15-1771

In the United States Court of Appeals for the Second Circuit

In the Matter of: MPM Silicones, L.L.C.,
Debtor.

U.S. Bank National Association, as indenture trustee,
Plaintiff-Appellant,

v.

Wilmington Savings Fund Society, FSB, as successor indenture trustee,
Momentive Performance Materials Incorporated,
Ad Hoc Committee of Second Lien Noteholders,
Apollo Management, LLC, and certain of its affiliated funds,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

OPENING BRIEF OF PLAINTIFF-APPELLANT U.S. BANK NATIONAL ASSOCIATION

Susheel Kirpalani
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7200

Roy T. Englert, Jr.
Mark T. Stancil
Alan E. Untereiner
Matthew M. Madden
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411 L
Washington, D.C. 20006
(202) 775-4500

Counsel for U.S. Bank National Association, as indenture trustee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant states the following:

U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company. No publicly held company owns 10% or more of U.S. Bancorp's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – Cont'd

Page(s)

TABLE OF AUTHORITIES – Cont'd

Page(s)

TABLE OF AUTHORITIES – Cont'd

Page(s)

TABLE OF AUTHORITIES – Cont'd

Page(s)

Statutes & Rules

Other Authorities

PRELIMINARY STATEMENT

This case involves a dispute between rival groups of creditors in the Chapter 11 reorganization of Momentive Performance Materials Inc. The appeal presents one pure question of law, and Appellees are almost certain to urge this Court to dismiss this appeal (despite a prior failed attempt) under the guise of so-called "equitable mootness." Appellees are wrong on both issues.

1. The central legal issue is a straightforward, but highly consequential, matter of contract interpretation. Appellant is the trustee for certain notes called the Senior Subordinated Notes. Those notes are subordinate only to what their indenture defines as "Senior Indebtedness." The indenture states that Senior Indebtedness *does not* include any debt that "by its terms is subordinate or junior in any respect to any other" debt. Moreover, this proviso is introduced by the italicized phrase "*provided, however,* that"—making clear that the proviso controls even if it is in tension with prior language. Accordingly, a debt can qualify as Senior Indebtedness—and thereby stand ahead of Appellant's notes for payment—only if it is not subordinate "in any respect" to any other debt.

The question is whether Appellees' notes—which are called the Second-Lien Notes because they are secured by junior liens and are subject to an intercreditor agreement with Senior-Lien Noteholders—qualify as Senior Indebtedness under the contract. The bankruptcy court and district court concluded that the Second-Lien Notes met that definition. As a result, the Second-Lien Notes obtained a significant recovery under the bankruptcy plan, while the Senior Subordinated Notes were left with nothing.

In so holding, the lower courts ignored the plain meaning of the indenture's words. The Second-Lien Notes are irrefutably subordinate "in any respect" to the Senior-Lien Notes, because the former cannot recover a penny against the common collateral until the latter are paid in full. And that is so even if the Senior-Lien Notes have their liens invalidated, or if the Second-Lien Notes manage to acquire proceeds or liens in some other way. Thus, the Second-Lien Notes are *heavily* subordinate to the Senior-Lien Notes.

Rather than acknowledge the plain meaning of the indenture's text, the lower courts simply rewrote it. More particularly, the words "*by its terms* subordinate or junior *in any respect*" were read to mean

"*implicitly* subordinate *in right of payment*." And the lower courts got the meaning of "*provided, however,* that" exactly backward, holding that what follows that phrase cannot conflict with or subsume what precedes it. Those glaring errors were compounded by the lower courts' mistaken assumption that a subordinated lien does not affect (in any respect) the nature of the debt it secures. As anyone who has ever taken out a second mortgage knows, the order of priority with respect to collateral has everything to do with the nature of the debt—indeed, that is often the most critical term affecting the debt's risk and cost.

The errors did not stop there. The lower courts also ignored the accepted meaning of "subordinate in any respect" in the bond industry, which developed this term precisely to prevent junior-lien creditors from inserting themselves above unsecured creditors. In the name of avoiding superfluity, the courts below embraced a reading that concededly produced its own superfluity, because they deemed Appellees' superfluity "easier to swallow" than the one caused by following the plain language. They committed the fundamental error of resorting to extrinsic evidence—and one-sided, self-serving assertions at that—to "confirm" (read: rewrite) unambiguous text. And they labeled

as "absurd" the commercially sensible idea that a debt might start out as *unsecured* Senior Indebtedness but give up that status in order to become a *secured* creditor. Respectfully, the lower courts misread the plain text of the provision *and* violated just about every principle of contract interpretation that could apply here.

2. Appellees will no doubt argue (as they have before, without success) that this Court should dismiss this appeal based on the judge-made doctrine of equitable mootness. In this Circuit, an appellate court may deploy that doctrine to dismiss a bankruptcy appeal after the substantial consummation of a Chapter 11 plan, but only in two narrow circumstances: (a) the appellant failed to pursue a stay, or (b) *every* effective remedy would unjustly unravel the plan, harm innocent third parties not before the court, or threaten the debtor's post-bankruptcy success. *In re Chateaugay Corp.*, 10 F.3d 944, 952–53 (2d Cir. 1993) *("Chateaugay II").*

Neither circumstance exists here. It is undisputed that Appellant promptly and diligently sought a stay of the plan consummation at every turn—in the bankruptcy court, the district court, and this Court. Accordingly, this "chief consideration" of the equitable-mootness

doctrine, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005), strongly favors reaching the merits of this appeal (as the district court did).

Moreover, effective relief is clearly available—indeed, there are several simple remedies available to correct the plan's improper diversion of recoveries from one group of noteholders to another. And recalibrating distributions among parties to this proceeding will not upset the reorganized debtors' post-bankruptcy success, create an uncontrollable situation, or adversely affect parties not before the Court. Indeed, it would be the height of *inequity* for Appellant to have been denied a stay on multiple occasions in part because the bankruptcy and district courts considered "the risk of equitable mootness" to be "not very great" (JA-2095; JA-2192), only to have its appeal now dismissed as equitably moot (based on circumstances, it must be added, that *Appellees* have largely created).

JURISDICTIONAL STATEMENT

The bankruptcy court had jurisdiction to consider the Debtors' joint plan of reorganization under 28 U.S.C. § 157(b)(2)(L). It entered an order confirming the plan on September 11, 2014. SPA-99 to SPA-

224. Also on September 11, 2014, Appellant U.S. Bank National Association filed a timely notice of appeal to the United States District Court for the Southern District of New York, which had jurisdiction to review the bankruptcy court's confirmation order under 28 U.S.C. § 158(a)(1). The district court entered a judgment affirming that on May 5, 2015. SPA-253 to SPA-254. U.S. Bank filed a timely notice of appeal to this Court on June 1, 2015. *See* JA-1019 to JA-1030. This Court has jurisdiction under 28 U.S.C. §§ 158(d)(1) and 1291.

STATEMENT OF THE ISSUE

Whether the Bankruptcy Court erred in confirming the Chapter 11 plan of Momentive Performance Materials, Inc., and various of its subsidiaries (collectively, the "Debtors"), because the plan improperly treated the Second-Lien Notes as "Senior Indebtedness" under the Senior Subordinated Notes indenture.

STATEMENT OF THE CASE

A. The Senior Subordinated Notes

In 2006, buyout firm Apollo Management acquired the Debtors and caused them to take on nearly $3 billion of debt. *See* JA-276. This debt included roughly $1 billion in secured bank loans, roughly $1.4 billion in unsecured senior notes maturing in 2014, and roughly $500

million of "11.5% Senior Subordinated Notes due 2016." JA-299 to JA-300. The last of these—the Senior Subordinated Notes—lie at the center of this case. Appellant U.S. Bank is the trustee for the Senior Subordinated Notes.

The Senior Subordinated Notes indenture governs where those notes stand relative to other creditors. The indenture provides that "only Indebtedness of the Company that is Senior Indebtedness of the Company shall rank senior to the Securities" in right of payment. JA-404. This case turns on what constitutes "Senior Indebtedness."

The indenture sets forth a detailed definition of Senior Indebtedness. As principally relevant here, it provides that

> "Senior Indebtedness" means all Indebtedness and any Receivables Repurchase Obligation of the Company or any Restricted Subsidiary, including interest thereon . . . and other amounts . . . owing in respect thereof, whether outstanding on the Issue Date or thereafter Incurred, unless the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company or such Restricted Subsidiary, as applicable; *provided*, *however*, that Senior Indebtedness shall not include, as applicable: . . .
>
> (4) any Indebtedness or obligation of the Company or any Restricted Subsidiary that by its terms is subordinate or junior in any respect to any other Indebtedness or obligation

> of the Company or such Restricted Subsidiary, as applicable, including any Pari Passu Indebtedness . . . .

JA-341 to JA-342.

This provision thus starts with a baseline definition that includes all obligations "unless the instrument creating or evidencing" them "expressly provides that such obligations are subordinated in right of payment to any other Indebtedness." *Id.* This baseline definition is then followed by the italicized phrase "*provided*, *however*, that"—which introduces six specific provisos. The provisos enumerate categories of debt and obligations that—notwithstanding the baseline definition—do not constitute Senior Indebtedness. Those six provisos cover a wide range of obligations—including, among other things, the company's obligations to subsidiaries, tax liabilities, accounts payable and trade creditor claims, and capital-stock obligations—thereby dramatically shrinking what qualifies as Senior Indebtedness.

The fourth of these provisos, the full text of which is quoted above, lies at the heart of this dispute. It declares that Senior Indebtedness does not include any existing or future indebtedness "that *by its terms* is subordinate or junior *in any respect* to any other Indebtedness or obligation." *Id.* (emphasis added).

When the indenture was executed, the Debtors had outstanding secured bank loans and unsecured senior notes. The secured bank notes clearly qualified as Senior Indebtedness because they were not subordinate by their terms in any respect to any other indebtedness. The unsecured senior notes might have been thought to be subordinate to the secured bank loans in one respect—namely, in their lack of any security interest, which meant that they had to wait behind secured creditors in the line to recover from the Debtors' collateral. The indenture separately specified, however, that "unsecured Indebtedness shall not be deemed to be subordinate or junior to Secured Indebtedness merely by virtue of its nature as unsecured Indebtedness." JA-347.

Reinforcing that point, the indenture separately grandfathered in several categories of existing obligations as "Designated Senior Indebtedness." JA-322. These included the bank loans and the unsecured senior notes, *id.*, both of which were set to mature before the Senior Subordinated Notes (in 2013 and 2014, respectively). Both of these categories of Designated Senior Indebtedness were ultimately paid off early.

B. The Debtors' Second-Lien Notes

To finance the early redemption of the unsecured senior notes, the Debtors issued new, second-lien debt. Second-lien debt gets its name because it is secured by a lien that is junior to other debt holding a senior lien on common collateral. Senior-lien debtholders "retain first priority to get paid from the proceeds of any shared collateral." JA-768. At the time the Senior Subordinated Notes' indenture was executed, the growing popularity of second-lien debt was the subject of attention in several industry publications. *See, e.g.*, JA-765, JA-779, JA-844.

In early 2006—before Appellant's Senior Subordinated Notes were issued—the Fitch Ratings agency issued a report warning that many unsecured note indentures contained a "loophole" that allowed debtors to circumvent existing restrictions on incurring (payment) subordinated debt by using second-lien debt. JA-768. (Fitch Ratings is a research, commentary, and ratings service widely followed in the corporate finance industry.) The Fitch report explained that many indentures restricted issuance of new debt only if it was "subordinated in right of payment" to existing first-priority debt. JA-769. These restrictions therefore did not reach second-lien debt, which is not subordinated "in

right of payment" to first-lien debt, because both second-lien debt and first-lien debt have the same access to the debtor's unencumbered assets. *See id.* In Fitch's view, the loophole could be closed by prohibiting not only new debt that is subordinate "in right of payment," but also "new debt that is 'subordinated in any respect.'" *Id.* This "in any respect" language would capture new debt that had a junior lien and hence junior access to the shared collateral. *Id.*

The Debtors started issuing their second-lien debt in 2009. At first, their efforts were relatively modest: They offered holders of the unsecured senior notes from 2006 and the Senior Subordinated Notes an opportunity to trade in their notes (at a discount) for second-lien notes that paid a higher interest rate (12.5%). JA-2241. Only $200 million of second-lien notes were issued through this 2009 exchange. *Id.*

Soon, however, the Debtors decided to issue much more second-lien debt. In 2010, they issued approximately $1.35 billion of new "Second-Priority Springing Lien Notes." JA-476. These notes, the Second-Lien Notes at issue here, paid interest rates of either 9% or 9.5% and were not set to mature until 2021. *Id.* Although these

Second-Lien Notes were initially unsecured, the notes' indenture provided that they would gain a second lien on most of the Debtors' assets—the lien would "spring"—after the existing 2009 second-lien notes were fully paid off. JA-517, JA-580 to JA-581. That would happen in 2012. JA-721. After this springing, the indenture declared, "the relative rights of holders of Second Priority Liens and holders of Liens securing First Priority Obligations" would be defined in an intercreditor agreement. JA-579.

Apollo, which continued to own and control the Debtors, became a major holder of the Second-Lien Notes. Unsurprisingly, then, the Debtors tried to present the Second-Lien Notes as standing ahead of the Senior Subordinated Notes. For instance, the Second-Lien Notes' indenture asserted that they were "senior Indebtedness of the Company." JA-626, JA-645. Likewise, in a 2010 SEC filing, the Debtors represented that, "[p]rior to and following the Springing Lien Trigger Date, the [Second-Lien] Notes . . . will rank . . . senior in right of payment to . . . the Company's existing subordinated notes." JA-3057.

But the Debtors articulated no reading of the Senior Subordinated Notes indenture that might justify this characterization under the

indenture's definition. Unlike the old senior notes (which by now had been paid off), the new Second-Lien Debt was not on the list of "Designated Senior Indebtedness." Thus, the new Second-Lien Debt could qualify as Senior Indebtedness for purposes of the Senior Subordinated Notes indenture only if the Second-Lien Notes were not "subordinate or junior in any respect" to any other debt. A prospectus prepared for the Second-Lien Notes, while claiming that the notes "will be senior indebtedness," made no reference to the capitalized definition of Senior Indebtedness in the Senior Subordinated Notes, which governs this case.[1] To the contrary, the Second-Lien Notes prospectus *acknowledged* when summarizing the "terms" of those notes that they ranked "effectively junior in priority" to the Debtors' senior secured obligations "to the extent of the value of [the common] collateral." JA-733.

C. The Intercreditor Agreement Between The Second-Lien Notes And Senior-Lien Notes

In 2012, in the course of refinancing their old secured bank debt (which was due to mature in 2013), the Debtors issued $1.35 billion of

[1] The Second-Lien Notes indenture does not define the term "senior indebtedness."

First and "1.5"-Lien Notes (the "Senior-Lien Notes"). *See* JA-285. These notes were scheduled to reach maturity in 2020 and effectively assumed the more senior liens that the old secured debt was giving up.

An intercreditor agreement between the Senior-Lien Noteholders and Second-Lien Noteholders defined the relationship between those two categories of notes. The Intercreditor Agreement was automatically incorporated as a term of the Second-Lien Noteholders' indenture. *See* JA-503. In the event of default, the Second-Lien Noteholders were not permitted to receive any proceeds from the common collateral until the Senior-Lien Noteholders were fully repaid.

> [S]o long as the Discharge of Senior Lender Claims has not occurred, the Common Collateral or proceeds thereof . . . shall be applied by the Intercreditor Agent to the Senior Lender Claims . . . .

JA-700. "Discharge of Senior Lender Claims" was elsewhere defined as "payment in full in cash." JA-693. Moreover, if the Second-Lien Noteholders somehow managed to receive proceeds from the common collateral ahead of the Senior-Lien Noteholders, they were required to hand the proceeds over immediately. JA-700 to JA-701. All this was

required even if the Senior-Lien Noteholders' liens proved to be legally *invalid*.[2]

The intercreditor agreement effectuates the Second-Lien Notes' subordination in several other ways, too. For example, if the Second-Lien Noteholders obtained a lien on any of the Debtors' property—even property that was not part of the common collateral—they would have to assign the lien to the Senior-Lien Noteholders unless the latter had been paid in full in cash. JA-698. The agreement also provided that, if a Second-Lien Noteholder obtained a judgment lien on common collateral "as a result of its enforcement of its rights as an *unsecured creditor*," it still had to subordinate the lien to the liens of the Senior-Lien Noteholders. JA-703 (emphasis added). Indeed, even if a payment to Senior-Lien Noteholders is later "declared to be fraudulent or

[2] The Second-Lien Noteholders' obligations "remain in full force and effect irrespective of . . . any lack of validity or enforceability of any Senior Lender Documents." JA-709. In addition, the "Senior Lender Claims" that have to be discharged before the Second-Lien Noteholders receive collateral proceeds include all "First-Lien Indebtedness," which in turn includes all the Senior-Lien Debt secured by any "Permitted Lien (as defined in the Second Lien Notes Indenture)." JA-693, JA-696. For its part, the Second-Lien Notes indenture defines "Permitted Lien" using an extremely broad definition of "Lien." That definition encompasses any security interest "whether or not filed, recorded or otherwise perfected under applicable law." JA-504.

preferential," the Senior-Lien claims must be reinstated and then paid in full before the Second-Lien Notes get a penny from the common collateral. JA-707.

D. The Debtors' Bankruptcy

After issuing all this debt, the Debtors found themselves over-leveraged and filed for bankruptcy. JA-286.

After a few months of "negotiations," the Debtors, Apollo, and other Second-Lien Noteholders came up with a plan. JA-288. The Senior-Lien Noteholders would be fully repaid in cash and the Second-Lien Noteholders would be repaid in the Debtors' equity (worth between 13 and 28 cents on the dollar (JA-271 to JA-272)). The Senior Subordinated Noteholders got nothing, because the plan provided that any value due to them was deemed paid over to the Second-Lien Noteholders. JA-4131.

Unsurprisingly, the Second-Lien Noteholders favored the plan, voting unanimously to accept it. SPA-105. No doubt that was because the plan treated the Senior Subordinated Notes as subordinate to the Second-Lien Noteholders' deficiency claims. And so, in effect, instead of paying the Senior Subordinated Noteholders any part of what they were

owed under their notes, the plan transferred *all* of that value to the Second-Lien Noteholders:

> [H]olders of Senior Subordinated Note Claims shall not receive any Plan Distribution on account of such Claims and any Plan Distribution to which they would have otherwise been entitled . . . shall constitute a portion of the recovery of holders of Second Lien Note Claims . . . .

SPA-188.

Appellant, on behalf of all Senior Subordinated Noteholders, challenged the proposed plan in the bankruptcy court, early on in an adversary proceeding (which was adjourned to plan confirmation) and ultimately through a formal objection to confirmation.[3] In challenging the proposed plan, Appellant argued that the premise underlying the

[3] Appellant repeatedly sought—and the Second-Lien Noteholders and the Debtors repeatedly resisted—expedited resolution of this contract dispute in the bankruptcy court. Thus, Appellant objected on the *first day* of the bankruptcy proceeding; promptly filed an adversary proceeding seeking a declaratory judgment on this issue; and asked for an expedited resolution. JA-4507 to JA-4512. In response, the Second-Lien Noteholders and the Debtors: (a) successfully urged the bankruptcy court to merge the adversary and confirmation proceedings, *deliberately electing* to delay resolution of this dispute until plan confirmation months later; (b) later opposed Appellant's request for immediate entry of an appealable order when the bankruptcy court said it intended to rule against Appellant; and (c) specifically urged that no order be issued until the Confirmation Order. *See* JA-1275 to JA-1276. The Second-Lien Noteholders and the Debtors candidly admitted that they wanted to deny Appellant an earlier and "separate appeal path for this issue." JA-1275.

redistribution of recoveries from one group of creditors to another was false—namely, that under the Senior Subordinated Notes indenture the Second-Lien Notes did not qualify as "Senior Indebtedness" and therefore could not recover ahead of the Senior Subordinated Noteholders (except as to any remaining value of the collateral not exhausted by the Senior-Lien Notes).

The bankruptcy court disagreed, holding that the Second-Lien Notes are not subordinate to the Senior-Lien Notes "in any respect," notwithstanding their inability to recover from the common collateral until the Senior-Lien Notes are repaid in full. SPA-18 to SPA-29. Having so held, the bankruptcy court confirmed Momentive's bankruptcy plan. *See* SPA-113 to SPA-114, SPA-117.

E. The Stay Proceedings

The bankruptcy court's confirmation order triggered an automatic 14-day stay, *see* Fed. R. Bankr. P. 3020(e), during which the Debtors were not permitted to consummate their reorganization plan. Appellant immediately asked the court to extend that stay pending appeal because the Debtors had signaled that they were likely to invoke the equitable-mootness doctrine in an effort to shield the confirmation

order from appellate review. At the hearing on the stay motion, Judge Drain stated that "the risk of equitable mootness [was] not strong here" because, among other things, if the plan challengers succeeded on appeal "their recovery would come largely from a recalibration of the consideration provided to the second lien noteholders" and would thus not require unwinding a host of complicated transactions. JA-2095. Moreover, he doubted "that the plan itself would fail by its terms if an appeal" were to succeed. *Id.* The bankruptcy court then denied the request for a longer stay. JA-1920 to JA-1921.

Appellant immediately renewed its stay request before the district court. JA-4541 to JA-4569. In a hearing on the motion, Judge Briccetti "agree[d] with Judge Drain that the risk of equitable mootness here [was] not very great because . . . it is possible to recalibrate the consideration provided to the second lien noteholders, who after all strongly support the reorganization plan," and because "the bankruptcy court could restructure the plan on remand." JA-2192. The district

court denied the stay request in an order entered on September 23. JA-2139.[4]

Appellant then immediately turned to this Court for emergency stay relief. In a summary order dated October 31, 2014, this Court also denied the motion for a stay. JA-2227.

F. The District Court Appeal

On November 11, 2014, after the plan had been substantially consummated and after the appeal was fully briefed,[5] the Debtors filed a motion to dismiss the Senior Subordinated Noteholders' appeal as equitably moot. JA-4570 to JA-4573. Appellant filed an opposition, emphasizing the considerations that had earlier persuaded the district

---

[4] The Second-Lien Noteholders and the Debtors opposed the stay requests on the ground that their plan was "very time sensitive" and delay in its implementation beyond the projected September 23, 2014, effective date would "automatically" terminate backstop funding and be a "death knell for the plan." JA-2162, JA-2166 to JA-2167, JA-2169. Nevertheless, they waited until October 24 to put their plan into effect.

[5] To allow the transactions contemplated by the plan to close on October 24—just ten days before merits briefing would be completed in the district court—the Second-Lien Noteholders *waived* a plan condition requiring all appeals from the Confirmation Order to be resolved before Plan consummation. In so doing, they gave up their right to see whether Appellant would prevail in this appeal before they exchanged their claims against Debtors for equity in Reorganized Debtors under the plan—thus assuming the risk that their distribution might be modified on appeal.

court and bankruptcy court that the appeal was unlikely to be equitably moot.

On May 4, 2015, without oral argument, the district court affirmed the bankruptcy court's confirmation order. Like the bankruptcy court, it held that the Second-Lien Notes were not subordinate in any respect to the Senior-Lien Notes. SPA-225 to SPA-252. The district court did not rule on the question of equitable mootness. SPA-252.

On September 3, 2015, 94 days after the notice of appeal was filed, and one day before Appellant's opening brief was originally due, Appellees filed in this Court a motion to dismiss this appeal on grounds of equitable mootness. In an order dated December 16, 2015, this Court denied the motion but permitted Appellees to raise the equitable-mootness issue in their merits brief.

SUMMARY OF THE ARGUMENT

1. The Debtors' reorganization plan gives all of the Senior Subordinated Noteholders' recovery to the Second-Lien Noteholders. This is unlawful under the unambiguous language of the Senior Subordinated Notes indenture. That document guarantees that the

Senior Subordinated Notes are subordinated *only* to a defined category of "Senior Indebtedness," a category that excludes debt that is "by its terms subordinate or junior in any respect" to any other debt issued by the Debtors. The Second-Lien Notes are not Senior Indebtedness because they are subordinate in certain respects to the Senior-Lien Notes: Among other things, the Second-Lien Notes cannot receive anything from collateral that constitutes most of the Debtors' assets until the Senior-Lien Noteholders are paid in full.

The bankruptcy court and district court were wrong to conclude otherwise. In their view, the Intercreditor Agreement that establishes this subordination is irrelevant, because it addresses mere "lien subordination." But that not only assumes the conclusion that "lien subordination" cannot render a debt "subordinate or junior in any respect," but also reads the plain meaning of "any" out of "in any respect."

The lower courts based that faulty assumption on the equally flawed premise that provisos following the phrase "*provided, however,* that" cannot conflict with or subsume what precedes it. That is exactly backward; the explicit purpose of that phrase is to introduce potentially

conflicting language and to make clear that it is controlling. Operating under that flawed premise, the lower courts had little choice but to redraft the provision's text. Thus, the words "by its terms subordinate or junior in any respect" were read to mean "implicitly subordinate in right of payment." The violence to the text is palpable.

The lower courts invoked yet another flawed premise: that liens have "a life of their own," so subordination of the lien cannot affect the nature of the debt. That defies both the common understanding of the term "subordination" and the very nature of liens, which are often the most important characteristic of a debt. That fact is on full display here. Because the common collateral accounted for the bulk of the debtors' assets, lien priority was the single most important factor in determining the payout of creditors' claims. What could be more integral to the nature of the debt?

Meanwhile, the lower courts dismissed evidence that "subordinate or junior in any respect" was well understood in the industry to encompass lien subordination. Leading industry publications recommended that language specifically *because* it would capture lien subordination where the baseline definition would not. Conversely, a

model indenture provision that *would have* allowed junior-lien debt to qualify as Senior Indebtedness was *not* included.

The lower courts justified their reading as necessary to avoid superfluity of the base definition of Senior Indebtedness. But they ultimately conceded that their reading of the indenture likewise produced superfluity—they just deemed their version "easier to swallow." This again rested on the false assumption that provisions introduced by the phrase "*provided, however*, that" cannot trump earlier language.

The lower courts also committed a fundamental error of contract interpretation by relying on post-hoc extrinsic evidence to "confirm" their supposedly unambiguous reading of the text. Worse yet, that selected extrinsic evidence was entirely one-sided (written by the Company, which was owned by Apollo (itself a major holder of the Second-Lien Notes)) and did not show that, at the time of contracting, *both* parties interpreted the language as the Debtors now do.

Finally, the courts unjustifiably thought that the Senior Subordinated Noteholders' interpretation would produce absurd results. This assessment was based on misguided speculation. There is nothing

absurd about the bargain that these parties struck: Only certain debt may cut in line in front of the Senior Subordinated Noteholders.

2. Like the district court, this Court should decide the merits of this appeal rather than, as Appellees have urged, dismiss this appeal as "equitably moot." The judge-made doctrine of equitable mootness permits a reviewing court, following the substantial consummation of a Chapter 11 plan, to decline to exercise the appellate jurisdiction assigned to it by Congress under 28 U.S.C. § 158, and thereby refuse to remedy legal errors made by the lower courts. In this Circuit, equitable mootness may be deployed to dismiss a bankruptcy appeal only in two narrow circumstances: (a) the appellant failed to pursue a stay, or (b) *every* effective remedy would unjustly unravel the plan, harm innocent third parties not before the court, or threaten the debtor's post-bankruptcy success. *Chateaugay II*, 10 F.3d at 952–53.

Neither circumstance exists here. Appellant promptly sought a stay of plan consummation at every turn—in the bankruptcy court, the district court, and this Court. As this Court has recognized, the equitable-mootness doctrine's "chief consideration" is the appellant's diligence in seeking a stay. *In re Metromedia Fiber Network, Inc.*, 416

F.3d at 144. Here, *Appellant's diligence is undisputed*. *See* JA-1916 (holding that diligence "shouldn't be an issue" in this case).

Nor would "every effective remedy" sought by Appellant have the requisite disastrous effects on the plan, innocent third parties, or the debtor's post-bankruptcy success. On the contrary, as both the bankruptcy court and district court recognized when they concluded that the risk of equitable mootness here was "not strong" or "not great," Appellant's remedy "would come largely from a recalibration of" the distribution to Second-Lien Noteholders (who, far from being innocent third parties, were parties to this litigation below and are parties to this appeal). JA-2095; JA-2192. And, as the lower courts explained, there is no reason to believe that the plan "would fail by its terms" if this Court were to decide this appeal and uphold Appellant's challenge. JA-2095 (bankruptcy court); *see also* JA-2192 (district court) (noting that the Second-Lien Noteholders "strongly support[ed]" the plan).

Appellees have never seriously suggested that effective relief is impossible; rather, they have claimed that they are entitled to retain the benefits of a plan *even if it is illegal*, because otherwise the "bargain" they struck for themselves in the plan would be upset. But

the equitable-mootness doctrine is intended to prevent companies from spiraling back into bankruptcy, not to protect a plan proponent's illegally obtained profits.

Finally, it would be the height of *inequity* for Appellant to have been denied a stay on multiple occasions in part because the bankruptcy and district courts believed "the risk of equitable mootness" to be "not very great" (JA-2095; JA-2192), only to have its appeal now dismissed as equitably moot. And that inequity would be even sharper because Appellant sought to have this dispute adjudicated promptly—well before plan confirmation—and Debtors and Second-Lien Noteholders manufactured many of the circumstances Appellees have cited as equitably mooting this appeal.

STANDARD OF REVIEW

The issues in this appeal are pure questions of law concerning the proper interpretation of the Senior Subordinated Notes indenture and proper application of the doctrine of equitable mootness. Both courts below held the contract provisions unambiguous and made no relevant factual findings. This Court's review is therefore de novo. *See, e.g.*, *Lucas v. Dynegy Inc. (In re Dynegy, Inc.)*, 770 F.3d 1064, 1067-68 (2d

Cir. 2014); *Common Law Settlement Counsel v. Travelers Indem. Co. (In re Johns-Manville Corp.)*, 759 F.3d 206, 214 (2d Cir. 2014).

ARGUMENT

I. The Second-Lien Notes Are Not Senior Indebtedness

It is undisputed that the Debtors' plan could not be confirmed unless the Second-Lien Notes qualify as Senior Indebtedness under the Senior Subordinated Notes Indenture. Senior Indebtedness is defined, in turn, to include only debt that is not "by its terms subordinate or junior in any respect" to other indebtedness. This case turns on whether "by its terms subordinate or junior in any respect" means what it says, or whether it somehow means "implicitly subordinated in right of payment." In embracing the latter view, the district court discarded the plain meaning of the contract's terms, violated numerous canons of contract interpretation, impermissibly relied on extrinsic evidence, and mischaracterized as "absurd" the clear commercial purpose underlying this provision.

A. The Indenture Unambiguously Provides That The Second-Lien Notes Are Not Senior Indebtedness

The indenture's "in any respect" provision means what it says: Any debt that "by its terms is subordinate or junior in any respect to

any other Indebtedness or obligation" is *not* Senior Indebtedness. JA-342. Something is "subordinate" or "junior" to something else whenever it occupies "a lower rank, class, or position" or has lower "standing." *Black's Law Dictionary* 978, 1653 (10th ed. 2014). And the phrase "in any respect" conveys the broadest possible scope—"[f]ew words in the English language are as expansive as 'any.'" *Picard. v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Sec. LLC*), 773 F.3d 411, 419 (2d Cir. 2014); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997), in turn quoting Webster's Third New International Dictionary 97 (1976)) ("'[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind"'"); *United States v. Barrow*, 400 F.3d 109, 118 (2d Cir. 2005) (the word "any" in a contract "unambiguously expresses the parties' intent to create an expansive" provision). The Second-Lien Debt's terms leave it in a lower position or standing than the Senior-Lien Debt in *multiple* respects.

1. For starters, it is undisputed that the Second-Lien Noteholders stand behind the Senior-Lien Notes with respect to the common collateral or any of its proceeds. According to the Intercreditor

Agreement—which is incorporated by the Second-Lien Notes' indenture, JA-579, and form of note, JA-626—the Second-Lien Noteholders cannot be paid one cent from the collateral until the Senior-Lien Notes claims are "pa[id] in full in cash." JA-693. Even if the Second-Lien Noteholders somehow happen to receive such proceeds ahead of the Senior-Lien Noteholders, they are obligated to hand them over immediately. JA-700 to JA-701. The bankruptcy plan here aptly illustrates the practical effect of this subordination: The Senior-Lien Noteholders receive a 100% recovery, while the Second-Lien Noteholders recover no more than 28 cents on the dollar. JA-271 to JA-272. With respect, this case could and should end right here: The Second-Lien Notes are "subordinate or junior" to the Senior-Lien Notes because the former cannot recover anything from the collateral until the latter are fully paid.

But there is much more. The intercreditor agreement provides that this subordination has effect *even if the Senior-Lien Noteholders' liens are declared legally invalid or unenforceable.* *See* JA-709 ("All rights, interests, agreements and obligations [established by the Intercreditor Agreement] shall remain in full force and effect

irrespective of . . . any lack of validity or enforceability of any Senior Lender Documents or any Second-Priority Documents."). The Intercreditor Agreement also provides that it remains in force *even if the Senior-Lien Noteholders' claims against the company do not survive*. *See id.* (Intercreditor Agreement remains in force "irrespective of . . . any other circumstances that otherwise might constitute a defense available to, or a discharge of, the Company or any other Grantor in respect of the Senior Lender Claims"). The Intercreditor Agreement further requires the Second-Lien Noteholders to assign any lien they may acquire on *any* Debtors' property—even property that is not part of the common collateral—to the Senior-Lien Noteholders so long as the senior holders have not been fully paid. JA-698. The Intercreditor Agreement also provides that any judgment lien on common collateral that the Second-Lien Noteholders obtain in their capacity as *unsecured* creditors likewise will be subordinated to the liens of the Senior-Lien Noteholders. JA-703. And the Intercreditor Agreement goes so far as to declare that Senior-Lien Noteholders' claims must be reinstated—and their priority over the Second-Lien Debt with respect to common collateral reestablished—even if it is determined that a prior payment

to the Senior-Lien debt "was declared to be fraudulent or preferential." JA-707. The liens at issue here are thus inextricably linked to the underlying claims and debt (contrary to the bankruptcy's court's statement that they were not).

Indeed, the interlocking provisions of the Intercreditor Agreement—coupled with the fact that the common collateral represented the bulk of the Debtor's assets—render Second-Lien Debt deeply subordinate *in every practical sense* to the Senior-Lien Debt. Again, one need only look at the relative payouts under the Debtors' plan: The Senior-Lien Debt recovered 100 cents on the dollar; the Second-Lien Debt recovered equity worth between 13 and 28 cents on the dollar. That vast disparity is impossible to square with Appellees' contention that Second-Lien Debt is not "junior or subordinate in any respect" to Senior-Lien Debt.

2. The district court failed to reckon with any of this. Rather, it dismissed the Intercreditor Agreement as irrelevant because "[t]he Intercreditor Agreement addresses only the relative priorities of the liens securing the Senior Secured Loans and the Second Lien Notes." SPA-238. In support of that proposition, it noted that Section 2 of the

Intercreditor Agreement is titled "Lien Priorities." SPA-238 to SPA-239. But that provision nowhere suggests that the entire agreement is limited to interaction of the liens. Nor could it, since, as noted above, the agreement provides that the Senior-Lien Notes recover first even if their liens are invalid. In any event, saying that the Intercreditor Agreement can be ignored because it addresses liens simply assumes that the subordination of a lien does not render debt "subordinate or junior in any respect." (And as explained below, *infra* pages 34–52, that assumption is false.)

The district court also cited Section 5.4 of the Intercreditor Agreement, which it claimed "provides that [the Intercreditor Agreement] does not alter the Second Lien Noteholders' rights as unsecured creditors." SPA-239. To the extent the district court was suggesting that Section 5.4 disclaims any intent to subordinate the Second-Lien Notes to the Senior-Lien Notes, that's not what it says. It declares only that the Second-Lien Noteholders "may exercise rights and remedies as an unsecured creditor against the Company or any Subsidiary [guarantor] *in accordance with the terms of the applicable Second-Priority Documents and applicable law*." SPA-703 (emphasis

added). It thus likewise begs the question whether the Second-Lien Debt is "subordinate or junior in any respect" to Senior-Lien Debt. Even if Section 5.4 took square aim at the definition of Senior Indebtedness in the Senior Subordinated Noteholders' indenture, nothing in that indenture allows other creditors to sweep away by agreement the Senior Subordinated Noteholders' rights. If the terms of the Second-Lien Debt in fact make it "subordinate or junior in any respect" to other indebtedness, it cannot be Senior Indebtedness—no matter how loudly self-serving contrary assertions are made.

Even if the Second-Lien Noteholders' declarations about their status were controlling (which of course they are not), the Second-Lien Notes' prospectus acknowledged that the "terms" of the Second-Lien Notes rendered it "effectively junior in priority" to the Debtors' more senior secured obligations "to the extent of the value of [the common] collateral." JA-733. That concession confirms what is evident by operation of the documents.

3. To avoid the plain meaning of the text as written, the lower courts simply reconfigured it. Even though the proviso excludes any debt that "by its terms is subordinate or junior in any respect" to any

other debt, the lower courts concluded that this provision could apply only to debt subordinated "in right of payment." That remarkable assertion—in effect, that "in any respect" can be replaced with "in right of payment"—starts with a deeply flawed premise and then proceeds to flout basic rules of grammar and syntax.

a. The flawed premise is that the enumerated provisos that follow the base definition of Senior Indebtedness—including the "in any respect" proviso—cannot conflict with or subsume the base definition. That is, because the base definition excludes from Senior Indebtedness debt that is subordinated "in right of payment," the provisos that follow "can only clarify or augment" the language that precedes them. SPA-234. Accordingly, the lower courts held, "subordinate or junior in any respect" does not *expand* the kinds of subordination that matter; it can refer only to subordination "in right of payment" because that's the kind of subordination referred to in the base definition.

That gets established law exactly backwards. Language that follows "*provided, however*, that" expressly overrides or "trumps" what has come before: "This Court has recognized many times that under New York law, clauses similar to the phrase '[n]otwithstanding any

other provision' trump conflicting contract terms." *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 917 (2d Cir. 2010) (collecting cases). When the Ninth Circuit construed a clause beginning with "[n]otwithstanding any other provisions of this Contract" to have effect only if its operative provision were applied consistently with another provision of the same contract, a unanimous Supreme Court called the reasoning "almost precisely backwards." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18-19 (1993).

Courts in New York and nationwide have further recognized, many times, that "*provided, however*, that" and "notwithstanding" phrases are functionally equivalent in this regard. *E.g.*, *Millard v. McFadden*, 57 N.Y.S.2d 594, 596 (Sup. Ct. 1945) (reading "Provided, however, that" to mean "notwithstanding anything therein contained to the contrary"); *Winston v. Winston*, 449 S.W.3d 1, 14 (Mo. Ct. App. 2014) ("[U]se of the words 'Provided, however,' . . . and 'Notwithstanding the above provisions of this Paragraph' . . . overrides whatever is provided in the preceding language."); *Davon Grp. Ltd. v. Dyer*, 337 F. App'x 436, 438 (5th Cir. 2009) (per curiam) (construing "provided, however, that" as trumping language like "Notwithstanding the

above"); *see also Ga. R.R. & Banking Co. v. Smith*, 128 U.S. 174, 181 (1888) (determining, in a statutory interpretation context, that "provided that" meant "notwithstanding existing provisions, the one thus expressed is to prevail").

In the face of a proviso's trumping language, the presumption against superfluity necessarily gives way. *See Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995) ("Whatever tension otherwise would exist among the three contract provisions discussed above is relieved by the 'notwithstanding' clause . . . ."); *Warberg Opportunistic Trading Fund, L.P., v. GeoResources, Inc.*, 973 N.Y.S.2d 187, 192 (1st Dep't 2013) ("notwithstanding" language trumps, even if that would render another provision meaningless). Not only is it *unnecessary* to insert "in right of payment" into the "in any respect" proviso because of what has come before the proviso (as the lower courts did), but the whole point of the "*provided, however*, that" introductory clause is to signal that what comes next may very well *conflict* with what has come before it.[6]

[6] The district court cited a pair of cases for the proposition that the "in any respect" proviso "can only clarify or augment the Base Definition." SPA-234. Neither can bear such weight. *Friedman v. Connecticut*

In any event, the lower courts' view—that the enumerated provisos must be read to refer to payment subordination—would make no sense in the context of this indenture. There are five other provisos besides the "in any respect" provision that follow the base definition, none of which has anything to do with payment subordination. For example, the first proviso excludes from Senior Indebtedness "any obligation of the Company to any Subsidiary of the Company." JA-341. There is no indication that this should be read to refer only to intercompany obligations that are "subordinated in right of payment." *Ibid.* Likewise, the second proviso excludes from Senior Indebtedness "any liability for Federal, state, local or other taxes owed or owing by the Company." *Ibid.* Tax bills generally cannot be subordinated "in

---

General Life Insurance Company, 9 N.Y.3d 105, 114 (2007), involved a dispute about *which* prior terms a proviso modified, not *how* a proviso could modify them. The court held that a separate contract exclusion exempted the earlier provision from modification by the proviso, not that the proviso applied but could only "clarify or augment" the earlier provision. *White v. United States*, 191 U.S. 545 (1903), aside from being a century-old case about a Navy civil engineer's pay scale, held only that a proviso should not be given "retrospective effect" (which would have put it in tension with another clause) unless Congress "declared [that] purpose in more distinct terms." *Id.* at 553, 555. Both cases, in any event, introduced the proviso merely with the word "provided"; here the proviso follows "*provided, however,*" which clearly indicates that the proviso must prevail even if it conflicts with prior language.

right of payment." Indeed, *none* of the obligations that are described in the enumerated provisos makes sense if crammed into the lower courts' view that they must have something to do with payment subordination. Thus, aside from the fact that it contradicts settled case law, the lower courts' interpretive principle cannot even be applied consistently across the definition of Senior Indebtedness.

b. Having committed to the faulty premise, the lower courts faced the difficult problem of explaining why a proviso that supposedly applies only to subordination in right of payment actually reads "by its terms subordinate or junior in any respect." The lower courts' answer was to reorder the text. They theorized that the "in any respect" provision meant to capture payment subordination that was not necessarily "express." That is, the base definition covered only payment subordination that was "express" in the debt document, while the "in any respect" provision referred to payment subordination that accomplished by any means—explicit or otherwise.[7]

[7] The bankruptcy court arguably took a slightly different tack, suggesting that "in any respect" provision is concerned with *where* the payment subordination is established—*e.g.*, if payment subordination is laid out "in a separate agreement, like an intercreditor agreement." SPA-19. But that theory is even more misguided, because it requires

But that defies the plain meaning of the text. The phrase "by its terms" plainly refers to "Indebtedness or obligation," so one would look to the "terms" of the debt—*i.e.*, its express provisions—to establish whether it is subordinated. But "by its terms" most naturally means "expressly," not "expressly *or* implicitly." *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982) ("In determining whether a private cause of action is *implicit* in a federal statutory scheme when the statute *by its terms* is silent on that issue . . . .") (emphasis added). Indeed, one wonders how "terms" of a debt could only implicitly establish something so specific as subordination in right of payment.

Moreover, defining "by its terms" to mean "not expressly" (as the district court did) would give that term a very different meaning in this provision than it carries throughout the rest of the indenture. Aside from the "in any respect" proviso, the indenture and its attachments use the phrase "by its terms" four times and "by the terms" eight times. *See* JA-323, JA-329, JA-333, JA-343, JA-350, JA-360, JA-374, JA-387, JA-

---

one to read "by its terms" to mean "by the terms of a separate agreement." In any event, here the Intercreditor Agreement between the Second-Lien Notes and Senior-Lien Notes was incorporated as a term of the Second-Lien Notes indenture.

437. In none of those instances would it make sense to read the phrase to mean "not expressly." *See, e.g.*, JA-323 (defining "Disqualified Stock" to include "any Capital Stock . . . which, *by its terms* (or *by the terms* of any security into which it is convertible or for which it is redeemable or exchangeable)" matures or may be converted or redeemed) (emphasis added). The phrase "by its terms" cannot have one meaning in the "in any respect" provision and another throughout the rest of the indenture. *See Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.*, 773 F.3d 110, 119 (2d Cir. 2014); *Finest Invs. v. Sec. Trust Co. of Rochester*, 468 N.Y.S.2d 256, 258 (4th Dep't 1983), *aff'd*, 462 N.E.2d 1199 (N.Y. 1984) (mem.).

In addition, the phrase "in any respect" plainly modifies "subordinate or junior." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (reaffirming "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). But if the proviso applies only to *payment* subordination, as the lower courts insisted, it must modify something else. So the lower courts picked it up and moved it to modify "by its terms." Hence the district court's

curious ellipsis when summarizing its reading of the proviso: "[T]he debt is still excluded from the definition of Senior Indebtedness if it is 'by its terms . . . in any respect' subordinated by right of payment." SPA-237. "English-speaking courts all follow the rule that the written page should be read from top to bottom and left to right." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1040 n.2 (8th Cir. 2000). A court cannot simply relocate an inconvenient bit of text and replace it with another to accord with a pre-conceived notion about a provision's scope.

In the end, in order to confine the "in any respect" provision to "payment subordination," the lower courts effectively revised it as follows:

> any Indebtedness that ~~by its terms~~ implicitly is subordinate or junior ~~in any respect~~ in right of payment to any other Indebtedness or obligation.

As the above deletions and additions illustrate, the lower courts did not interpret the provision; they rewrote it.

c. The lower courts' revision is all the more implausible because the Indenture's drafters obviously knew how to refer to payment subordination by name. As noted above, the base definition of Senior

Indebtedness excludes "obligations [that] are subordinated *in right of payment* to any other Indebtedness." JA-341 (emphasis added). In the lower courts' view, however, when the Indenture uses the words "subordinate or junior *in any respect*" just a few lines later in the fourth proviso, it means "subordinated in right of payment." That defies common sense, and it violates the bedrock interpretive principle that conspicuous differences in wording should be construed to convey differences in meaning. *See, e.g.*, *Novella v. Westchester Cnty.*, 661 F.3d 128, 142 (2d Cir. 2011) (under the principle of "meaningful variation," when a provision exists in one part in a contract, "the omission of that provision" elsewhere is presumptively "deliberate"); *cf. N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 990 N.E.2d 114, 119 (N.Y. 2013) ("[W]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended.") (internal quotation marks and citation omitted).

In fact, the Indenture uses the term "in right of payment" no fewer than *twenty* times, ten of which include the full phrase "subordinated in right of payment." It strains credulity to suggest that the one and only time "subordinate or junior *in any respect*" appears, it was intended to

mean something expressed with very different language so many other places. *See Chesapeake Energy Corp.*, 773 F.3d at 116 (rejecting contract interpretation that would require "term to mean different things in different instances of its appearance").

4. The lower courts also attempted to evade the provision's text by drawing a false distinction between "lien subordination" and "debt subordination." As those courts would have it, a lien's characteristics cannot affect the characteristics of the indebtedness it secures. Liens simply "have a life of their own," SPA-14, those courts asserted, so no amount of lien subordination could render the underlying debt "subordinate or junior in any respect." That is wrong.

Being secured by a second lien makes the *debt* itself subordinate or junior in that particular respect. In fact, the dictionary definition of "subordinate debt" or "junior debt" offers lien subordination as an example:

> **subordinate debt.** (1945) A debt that is junior or inferior to other types or classes of debt. • Subordinate debt may be unsecured *or have a low-priority claim against property secured by other debt instruments*.—Also termed *junior debt*.

Black's Law Dictionary 489 (10th ed. 2014) (first emphasis added); *see also Good Hill Partners L.P. ex rel. Good Hill Master Fund, L.P. v. WM*

Asset Holdings Corp. CI 2007-WM2, 583 F. Supp. 2d 517, 518 (S.D.N.Y. 2008) ("[J]unior-lien loans are subordinated claims."). Likewise, this Court has recognized that "a security interest cannot exist independent of the obligation it secures." *Roswell Capital Partners LLC v. Beshara*, 436 F. App'x 34, 35 (2d Cir. 2011) (internal quotation marks omitted); *see also, e.g.*, *Lawyers Title Ins. Corp. v. Norwest Corp.*, 493 S.E.2d 114, 117 (Va. 1997) ("[A] loan secured by a second or third lien lacks the character and quality of a loan secured by a first lien.").

Nor does the Indenture provide any basis for supposing that liens cannot affect the nature of the underlying debt. To the contrary, the indenture repeatedly makes clear that liens go hand in hand with the nature of the debt. The definition of "Indebtedness" includes, among other things, "Indebtedness of another Person *secured by a Lien* on any asset owned by such person." JA-328 (emphasis added). Indeed, that definition further provides that "the amount of such Indebtedness will be the lesser of: (a) the Fair Market Value of such asset at such date of determination, and (b) the amount of such Indebtedness of such other Person." *Ibid.* Thus, the lien not only affects the nature of "Indebtedness," but effectively defines the *amount* of the Indebtedness.

Likewise, "any Indebtedness secured by a Lien" is defined as "Secured Indebtedness"—thus recognizing that the debt itself falls into a different category by virtue of the lien attached to it. JA-340. The Intercreditor Agreement also makes clear that liens and the underlying debts are inextricably linked: It enforces subordination with respect to the collateral even if the Senior-Lien Noteholders' liens are *invalidated*, or if prior payment on the Senior-Lien Notes is set aside as *fraudulent*.

Tellingly, the district court urged that the distinction between "liens" and "debt" must be appreciated "*[b]efore* delving into the language of the 2006 Indenture." SPA-233 (emphasis added). That is because one must ignore the terms of the indenture—not to mention the authorities cited above and the plain meaning of the contract terms—to suppose that subordination of a lien cannot render a debt "subordinate or junior in any respect." In other words, the reader must ignore plain English, and adopt a secret code about debts and liens, and only then open the indenture. That turns basic principles of contract interpretation on their head.

The bankruptcy court deemed it significant that the "in any respect" provision does not "refer to liens" explicitly. SPA-17. But that

is hardly remarkable. The very purpose of a provision cast in such broad terms is to provide maximum defense against new-fangled subordination techniques, rather than individually enumerating every conceivable type of subordination—"any" means "any." And the drafters' decision to use generally applicable language is no license to disregard or modify that language. *Cf. Robers v. United States*, 134 S. Ct. 1854, 1858 (2014) (legislators who draft a "single statutory provision that covers . . . different kinds" of situations are not required "to write extra language" for particular cases).

5. The lower courts' reading of "in any respect" not only flouts the text and structure of the contract; it ignores how that term was understood in the industry. *See Chesapeake Energy*, 773 F.3d at 114 (contract terms must be read "'cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business'") (quoting *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010)); accord *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) (emphasis added). Here, the "in any respect" provision was a tool

developed by the bond industry specifically to prevent issuers from demoting existing creditors by issuing second-lien debt.

The use of second-lien debt was becoming far more common in the mid-2000s. More particularly, the spike in second-lien debt "trace[d] its origins to efforts to circumvent anti-layering covenants found in many high-yield public debt indentures." Gilhuly, *et al.*, *Changing Roles in Commercial Cases: The Impact of Hedge Funds on the Restructuring* Landscape, SM084 ALI-ABA 499 (Apr. 2007) (reproduced at JA-778 to JA-835). Several months before the Senior Subordinated Notes indenture was written, the Fitch Ratings agency reported on the threat of second-lien debt to unsecured creditors and expressly recommended that such creditors replace the language "subordinated in right of payment" with the language "subordinated in any respect," in order to "thereby capture any new debt . . . structured with simply lien subordination." JA-769. A couple of years before that, a (publicly accessible) presentation by the law firm Latham & Watkins made the same observations: Existing indenture provisions, it warned, "may only restrict debt subordination and not lien subordination." But whether they do "[d]epends on [their] exact wording"—that is, whether they say

"subordinated 'in right of payment' vs. 'in any respect.'" JA-857. To layperson and sophisticate alike, the "in any respect" language thus encompasses second-lien debt.

To be clear, such evidence is used to illuminate not the contracting parties' subjective beliefs about their agreement, but the objective meaning of the agreed-upon language to a reasonable person in their position. *See, e.g.*, *Law Debenture Trust*, 595 F.3d at 466 ("Proof of custom and usage does not mean proof of the parties' subjective intent [but rather] proof that the language in question is fixed and invariable in the industry in question.") (internal quotation marks omitted). For this reason, the district court's observation that "there is no evidence in the record that the parties relied on the Fitch Ratings article" is beside the point. SPA-237. The point is that the article and other sources reflect a sufficiently settled industry usage "to raise a *fair presumption* that it was known to both contracting parties and that they contracted in reference thereto." *Law Debenture Trust*, 595 F.3d at 466 (emphasis added) (internal quotation marks omitted).[8]

[8] Positive proof of awareness is thus unnecessary. Indeed, it would cross the line into forbidden consideration of extrinsic evidence (which error the lower courts committed, *see infra* pages 55–59).

The courts below dismissed this evidence of industry usage on the ground that the indenture did not place the "in any respect" language in the particular part of the indenture that the Fitch report and Latham presentation suggested. That is, rather than placing the language in the indenture's "anti-layering" covenant, which would prohibit issuance of any second-lien debt unless the Debtors made it subordinate or pari passu to the Senior Subordinated Notes, the drafters included the language in its definition of Senior Indebtedness.

But it is the established meaning of "in any respect" that matters, not the phrase's location. The presumption under New York contract law is that the same words carry the same meaning wherever in the contract they appear. *See Chesapeake Energy Corp.*, 773 F.3d at 116. Nor was the "in any respect" language hidden in a mousehole where no one would expect to find it. Contracting parties know that definitional provisions are important, especially where (as here) the all-important subordination provision speaks in capitalized defined terms. In any event, the fact that the Senior Subordinated Noteholders did not receive an *additional* covenant from the Debtors cannot negate what they explicitly obtained in the definition of Senior Indebtedness.

Similarly, the parties had at their fingertips a provision that *would have*—if implemented—prevented a junior lien from affecting whether debt is senior. A 2006 American Bar Association model indenture offered a rule of construction declaring that "secured Indebtedness shall not be deemed to be subordinate or junior to any other secured Indebtedness merely because it has a junior priority with respect to the same collateral." JA-964. Despite reproducing seven of those ABA model rules verbatim—including the provision stating that *unsecured* indebtedness is not rendered subordinate "merely by virtue of its nature as unsecured Indebtedness" (*see supra* page 9)—the indenture does not include the above-quoted provision regarding junior *secured* indebtedness.[9] With respect, it is improbable that this omission was inadvertent; to the contrary, it strongly suggests a decision *not* to treat future second-lien debt as Senior Indebtedness.

What is more, other issuers in this same time period deployed that ABA provision when they wished to allow junior-lien debt to remain senior indebtedness. As detailed in Annex 2 to this brief, Appellant

[9] Annex 1 to this brief contains a line-by-line comparison of the ABA Model Rules of Construction and the corresponding Section 1.04 of the Senior Subordinated Notes Indenture. This comparison was likewise included in the briefing below.

identified four indentures in the 2006-2007 timeframe that defined Senior Indebtedness to exclude debt that that was "subordinate or junior in any respect" but then *included* the ABA model provision stating that junior-lien debt is not excluded from Senior Indebtedness "merely because it has a junior priority with respect to the same collateral." "[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission." *See Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014). That conclusion is all the more inescapable here, because in two of those instances—issuances by Realogy Corp. and Bauble Acquisition Sub, Inc.—Appellee Apollo was involved in the underlying LBO and a controlling party. Yet here that provision was *omitted*. The logical inference to draw is that here the parties excluded junior-lien debt from the definition of Senior Indebtedness—particularly given the plain meaning of the phrase "by its terms subordinate or junior in any respect."

B. Concerns About Surplusage Cannot Override The Indenture's Plain Meaning

The bankruptcy and district courts both concluded that giving "in any respect" its plain meaning would make the baseline definition's "in right of payment" provision unnecessary. Any debt that is subordinated in right of payment is, by that very fact, subordinate "in any respect." On this view, they held, allowing "in any respect" to mean what it says would violate the presumption that, "if possible," contracts should be read not to contain superfluous provisions. *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) (internal quotation marks omitted).

But *no one's* reading of the provisions avoids all superfluity. More particularly, both proffered readings of the "in any respect" provision would wholly subsume the "in right of payment" provision. As noted above, the lower courts' view was that the "in any respect" provision is concerned with payment subordination that is not "expressly" established by the debt instrument.

Even if that reading were correct (it isn't, *see supra* pages 39–42), it does not cure the superfluity problem. Reading "subordinate or junior in any respect" to mean, in effect, "payment subordination, however accomplished," leaves no work for the "in right of payment" provision to

do. That is, if the "in any respect" provision applies to *all* payment subordination, explicitly or implicitly, the provision necessarily sweeps up all indebtedness that is expressly made subordinate within the creating instrument. (And, as discussed at length above, it has the additional intolerable effect of reading the phrase "by its terms subordinate or junior in any respect" as an inexplicable synonym for "implicitly subordinated in right of payment.")

For this indenture, it simply is *not* "possible" to avoid superfluity. *Galli*, 973 F.3d at 149. The presumption against surplusage therefore has no legitimate application to the text at hand. *See TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 580 (6th Cir. 2010) (Sutton, J.) ("[A]pplying the rule against surplusage is often overrated, [and] it is particularly inappropriate to apply here where it purports to resolve one set of redundancies while creating several others.") (internal quotation marks omitted); *see also* Restatement (Second) of Contracts § 203 cmt. b (1981) ("Even agreements tailored to particular transactions sometimes include overlapping or redundant or meaningless provisions.").

The district court ultimately acknowledged that its reading yielded surplusage, but deemed it "far easier to swallow" because it

merely "augment[s]" the "in right of payment" provision rather than "substitut[ing] the proviso entirely for the Base Definition." SPA-236 to SPA-237. That is no answer, however, because *any* superfluous provision is augmented by and replaceable with the broader provision. In any event, as explained above (*see supra* pages 22–23) the district court's view emanated from the flawed premise that language following the phrase "provided, however" cannot conflict with or subsume what precedes it.

C. The Indenture's Clear Words May Not Be Overridden By One Side's Self-Serving, Post-Hoc Behavior

Even though both courts below held that the indenture's text was unambiguous, they purported to confirm their reading in "the parties' subsequent actions." SPA-27; *see also* SPA-238. In particular, they emphasized statements by Apollo and the Debtors (owned by Apollo) that the Second-Lien Notes were senior indebtedness, as well as the Senior Subordinated Noteholders' failure to object to those statements when they were made (beginning in 2009). The bankruptcy court also emphasized that a subset of the Senior Subordinated Noteholders exchanged their notes for the Debtors' 2009 second-lien debt at a discount. According to the court, it is "relevant, at least to confirm what

appears to be an unambiguous provision or set of provisions in a contract, to consider the parties' interpretation of the contract in practice before litigation." SPA-10.

This was clear legal error. When "a contract is unambiguous, courts are required to give effect to the contract as written and *may not consider extrinsic evidence* to alter *or interpret* its meaning." *U.S. Trust Co. of N.Y. v. Jenner*, 168 F.3d 630, 632 (2d Cir. 1999) (emphasis added) (internal quotation marks omitted); *see also, e.g.*, *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009) ("In interpreting an unambiguous contract, . . . the court is not to consider any extrinsic evidence as to the parties' intentions."); *Heller & Henretig, Inc. v. 3620-168th St. Inc.*, 98 N.E.2d 458, 459 (N.Y. 1951) ("If the court finds as matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision of the case."). That is, courts may not look at—let alone rely on—extrinsic evidence unless the text standing alone is ambiguous. *See British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 342 F.3d 78, 82 (2d Cir. 2003). Under New York law (unlike the law of some jurisdictions), courts may not even consult the extrinsic evidence to determine whether ambiguity

exists. *See, e.g.*, *Reiss v. Fin. Performance Corp.*, 764 N.E.2d 958, 961 (N.Y. 2001) ("whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence") (internal quotation marks omitted).

Compounding that error, the courts below—particularly the bankruptcy court SPA-27 to SPA-29—looked to post-hoc statements of one side of this dispute despite their blatantly self-serving character. It was in the Debtors' interest to characterize the Second-Lien debt as senior to the existing debt, which surely helped to increase the new debt's appeal to prospective creditors and thus reduce the cost of borrowing. These one-sided statements do not show "the kind of *mutual* understanding over a period of time which is necessary for practical construction to become relevant to interpretation." *Sharon Steel*, 691 F.2d at 1049 (emphasis added). There is zero evidence in the record indicating that the Senior Subordinated Noteholders or their trustee knew about and agreed with the Debtors' statements.

Nor is there any basis in law for the courts' expectation that a contracting party police its counterparty's post-contracting mischaracterizations of their bargain—on pain of losing the ability to object to any

eventual breach. There is one doctrine in that general vein—laches—but its availability is closely circumscribed, and even the bankruptcy court acknowledged that laches "would not apply here." SPA-28.

Still less can be inferred from the fact that some Senior Subordinated Noteholders voluntarily exchanged their notes at a discount for the Debtors' 2009 second-lien notes. For one thing, the 2009 second-lien notes offered a higher interest rate than the Senior Subordinated Notes—12.5% rather than 11.5%. For another, it is (again) usually better to be secured than unsecured. To assess the reason underlying the exchanging noteholders' decision, one would need (at a minimum) to compare the value of the common collateral at the time to the value of the Senior-Lien Noteholders' claims. The exchange could easily have made economic sense if exchanging noteholders believed there would be proceeds from the common collateral remaining after the Senior-Lien Noteholders had been paid in full. The bankruptcy court did not offer any such analysis. It simply assumed that the exchange would not have made economic sense unless the Debtors' interpretation were correct. Accordingly, even if it were not clear legal error to look to extrinsic evidence to "confirm" unambiguous

text, the evidence on which the lower courts relied cannot bear such weight.

The district court likewise dipped its toe in the extrinsic-evidence waters, suggesting in a cursory footnote that it agreed with the bankruptcy court's view that "the parties believed the Second Lien Notes were Senior Indebtedness." JA-238. To the extent this purports to be an alternative holding, it fails for the reasons stated above. To the extent the district court allowed extrinsic evidence to "confirm" its purportedly unambiguous reading of the agreement, that was clear legal error.

D. Giving The Indenture's Words Their Plain Meaning Would Not Yield An "Absurd" Result

Both the bankruptcy court and district court thought that accepting the Senior Subordinated Noteholders' reading of the contract would produce "absurd" or "anomalous" results. SPA-24, SPA-238. But that view was based entirely on faulty assumptions—not record evidence—and ignored the sensible commercial purpose underlying the plain meaning of the "in any respect" provision (namely, to circumscribe carefully the debt that a creditor agrees may occupy a superior position).

Consider the supposedly absurd implication that the Second-Lien Notes were Senior Indebtedness while they were unsecured but then lost that status when they gained a second lien that made them subordinate in certain respects to the Senior-Lien Notes. There is nothing absurd about debt with such terms. In the right circumstances, it would be perfectly rational to give up senior *unsecured* status for a junior *secured* status. For example, if the Senior-Lien Notes were believed to be significantly oversecured (but unencumbered assets were few), getting a jump on the excess collateral ahead of the Senior Subordinated Noteholders would have been quite valuable. And *not* getting such priority would only have let another creditor come in and do so, eating into whatever recovery might have been available to the senior unsecured creditors. The courts below never even considered this real-world purpose for the changing status of the Second-Lien Notes.

Moreover, the indenture made clear that the parties knew how to ensure that certain indebtedness would permanently maintain senior status notwithstanding the plain meaning of the "in any respect" proviso. The indenture's "Rules of Construction" provide that

indebtedness is not to be treated as subordinate "merely by virtue of its nature as unsecured Indebtedness." JA-347. That provision was included to ensure that the Debtors' 2006 senior unsecured notes, which were grandfathered in as "Designated Senior Indebtedness," would not be deemed subordinate in certain respects because of their lack of security interest. JA-322. So the parties *did* define indebtedness that would remain senior despite the operation of the "in any respect" clause, and they called it Designated Senior Indebtedness. The parties did not, however, define that category to include junior-lien debt, nor did they include any contract term prohibiting debt from moving from one category of indebtedness to another.

Finally, the particular characteristics of the Senior-Lien Notes do not give rise to an absurdity, either. According to the Debtors, the Senior Subordinated Noteholders' interpretation cannot be right because the two categories of Senior-Lien Notes—the Firsts and the "1.5s"—each have some degree of lien subordination. The 1.5's lien is junior to the Firsts' lien, and the Firsts' lien is not the most senior on certain working capital assets. Whether or not that is so, however, it does not render absurd the Senior Subordinated Noteholders' plain

interpretation of the indenture. The Senior-Lien Notes were paid in full from their collateral and, consequently, the question whether they would have been entitled to pay-over from the Senior Subordinated Noteholders' distribution from unencumbered assets was never at issue.

An interpretation of a contractual provision does not become absurd or "commercially unreasonable" merely because it leaves that provision without application in "a particular case." *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.*, 79 F.3d 295, 298 (2d Cir. 1996). That is doubly so where, as here, the provision *did* apply at the time of contracting, because commercial reasonableness turns on what was "contemplated by the parties upon execution of the agreement." *Elsky v. Hearst Corp.*, 648 N.Y.S.2d 592, 593 (1st Dep't 1996). In 2006, none of the senior secured debt was subordinate by its terms in any respect to any other debt, and so it all qualified as Senior Indebtedness even if the Debtors' subsequent actions have caused the 2012 Senior-Lien Notes not to qualify as such. But even now, there could be no real absurdity in the Senior-Lien Notes' status. They are fully secured and entitled to complete recovery

regardless of whether they qualify as "Senior Indebtedness" under the Senior Subordinated Notes' indenture.

In short, these "absurdity" arguments, like the Appellees' others, are really only an attempt to persuade the court to overlook or revise the indenture's unambiguous language. They should be rejected. *See Law Debenture Trust Co.*, 595 F.3d at 472 ("Any suggestion that the Indenture should be read to accomplish what the Trustee views as 'commercial[ly]' 'reasonable' essentially asks us to rewrite the Indenture's Public Acquirer definition. Instead, we are required to give effect to the intentions expressed in the agreement's own language.") (internal citation omitted).

II. This Appeal Should Not Be Dismissed As Equitably Moot

The doctrine of equitable mootness is "a judicial anomaly" and limited "exception to courts' 'virtually unflagging obligation to exercise jurisdiction.'" *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012) (quoting *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009)).[10] It is applied, "with a scalpel rather than an axe," *only* when

[10] Appellant disputes the validity of the equitable-mootness doctrine, and so reserves its right to challenge that doctrine (and this Circuit's application of it) before the *en banc* Court or Supreme Court if

every "particular remedy" would "unjustly upset[] a debtor's plan of reorganization." *Id.* at 481–82. Courts "examine the actual effects of the requested relief," and do not "rely solely on the debtor's conclusory predictions or opinions that the requested relief would doom the reorganized company." *Id.* at 482.

This Circuit evaluates requested relief based on five so-called *Chateaugay* factors. *See Chateaugay II*, 10 F.3d at 952–53. When effective relief is not impossible (factor 1), then only two categories of circumstances are said to make appellate review "unjust." The first category—and the "chief consideration"—is whether appellant failed to pursue a stay (factor 5). *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005). The other category of circumstances is whether *any* remedy would stymie "the re-emergence of the debtor as a revitalized corporate entity" (factor 2), "create an unmanageable, uncontrollable situation for the Bankruptcy Court" by "unravel[ing] intricate transactions" and undermining "every transaction that has taken place"

---

necessary. *See, e.g.*, *In re One2One Commc'ns, LLC*, 805 F.3d 428, 439 (3d Cir. July 21, 2015) (Krause, J., concurring) (doctrine is "legally ungrounded and practically unadministrable," and "cannot survive constitutional scrutiny"); *In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (criticizing doctrine).

(factor 3), or "adversely affect[]" innocent third parties who lacked "notice of the appeal and an opportunity to participate in the proceedings" (factor 4). *Chateaugay II*, 10 F.3d at 952–53. This appeal plainly is not equitably moot.

A. Effective Relief Is Available

The first *Chateaugay* factor examines whether relief is genuinely "impossible . . . in the sense that the [appeal is] constitutionally moot." *Charter*, 691 F.3d at 484. Here, there are numerous available remedies that would remedy the misallocation. Whether those remedies are appropriate is the focus of other factors (*see infra* Sections II.C and II.D), but there is no serious argument that effective relief is categorically unavailable.

B. Appellant Diligently Sought A Stay, And Appellees' Manufacture Of The Present Circumstances Would Make Dismissal Anything But "Equitable"

The "chief consideration" of this Court's equitable-mootness doctrine "is whether [Appellant] sought a stay of confirmation." *Metromedia*, 416 F.3d at 144. "If a stay was sought," this Court "will provide relief if it is at all feasible." *Id.* When this Court rejected the equitable mootness of an appeal in *Chateaugay II*, for example, it was "signifi-

cant" that the appellant had unsuccessfully "sought to stay confirmation of the Plan in urgent applications before the bankruptcy court, the district court and this Court." 10 F.3d at 954.

Here, it is undisputed that Appellant pressed "urgent applications" for a stay before three courts. *Id.* Because Appellant's "initiative" cannot be faulted, concern for "finality in bankruptcy proceedings" is "not sufficient to moot [its] issue on appeal." *Id.* In fact, the lower courts' denials of a stay were premised in part on their conclusions that "the risk of equitable mootness" is "not strong" and "not very great" in this appeal. JA-2095; JA-2192. It would be topsy-turvy for that appeal now to be deemed moot *because* a stay was denied.

A doctrine purportedly grounded in equity, moreover, must take into account Appellees' (a) repeated *opposition* to a stay and their other calculated efforts to prevent resolution of this appeal before plan consummation (*see supra* notes 3–4); and (b) repeated efforts since confirmation to evade and delay prompt resolution of this dispute, and then this appeal—including most recently their strategically timed motion to dismiss in this Court (*see supra* page 21).

C. Recalibrating Distributions Between Parties To This Appeal Will Not Unravel The Plan, Adversely Affect Third Parties Not Before The Court, Or Threaten Reorganized Debtors' Success

As both lower courts recognized, this appeal seeks "to recalibrate the consideration provided to the second lien noteholders." JA-2192; *see also* JA-2095. If the plan improperly awarded Second-Lien Noteholders 100% of Reorganized Debtors' common shares based on an erroneous contract interpretation, then "it would not be inequitable to require [them] to disgorge their ill-gotten gains" for redistribution to U.S. Bank. *Charter*, 691 F.3d at 484. A plan proponent is not entitled to retain each and every economic benefit of an illegal bargain—particularly one the proponent itself engineered. Moreover, recalibration could also be achieved by other methods, such as by granting U.S. Bank shares, cash, or debt from the Reorganized Debtors—which, it bears repeating, are owned by the Second-Lien Noteholders and thus those remedies ultimately would affect only them. As explained below, such relief offends none of the remaining *Chateaugay* factors.

1. This Appeal Will Not Unravel The Plan Or Create An "Uncontrollable" Situation In Bankruptcy Court

In their unsuccessful motion to dismiss filed in this Court, Appellees' principal complaint was that it would be unjust to "decrease the value of the equity Second Lien Noteholders received under the Plan" by "redistributing" a portion of that value to U.S. Bank. Mot. 12–13. That is nonsense. The premise of this appeal is that Second-Lien Noteholders obtained value to which U.S. Bank is entitled. This appeal seeks to restore the diverted value to its rightful owner. In *Chateaugay II*, this Court rejected the equitable mootness of an appellant's claim "to funds . . . wrongfully distributed to . . . one or more entities . . . before this Court." 10 F.3d at 953.

Nor is there any merit to Appellees' previous suggestion (Mot. 1) that Second-Lien Noteholders' distribution under the Plan is the inviolable result of a "highly negotiated, complex economic settlement" between the Debtors and Second-Lien Noteholders. The "settlement" was in fact bankruptcy-plan engineering—with Apollo sitting on both sides of the table. Apollo owned the Debtors *and* owned 40% of the Second-Lien Notes. In short, this was a pre-packaged plan designed to

maximize Second-Lien Noteholders' recovery at other creditors' expense. Self-interested architects of an illegal plan cannot insulate it from review simply by calling it a "settlement," or by claiming they are entitled to the terms of their own illegal "bargain."

Finally, there is no evidence that recalibrating distributions between Second-Lien Noteholders and U.S. Bank will result in an "unmanageable, uncontrollable situation for the Bankruptcy Court" by unraveling the Plan. *Chateaugay II*, 10 F.3d at 953. As Judge Drain acknowledged, he could think of no reason why the Plan "would fail by its terms if [U.S. Bank's] appeal were granted." JA-2095.

And there *is* no such reason. An appeal is not "automatically equitably moot" simply because "the relief requested would require that a confirmed plan be altered." *Charter*, 691 F.3d at 482. Providing relief to U.S. Bank—in whole or in part—would not "cut the heart out of the reorganization" or "seriously threaten[]" Reorganized Debtors' "ability to re-emerge successfully from bankruptcy." *Id.* at 486.[11]

[11] Indeed, Second-Lien Noteholders stood to benefit so richly from the reorganization that they voted to support a Plan that *provided for* payment of up to an additional $200 million of value to Senior Lenders, if required by a court. *See* JA-4533 to JA-4540. Relief for Senior Subordinated Noteholders (who, excluding Apollo, hold *total* claims of

2. This Appeal Will Not Affect Third Parties Not Before The Court

A redistribution of equity or its proceeds from Second-Lien Noteholders to U.S. Bank, or another remedy with the same practical effect, will "not adversely affect parties without an opportunity to participate in the appeal (factor 4)." *Charter*, 691 F.3d at 484. Those remedies affect only Second-Lien Noteholders. Every Second-Lien Noteholder is represented in these proceedings by their indenture trustee and by the Reorganized Debtors they now own. Moreover, 90% of them have been represented by Apollo or the Ad Hoc Committee throughout this litigation. In any event, there would be no inequity in allowing U.S. Bank to recoup their "ill-gotten gains, participation in the appeal or not." *Id.* at 484.

3. This Appeal Will Not Threaten Reorganized Debtors' Successful Re-emergence From Bankruptcy

Appellant's requested relief implicates whether Second-Lien Noteholders will own all of the Reorganized Debtors' equity, or return some consideration to Appellant. But reallocating an ownership slice—

$252 million) comes well within the same built-in cushion to which Second-Lien Noteholders acceded.

or its financial equivalent—has no effect on the company's success. Alternatively, the Reorganized Debtors—which are owned by the Second-Lien Noteholders—could be ordered to transfer cash, stock, or debt to Appellant to remedy some or all of the improperly diverted value. This too would not imperil the company. And, of course, these remedies could be accomplished through a recalibration of equity distributions and other means that would not require Reorganized Debtors to issue any additional debt.

At the end of the day, the question is *not* whether U.S. Bank's victory on appeal might have *any* negative effect; it is whether those effects will sink the "revitalized corporate entity." *Chateaugay II*, 10 F.3d at 953. Were it otherwise, equitable mootness would swallow up every confirmation appeal. This appeal could not possibly sink a multi-billion-dollar enterprise.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below, and instruct the district court to remand this matter to the bankruptcy court to fashion appropriate relief for the Senior Subordinated Noteholders.

Dated: March 16, 2016

Respectfully submitted,

Susheel Kirpalani
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7200

/s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.
Mark T. Stancil
Alan E. Untereiner
Matthew M. Madden
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411 L
Washington, D.C. 20006
Tel: (202) 775-4500
Fax: (202) 775-4510
renglert@robbinsrussell.com

Counsel for U.S. Bank National Association, as indenture trustee

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,974 words according to the count of Microsoft Word 2010, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Century Schoolbook, using Microsoft Word 2010.

Dated: March 16, 2016

/s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2016, I electronically filed the foregoing brief and its accompanying Special and Joint Appendices using the Court's CM/ECF system, causing copies to be served by CM/ECF upon counsel of record for all parties.

Dated: March 16, 2016

/s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.

ANNEX 1
COMPARISON OF ABA MODEL AND THE INDENTURE'S RULES OF CONSTRUCTION

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

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

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

ANNEX 2

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

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

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

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

Sources:

---

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

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

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

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

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

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

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