of May 25, 2012.

2. I am a Certified Public Accountant, a Certified Insolvency and Restructuring Advisor, a Certified Turnaround Professional, and a Certified Fraud Examiner. I have over 35 years of broad-based financial experience as an auditor, corporate officer and, for approximately the past 23 years, as an advisor or crisis manager in bankruptcy and turnaround matters.

3. I am one of the founding members of Capstone Advisory Group, LLC ("Capstone"), a financial services consulting firm, founded in January 2004, which provides services to a vast array of businesses. The services provided by Capstone include consultation in business turnaround and restructuring situations, workouts and reorganization, bankruptcy matters, crisis management, transaction advisory and due diligence services, forensic accounting, valuation and dispute resolution

services. Prior to co-founding Capstone, from 1991 to 2004, I was a senior managing director of FTI Consulting, Inc. ("FTI") (and predecessor firms) and was co-leader of FTI's New York office. My experience and client assignments during that period were substantially similar to the assignments I have performed at Capstone.

4. Prior to 1991, I was employed by Bristol-Myers Squibb Company for approximately three years (including serving as Assistant Corporate Controller), and a major international public accounting firm for ten years in the mergers and acquisitions group, and in the audit practice. I have served as a principal financial advisor in numerous complex bankruptcies and restructurings, including MF Global Holdings Ltd, Nortel Networks Inc., SemGroup LP, Calpine Corp., Mirant Corporation, Starter Corporation, Centro Properties Group, and Chemtura Corp. I have served as a testifying expert witness in matters concerning solvency, valuation, contract breach, lost profits and various financial/business issues in bankruptcy and restructuring. In addition, I have served as a testifying expert in cases regarding make whole premiums and no call provisions under various indentures and credit agreements. A copy of my curriculum vitae is attached hereto as Exhibit A.

5. Additionally, I have relied extensively on the knowledge and experience that I have gained through consultancy and work experience including the areas of business turnaround and restructuring situations, out-of-court workouts, bankruptcy matters, crisis management, transaction advisory and due diligence services and dispute resolution.

6. My current billing rate for this assignment is $875 per hour. I was assisted by others at Capstone, who worked at my direction and under my supervision. Capstone's compensation for this matter is in no way contingent upon the outcome of this proceeding.

II. Summary of Opinions and Conclusions

7. Counsel requested that I:

a. **Calculate the Applicable Premium as of the Petition Date and the Related Total Amount Due on the Assumed Effective Date:** Calculate (i) the

"Applicable Premium"[2], as defined in the Indenture, for the 1.5 Lien Notes as of April 13, 2014[3] (the "Petition Date") and (ii) the related total amount of the redemption payment as of September 30, 2014 (the "Assumed Effective Date"), including principal, Applicable Premium, accrued and unpaid interest and additional accrued interest on the unpaid amounts to the Assumed Effective Date.

b. **Calculate the Applicable Premium as of the Assumed Effective Date and the Related Total Amount Due on Such Date:** Calculate (i) the "Applicable Premium", as defined in the Indenture, for the 1.5 Lien Notes as of the Assumed Effective Date and (ii) the related total amount of the redemption payment as of such date, including principal, Applicable Premium and accrued and unpaid interest.

c. **Compare the Applicable Premium to Market:** Determine whether it is standard and customary for make whole provisions to be included in secured public bond issuances by market participants.

d. **Compare the Discount Rate to Market:** Evaluate whether the discount rate used to compute the Applicable Premium is consistent with discount rates used to calculate make whole premiums by market participants.

8. In summary, my conclusions are as follows:

a. **Calculate the Applicable Premium as of the Petition Date and the Related Total Amount Due on the Assumed Effective Date**: The Applicable Premium, excluding accrued and unpaid interest, is $52.9 million for the 1.5 Lien Notes as of the Petition Date. The total amount of the redemption payment as of the Assumed Effective Date, including principal, Applicable Premium, accrued and

---

[2] As defined in the Indenture, pages 2 and 3. The definition of Applicable Premium in the Indenture is what is commonly known as a "make whole" provision. In this report, Applicable Premium and make whole are used interchangeably.

[3] April 13, 2014 is the date MPM filed for bankruptcy.

unpaid interest and additional interest on unpaid amounts to the Assumed Effective Date is $316.5 million.

b. **Calculate the Applicable Premium as of the Assumed Effective Date and the Related Total Amount Due on Such Date**: The Applicable Premium, excluding accrued and unpaid interest, is $42.9 million for the 1.5 Lien Notes as of the Assumed Effective Date. The total amount of the redemption payment as of the Assumed Effective Date, including principal, Applicable Premium and accrued and unpaid interest, is $304.4 million.

c. **Compare the Applicable Premium to Market:** The inclusion of make whole provisions in secured public bond issuances is market.

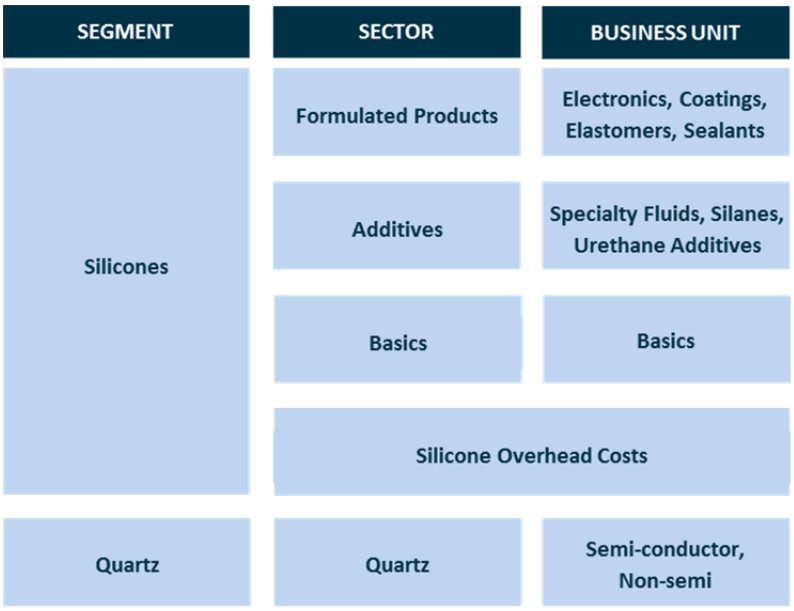
d. **Compare the Discount Rate to Market:** Calculation of make whole premiums using a 50 basis point premium over an applicable treasury rate is market.

III. Overview of MPM and its Capital Structure as of April 13, 2014

9. MPM, together with its Debtor and non-Debtor subsidiaries (collectively, the Company), is one of the world's largest producers of silicones and silicone derivatives, and is a global leader in the development and manufacture of products derived from quartz and specialty ceramics.[4] The Company has a 70-year history, with its origins as the Advanced Materials business of General Electric Company ("**GE**"). In December 2006, investment funds affiliated with Apollo Global Management, LLC and certain of its affiliated funds (collectively "**Apollo**") acquired the Company from GE[5]. The Company maintains twenty-two (22) production facilities and five (5) research and development facilities in the Americas, Europe and Asia[6].

[4] Disclosure Statement, page 17, Section 3.1. (a).
[5] Disclosure Statement, page 17, Section 3.1. (b).
[6] Disclosure Statement, page 18, Section 3.1. (c).

10. The Company operates two major business divisions: the silicones division (the "Silicones Division") and the quartz division (the "Quartz Division"). As reflected in the chart below, the Company's business divisions are divided into "sectors," which are further divided into "business units." The Silicones Division represents 92% of the Company's business in terms of sales and 87% of EBITDA. The Silicones Division manufactures a multi-functional family of materials used in a variety of products, which serve as a critical ingredient in various construction, transportation, healthcare, personal care, electronic, consumer and agricultural uses. The Quartz segment manufactures quartz, specialty ceramics and crystal products for use in high-technology industries.[7]



11. As of March 31, 2014, MPM had a total of approximately $3.358 billion of outstanding indebtedness as set forth in the table below.[8]

[7] Disclosure Statement, Exhibit 3, page 5, Section C.
[8] MPM Form 10-Q for the quarterly period ended March 31, 2014, page 14.

Pre-Petition Company Capital Structure at March 31, 2014	
$ millions	Balance
ABL Facility	$ 165
Cash Flow Facility	75
8.875% First Lien Notes due 2020	1,100
10% Senior Secured Notes due 2020 (1-1/2 Lien Notes)	250
9% Springing Lien Dollar Notes due 2021	1,161
9.5% Springing Lien Euro Notes due 2021	183
11.5% Senior Subordinated Notes due 2016	382
Foreign Bank Debt	42
Total Debt	**$ 3,358**

Source: Momentive Performance Materials Inc. Form 10Q for the quarterly period ended March 31, 2014. Total Debt excludes affiliated debt of $9 million.

Note: Excluded from the table above is the Momentive Performance Materials Holdings Inc. (MPM's direct parent) 11% PIK note due June 4, 2017 (the "PIK Note"). As of December 31, 2013, the balance of the PIK Note was $854 million. Disclosure Statement (Doc 516), page 28.

12. The aggregate outstanding principal amount of the 1.5 Lien Notes is $250 million.[9] The 1.5 Lien Notes are guaranteed on a senior secured basis by all of MPM's Debtor subsidiaries. The 1.5 Lien Notes are secured by a security interest in the Notes Priority Collateral and the ABL Priority Collateral in each case owned by MPM and its domestic subsidiaries, which interest is junior in priority to the liens on such collateral securing the ABL Facility, the Cash Flow Facility and the First Lien Notes and senior in priority to the liens on such collateral securing the Springing Lien Notes.[10]

13. On April 13, 2014 MPM and its Debtor subsidiaries filed for chapter 11 bankruptcy protection.

IV. Call Provisions, Make Whole Premiums and Interest Rate Environment

Call Provisions

14. Call provisions are standard and customary in bond indentures. If a bond's indenture contains such a provision, the issuer has the right to retire the debt, fully or partially, before the scheduled maturity date at a predetermined contractual price.[11]

---

9 MPM Form 10-Q for the quarterly period ended March 31, 2014, page 14.

10 MPM Form 10-K for the year ended December 31, 2013 (the "2013 10-K"), page 61-62. Capitalized terms are defined in the 2013 10-K.

11 THE HANDBOOK OF FIXED INCOME SECURITIES (Seventh Edition), Fabozzi, pp. 9 – 10.

15. There are many benefits to the borrower of incorporating the right to call the debt early, the principal one of which is to allow the borrower to reduce its cash interest burden by refinancing its debt at lower rates of interest in the event that market rates of interest fall. A borrower may also desire to refinance its debt if its creditworthiness improves and it is able to secure financing at more favorable terms. Other reasons a borrower might want the ability to refinance its debt include the ability to renegotiate restrictive covenants or use excess cash balances to improve is balance sheet.[12]

16. A rational borrower will decide to refinance its debt as soon as the cost savings and other benefits of refinancing the debt exceed the transaction costs of procuring the new debt.

17. From an investor's perspective, however, there are several disadvantages of a call provision, including:

a. The timing of cash flows to be received are not known with certainty;

b. Investors are exposed to reinvestment risk; that is, the risk that the investor must reinvest proceeds received if the bond is called when market rates of interest are lower than expected had the investment been held to maturity; and

c. Investors' ability to benefit from improvements in the credit quality of the borrower through a cap on the capital appreciation of a bond is limited.[13]

18. Because call features benefit the borrower and place the investor at a disadvantage, callable bonds generally carry higher rates than bonds which are not able to be retired prior to maturity. This yield differential is likely to increase if an investor believes that market interest rates are likely to fall in the future and the borrower is likely to replace higher-yielding debt with a low-coupon bond.[14] This increased yield is often not sufficient consideration to an investor for granting the call privilege to the borrower. As a consequence, the call provisions contained in indentures generally permit the bond to

---

12 *Id.*
13 *Id.*
14 *Id.*, page 10

be called only at a premium to the face amount of the bond, and the ability of the borrower to call the bonds may be restricted in early years.[15]

Make Whole Premiums

19. Make whole premiums, and related no call provisions, are standard and customary in bond indentures and are important to investors in fixed income securities. It is common that, as an additional concession to an investor, a borrower's right to call the debt is restricted during a specified number of years in the early life of the debt.[16] A "no call" provision defines the period during which the bond is non-callable. Where parties agree to a no call period, a borrower is permitted to prepay its loan only if a make whole premium is paid. The calculation of the make whole premium is contractually established at the time the debt is issued. In contrast to a fixed redemption premium, which is calculated as a percentage of par value, a make whole premium incorporates both a fixed redemption premium and the present value of interest lost as a result of the redemption.

20. As mentioned above, a borrower would be subject to higher interest rates if a bond was callable and there were no restriction to prevent the borrower from redeeming the bond early. Make whole provisions benefit borrowers by providing them with lower borrowing costs as well as the ability to refinance their debt at a cost which is based on a predetermined formula. No call provisions and related make whole premiums have appeared routinely in privately placed issues since the late 1980's and, more recently, in an increasing number of public debt issues.[17] In fact, as discussed below, of 1,334 first lien, 1.5 lien, and second lien indentures publicly issued in the United States between January 1, 2007 and July 10, 2014, approximately 69% contained make whole provisions.

21. A no call period in the early life of a bond with make whole provisions is priced into the bond when the issue is brought to market. The 1.5 Lien Notes issued by MPM in 2012 included make

---

[15] *Id*., page 10. The 1.5 Lien Notes are callable from October 15, 2015 until October 15, 2018 at a predetermined premium. The redemption price at October 15, 2015 is 107.5%, and it declines annually by 2.5% thereafter. Indenture, Exhibit B-6–B-7

[16] *Id.*

[17] *Id*., pp. 10 - 11

whole provisions defining the premium that would be due upon the early redemption of the notes. The pricing of the 1.5 Lien Notes, and the yields expected by the investors, reflect the existence of this provision.

22. Make whole provisions protect investors from being forced to realize a reduced return on their investment as a result of reinvesting their capital in lower-yielding opportunities upon an unanticipated early repayment. Should the borrower decide to redeem its debt early, investors that are subject to investment criteria, investment approval processes, and liquidity constraints would earn a lower yield as a result of the time it takes them to identify, diligence, and execute an alternative investment. The presence of a make whole provision compensates the investors for the very real costs that are incurred in finding a suitable replacement investment and the situation in which an investor may have to invest in lower-yielding securities while they search for reinvestment opportunities. Furthermore, by virtue of specifying a period where the company is unable to call the debt, or can only call the debt by making the investors whole, these costs incurred by an investor can be allocated amongst several years of returns.

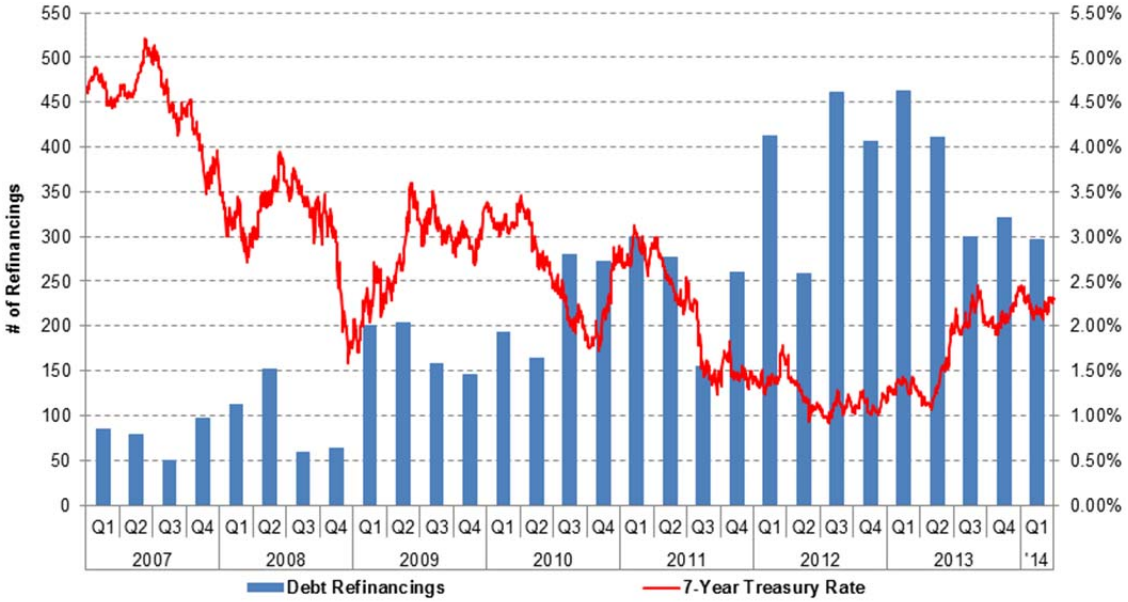
Interest Rate Environment

23. As noted above, one of the primary factors underlying the investor's desire to have make whole provisions written into financing documents is yield protection for a period of time. While investors are motivated to 'lock-in' the yield they are receiving, they are particularly motivated to do so when interest rates are expected to decrease and borrowers are more likely to refinance.

24. Refinancing activity generally increases when interest rates fall. This is illustrated in the chart below, which shows the relationship between the number of debt refinancings greater than $250 million and the 7-year treasury rate for the period from 2007 through Q1 2014[18]. As seen in the chart below, the refinancing rate was relatively low during periods when interest rates were high. As the

[18] Sources: http://www.federalreserve.gov/releases/h15/data.htm and Capital IQ. Capital IQ identified over 6,600 unique corporate bond transactions for which the proceeds were used to repay existing debt either early or upon maturity.

treasury rates decreased from their highs during the second half of 2007, the number of debt refinancings generally increased. The height of debt refinancing activity occurred during the 9-month period between Q3 2012 and Q1 2013, when 7-year treasury rates were the lowest (ranging from a low of .91% to 1.24%).[19]



Sources: http://www.federalreserve.gov/releases/h15/data.htm and Capital IQ,

V. Calculate the Applicable Premium as of the Petition Date and the Related Total Amount Due on the Assumed Effective Date

25. I am informed by Counsel that the 1.5 Lien Notes are governed by the Indenture. Counsel advised me that the provisions detailing the calculation methodology for the applicable premium are contained in the definition of "Applicable Premium" in the Indenture.

26. At the request of counsel, I have calculated the Applicable Premium for the 1.5 Lien Notes as of the Petition Date. Counsel instructed me to use April 13, 2014 as the Petition Date for purposes of these calculations.

27. Using the calculation set forth in the definition of Applicable Premium in the Indenture, I calculate the Applicable Premium as of the Redemption Date to be $52.9 million. Furthermore, I

[19] The Issue Date for the 1.5 Lien Notes was May 25, 2012, Indenture, page 26.

calculate the total amount of the related redemption payment as of the Assumed Effective Date, including principal, Applicable Premium, accrued and unpaid interest and additional accrued interest on the unpaid amount to such date to be $316.5 million (see Exhibit B).

VI. Calculate the Applicable Premium as of the Assumed Effective Date and the Related Total Amount Due on Such Date

28. At the request of counsel, I have also calculated the Applicable Premium for the 1.5 Lien Notes as of the Assumed Effective Date. Counsel instructed me to use September 30, 2014 as the Assumed Effective Date for purposes of these calculations.

29. Using the calculation set forth in the definition of Applicable Premium in the Indenture, I calculate the Applicable Premium as of the Assumed Effective Date to be $42.9 million. Furthermore, I calculate the related total amount of the redemption payment as of the Assumed Effective Date, including principal, Applicable Premium and accrued and unpaid interest, to be $304.4 million (see Exhibit C).

VII. Compare the Applicable Premium and Discount Rate to Market

30. A make whole call price (i.e. redemption amount) is typically calculated as the sum of the present values of the remaining coupon payments and principal discounted at a yield on a treasury security that matches the bond's remaining maturity plus a spread.[20] The calculation of the Applicable Premium within the Indenture is consistent with this methodology, and includes a spread over the relevant treasury of 50 basis points ("T plus 50bps").[21]

---

[20] THE HANDBOOK OF FIXED INCOME SECURITIES (Seventh Edition), Fabozzi, pp. 10 – 11.

[21] The make whole provision in the Indenture is set forth in the definition of "Applicable Premium", defined as follows: "'Applicable Premium' means, with respect to any Note on any applicable redemption date, the greater of: (1) 1% of the then outstanding principal amount of such Note; and (2) the excess of: (a) the present value at such redemption date of (i) the redemption price of such Note, at October 15, 2015 (such redemption price being set forth in paragraph 5 of the applicable Note) plus (ii) all required interest payments due on such Note through October 15, 2015 (excluding accrued but unpaid interest), computed using a discount rate equal to the Treasury Rate as of such redemption date plus 50 basis points; over (b) the then outstanding principal amount of such Note." See Exhibit D for the definition of "Treasury Rate" as set forth in the Indenture.

31. The standard and customary nature of make whole provisions can be observed in the marketplace for bond issues similar to the 1.5 Lien Notes. In order to determine if make whole provisions are standard and customary in the market in indentures similar to the 1.5 Lien Notes, we utilized the Bloomberg Fixed Income database to compile a list of all active and inactive first lien, 1.5 lien, and second lien notes issued between January 1, 2007 and July 10, 2014. We excluded all non-United States debt issuances and derived a final list of 1,334 issuances to be screened to determine (i) if the indentures contained a make whole provision, and, (ii) if so, whether a spread above a treasury security is used to calculate any make whole premium.

32. Our research indicates that, of the 1,334 first lien, 1.5 lien, and second lien notes issued in the United States during the period from January 1, 2007 through July 10, 2014, 69.3% contained make whole provisions in their respective indentures. In addition, 89.2% of issuances with make whole provisions determine the make whole amounts using a discount rate of T plus 50bps. Moreover, of the 436 first lien, 1.5 lien, and second lien notes issued in the United States during the period from January 1, 2012 through July 10, 2014, 79.6% contained make whole provisions in their respective indentures and 89.3% of issuances with make whole provisions determine the make whole amount using a discount rate of T plus 50bps. Presented in the table below are the results of our research:

Date Issued	Number of Issuances	Make Whole Call		Make Whole Spread of T+ 50bps	
		Total Number	Percent of Total	Total Number	Percent of Total
1st, 1.5 and 2nd Lien Notes					
1/1/2007 Through 7/10/2014	1,334	924	69.3%	824	89.2%
1/1/2012 Through 7/10/2014	436	347	79.6%	310	89.3%
1st Lien Notes Only					
1/1/2007 Through 7/10/2014	913	599	65.6%	514	85.8%
1/1/2012 Through 7/10/2014	306	235	76.8%	198	84.3%
1.5 and 2nd Lien Notes					
1/1/2007 Through 7/10/2014	421	325	77.2%	310	95.4%
1/1/2012 Through 7/10/2014	130	112	86.2%	112	100.0%

Source: Bloomberg

33. Following the credit crisis in 2008, make whole provisions in indentures have become market practice as can be seen below. Following 2008, the percentage of make whole provisions found in indentures increased from 32.9% in 2008 to 82.8% in 2013, and 92.9% year to date July 10, 2014.

Over the entire period January 1, 2007 through July 10, 2014, a substantial majority of indentures use a discount rate of T + 50bps.

Year of Issuance	Number of Issuances	Make Whole Call		Make Whole Spread of T+ 50bps	
		Total Number	Percent of Total	Total Number	Percent of Total
2007	143	39	27.3%	26	66.7%
2008	82	27	32.9%	18	66.7%
2009	199	118	59.3%	101	85.6%
2010	264	214	81.1%	196	91.6%
2011	210	179	85.2%	173	96.6%
2012	217	160	73.7%	143	89.4%
2013	163	135	82.8%	122	90.4%
2014	56	52	92.9%	45	86.5%
Total Population	**1,334**	**924**	**69.3%**	**824**	**89.2%**

Analysis includes active and inactive 1st,1.5 and 2nd Lien notes issued in the United States

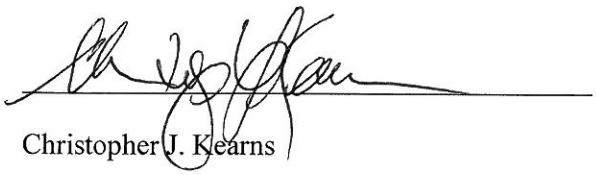
Source: Bloomberg

34. Based on our research, I conclude that the MPM Applicable Premium is a standard and customary make whole premium in the secured public bond market.

VIII. Right to Supplement

35. I reserve the right to supplement or amend my report based on any new information that may come to my attention that is relevant to the opinions contained herein.

Respectfully submitted,



Christopher J. Kearns

New York, New York

July 14, 2014

Exhibit A

Christopher J. Kearns

Manager and Member of the Firm
Capstone Advisory Group, LLC
104 W 40th Street, 16th Floor
New York, NY 10018
212-782-1409
CKearns@CapstoneAG.com

SUMMARY

Mr. Kearns is a Managing Member of the Firm and co-founder of Capstone Advisory Group, LLC ("Capstone" or the "Firm"). He is a Certified Public Accountant, a Certified Turnaround Professional, a Certified Insolvency and Restructuring Advisor and a Certified Fraud Examiner. He specializes in providing financial restructuring advisory services and crisis management services in the troubled company environment. He has represented all parties-in-interest in various complex matters and has rendered expert testimony on various issues.

PROFESSIONAL EXPERIENCE

Capstone Advisory Group, LLC – January 2004 – Present
Managing Member of the Firm

FTI Consulting, Inc. (and predecessor firms) – 1991 – January 2004
Senior Managing Director
At Capstone, FTI and predecessor firms provided financial advisory and crisis management services in the troubled company environment. Assignments have included service as Chief Executive Officer, Chief Restructuring Officer, Responsible Officer, Receiver and Trustee. Also have rendered expert testimony in various jurisdictions on matters involving valuation, lost profits, liquidation and recovery analysis, and other issues regarding distressed situations. Sample assignments include:

- *Gleacher & Company, Inc. (2013 – present)* – Chief Executive and Chief Restructuring Officer for a publicly traded financial services business and broker dealer.
- *Extended Stay Hotels (2009-2010)* – Financial advisor to the Operating Advisor in a $7 billion CMBS structure in a Chapter 11 proceeding for a hotel chain, including sale of the assets.
- *Archstone* – Financial advisor to major stakeholders for a large multi-family dwelling platform in major markets in connection with a debt for equity swap and related valuation.

Christopher J. Kearns

(continued)

- *Nortel (2009-present; ongoing)* – Financial advisor to the Unsecured Creditors Committee in a Chapter 11 proceeding for a multinational telecommunications company.
- *MF Global (2011-2013)* – Financial advisor to the Statutory Creditors' Committee in a Chapter 11 proceeding for a failed multinational broker dealer.
- *Dynegy Holdings LLC (2011-2013)* – Financial advisor to the Indenture Trustee, Roseton and Danskammer.
- *Eastman Kodak (2012-2013)* – Financial advisor to ad hoc noteholders on intellectual property matters.
- *Centro Group (2007-2009)* – Financial advisor to US lenders (debt of approximately $2.2 billion) in connection with the restructuring of a multinational commercial real estate company.
- *Energy Future Intermediate Holdings (2013-present; ongoing*) – Financial advisor to ad hoc group of First Lien lenders to a holdco with a significant interest in a regulated electric transmission company.
- *Mirant Corporation (2004-2006*) – Financial advisor to Unsecured Creditors Committee in Chapter 11 proceeding for a multinational energy company with generation capacity of 18,000 megawatts. Reorganization value upon emergence $11.5 to $12.0 billion.
- *SEMGroup (2008-2009)* – Financial advisor to Secured Lenders (aggregate indebtedness of nearly $3 billion) in a Chapter 11 proceeding for a company engaged in the transport, storage and distribution of petroleum products in the North American energy corridor.
- *NRG Energy (2002-2003)* – Financial advisor to Global Lenders (aggregate indebtedness of over $3 billion) in a Chapter 11 proceeding for a multinational energy company.
- *Calpine entities (2005-2007)* – Financial advisor to various ad hoc groups, including Calgen noteholders, CCFC noteholders, and Broad River/ Southpoint / Rockgen stakeholders.
- *Xerox (2002)* – Financial advisor to the Lenders in connection with the successful restructuring of a $7 billion credit facility for this multinational company.
- *Superior Essex Communications LLC (f/k/a Superior Telecommunications) (2001-2002)* – Financial advisor to the Lenders (debt of approximately $1 billion) in a Chapter 11 proceeding for a manufacturer of wire and cable.
- *Schwinn/GT (2001)* - Financial advisor to the Debtor in a Chapter 11 proceeding for a manufacturer and distributor of bicycle and fitness products.
- *Heilig-Meyers and The RoomStore (2001-2005)* – Financial advisor to the Debtors in a Chapter 11 proceeding for a furniture retailer.
- *Starter Corporation (1999)* – Financial advisor to the Debtor in a Chapter 11 proceeding for an apparel and retail company.

Christopher J. Kearns

(continued)

Other restructuring and bankruptcy assignments include:

- aaiPharmaceutical – Advisor to the Lenders
- Aerospace contractor – Advisor to the Lenders
- Advanced Glassfiber Yarns – Advisor to the Lenders
- Aircraft parts and maintenance company – Advisor to the Lenders
- Allied Holdings – Advisor to the Company and Lenders (separate matters)
- American Asphalt & Grading – Advisor to the Lenders
- American Capital – Advisor to the Lenders
- APA Trucking – Advisor to the Company
- Biofuel company – Advisor to the Lenders
- Boscov's – Advisor to the Debtor
- Bridge and tunnel construction company – Advisor to the Lenders
- Buddy L, Inc. – Advisor to the Debtor and Trustee
- Building products company – Advisor to the Company
- Countrywide – Litigation consultant regarding mortgage put backs
- Channel Master – Advisor to the Debtor
- **Chemtura Corporation – Advisor to the Lenders**
- Credit card company and private bank – Advisor to the Company
- Direct marketing company – Advisor to the Lenders
- Downey – Litigation consultant and advisor to the Trustee
- G3K Display, LLC - Receiver
- Gas importer/retailer – Advisor to the Lenders
- Kasper A.S.L. – Advisor to the Lenders
- Privately owned hotel chain – Advisor to the Lenders
- KPNQwest – Advisor to the Lenders
- Maxxim Medical – Advisor to the Lenders
- Marvel Avoidance Litigation Trust – Trustee
- Mid-stream oil and gas company – Advisor to the Lenders
- Mid-stream oil and gas company – Advisor to the Lenders
- Mid-stream gas company – Advisor to the Company
- Monet Group – Advisor to the Debtor
- Multinational manufacturer – Advisor to the Company
- New York Waterways – Advisor to the Company

Christopher J. Kearns

(continued)

- Non public business development company – Advisers to the Lenders
- **Non-public Specialty Chemicals company – Adviser to the Lenders**
- Non-public multinational bulk shipping company – Adviser to the Lenders
- Nutritionals manufacturer – Advisor to the Company
- Pathnet – Advisor to the Debtor
- PCB manufacturer – Advisor to the Lenders
- Pharmaceutical company – Advisor to the Company
- Pharmaceutical company – Advisor to the Lenders
- Privately owned pharmaceutical and contract research company – Advisor to the Lenders
- Real estate / hotel company – Advisor to the Noteholders
- Real estate / hotel company – Advisor to the CMBS Mezzanine Lender
- Real estate development company – Advisor to the Lenders
- **Rhodia Inc. – Advisor to the Lenders**
- Schein Pharmaceutical – Advisor to the Lenders
- Sharp International – Responsible Officer
- Singer Company – Advisor to the Unsecured Creditors Committee
- Sirius XM – Advisor to the Lenders
- Spanish Broadcasting System, Inc. – Advisor to the Company
- SLM International – Advisor to the Company
- Specialty chemical company – Advisor to the Lenders
- Spiegel – Advisor to the Lenders
- Sub-prime auto lender – Responsible Officer
- Sub-prime mortgage lender – Advisor to the Company
- Transportation company – Advisor to the Company
- Transportation company – Advisor to the Lenders
- Winter Group – Chief Restructuring Officer
- Women’s apparel manufacturer – Advisor to the Company

Christopher J. Kearns

(continued)

Litigation related assignments / Expert testimony:

– Arbitrator, American Arbitration Association

– Testimony (dates are approximate):

- 2013: In re Getty Marketing, Inc. v. Lukoil Americas Corporation et al – valuation analysis and determination of "reasonably equivalent value" in a fraudulent transfer matter
- **2013: In re: School Specialty, Inc. – make whole determination for the senior secured lender**
- **2011: In re: Lyondell Litigation Trust vs. Lyondell directors and officers, Blavatnik et al – solvency and valuation analysis, including issues related to alleged fraudulent transfer**
- **2010: In re: Premier Entertainment Biloxi LLC (d/b/a Hard Rock Hotel & Casino Biloxi) (Southern District of MS) – make whole / no call determination for noteholders**
- **2009: In re Lyondell Chemical Company, et al; Official Committee of Unsecured Creditors v. Citibank N.A., et al – solvency and valuation analysis, including issues related to alleged fraudulent transfer**
- 2007: Phar-Mor vs. McKesson – solvency and valuation analysis
- 2007: Northwestern Corporation – rebuttal on structured finance and restructuring related matters
- **2007: In re: Calpine Corporation (Southern District of NY) – solvency analysis and make whole / no call determination for certain noteholders**
- 2006 and 2007: In re: Enron Securities Litigation – rebuttal on solvency and valuation matters
- 2005: Maxxim Medical, Inc. vs. Professional Hospital Supply (Plaintiff – Middle District of Florida) – lost profits and business valuation
- 2001 and 2005: Heilig-Meyers and The RoomStore (Virginia) – KERP program, asset sales, business valuation and for plan proponent
- 2001: Schwinn/GT (Colorado) – KERP program, liquidation analysis and creditor recoveries, sale of assets, and for plan proponent
- 2000: Monet Group (Delaware) – Sale of assets and for plan proponent
- 2000: Nature's Best Group Inc. v. Best Foods et al (Nassau County, NY State) – Deposition testimony for defendant; lost profits and business valuation
- 1999: Starter Corp. (Delaware) – KERP program, liquidation and creditor recoveries analysis, and for plan proponent
- 1998: Fletcher et al v. Liggett Group Inc. (Defendant - Alabama) – business valuation, bankruptcy and restructuring recoveries, and intellectual property analysis
- 1995: Buddy L, Inc. (Delaware) – for Chapter 11 plan proponent

Christopher J. Kearns

(continued)

Recent Speaking Engagements

- 2012 – American Bankruptcy Institute – mid-level professionals conference, panelist
- 2012 – Distressed Investors Conference – Schulte Roth & Zabel LLP, panelist
- 2011 – Energy Industry Conference – Cadwalader Wickersham & Taft, panelist
- 2011 – American Bankruptcy Institute – young professionals conference, panelist

Bristol-Myers Squibb Company – 1988-1991

Assistant Controller: 1990-1991

- Responsible for SEC reporting for the corporation and internal reporting and analysis for senior management
- Principal corporate financial interface with accounting and finance function for major divisions /subsidiaries
- Managed all corporate disbursements

Director – Internal Audit: 1988-1990

- Managed audits and special projects at corporate and multinational subsidiary levels for the Company's pharmaceutical, healthcare and consumer products businesses

Arthur Andersen & Company – 1978-1988

Manager: 1983-1988

- Managed numerous audit engagements, including overall engagement responsibility for ITT Corporation, Grumman Corporation and Signal Companies
- Advised major investment banks in connection with merger and acquisition structure and techniques.

Christopher J. Kearns

(continued)

BOARDS OF DIRECTORS

Corporate

- aaiPharmaceutical, Inc. 2006-2009
- Outsourcing Solutions, Inc. 2003-2005
- Supradur Company – 1992-1993

Non-profit

- Leukemia and Lymphoma Society, National Board of Representatives 2005 – 2010, NY Chapter - Chairman Emeritus, past President and Trustee 1995- 2010
- Make-A-Wish Foundation of Metro New York – 1992-1994
- Turnaround Management Association – NY Chapter past President
- Friends of Mercy Medical Center, Long Island NY – Executive Committee 2008 – present, past president

MEMBERSHIPS

- Turnaround Management Association (past president – New York)
- Association of Certified Insolvency and Restructuring Advisors
- American Institute of Certified Public Accountants
- NY State Society of CPA's
- National Association of Certified Fraud Examiners
- American Bankruptcy Institute

EDUCATION AND PROFESSIONAL CERTIFICATIONS

- Iona College – BBA Accounting with honors 1978
- Certified Public Accountant
- Certified Turnaround Professional
- Certified Insolvency and Restructuring Advisor
- Certified Fraud Examiner

Exhibit B

Calculation of the Applicable Premium as of the Petition Date and the Related Total Amount Due on the Assumed Effective Date

Make Whole Calculation as of Petition Date (4/13/2014)
($ in 000's)

Outstanding Principal Balance		$ 250,000
Redemption Price		1.075
Redemption Amount		$ 268,750
Treasury Rate [(a)]		0.29%
Spread above Treasury		0.50%
Discount Rate		0.79%
Previous Interest Payment Date		10/15/2013
Accrued and Unpaid Interest at Petition Date [(b)]		$ 12,361

Payment Date	Payment	PV Factor	PV Payment
15-Apr-14	$ 139	1.000	$ 139
15-Oct-14	12,500	0.996	12,451
15-Apr-15	12,500	0.992	12,402
15-Oct-15	12,500	0.988	12,353
15-Oct-15	268,750	0.988	265,597

Total PV Payments		$ 302,942
Par Value of the Notes		250,000
Applicable Premium		$ 52,942
% of Par		*21.2%*

Amount Due on Petition Date

Outstanding Principal Balance		$ 250,000
Accrued and Unpaid Interest at Petition Date		12,361
Applicable Premium		52,942
Total Amount Due on Petition Date		$ 315,303

Accrued Interest on Unpaid Amount Due

Coupon Rate of Interest		10.00%
Total Amount Due on Petition Date		$ 315,303
FV Factor		1.001
Total Amount Due, Beg:	4/15/2014	$ 315,470
Payment on:	4/15/2014	12,500
Total Amount Due, End:	4/15/2014	$ 302,970
FV Factor		1.045
Total Amount Due on Effective Date	**9/30/2014**	**$ 316,498**

(a) Treasury Rate is interpolated on a straight-line basis from the arithmetic mean of the yields for the 1-year and 2-year constant maturity treasury rates as published in the April 7, 2014 Federal Reserve Statistical Release H.15 for the week ended April 4, 2014.

(b) All interest and discounting calculations are calculated based on the 30/360 convention in conformity with paragraph 1(a) of Exhibit A-7 of the Indenture.

Exhibit C

Calculation of the Applicable Premium as of the Assumed Effective Date and the Related Total Amount Due on Such Date

Make Whole Calculation as of Assumed Effective Date (9/30/2014)
($ in 000's)

Outstanding Principal Balance	$ 250,000
Redemption Price	1.075
Redemption Amount	$ 268,750
Treasury Rate [(a)]	0.13%
Spread above Treasury	0.50%
Discount Rate	0.63%
Previous Interest Payment Date	4/15/2014
Accrued and Unpaid Interest at Effective Date [(b)]	$ 11,458

Payment Date	Payment	PV Factor	PV Payment
15-Oct-14	$ 1,042	1.000	$ 1,041
15-Apr-15	12,500	0.997	12,458
15-Oct-15	12,500	0.994	12,419
15-Oct-15	268,750	0.994	267,009

Total PV Payments	$ 292,927
Par Value of the Notes	250,000
Applicable Premium	$ 42,927
% of Par	*17.2%*

Amount Due on Effective Date

Outstanding Principal Balance	$ 250,000
Accrued and Unpaid Interest at Effective Date	11,458
Applicable Premium	42,927
Total Amount Due on Effective Date	**$ 304,386**

(a) Treasury Rate is interpolated on a straight-line basis from the arithmetic mean of the yields for the 1-year and 2-year constant maturity treasury rates as published in the July 7, 2014 Federal Reserve Statistical Release H.15 for the week ended July 4, 2014.

(b) All interest and discounting calculations are calculated based on the 30/360 convention in conformity with paragraph 1(a) of Exhibit A-7 of the Indenture.

Exhibit D

Definition of "Treasury Rate" as set forth in the Indenture

"Treasury Rate" means, as of the applicable redemption date, the yield to maturity as of such redemption date of United States Treasury securities with a constant maturity (as compiled and published in the most recent Federal Reserve Statistical Release H.15 (519) that has become publicly available at least two Business Days prior to such redemption date (or, if such Statistical Release is no longer published, any publicly available source of similar market data)) most nearly equal to the period from such redemption date to October 15, 2015; provided, however, that if no published maturity exactly corresponds with such date, then the Treasury Rate shall be interpolated or extrapolated on a straight-line basis from the arithmetic mean of the yields for the next shortest and next longest published maturities; provided further, however, that if the period from such redemption date to October 15, 2015 is less than one year, the weekly average yield on actually traded United States Treasury securities adjusted to a constant maturity of one year will be used.

Exhibit B

Filed Under Seal

Exhibit C

Filed Under Seal

Exhibit D

Filed Under Seal

Exhibit E

Filed Under Seal

Exhibit F

Filed Under Seal

Exhibit G

Filed Under Seal

Exhibit H

Filed Under Seal

Exhibit I

Filed Under Seal