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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF WILMINGTON TRUST, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE, TO CONFIRMATION OF DEBTORS' PROPOSED JOINT CHAPTER 11 PLAN OF REORGANIZATION

[1] Ropes & Gray LLP is appearing on this Objection solely with respect to Section III hereof.

[2] 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.

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Wilmington Trust, National Association, as successor indenture trustee (the "1.5 Lien Indenture Trustee") under that certain indenture dated as of May 25, 2012 (as amended or supplemented, the "1.5 Lien Indenture") among Momentive Performance Materials Inc. ("Momentive Performance"), the Note Guarantors party thereto, and The Bank of New York Mellon Trust Company, N.A., as indenture trustee, pursuant to which Momentive Performance issued those certain 10% Senior Secured Notes due 2020 (the "1.5 Lien Notes"), by and through its undersigned counsel, hereby submits this objection (the "Objection") to confirmation of the *Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials Inc. and Its Affiliated Debtors*, dated June 23, 2014 [ECF No. 515] (the "Proposed Plan").[3] In support of this Objection, the 1.5 Lien Indenture Trustee respectfully represents and sets forth as follows:

Preliminary Statement

1. The Debtors' Proposed Plan should not be confirmed, because it grants certain of the Debtors' stakeholders (including the Debtors' own controlling shareholder, Apollo Global Management, LLC ("Apollo")) sweepingly broad involuntary third-party releases (the "Involuntary Third-Party Releases"), which both exceed the jurisdictional power of this Court and fail to meet the requirements for such releases as established by the Court of Appeals for the Second Circuit in Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005) ("Metromedia"). The Involuntary Third-Party

[3] Each capitalized term used in this Preliminary Statement but not otherwise defined herein shall have the meaning ascribed them below or in the Proposed Plan, as applicable.

Releases would impermissibly extinguish the 1.5 Lien Indenture Trustee's state-law causes of action for breach of contract against Apollo and certain other of the Debtors' junior lenders, which claims are the subject of pending intercreditor litigation commenced by the 1.5 Lien Indenture Trustee in New York Supreme Court (the "Intercreditor Claims"). In addition, both the Involuntary Third-Party Releases, and the proposed plan's attempt to extinguish the Second Lien Intercreditor Agreement, violate section 510(a) of the Bankruptcy Code.

2. As a threshold matter, the Court lacks subject matter jurisdiction to release the Intercreditor Claims. The success or failure of the 1.5 Lien Indenture Trustee with respect to those claims "does not alter the Debtors' rights, liabilities, options or freedom of action, nor need it impact the handling and administration of the Chapter 11 Cases." Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.5 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)). Further, pursuant to well-established case law in this and other jurisdictions, the Debtors' ***postpetition*** decision to oblige themselves to indemnify their current shareholder, Apollo, as well as their future shareholders, cannot create a basis for jurisdiction (or, for that matter, a sufficient justification for an involuntary third-party release) that would not have otherwise existed.

3. Indeed, even if this Court does have subject matter jurisdiction, the Involuntary Third-Party Releases should not be granted for two distinct reasons.

4. *First*, the Involuntary Third-Party Releases fail to satisfy the Second Circuit's requirements for involuntary third-party releases, as established in Metromedia. There are no "truly unusual circumstances" here that "render the release terms important

to the success of the Debtors' plan." On the contrary, the facts we have here are quite ordinary. The Debtors' Second Noteholders (as defined below), who happen to include the Debtors' controlling shareholder, have agreed to equitize their debt (because they are deeply undersecured and had no other choice). In addition, they have made a self-interested decision to capture the rest of the Reorganized Debtors' equity for a discounted purchase price, a $30 million fee, and far-sweeping indemnification obligations by the Debtors. None of that provides the Debtors with substantial consideration, nor does it make the release terms important to the success of the Proposed Plan. On the contrary, because the Proposed Plan provides for the releases to be effective only to the extent permissible by law, the Debtors' controlling shareholder, and its fellow Backstop Parties (as defined below), are evidently willing to go forward with the BCA and the Proposed Plan even if the release terms are stricken. And, the caselaw is clear that the Debtors' self-inflicting of postpetition indemnification obligations to their present and future owners does not create "truly unusual circumstances" sufficient to justify the Involuntary Third-Party Releases.

5. Further, the structure of the Debtors' opt-out mechanism for the Involuntary Third-Party Releases improperly deprives accepting and abstaining holders of 1.5 Lien Notes of the ability to opt out of the Involuntary Third-Party Releases. Most egregiously, the Proposed Plan deems holders of 1.5 Lien Notes that vote to accept as having consented to proposed plan's releases, while providing these creditors with (a) no ability to opt out of the releases and (b) no assurance that they will receive the cash plan treatment for which they vote. Thus, if the class of 1.5 Lien Notes rejects the Proposed

Plan, these accepting creditors will have been deemed to have granted a release in exchange for cash consideration they will not receive, and they will have lost the ability retained by rejecting creditors (who are given the ability to opt out) to pursue the Intercreditor Claims. This would grossly inequitable, unprecedented and far from consensual.

6. *Second*, the Involuntary Third-Party Releases, if granted, would violate section 510(a) of the Bankruptcy Code. Section 510(a) mandates that subordination agreements are enforceable in a chapter 11 case to the same extent they are enforceable under state law. Nonetheless, the Involuntary Third-Party Releases seek to eviscerate the enforceability of the Second Lien Intercreditor Agreement. Thus, both the Involuntary Third-Party Releases, and the Proposed Plan's attempt to cancel the Second-Lien Intercreditor Agreement, violate section 510(a) of the Bankruptcy Code.

7. In sum, and as further set forth below, the Court should deny confirmation of the Proposed Plan.

Background

8. On April 13, 2014 (the "Petition Date"), the Debtors filed voluntary petitions for relief (the "Petitions") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Court").

9. As of the Petition Date, the Debtors were party to three secured note indentures: (i) the Indenture dated October 25, 2012, as supplemented by the Supplemental Indenture dated as of November 16, 2012 (as amended, restated,

supplemented or otherwise modified, the "First Lien Indenture"), with BOKF, N.A. as trustee (the "First Lien Indenture Trustee"),[4] (ii) the 1.5 Lien Indenture, and (iii) the Indenture dated as of November 5, 2010 (as amended, restated, supplemented or otherwise modified, the "Second Lien Indenture"), with Wilmington Fund Savings Society, FSB as trustee (the "Second Lien Indenture Trustee").[5]

The Second Lien Intercreditor Agreement

10. On or about November 16, 2012, the Debtors, the First Lien Indenture Trustee, the 1.5 Lien Indenture Trustee and the Second Lien Indenture Trustee entered into the Second Lien Intercreditor Agreement, which establishes, among other things, the priorities of the parties' liens on the "Common Collateral" (as defined in the Second Lien Intercreditor Agreement) securing the lenders' respective obligations under the Indentures. (See *Declaration of Geoffrey J. Lewis*, executed on July 28, 2014 ("Lewis Decl."), at Ex. 1).[6]

11. The Second Lien Intercreditor Agreement defines rights to the Common Collateral with respect to two categories of claim-holders: the "Senior Lender Claims" and the "Second-Priority Secured Parties." Generally:

a. The Senior Lender Claims are the claims of the holders of all "First-Lien Indebtedness." The First-Lien Indebtedness includes all indebtedness under the "Credit Agreement," the First Lien Notes Indenture, the 1.5 Lien Notes Indenture, and other senior lender documents.

[4] On June 18, 2014, BOKF, N.A. replaced The Bank of New York Mellon Trust Company as trustee under the First Lien Indenture.

[5] On or about April 16, 2014, Wilmington Savings Fund Society, FSB ("WSFS") replaced The Bank of New York Mellon Trust Company as trustee under the Second Lien Indenture.

[6] The Lewis Decl. is being filed and served contemporaneously with this Objection.

b. The Second-Priority Secured Parties are all persons holding any secured "Second-Priority Claims" who are beneficiaries of the Second Lien Intercreditor Agreement.

12. The Second Lien Intercreditor Agreement provides, among other things, that until the Senior Lender Claims are fully satisfied *in cash* (as defined therein), the Second Lien Indenture Trustee, as agent, and the Second-Priority Secured Parties will not:

a. exercise any remedies with respect to the Common Collateral (§ 3.l(a)(i)(x));

b. interfere with the Senior Lenders' exclusive rights to enforce rights or exercise remedies with respect to the Common Collateral (§ 3.1(a)(ii));

c. take actions adverse to the Senior Lenders' liens on the Common Collateral (§ 3.1(a)(B));

d. take or receive Common Collateral or proceeds of Common Collateral in connection with the exercise of rights in respect of their claims (§ 3.1(b));

e. take any action that would hinder the 1.5 Lien Indenture Trustee's or any Senior Lender's exercise of remedies (§ 3.1(c));

f. commence or join any efforts to collect on their interest in the Common Collateral (§ 3.2);

g. object to any request for judicial relief made by the 1.5 Lien Indenture Trustee relating to the lawful enforcement of any lien of any Senior Lender (§ 6.1); and

h. contest or object to: (i) any request for adequate protection by any Senior Lender, or (ii) the claim for lack of adequate protection by any Senior Lender (§ 6.3).

The RSA and BCA

13. On May 9, 2014, the Debtors filed a motion to assume (i) a prepetition Restructuring Support Agreement, dated as of the Petition Date (as amended, supplemented or otherwise modified, the "RSA"), by and among the Debtors, Apollo and certain holders of the Second Lien Notes (collectively, the "Plan Support Parties") and (ii) a Backstop Commitment Agreement dated as of May 9, 2014 (as amended, supplemented or otherwise modified, the "BCA") by and among the Plan Support Parties (the "Backstop Parties") [ECF No. 147] . The RSA and the BCA contemplate a rights offering to holders of Second Lien Notes (the "Second Lien Noteholders") of equity in the Reorganized Debtors at a substantial discount and a backstop commitment by certain Second Lien Noteholders to purchase any unsubscribed shares in the offering.[7] These agreements were each executed by holders of approximately 85% in outstanding principal amount of Second Lien Notes. Approximately 45% of the outstanding principal amount of the Second Lien Notes is held by members of an ad hoc committee of holders of Second Lien Notes (the "Second Lien Committee"). The balance of the 85% of Second Lien Notes held by parties which signed the RSA and BCA, is held by Apollo, which holds approximately 40% of the Second Lien Notes.

14. In exchange for agreeing to the Backstop, the Backstop Parties will receive a nonrefundable, non-avoidable, $30 million fee, payable upon entry of an order approving the BCA (the "BCA Commitment Premium"). (See BCA § 3.2). The BCA

[7] Under the BCA, the Debtors will issue subscription rights to the holders of Second Lien Note Claims to purchase common stock in the reorganized company (the "Rights Offering"). To the extent that any subscription rights are not purchased, the Backstop Parties have agreed to "backstop" the Rights Offering by agreeing to purchase any unsubscribed shares (the "Backstop").

Commitment Premium is payable in common stock in the Reorganized Debtors, unless the BCA is terminated and certain conditions are met, in which case the BCA Commitment Premium is payable in cash. (See id. §§ 3.2; 9.4).

15. In addition to the BCA Commitment Premium, the Backstop Parties are entitled to (i) an expense reimbursement by the Debtors for certain of the fees and expenses of the Backstop Parties, including the reasonable fees and expenses of the Backstop Parties and Apollo (the "BCA Expense Reimbursement") (see id. § 3.3), and (ii) an indemnification by the Debtors for any and all losses, claims, damages, liabilities, costs and expenses incurred in connection with the BCA and the Proposed Plan, and the transactions contemplated thereby, including the Backstop, the Rights Offering, the payment of the BCA Commitment Premium, or any claim, challenge, litigation, investigation or proceeding relating to any of the foregoing (the "BCA Indemnification") (See id. § 8.1). All parties to the BCA agree to use their reasonable best efforts to make effective the BCA and transactions thereunder, including the Proposed Plan. (See id. § 6.6(a)).

16. The BCA contains detailed procedures for submitting a claim for indemnification. (See BCA § 8.2). As a result, any indemnification claims made under the BCA would require two actions. First, the Backstop Parties would have to be liable in such a way that the BCA Indemnification is triggered. Second, the Backstop Parties would have to prevail in a subsequent action against the Debtors based on whatever indemnification obligations they contend are owed.

17. A hearing before this Court on the motion to assume the RSA and the BCA was held on June 19, 2014. The motion was opposed by certain Second Lien Noteholders that were not parties to the RSA and BCA. As set forth in a letter to the Debtors, dated May 30, 2014, and reiterated in open court, these precluded holders proposed to fund a backstop of the unsubscribed shares for a fee significantly lower than the fee proposed to be paid to the Backstop Parties under the BCA.[8] On cross-examination at the June 19 hearing, William Carter, the Debtors' Chief Financial Officer, testified that, other than the BCA, the Debtors never sought alternative financing to backstop the rights offering, not even from the 15% of Second Lien Noteholders that were not Plan Support Parties, nor from senior lenders or holders of the Debtors' unsecured subordinated notes and certainly not from third-parties. (June 19 Hearing Tr. 52:18-53:7). After hearing evidence, the Court stated that it was not prepared to approve the motion based on the evidence presented absent a substantial reduction in the Backstop Commitment Premium. (June 19 Hearing Tr. 198:5-11). Subsequently, the Court approved the motion, including the Backstop Commitment Premium as originally proposed, after the objections to the motion were resolved (which resolutions provided for adding the three objectors as parties to the RSA and BCA). See *Order Authorizing and Approving the Debtors' (I) Entry Into and Performance Under the Backstop Commitment Agreement, (II) Payment of Related Fees and Expenses, and (III)*

[8] *Objection of Fortress Investment Group LLC to Debtors' Motion for Orders (i) Authorizing the Debtors to Assume the Restructuring Support Agreement and (ii) Authorizing and Approving the Debtors' (A) Entry into and Performance under the Backstop Commitment Agreement, (B) Payment of Related Fees and Expenses and (C) Recurrence of Certain Indemnification Obligations*, filed on June 6, 2014 [ECF No. 330], ¶ 17 and Exhibit A; Tr. of Hr'g 89:23-94:25, June 19, 2014 (the "June 19 Hearing Tr."). The relevant portions of the June 19 Hearing Tr. cited herein are attached to the Lewis Decl. as Exhibit 4.

Incurrence of Certain Indemnification Obligations, dated June 23, 2014 [ECF No. 509] at ¶ 7. After such resolution, the percentage of second lien noteholders signatory to the RSA and BCA was ninety (90%) percent. See *Disclosure Statement for Joint Chapter 11 Plan of Reorganization for Momentive Performance Materials Inc. and its Affiliated Debtors*, dated June 23, 2014 [ECF No. 516] (the "Disclosure Statement") at 9 & n.6.

The Proposed Plan and Its Unlawful Third-Party Releases

18. On June 23, 2014, the Debtors filed the Proposed Plan, and the Court entered an Order on that date authorizing the Debtors to solicit votes on the Proposed Plan [ECF No. 508] (the "Solicitation Order").

19. Article XII of the Proposed Plan provides for the release, discharge and injunction of and against various claims, including releases of claims by and against certain non-Debtor third-parties. In particular, section 12.5(b) of the Proposed Plan provides that:

> Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date: (i) each of the Released Parties; (ii) *each holder of a Claim or Interest entitled to vote on this Plan that did not "opt out" of the releases provided in Section 12.5 of the Plan in a timely submitted Ballot; and* (iii) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, *all holders of Claims and Interests*, in consideration for the obligations of the Debtors and Reorganized Debtors under this Plan, the Plan Consideration and other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, *and each entity (other than the Debtors) that has held, holds or may hold a Claim or Interest*, as applicable, *will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities* (other than the right to enforce the obligations of any party under this Plan and the contracts, instruments, releases, agreements and documents delivered under or in connection with this Plan) *against the Released Parties*, whether liquidated or unliquidated, fixed or contingent,

> matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise *that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Reorganization Cases, or this Plan or the Disclosure Statement*.

Proposed Plan § 12.5(b) (emphasis added).

20. The non-Debtor third-parties included in the Proposed Plan's definition of "Released Parties" (which are the parties granted releases under the Proposed Plan) include: (a) "each of the Backstop Parties"; (b) "the Ad Hoc Committee of Second Lien Noteholders and each current and former member thereof"; (c) "each current and former Backstop Party"; (d) Apollo; and (e) "the Second Lien Indenture Trustee[.]" Proposed Plan § 1.147.

21. The ballots used to solicit votes on the Proposed Plan by holders of 1.5 Lien Note Claims provide holders with the option to either accept or reject the Proposed Plan. See Solicitation Order, Ex. B-4. Holders that vote to reject the Proposed Plan — and only these holders — are afforded an additional option to opt out of the releases set forth in section 12(b) of the Proposed Plan. See id. Specifically, the ballot states:

> IF YOU VOTED . . . TO REJECT THE PLAN AND YOU DO NOT OPT OUT OF THE RELEASE PROVISIONS BY CHECKING THE BOX BELOW (OR IF YOU VOTED TO ACCEPT THE PLAN, REGARDLESS OF WHETHER YOU CHECK THE BOX BELOW), YOU WILL BE DEEMED TO HAVE CONCLUSIVELY, ABSOLUTELY, UNCONDITIONALLY, IRREVOCABLY AND FOREVER RELEASED AND DISCHARGED THE RELEASED PARTIES FROM ANY AND ALL CLAIMS AND CAUSES OF ACTION TO THE EXTENT PROVIDED IN SECTION 12.5 OF THE PLAN.

Id. Thus, holders of 1.5 Lien Note Claims that either vote to accept the Proposed Plan, vote to reject the Proposed Plan and fail to check the "opt out" box, or abstain from voting on the Proposed Plan altogether are deemed to have granted the releases set forth in Section 12.5 of the Proposed Plan.

The 1.5 Lien Indenture Trustee's Intercreditor Action

22. On July 16, 2014, the 1.5 Lien Indenture Trustee commenced an action in New York Supreme Court (the "Intercreditor Action") against, among other defendants, certain Second Lien Noteholders, including Apollo, members of the Second Lien Committee, and the Backstop Parties (the "Intercreditor Defendants"). See Wilmington Trust, National Association v. J.P. Morgan Chase Bank, N.A., et al., Index no. 652181/2014 (N.Y. Sup. Ct.), filed July 16, 2014 (the "Intercreditor Complaint").[9] All of these parties are "Released Parties" under section 12.5(b) of the Proposed Plan.

23. As set forth in the Intercreditor Complaint, the Intercreditor Defendants breached the Second Lien Intercreditor Agreement. Under that agreement, the Second Lien Noteholders — again, a group largely dominated by Apollo — undertook to the 1.5 Lien Noteholders that they would not collect Common Collateral or the proceeds thereof from the Debtors, and would not interfere with the 1.5 Lien Noteholders' rights to Common Collateral, until the 1.5 Lien Noteholders were paid *in cash, in full*. Notwithstanding their obligations, and notwithstanding the fact that the 1.5 Lien Noteholders have *not* been paid in cash, in full, the Second Lien Noteholders have repudiated their commitments under the Second Lien Intercreditor Agreement. Among

[9] A copy of the Intercreditor Complaint is attached as Exhibit 2 to the Lewis Decl.

other things, they interfered with the 1.5 Lien Noteholders' rights by executing the RSA and supporting a Proposed Plan that provides for payments to them before the 1.5 Lien Noteholders were paid full, in cash. (See Intercreditor Complaint, Lewis Decl. at Ex. 2). Accordingly, the Intercreditor Complaint seeks compensatory damages as well as declarations requiring the Second Lien Indenture Trustee and the Second Lien Noteholders to hold in trust, and to turn over, distributions they receive under the Proposed Plan until their obligations to the 1.5 Lien Noteholders under the Second Lien Intercreditor Agreement are satisfied.[10]

Objection

I. THE PROPOSED PLAN SHOULD NOT BE CONFIRMED BECAUSE THE RELEASE OF THIRD-PARTY CLAIMS IS CONTRARY TO LAW

A. The Court Lacks Subject Matter Jurisdiction to Release Direct Third-Party Claims

24. The Second Circuit has cautioned that, before approving non-debtor releases, courts should carefully consider whether they have the subject matter jurisdiction to do so. See Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 66 (2d Cir. 2008), rev'd on other grounds and remanded sub nom. Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009), on remand Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 600 F.3d 135, 137 (2d Cir. 2010); see also In re Dreier LLP, 429 B.R. 112, 132 (Bankr. S.D.N.Y. 2010)

[10] On July 24, 2014, Apollo filed a Notice of Removal of the Intercreditor Action, thereby removing the Intercreditor Action to this Court. (Lewis Decl., Ex. 3). The 1.5 Lien Indenture Trustee will be filing a motion to remand the Intercreditor Action to New York Supreme Court at an appropriate time.

("[B]efore the Bankruptcy Court decides whether the proponent of a plan settlement injunction has demonstrated the 'unusual circumstances' mandated by Metromedia, it must first decide whether it has subject matter jurisdiction."). The burden to establish federal jurisdiction rests on the party invoking it — here, the Debtors. See, e.g., Linardos v. Fortuna, 157 F.3d 945, 947 (2d Cir. 1998).

25. A bankruptcy court has "related to" subject matter jurisdiction over an action if "the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.5 (1995) (citations and quotations omitted). Courts interpreting this standard have held that a court has "related to" subject matter jurisdiction if an action could have a "conceivable effect" upon the bankruptcy estate. Pfizer, Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.), 676 F.3d 45, 53 (2d Cir. 2012), cert. denied, 133 S. Ct. 2849 (2013) ("Quigley"). "[A]ny contingencies cannot be too far removed" and jurisdiction may not be found where there are "too many links in the chain of causation before the bankruptcy estate is affected." Sealink Funding Ltd. v. Bear Stearns & Co., No. 12 Civ. 1397 (LTS) (HBP), 2012 U.S. Dist. LEXIS 145418, at *8 (S.D.N.Y. Oct. 9, 2012).

26. The Debtors have not met and cannot meet their burden to establish the Court's subject matter jurisdiction under the "conceivable effect" standard. The Proposed Plan proposes to make certain distributions to the Second Lien Noteholders. If the 1.5 Lien Indenture Trustee is successful in the Intercreditor Action in establishing that the Intercreditor Defendants violated their obligations under the Second Lien

Intercreditor Agreement, the court in that action will direct the Intercreditor Defendants to pay over some amount of the consideration they receive under the Proposed Plan to make the 1.5 Lien Noteholders whole. The Intercreditor Defendants' compliance with that judgment, which would inevitably occur after confirmation (given that that Intercreditor Action is only at the pleading stage), could have no conceivable effect on the bankruptcy estate. Unlike in Quigley, the damages in the Intercreditor Action will be payable *only* by the Intercreditor Defendants, not from the Debtors' assets or from a joint fund shared with the Debtors. Quigley, 676 F.3d at 54 (finding jurisdiction to enjoin third-party claims because the third-party defendant and the debtor shared a common, finite insurance fund). Accordingly, any claims of the Backstop Parties against the Debtors under the BCA Indemnification are too attenuated to serve as a basis for jurisdiction because two actions will be necessary before any indemnification is triggered. Thus, the Intercreditor Action does not alter the Debtors' rights, liabilities, options or freedom of action, nor need it impact the handling and administration of the Debtors' cases. Indeed, the outcome of the Intercreditor Action will have no conceivable effect on the Debtors' estates.

27. The Debtors' opening brief in support of confirmation of the Proposed Plan does not even attempt to carry their burden with respect to the Court's jurisdiction to enter the Involuntary Third-Party Releases. In its Notice of Removal, however, the Apollo argued that the Court had subject matter jurisdiction with respect to that action because the Debtors have agreed to indemnify the Intercreditor Defendants for any losses they sustain in that action. NOR ¶ 14 (Lewis Decl., Ex. 3). The proponent of a third-

party release, however, cannot establish a "conceivable effect" on the bankruptcy estate, Quigley, 676 F.3d at 54, by manufacturing it through a postpetition agreement with plan proponents. See Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 761 (11th Cir. 2010) (explaining party's voluntary act does not confer jurisdiction on federal court); Greene v. Nationwide Mut. Ins. Co., 2011 U.S. Dist. LEXIS 6514, at *7 (N.D. W. Va. Jan. 21, 2011) (a party "cannot manufacture federal jurisdiction by a document of its own making").

28. Indeed, an indemnification agreement entered into postpetition cannot serve as a basis for subject matter jurisdiction over third-party claims where no other basis for jurisdiction exists. See Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 756 (5th Cir. 1995) (holding that bankruptcy court lacked subject matter jurisdiction to enjoin tort claims against debtor's insurance provider "[b]ecause [third-parties] are not debtors and because the property at issue – the bad faith claims – is not property of the estate" and absent the indemnification provision in the settlement, there was no other basis for jurisdiction); Dreier, 429 B.R. at 133 (declining to approve injunction against list of third-party claims, stating "such claims do not affect property of the estate or the administration of the estate beyond [third-party's] insistence that the GSO Settlement Agreement must include the Bar Order.").

29. Accordingly, any impact on the Debtors that may arise from the litigation of the Intercreditor Claims is entirely of their own making pursuant to agreements with their current and future owners either entered into immediately prior to filing and assumed in these bankruptcy cases, or entered into postpetition. The Debtors cannot be

permitted to manufacture this Court's subject matter jurisdiction over the direct claims of third-parties that have no conceivable effect on their cases by the undertaking of obligations under the RSA and BCA. Therefore, the Court lacks subject matter jurisdiction to release the Intercreditor Defendants from claims asserted in the Intercreditor Action.

B. The Involuntary Third-Party Releases Do Not Meet Any of the Metromedia Factors

30. Even if the Debtors could establish the Court's subject matter jurisdiction to enter a release of the Intercreditor Claims, the Debtors still cannot establish that the claims should be released under the Second Circuit's holding in Metromedia. 416 F.3d at 143. Under Metromedia, non-debtor third-party releases are allowed "only in rare cases" where "truly unusual circumstances render the release terms important to success of the plan." Id.; see also Cartalemi v. Karta Corp. (In re Karta Corp.), 342 B.R. 45, 55 (S.D.N.Y. 2006) ("the challenge for a court is to parse the facts of the case before it to see whether a significant non-debtor financial contribution plus other unusual factors render a situation so 'unique' that non-debtor third-party releases are appropriate"). The Second Circuit has cautioned that "a nondebtor release is a device that lends itself to abuse" especially where the releases "afford blanket immunity." Metromedia, 416 F.3d at 142.

31. In determining whether circumstances in a particular bankruptcy case justify third-party releases, Metromedia requires courts to consider the following factors: whether (i) the released claims are "channeled to a settlement fund rather than extinguished"; (ii) the debtors' estates will "receive[] substantial consideration" from the

released parties; (iii) the released claims "would indirectly impact the debtor's reorganization by way of indemnity or contribution"; (iv) the "plan otherwise provide[s] for the full payment of the enjoined claims"; and (v) third-party "affected creditors consent." See id. at 142-43 (internal quotation marks omitted). When weighed here, these considerations militate against granting the Involuntary Third-Party Releases set forth in the Proposed Plan.

(i) *The Intercreditor Claims Are Being Extinguished, Not Channeled.*

32. The Intercreditor Claims are not being channeled to a settlement fund. They will be extinguished if the Involuntary Third-Party Releases are upheld by this Court. This factor weighs against approval.

(ii) *The Debtors' Estates Are Not Receiving Substantial Consideration.*

33. The Debtors' estates are not receiving substantial consideration to justify the release of the Intercreditor Claims. To the contrary, the record demonstrates that it is the Backstop Parties themselves (*i.e.*, Apollo and the participating Second Lien Noteholders) — not the Debtors' estates — that are receiving substantial consideration through the BCA. The Backstop Parties have agreed to subscribe for their *pro rata* share of the Debtors' $600 million equity rights offering and to backstop the remaining 10% of the offering. Their agreement to serve, however, came with substantial benefits. Under the BCA, they are acquiring the reorganized stock of the Debtors at a substantial discount (15%) from the Proposed Plan valuation price. Even sweeter, the BCA grants them a $30 million fee for their "commitment" to buy the Debtors' stock at a discount. Disclosure Statement § 12.1; BCA § 3.1.

34. There is no evidence in the record that the value of the backstop commitments was assessed or that the third-party releases were a necessary component of these commitments. To the contrary, there was no competitive process to obtain this equity financing, either before or after proposal of the RSA and BCA, and the Debtors apparently ignored unsolicited offers of cheaper financing. See June 19 Hearing Tr. 52:18-53:7; *supra* ¶ 17. Finally, the benefits enjoyed by those providing the Backstop financing are so substantial that Second Lien Noteholders that were not Backstop Parties contested their being excluded from the deal. *Supra* ¶ 17.

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

36. There has, therefore, been no consideration from the released parties substantial enough to justify the Involuntary Third-Party Releases. Compare Karta, 342 B.R. at 55 ("the mere fact of financial contribution by a non-debtor cannot be enough to trigger the right to a Metromedia . . . release of non-debtor claims"), with Fox v. Picard (In re Madoff), 848 F. Supp. 2d 469, 490 (S.D.N.Y. 2012) ($7.2 billion recovery to the estate from alleged Madoff co-conspirator qualifies as substantial consideration); In re

Adelphia Commc'ns Corp., 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007) ($17.5 billion into the debtors' estates qualifies as substantial consideration).

(iii) *The Postpetition Indemnifications Here Should Be Disregarded as a Metromedia Factor*

37. Although the BCA obligates the Debtors to indemnify the Backstop Parties for liability associated with the Intercreditor Action, this indemnity does not justify a third-party release under the Metromedia standard. Under Metromedia, only prepetition indemnification agreements should be considered. See, e.g., In re Genco Shipping & Trading Ltd., No. 14-11108 (SHL), 2014 Bankr. LEXIS 2854, at *106-07 (Bankr. S.D.N.Y. July 2, 2014) ("Thus, the Court will approve third-party releases to align with indemnification obligations of the Debtors that existed before the filing of these bankruptcy cases by virtue of employment agreements, bylaws, retentions, or other loan agreements."). As the court in Adelphia explained:

> Some people and entities (e.g., by employment contracts, corporate bylaws, or retention or loan agreements) must be indemnified by the estate with respect to their services. To the extent that the third-party releases are congruent with the indemnification obligations, and the Debtors would be liable for any liability imposed on such persons, third party releases are acceptable.

Adelphia, 368 B.R. at 268.

38. Postpetition indemnification obligations under plan support and related agreements do not justify a third-party release under Metromedia. See Genco, 2014 Bankr. LEXIS 2854, at *106-07. This is because "[i]t would set the law on its head if parties could get around it by making a third-party release a sine qua non of their deal, to establish a foundation for an argument that the injunction is essential to the

reorganization, or even 'an important part' of the reorganization." Adelphia, 368 B.R. at 269. The BCA Indemnification is precisely the type of manufactured justification for a third-party release that the courts in Genco and Adelphia disallowed. There, as here, "[t]he Debtors and the Released Parties should not be able to create indemnification obligations simply to gain the protection of a third party release." Genco, 2014 Bankr. LEXIS 2854, at *107.[11]

39. This is particularly true where, as here, the indemnification is entirely circular. Under the Proposed Plan, the parties indemnified by the Reorganized Debtors in connection with the Intercreditor Claims (*i.e.*, the Second Lien Noteholders) will own the Reorganized Debtors post-confirmation. Plan § 5.6. Thus, the Backstop Parties are creating only the *appearance* of indemnification — in fact, the indemnifying and indemnified parties are nearly identical. The Court should afford no consideration to this contrived arrangement.

(iv) *The Proposed Plan Does Not Provide For Full Payment of the Intercreditor Claims*

40. Even if the 1.5 Lien Note Claims may be satisfied under the Bankruptcy Code with the Replacement 1.5 Lien Notes, that distribution does not necessarily satisfy any damage claims under New York law under the Second Lien Intercreditor Agreement. The 1.5 Lien Indenture Trustee is permitted to seek damages associated with the Intercreditor Defendants' various breaches of the Second Lien Intercreditor Agreement — including whether the Debtors' treatment of the 1.5 Lien Noteholders in their

[11] Moreover, the BCA Indemnification relates solely to the Backstop Parties and has no bearing on — and therefore provides no justification for — the proposed Involuntary Third-Party Release of the Second Lien Indenture Trustee, the Second Lien Committee or Apollo acting in any other capacity.

reorganization would have been successful but for the Intercreditor Defendants' support of that treatment. Such damages are not provided for in the Proposed Plan in any respect.

(v) *The Affected Creditors Do Not Consent to the Involuntary Third-Party Releases*

41. Finally, Metromedia requires the Court to consider whether the 1.5 Lien Noteholders voted to accept the releases. The 1.5 Lien Indenture Trustee does not consent to the Involuntary Third-Party Releases and cannot be deemed to consent because there is no mechanism for the 1.5 Lien Indenture Trustee to "opt out" of such third party releases. See Genco, 2014 Bankr. LEXIS 2854, at *103-04 (finding equity holders did not consent to third-party releases where there was no opt-out mechanism for purposes of plan voting and analyzing permissibility of such releases under Metromedia).

42. In addition, the balloting process was constructed in such a way that abstentions by 1.5 Lien Noteholders would be deemed consents by the Debtors. The only way to *not* consent here was to affirmatively opt out by rejecting the Proposed Plan. Deprivation of the ability to abstain from voting while still opting out of the Proposed Plan's releases cannot fairly be characterized as consent to the Proposed Plan's releases, and abstentions should not be construed as consents to the detriment of the parties in interest. See In re Wash. Mutual, Inc., 442 B.R. 314, 355 (Bankr. Del. 2011) (holding that "[f]ailing to return a ballot is not a sufficient manifestation of consent to a third party release."); In re Conseco, Inc., 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003) (after warning that the court would not confirm a plan where non-accepting creditors would be bound by third-party releases (similar to the Proposed Plan), the court confirmed the debtor's

redrafted plan which included a procedure for creditors who abstained from voting to opt out of the releases).

43. It would be particularly inequitable to treat holders of 1.5 Lien Note Claims that vote to accept the Proposed Plan as having consented to the third-party releases in the event that Class 5 ultimately rejects the Proposed Plan. This would result in the votes of the majority creditors in Class 5 (that vote to reject) binding the minority (that vote to accept) to be compelled to receive Replacement 1.5 Notes rather than the cash they sought to choose, while then precluding those minority creditors from getting all the consideration being received by the majority — namely, the opt-out of releases and attendant ability to pursue the Intercreditor Claims. This structure thereby inequitably punishes those holders of 1.5 Lien Note Claims who seek to accommodate the Plan proponents, by depriving these creditors from enjoying the rights received by those who were seeking to stymie the Proposed Plan and the objectives of the Plan proponents. This is simply unjustifiable.

44. Indeed, even in cases that have tolerated releases from accepting creditors with no opt-out option, the accepting creditors have been afforded the recovery for which they voted, which is why there was an arguable basis for the release. See Genco, 2014 Bankr. LEXIS 2854, at *100-05 (declining to grant deemed third-party releases by unimpaired and impaired classes that were not entitled to vote, but granting third-party releases by creditors that could and did vote to accept where the accepting creditors received the plan treatment for which they voted); In re DBSD N. Am., Inc., 419 B.R. at 218-19 (granting third-party release by creditors in accepting classes that voted to accept

the plan); Adelphia, 368 B.R. at 268 (same); In re Calpine, 2007 Bankr. LEXIS 4390, at *15, 26, 50-53 (granting third-party release by stakeholders that voted to accept the plan, including accepting members of crammed-down class, where cram-down plan did not provide toggle treatment and rejecting class therefore received the same consideration as it would have received had it accepted). In such cases, stakeholders who voted in favor of the plan at issue, and thereby did not have the opportunity to opt out of the third-party releases, were deemed to have agreed to the third party release; however, in each case the stakeholders who voted on the plan actually received the treatment that was being endorsed by such stakeholder's vote to accept. Here, by contrast, a holder of 1.5 Lien Note Claims that votes to accept the Proposed Plan expects to receive a certain treatment — cash — but if Class 5 rejects the Proposed Plan, such holder of 1.5 Lien Note Claims will receive Replacement 1.5 Lien Notes. Thus, unlike the foregoing cases, holders of 1.5 Lien Note Claims who vote to accept the Proposed Plan will be denied the treatment they viewed to be worthwhile, and which justified the granting of the release. Such an inequitable result should not be countenanced by the Court.

* * *

45. In sum, the balancing of Metromedia considerations demonstrates that the Involuntary Third-Party Releases are not essential or even important to the success of the Proposed Plan. To the contrary, the Involuntary Third-Party Releases are, by their very terms, granted solely "to the fullest extent permissible under applicable law." Notwithstanding this phrase, courts routinely address third-party releases at the confirmation stage and deny approval of the releases to the extent inconsistent with

applicable law. U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion), 426 B.R. 114, 143-44 (Bankr. D. Del. 2010) (notwithstanding "to the fullest extent permissible under applicable law" provision, court denied approval of impermissible releases at plan confirmation stage); see also Genco, 2014 Bankr. LEXIS 2854, at *103-09 (notwithstanding "to the fullest extent permissible under applicable law" provision, court denied approval of releases with respect to certain categories of claims). The fact that the Debtors and beneficiaries of the releases contemplated and were willing to move forward with the Proposed Plan even without the releases demonstrates that the Involuntary Third-Party Releases are not essential or even important to the Proposed Plan. Proposed Plan § 12.5(b)). Were this not the case, such conditionality would not have been acceptable and this language would not have been included in the Proposed Plan.[12]

46. Failing, as it does, to meet the standards established in Metromedia for approval of the Involuntary Third-Party Release, the Proposed Plan should not be confirmed.

[12] Notably, a finding by this Court that section 12.5(b) of the Proposed Plan does not release the Intercreditor Claims would not provide a basis for parties to terminate the BCA or the RSA, given that no substantive modification of the Proposed Plan would be effected as compared with the term sheet attached to the RSA [ECF No. 16, App'x 1, Ex. A] (the "RSA Term Sheet"). The RSA Term Sheet requires only that "[t]he Plan of Reorganization shall contain customary releases and exculpation provisions." RSA Term Sheet at 17; cf. BCA § 9.2(h) (granting termination right if Proposed Plan or related documents are amended or modified without prior written consent of "Requisite Commitment Parties") and RSA § 2.1(m) (granting termination right if Proposed Plan or related documents are amended or modified without consent of the "Requisite Investors"). The fact that the RSA and BCA do not provide a right of termination in the event that the Proposed Plan does not release the Intercreditor Claims demonstrates the manifest lack of importance of such releases. Accordingly, the Involuntary Third-Party Releases do not satisfy Metromedia and should not be approved by this Court.

II. THE PROPOSED PLAN CANNOT BE CONFIRMED BECAUSE THE RELEASE OF THE INTERCREDITOR CLAIMS AND THE ATTEMPT TO CANCEL THE SECOND LIEN INTERCREDITOR AGREEMENT IN SECTION 7.3 OF THE PROPOSED PLAN VIOLATE SECTION 510(a) OF THE BANKRUPTCY CODE

A. The Legal Standard

47. Section 1129(a) of the Bankruptcy Code sets forth 13 prerequisites for the confirmation of a chapter 11 plan of reorganization. See 11 U.S.C. § 1129(a). As a matter of law, absent satisfaction of each requirement of section 1129(a) of the Bankruptcy Code, a plan cannot be confirmed. Even a plan that satisfies the "cram down" criteria set forth in section 1129(b) of the Bankruptcy Code must still satisfy each of the 1129(a) requirements other than the requirements set forth in section 1129(a)(8).

48. The Debtors, as the proponents of the Proposed Plan, bear the burden of establishing by a preponderance of the evidence that the Proposed Plan meets the requirements of section 1129(a) of the Bankruptcy Code. See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns), 419 B.R. 221, 243 (Bankr. S.D.N.Y. 2009). If the Debtors fail to present sufficient evidence to support an affirmative finding as to any element set forth in section 1129(a), the Court should deny confirmation of the Proposed Plan. In re Prudential Energy Co., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986).

49. The Debtors have failed to meet their burden of establishing that the Proposed Plan satisfies each applicable requirement of section 1129(a) of the Bankruptcy Code. The Proposed Plan fails to satisfy section 1129(a)(1), which provides that a plan can be confirmed only if it "complies with the applicable provisions of [the Bankruptcy

Code]." 11 U.S.C. § 1129(a)(1). In particular, the Proposed Plan violates section 510(a) of the Bankruptcy Code which mandates the enforceability of valid subordination agreements. See, e.g., In re Best Prods. Co., 168 B.R. 35, 62 (Bankr. S.D.N.Y. 1994) ("Pursuant to sections 510(a) and 1129(a)(1) of the Bankruptcy Code, [debtor] was mandated to enforce the subordination agreements unless the parties in whose favor they ran agreed otherwise or unless the subordination agreements were unenforceable under applicable nonbankruptcy law."). Both the Involuntary Third-Party Releases and section 7.3 of the Proposed Plan violate section 510(a) of the Bankruptcy Code.

B. The Involuntary Third-Party Releases Abrogate an Enforceable Subordination Agreement in Violation of 11 U.S.C. § 510(a)

50. Section 510(a) of the Bankruptcy Code provides that "[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. § 510(a). The Involuntary Third-Party Releases seek to release the Intercreditor Claims and would thereby abrogate the subordination provisions of the Second Lien Intercreditor Agreement in violation of section 510(a) of the Bankruptcy Code.

51. Subordination agreements are enforceable under New York law. See N.Y. U.C.C. Law § 9-339 (McKinney 2014). The Second Lien Intercreditor Agreement is governed by New York law, and therefore as a subordination agreement it is enforceable in these chapter 11 cases. See In re Bos. Generating, LLC, 440 B.R. 302, 318 (Bankr. S.D.N.Y. 2010) (An "[i]ntercreditor [a]greement is an enforceable agreement under section 510(a) of the Bankruptcy Code to the extent that it is a subordination

agreement."). "Subordination agreements are essentially inter-creditor arrangements[.]" HSBC Bank USA v. Branch (In re Bank of New Eng. Corp.), 364 F.3d 355, 361 (1st Cir. 2004).

52. The Second Lien Intercreditor Agreement is a subordination agreement for purposes of section 510(a) of the Bankruptcy Code because it provides that the Second Lien Noteholders agree to subordinate their liens and priority to the liens securing the First Lien Notes and the 1.5 Lien Notes. See Robinson v. Howard Bank (In re Kors, Inc.), 819 F.2d 19, 24 (2d Cir. 1987) ("§ 510(a) enables creditors to subordinate their priorities by agreement if permitted to do so by nonbankruptcy law. In this case, the applicable nonbankruptcy law . . . states [that n]othing in this article prevents subordination by agreement by any person entitled to priority. Such subordination agreements are uniformly upheld by the courts.") (citation omitted); Ion Media Networks, Inc. v. Cyrus Select Opportunities Master Fund, Ltd. (In re Ion Media Networks, Inc.), 419 B.R. 585, 595 (Bankr. S.D.N.Y. 2009 ("The Court concludes that the Intercreditor Agreement is strictly enforceable in accordance with its terms. Moreover, plainly worded contracts establishing priorities . . . should be enforced and creditor expectations should be appropriately fulfilled. The Intercreditor Agreement is an enforceable contract under section 510(a) . . . ."); see also Second Lien Intercreditor Agreement § 2.1(b) ("[A]ny Lien on the Common Collateral securing any Second-Priority Claims . . . shall be junior and subordinate in all respects to all Liens on the Common Collateral securing any Senior Lender Claims[.]"). The Second Lien Intercreditor Agreement therefore remains enforceable in these chapter 11 cases pursuant to section 510(a) of the Bankruptcy Code.

53. As articulated at the June 19, 2014 hearing to consider approval of the Disclosure Statement, Debtors' counsel agreed that the Bankruptcy Code requires the Proposed Plan to preserve and give effect to enforceable subordination agreements, including the Second Lien Intercreditor Agreement. See June 19 Hearing Tr. 73:13-20 ("THE COURT: Isn't there another provision of this plan that says subordination agreements are to be fully enforced? I mean, that's the underlying premise of the plan. MR. FELDMAN [counsel to the Debtors]: Yes, Your Honor. There's nothing in the plan that seeks to eliminate or limit subordination — THE COURT: Subordination rights. MR. FELDMAN: Yeah.").

54. For the enforcement of subordination agreements to have any meaning, the non-Debtor beneficiaries of such subordination agreements must have the ability to enforce their rights against the non-Debtor subordinated parties. The Involuntary Third-Party Releases, however, will strip these agreements of any meaningful enforcement mechanism, because the parties will be unable to pursue remedies for breaches thereof. Such a result is untenable, as implied by the Court's remarks at the Disclosure Statement hearing. See June 19 Hearing Tr. 74:11-14 ("THE COURT: But my thought was again that the plan also enforces all subordination agreements. So I guess there is a conflict there, but I would think the subordination agreement would trump it.").

C. 11 U.S.C. § 1129(b)(1) Does Not Support a Release of the Intercreditor Claims or Cancelling the Second Lien Intercreditor Agreement

55. Section 1129(b)(1) provides that a cram down plan can be confirmed "[n]otwithstanding section 510(a) of this title[.]" 11 U.S.C. § 1129(b)(1). Read

collectively with sections 510(a) and 1129(a)(1) of the Bankruptcy Code, subordination agreements are enforceable in bankruptcy to the same extent that they are enforceable under applicable non-bankruptcy law, and must be given effect in order for a chapter 11 plan to be confirmed, except to the limited extent these requirements may be overridden for purposes of cramdown pursuant to section 1129(b)(1). See 11 U.S.C. § 510(a) (stating that a "subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law"); 11 U.S.C. § 1129(a)(1) (providing that a plan can be confirmed only if it "complies with the applicable provisions of [the Bankruptcy Code])."

56. Courts have reached differing conclusion as to applicability of subordination agreements in the context of considering whether to confirm a cramdown plan pursuant to section 1129(b). Compare In re Tribune Co., 472 B.R. 223, 241-42 (Bankr. D. Del. 2012) (subordination agreements otherwise enforceable under section 510(a) are not considered in a section 1129(b) unfair discrimination analysis for cramdown plan confirmation purposes), aff'd in part, vacated in part sub nom. Wilmington Trust Co. v. Tribune Co. (In re Tribune Co.), No. 12-128, 2014 U.S. Dist. LEXIS 82782 (D. Del. June 18, 2014); with In re Consul Rest. Corp., 146 B.R. 979, 988 (Bankr. D. Minn. 1992) (subordination rights are "enforceable under the discrimination and fair and equitable concepts" of section 1129(b)(1)) (citations omitted). Those differing conclusions aside, however, it is indisputable that otherwise valid subordination

agreements remain enforceable for all other, non-cramdown purposes, notwithstanding section 1129(b)(1) of the Bankruptcy Code.[13]

57. Whether a subordination agreement is given effect for purposes of determining whether a plan can be confirmed under section 1129(b) of the Bankruptcy Code has no bearing on the continued validity and enforceability of the subordination agreement in other contexts and for other purposes. Thus, the Involuntary Third-Party Releases are invalid because they render the Second Lien Intercreditor Agreement unenforceable. See, e.g., In re TCI 2 Holdings, LLC, 428 B.R. 117, 141-42 (Bankr. D.N.J. 2010) (confirming a cramdown plan notwithstanding potential violations of an intercreditor agreement, but nevertheless sustained an objection to the plan's proposed releases of pending litigation arising under such intercreditor agreement between non-debtor third parties).

58. In addition, section 1129(b) of the Bankruptcy Code thus provides no justification for cancelling the Second Lien Intercreditor Agreement in blatant disregard of section 510(a) of the Bankruptcy Code. Indeed, the Debtors have offered no legal basis for the Proposed Plan's cancellation and discharge of the Second Lien Intercreditor Agreement as it relates to non-Debtor parties, and none exists.

59. In sum, both the Involuntary Third-Party Releases and section 7.3 of the Proposed Plan violate section 510(a) of the Bankruptcy Code. The Proposed Plan thus cannot be confirmed.

[13] The 1.5 Lien Indenture Trustee expressly reserves all its rights and arguments with respect to the proposed cramdown of the 1.5 Lien Note Claims if the holders of such claims reject the Proposed Plan.

III. THE DEBTORS HAVE NOT PROVIDED SUFFICIENT EVIDENCE TO SUPPORT THE FEASIBILITY OF THE PLAN FOR PURPOSES OF THE BANKRUPTCY CODE

60. The Plan also is unconfirmable as a matter of law in the event that this Court determines that the Claims of the 1.5 Lien Successor Trustee and 1.5 Lien Noteholders can be crammed down at a rate higher than the rate proposed by the Debtors in the Plan. As described in the Disclosure Statement, the Plan proposes that the Replacement 1.5 Lien Notes (i) "will bear interest at a rate per annum equal to the Treasury Rate plus 2%, or such greater rate determined by the Bankruptcy Court is necessary to satisfy the provisions of the Bankruptcy Code" and (ii) will have a maturity date of 7 1/2 years. Disclosure Statement, Ex. 8 ("Replacement 1.5 Lien Notes Term Sheet").

61. The Debtors' Chief Financial Officer and financial advisor have each testified in their respective depositions that the Debtors have undertaken no analysis to determine whether the Plan would be feasible if the 1.5 Lien Successor Trustee was successful in obtaining a ruling from this Court that the appropriate cram-down rate was higher than the rate proposed in the Plan. To the extent the 1.5 Lien Successor Trustee is successful in obtaining a higher interest rate, the Debtors should be prohibited from introducing any evidence in support of feasibility unless the 1.5 Lien Successor Trustee is first provided with appropriate discovery and an opportunity to conduct a supplemental deposition of the Debtors and their financial advisor.

IV. THE CONFIRMATION ORDER SHOULD CLARIFY THE 1.5 LIEN INDENTURE TRUSTEE'S RIGHT TO PURSUE INTERCREDITOR CLAIMS ON BEHALF OF OPT-OUTS

62. Finally, the 1.5 Lien Indenture Trustee seeks clarification of a potential ambiguity in the Proposed Plan as to the right of the 1.5 Lien Indenture Trustee to pursue the Intercreditor Claims and other causes of action on behalf of 1.5 Lien Noteholders that affirmatively opt out of the third-party releases. Section 12.5 of the Proposed Plan provides that the non-Debtor third-party releases will be granted by "all holders of Claims" and "each entity . . . that that has held, holds or may hold a Claim[.]" Proposed Plan § 12.5(b). Based on this language, the post-confirmation Reorganized Debtors could conceivably try to argue that the 1.5 Lien Indenture Trustee independently is enjoined by the Proposed Plan from prosecuting the Intercreditor Claims on behalf of 1.5 Lien Noteholders that affirmatively opt out of the Proposed Plan's non-Debtor third-party releases. Such a strained interpretation would be unreasonable and unsupportable, since the 1.5 Lien Indenture Trustee was given no opportunity to opt out of the Proposed Plan's releases. Nevertheless, out of an abundance of caution, the 1.5 Lien Indenture Trustee respectfully requests that the Confirmation Order clarify that nothing in the Proposed Plan affects the rights of the 1.5 Lien Indenture Trustee to pursue the Intercreditor Claims and any other causes of action on behalf of 1.5 Lien Note holders that affirmatively opt out of the Proposed Plan's release provisions.

Notice

63. This Objection will be served upon (i) Momentive Performance Materials Inc., 260 Hudson River Road, Waterford, NY 12188 (Attn.: Douglas A. Johns, Esq.);

(ii) counsel for the Debtors, Willkie Farr & Gallagher LLP, 787 Seventh Avenue, New York, NY 10019 (Attn: Matthew A. Feldman, Esq. and Jennifer J. Hardy, Esq.); (iii) the Office of the United States Trustee, 201 Varick Street, Suite 1006, New York, NY 10014 (Attn: Brian S. Matsumoto, Esq. and Richard W. Fox, Esq.); (iv) counsel to the administrative agent under the Debtors' postpetition secured credit agreement, Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, NY 10017 (Attn: Steven M. Fuhrman, Esq. and Nicholas Baker, Esq.); (v) counsel to General Electric Capital Corporation, Bingham McCutchen LLP, One Federal Street, Boston, MA 02110 (Attn: Stephen M. Miklus, Esq. and Julia Frost-Davies, Esq.); (vi) counsel to the indenture trustee for the 8.875% First-Priority Senior Secured Notes, Dechert LLP, 1095 Avenue of the Americas, New York, NY 10036 (Attn: Michael J. Sage, Esq. and Brian E. Greer, Esq.); (vii) counsel to the Ad Hoc Committee of Second Lien Noteholders, Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, NY 10005 (Attn: Dennis F. Dunne, Esq. and Samuel A. Khalil, Esq.); (viii) counsel to Apollo Global Management, LLC and certain affiliated funds, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, NY 10036 (Attn: Ira S. Dizengoff, Esq. and Philip C. Dublin, Esq.); (ix) counsel to Momentive Performance Materials Holdings LLC, Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of Americas, New York, NY 10019 (Attn: Alan W. Kornberg, Esq. and Elizabeth R. McColm, Esq.); (x) counsel to the official committee of unsecured creditors, Klee, Tuchin, Bogdanoff & Stern LLP, 1999 Avenue of the Stars, Los Angeles, CA 90067 (Attn: Lee R. Bogdanoff, Esq. and Whitman L. Holt, Esq.); and (xi) counsel to the agent and arrangers for the Incremental

Facility, Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, NY 10017 (Attn: Damian S. Schaible, Esq. and Eli J. Vonnegut, Esq.).

Revisions to Proposed Plan

64. For the reasons set forth above, the 1.5 Lien Indenture Trustee respectfully requests that this Court deny confirmation of the Proposed Plan and deny approval of the Involuntary Third-Party Releases. To the extent that the Proposed Plan is confirmed, the 1.5 Lien Indenture Trustee requests that the Proposed Plan be modified as set forth on the attached **Appendix**.

No Prior Request

65. No prior request for the relief sought in this Objection has been made to this or any other court.

Reservation of Rights

66. The 1.5 Lien Indenture Trustee reserves the right (i) to amend or supplement this Objection based upon any facts or arguments that come to light prior to the Confirmation Hearing, including, without limitation, any facts uncovered in ongoing discovery or any assertion by the Debtors that the 1.5 Lien Note Claims are unimpaired under the Proposed Plan and (ii) to file additional objections to confirmation with respect to the Cramdown Provisions and the Redemption Premium Issue each as defined, and as provided for, in the *Order Establishing a Timeline for Confirmation- and Adversary Proceeding-Related Discovery*, entered on June 26, 2014 [ECF No. 551].

WHEREFORE, for all the foregoing reasons, the 1.5 Lien Indenture Trustee respectfully requests that this Court deny confirmation of the Proposed Plan.

Dated: New York, New York
July 28, 2014

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Appendix

For the reasons set forth in the Objection, the 1.5 Lien Indenture Trustee respectfully requests that this Court deny confirmation of the Proposed Plan and deny approval of the Involuntary Third-Party Releases. To the extent that the Proposed Plan is confirmed, the 1.5 Lien Indenture Trustee requests that the Proposed Plan be modified as set forth below (proposed revisions indicated by bolded and underlined text):

Proposed Plan § 7.3: Cancellation of Existing Securities and Agreements.

> Except for the purpose of evidencing a right to distribution under this Plan, including the enforcement of any subordination and "pay over" provisions in the Senior Subordinated Notes Indenture, and except as otherwise set forth herein, on the Effective Date all agreements, instruments, and other documents evidencing, related to or connected with any Claim or Interest **~~(including the Second Lien Notes Intercreditor Agreement),~~** other than Intercompany Interests, and any rights of any holder in respect thereof, shall be deemed cancelled, discharged and of no force or effect. The holders of or parties to such cancelled instruments, securities and other documentation will have no rights arising from or relating to such instruments, securities and other documentation or the cancellation thereof, except the rights provided for pursuant to this Plan. Notwithstanding anything to the contrary herein, each of the First Lien Indenture, 1.5 Lien Indenture, Second Lien Indenture, **~~and,~~** the Senior Subordinated Indenture **and the Second Lien Intercreditor Agreement** shall continue in effect solely to the extent necessary to: (a) permit holders of Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims, respectively, to receive Plan Distributions in accordance with the terms of this Plan; (b) effectuate and preserve any subordination and "pay over" provisions set forth in the Senior Subordinated Indenture **and the Second Lien Intercreditor Agreement**; (c) permit the Reorganized Debtors, the First Lien Indenture Trustee, the 1.5 Lien Indenture Trustee and the Second Lien Indenture Trustee to make Plan Distributions on account of the Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims, respectively, and deduct therefrom such compensation, fees, and expenses due thereunder or incurred in making such distributions, including by effectuating any charging liens permitted under the First Lien Indenture, 1.5 Lien Indenture and the Second Lien Indenture, respectively; and (d) permit the First Lien Indenture Trustee, the 1.5 Lien Indenture Trustee, and the Second Lien Indenture Trustee, respectively, to seek compensation and/or reimbursement of fees and expenses in accordance with the terms of this Plan. Except as provided pursuant to this Plan, upon the satisfaction of the Allowed First Lien Note Claims, Allowed 1.5 Lien Note Claims and Allowed Second Lien Note Claims, each of the First Lien Indenture Trustee, 1.5

Lien Indenture Trustee, the Second Lien Indenture Trustee and the Senior Subordinated Indenture Trustee and their respective agents, successors and assigns shall be discharged of all of their obligations associated with the First Lien Notes, 1.5 Lien Notes, Second Lien Notes and Senior Subordinated Notes, respectively. For the avoidance of doubt and notwithstanding any provision of the Plan to the contrary, nothing herein shall be deemed to impair or negatively impact any charging lien permitted under the Indentures.

Proposed Plan § 12.5(b): Releases by Holders of Claims and Interest.

Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date: (i) each of the Released Parties; (ii) each holder of a Claim or Interest entitled to vote on this Plan that did not "opt out" of the releases provided in Section 12.5 of the Plan in a timely submitted Ballot; and (iii) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, all holders of Claims and Interests, in consideration for the obligations of the Debtors and Reorganized Debtors under this Plan, the Plan Consideration and other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, and each entity (other than the Debtors) that has held, holds or may hold a Claim or Interest, as applicable, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities (other than the right to enforce the obligations of any party under this Plan and the contracts, instruments, releases, agreements and documents delivered under or in connection with this Plan) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Reorganization Cases, or this Plan or the Disclosure Statement. **However, notwithstanding this section or any other section of the Plan to the contrary, no release, exculpation, injunction, discharge, or other provision of the Plan shall release, impair or otherwise affect those claims asserted by the 1.5 Lien Indenture Trustee in that action styled as Wilmington Trust, N.A. v. JPMorgan Chase Bank, N.A., Index No. 652181/2014 (N.Y. Sup. Ct. July 16, 2014).**