SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

North Star Debt Holdings, L.P., Silver Oak Capital, L.L.C., AG Credit Solutions Non-ECI Master Fund, AG Centre Street Partnership L.P., AG Super Fund Master, L.P., and Gamut Capital SSB, LLC, Plaintiffs, v. Serta Simmons Bedding, LLC, Advent International Corporation, Eaton Vance Corp., Invesco Ltd., Credit Suisse Group AG, Barings LLC, and Does 1-50, Defendants.	Index No. 652243/2020 Commercial Division Part 48, Justice Masley

LENDER DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED DISCOVERY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Defendants Eaton Vance Corp., Invesco Ltd., and Credit Suisse Group AG[1] (collectively, the "Lender Defendants") submit this memorandum of law in opposition to Plaintiffs' application for a temporary restraining order, preliminary injunction, and expedited discovery.[2]

I. PRELIMINARY STATEMENT

Plaintiffs have not been candid with this Court. In seeking equitable relief here, they have failed to disclose the real story behind the Proposed Transaction and their base motives for challenging it. And in doing so, they have put in jeopardy the future of a distressed company in desperate need of the capital this transaction will provide, for their own reprehensible reasons, and to the detriment of all parties here. They come before this Court with unclean hands, and that alone precludes equitable relief.

Plaintiffs are lenders who hold a minority stake of First Lien Loans in the Company. Led by late-comer behemoth Apollo, which only first purchased its Serta debt three months ago at deeply discounted trading prices, these Plaintiffs have spent the better part of the past three months engaging in an elaborate scheme to strip away the other First Lien Lenders' Collateral for their sole benefit. In these trying times, Serta finds itself facing a liquidity problem, and these Plaintiffs tried to take full advantage of Serta's plight. They proposed a predatory financing transaction to rip away Serta's "crown jewel" trademarks for the nationally recognized Simmons/Beautyrest and Tuft & Needle mattress brands (worth at least hundreds of millions of dollars) into a subsidiary outside the reach of all other First and Second Lien Lenders' claims that would have secured Plaintiffs' own new structurally senior facility alone.

[1] As Plaintiffs' counsel has been advised, these entities have been improperly named and are not involved in the Proposed Transaction. In the event that Plaintiffs do not agree to substitute the correct entities and dismiss the improperly named entities, Defendants intend to move for their dismissal. By making this special appearance, the Lender Defendants do not waive any defenses, including defenses based on lack of personal jurisdiction.

[2] Undefined capitalized terms used herein have the meanings given them in Plaintiffs' Memorandum of Law (Dkt. 3) ("Pls.' MOL"). Other capitalized terms shall have the meanings ascribed to them in this Opposition.

The Company rejected Plaintiffs' aggressive scheme to take advantage of Serta's liquidity problem, which would have breached numerous provisions of the existing Credit Agreement and violated applicable law. Instead, it elected to pursue an alternative transaction that the other Serta lenders, including the Lender Defendants, negotiated with the Company as a defensive measure in order to protect themselves and provide the Company with much-needed liquidity to weather financial strains exacerbated by the COVID-19 pandemic. It is this perfectly permissible alternative transaction, so urgently needed by Serta, that these predatory Plaintiffs have now rushed into court to block.

In mounting this challenge, Plaintiffs have fundamentally mischaracterized this transaction as an extraordinary and "unlawful scheme" that somehow alters their "sacred" rights. In reality, it does no such thing. It amends neither the pro rata provision nor the waterfall of the existing Credit Agreement *in any way*. The Proposed Transaction complies *in all respects* with the existing Credit Agreement's terms and is no different than numerous other transactions that other lenders, *including the Plaintiffs themselves*, have routinely entered into with companies needing liquidity like Serta here.[3]

Plaintiffs' "emergency" application rings hollow and must be denied. The essence of Plaintiffs' complaint is that their current Serta debt will be subordinated to a new "super-senior" credit facility. They argue that their approval was required for such a transaction. But by the very terms of the Credit Agreement, it plainly was not. The Credit Agreement permits the kind of amendments required to implement the Proposed Transaction with approval (as was given here) of lenders holding a majority of the loans. The provision that Plaintiffs assert supports their

[3] Previous transactions similar to the Proposed Transaction are described in ¶¶ 8-9 of the Affirmation of Jennifer L. Conn, dated June 16, 2020 and accompanying exhibits ("Conn Aff."). *See also* Affidavit of Roopesh K. Shah, Dkt. 27 ("Shah Aff."), ¶¶ 36–40.

argument that 100% lender approval was required—CA § 9.02(b)(A)(6)—contains an explicit carve-out for the kind of transaction proposed here.

Indeed, unlike other credit agreements that contain express anti-subordination provisions, the sophisticated parties here agreed to allow the Company the flexibility to incur additional priority indebtedness under this Credit Agreement. And contrary to Plaintiffs' claims, the Proposed Transaction would not remove any collateral or guarantee protection afforded to the First Lien Lenders, nor would it alter any of their so-called "sacred rights" requiring their consent. The Proposed Transaction would not change the First Lien Lenders' entitlement to receive their agreed principal repayments, interest payments, and pro rata sharing of all proceeds of collateral received by the Administrative Agent (the "1L Agent"). Indeed, the provisions of the Credit Agreement that Plaintiffs claim will be "amended" as part of the Proposed Transaction will, in fact, remain exactly as they are now on the day this transaction closes.

But these Plaintiffs—sophisticated distressed credit investors—know all of this because they have both sponsored and participated in numerous transactions structured similarly to this transaction, and their baseless assertions that permitting the Proposed Transaction to proceed would roil the markets is simply absurd. In fact, the opposite is true. Were this Court to enjoin the transaction, it is *that injunction* that would upend the markets by preventing many other distressed American companies the ability to access capital when they need it most and force them into insolvency.[4]

For all of the reasons explained here, Plaintiffs cannot satisfy any of the elements necessary for emergency injunctive relief.

[4] Companies frequently enter into transactions similar to the Proposed Transaction. Conn Aff. ¶¶ 8-9; *see also* Shah Aff. ¶¶ 36–40 (explaining the commonality of transactions providing for super priority status).

First, Plaintiffs cannot establish a likelihood of success on the merits, because the plain terms of the Credit Agreement permit the Proposed Transaction. Moreover, under the Credit Agreement's "no action" provision, Plaintiffs lack standing even to pursue this suit, as actions relating to the First Lien Collateral and enforcing the Guarantee may be pursued only by the Administrative Agent.

Second, Plaintiffs have utterly fail to establish they will suffer any irreparable harm. This case is about money, pure and simple. It's about the consequences of a proposed deal, and who will make more or less money as a result. Therefore, even if there were any injury suffered by these Plaintiffs—and there is none—it would be fully compensable by money damages. It is no answer for these well-heeled Plaintiffs to file suit against everyone they can think of to prevent a transaction *to preserve the Company's solvency*, and then complain that the Company is in distress and speculate about its future. Indeed, with the proceeds from this transaction alone, the Company will have increased liquidity, and the ability to stabilize its financial condition, continue its operations, invest in its assets and employees, and repay its Lenders in the ordinary course, including Plaintiffs.

Third, the balance of the equities tips decidedly in Defendants' favor. As Serta explains in its opposition papers, it urgently needs the capital that this Proposed Transaction will provide. The Company, along with the Lender Defendants and others, has carefully structured a super-priority transaction that is consistent with the Credit Agreement and will stabilize the Company for the benefit of all of the Company's lenders, including the Plaintiffs. By contrast, Plaintiffs come to this Court with unclean hands, failing to disclose that they were architects of a proposed predatory lending transaction the Company turned down because it would have required stripping away, for Plaintiffs' sole benefit, key intellectual property collateral protecting all other Lenders.

For all of these reasons, Plaintiffs' application for emergency relief must be denied in its entirety. This Court should not reward Plaintiffs' hardball tactics and lack of candor. On the one hand, a company in distress needs capital now. And financial markets in crisis are watching, as many other similarly situated companies stand at the precipice in these troubled times. On the other hand, sophisticated lenders who tried to take advantage of the Company's plight—and were rebuffed—are now lashing out with a vengeance. But those who seek equity must act equitably. These Plaintiffs are simply not entitled to equitable relief.

II. <u>STATEMENT OF FACTS</u>

A. Overview of Serta's Credit Facilities and the First Lien Credit Agreement

On November 8, 2016, Serta entered into three credit facilities with various counterparties, including the Lender Defendants. The agreements comprising the credit facilities include: (i) a $225 million asset-based loan revolving credit facility (the "ABL"); (ii) a first lien term loan agreement (the "Credit Agreement" or "CA"[5]) providing for $1.95 billion in term loans (the "1L Loans"); and (iii) a second lien term loan agreement (the "2L Credit Agreement") providing for $450 million in term loans (the "2L Loans").

One of the principal differences among the loans issued under these credit agreements is the relative priorities of liens on the collateral securing the loans. In the event the collateral is sold or liquidated, or the value represented by the collateral is distributed pursuant to a bankruptcy plan, lenders' relative entitlements to repayment are governed by the order of their respective lien and payment priorities. As is customary in a multi-loan capital structure in which the loans are secured by common set of collateral, the relative rights to payment from the Collateral for each of the foregoing credit facilities is governed by intercreditor agreements.

[5] Affirmation of David Lender, Dkt. 23, Ex. 1.

Plaintiffs' contract claims concern the Credit Agreement. Serta is a party to the Credit Agreement with many dozens of financial institutions as lenders, including Lender Defendants, as well as an administrative agent (the "1L Agent"), whose role is to administer the loans. More specifically, Plaintiffs' contract claims center on the Credit Agreement's pro rata sharing provisions at Section 2.18(b) and (c). Section 2.18(b) further states that any time the 1L Agent receives proceeds from the Collateral (e.g., pursuant to remedy-enforcement), such proceeds must be applied or distributed in a specified order, which is referred to as a "waterfall," as follows:

- first, to pay the expenses of the 1L Agent
- second, to pay indemnities owed to the 1L Agent;
- third, to repay the 1L Loans on a pro rata basis;
- fourth, to repay debt as provided in the ICA, i.e., junior debt such as the 2L Loans; and
- fifth, to the "Top Borrower," i.e., Serta, or as a court of competent jurisdiction may direct.

CA § 2.18(b).

Section 2.18(b) also states that the rights therein are "[s]ubject in all respects to the provisions of each applicable Intercreditor Agreement," which set forth the priority rights of the parties to proceeds of Collateral. Notably, Section 2.18(b) does not guarantee that the 1L Agent receive a certain amount of, or any, Collateral proceeds under the ICA. It merely states that whatever proceeds do go to the 1L Agent must be distributed according to the waterfall. This assures each lender that it will receive its pro rata share of whatever the 1L Agent receives, after the payment of customary expenses and entitled reimbursement.

Section 2.18(c) requires that lenders receiving payment of their loans generally abide by the pro rata requirement, but it also includes carve outs where pro rata sharing is not required.

Specifically, the provisions of Section 2.18(c) do not apply to any assignment of a loan, including those entered into by the Company or certain affiliates (*e.g.*, pursuant to Section 9.05).[6]

B. The Credit Agreement Provides for Amendment

The Credit Agreement, is not a static document and contemplates amendments. *See* CA § 9.02(b). The Credit Agreement contains a typical convention providing that amendments to it and related "loan documents"[7] require only the consent of lenders holding a majority of the amount of the loans governed by the agreement (typically referred to as "Required Lenders"). *See* CA § 9.02(b).

Like other credit agreements, this Credit Agreement contains limited, enumerated exceptions to this general rule that require the consent of all lenders or all "affected" lenders (each, a "100% Exception") for certain amendments. *See* CA § 9.02(b)(A). For example, the Credit Agreement contains 100% Exceptions for any amendment that reduces the principal amount of the loan (CA § 9.02(b)(A)(2)), extends the maturity date of the loan (CA § 9.02(b)(A)(3)), reduces the interest rate of the loan (CA § 9.02(b)(A)(4)), and, as Plaintiffs assert is relevant here, modifies the agreement's provisions governing pro rata sharing of proceeds of collateral (CA § 9.02(b)(A)(6)). This 100% Exception requires consent of all affected lenders for any amendment that:

> waives, amends or modifies the provisions of Sections 2.18(b) or (c) of this Agreement in a manner that would **by its terms** alter the pro rata sharing of

[6] Section 2.18(c) states, "If any Lender obtains payment . . . of a greater proportion of the aggregate amount of its Loans . . . and accrued interest thereon than the proportion received by any other Lender . . . then the Lender receiving such greater proportion shall purchase . . . participations in the Loans of other Lenders . . . so that the benefit of all such payments shall be shared by the Lenders . . . in accordance with the aggregate amount of principal of and accrued interest on their respective Loans . . . provided that . . . (ii) the provisions of this paragraph shall not apply to . . . (B) any payment obtained by any Lender as consideration for the assignment of or sale of a participation in any of its Loans to any permitted assignee or participant, **including any payment made or deemed made in connection with Sections 2.22, 2.23, 9.02(c) and/or Section 9.05**" (emphasis added).

[7] "Loan documents" refers to the array of contractual documents governing the loan including the credit agreement, the security agreement, and the ICA.

> payments required thereby (**except in connection with any transaction permitted under Sections 2.22, 2.23, 9.02(c) and/or 9.05(g)** or as otherwise provided in this Section 9.02).
>
> *See* CA § 9.02(b)(A)(6) (emphasis added).

This 100% Exception is specific—in that the consent of affected lenders is required for an amendment that "by its terms" alters the pro rata sharing of payments required by Section 2.18(b) or (c)—and itself contains exceptions—notably, it applies "except in connection with any transaction permitted under Section[] . . . 9.05(g)." *Id.*

Most importantly, the Credit Agreement does not include a frequently used 100% Exception referred to as an "anti-subordination" provision, which would require all affected lenders to agree to any amendment that subordinates the loans governed by the underlying credit agreement to other new or existing loans. Credit agreements often contain this bargained-for exception.[8] When a Borrower has negotiated away its ability to incur senior indebtedness, the language in the credit agreement is clear.[9] The Credit Agreement has no such provision. *See generally* CA § 9.02.

C. Plaintiffs' Predatory Proposal

Just a few months ago, in March 2020, as the COVID-19 crisis was gripping the United States, Apollo and the other Plaintiffs purchased 1L Loans at deeply discounted rates. Such tactics are the typical playbook of aggressive investors seeking to exploit the vulnerabilities of distressed companies. Because they did not hold a sufficient percentage of first-lien loans to constitute a majority to amend the Credit Agreement, however, Plaintiffs demanded that Serta—desperate for cash—enter into an aggressive and predatory proposal to the exclusion of all other lenders.

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[8] *See, e.g.*, Conn Aff. ¶ 9, Exs. 13-15 (examples of credit agreements with anti-subordination provisions).

[9] *Id*.

Plaintiffs' proposed transaction would have purported to require Serta to transfer a large portion of collateral (including the Company's "crown jewel" intellectual property worth at least several hundreds of millions of dollars[10]) away from the 1L Lenders to a newly formed subsidiary that would not be a party to the Credit Agreement and would benefit Plaintiffs alone, (the "Predatory Proposal").[11] Such a predatory transaction would likely have resulted in prolonged litigation for the Company and Sponsor, damage to the Company's relationship with its lender base and its ability to raise further capital, and damage to the Sponsor's market relationships and ability to raise capital, in addition to the negative press and publicity it would have generated.

This highly aggressive maneuver is often referred to in the credit marketplace as a "J.Crew" transaction, named after the apparel retailer that implemented a transaction with this structure in 2016, and has been driven into near-insolvency. *See Eaton Vance Mgmt., et al. v. Wilmington Sav. Fund Soc'y FSB, J. Crew Grp., Inc., et al.*, Index No. 654397/2017 (N.Y. Sup. Ct., filed June 22, 2017).[12]

D. The Proposed Transaction

Aware that Plaintiffs were scheming to strip out the Collateral of the First and Second Lien Lenders with a J. Crew-type transaction, the Majority Lenders worked with Serta to structure an alternative transaction—a defensive measure that would keep the Collateral intact and lend

[10] Shah Aff. ¶ 15.

[11] *Id.* ¶¶ 15-20.

[12] *See* Conn Aff. ¶ 5, Ex. 4 (Complaint); *see also id.* ¶ 7, Ex. 6 ("J.Crew . . . was driven into near-insolvency not by a pernicious virus but by a carefully constructed plot to extract every available penny from the company and leave it a hollowed-out shell with no pickings left for creditors.")); *id.* ¶ 6, Ex. 5.

additional funds against it. Serta declined the Predatory Proposal and opted to proceed with the Proposed Transaction instead.[13]

On June 8, 2020, Serta announced agreement the Proposed Transaction, a transaction with a majority of lenders under each of the Credit Agreement and the 2L Credit Agreement (together, the "Majority Lenders"[14]); Lender Defendants are among the Majority Lenders.[15] The goals of this transaction are to provide Serta with (i) additional cash it desperately needs to maintain operations in the economic downturn caused by the COVID-19 pandemic; and (ii) the ability to reduce Serta's overall indebtedness, by allowing it to take advantage of its own loans' discounted price in the market.[16]

Specifically, Serta and the Majority Lenders agreed in principle to enter into a new credit facility (the "New Credit Facility"; the loans thereunder, the "New Loans") with the following two components: (i) $200 million of New Loans originated by the Majority Lenders, and (ii) the exchange at a discount by the Majority Lenders of up to $875 million of 1L Loans and 2L Loans into lesser amounts of New Loans.[17] The New Loans will have super-priority over currently existing loans.[18] The exchange of existing debt (which trades at a discounted price in the market) for a lesser amount of debt under the New Credit Facility would allow the Company to capture the market discount of its debt in order to reduce its overall outstanding debt and thereby de-lever its

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[13] *See* Conn Aff. ¶ 3, Ex. 2 ("[T]he company backed the majority group of lenders serving up a rare victory for original issuance lenders against more aggressive maneuvers of distressed investors.").

[14] These lenders constitute the Required Lenders (i.e., lenders holding a majority of the loans) under each credit agreement.

[15] Conn Aff. ¶ 4, Ex. 3.

[16] Shah Aff. ¶¶ 29–35.

[17] Conn Aff. ¶ 4, Ex. 3.

[18] *Id.*

capital structure. The exchange portion of the transaction was particularly important to the Company (and incorporated at its request) as it would allow substantial deleveraging—an approximately $400 million reduction in indebtedness—at a time when the market prices of the Company's loans are depressed.[19] It is important to close the transaction by June 22, 2020; there is no obligation after that date.[20]

In terms of mechanics, the New Credit Facility requires certain amendments to the loan documents that do not implicate the 100% Exceptions and can be made by lenders holding a majority of the outstanding loans, i.e., the Required Lenders, and also employs certain bargained-for provisions regarding assignments contained within the Credit Agreement.

1. Amendments to Implement the New Loans.

In order to implement the New Credit Facility, the Company, with the consent of the Required Lenders, would make amendments to the Credit Agreement (and corresponding amendments to the 2L Credit Agreement) and amend or enter into applicable intercreditor agreements, which govern the priority of loans relative to each other. Article 6 of the Credit Agreement contains provisions expressly permitting Serta to take on new debt or incur new liens under certain enumerated circumstances. *See* CA §§ 6.01, 6.02. As Article 6 is not subject to any of the 100% Exceptions in the Credit Agreement, it can be modified with the consent of the Required Lenders. *See* CA § 9.02(b). The New Loans will be secured by the existing liens already securing the loans under the Credit Agreement, which will be permitted because Serta and the Required Lenders will agree to amend the debt and lien incurrence covenants in Article 6 in order to permit this transaction. In order to implement the super-priority of the New Loans, the Required

[19] Shah Aff. ¶¶ 21–23.

[20] Affidavit of Barry Canipe, Dkt. 28, ¶ 16.

Lenders would agree to amend or enter into applicable intercreditor agreements to assign the New Loans a right to payment senior to the right of payment of the 1L Loans and the 2L Loans.

2. Effecting the Exchange Pursuant to the Agreement.

To effect the exchange of 1L Loans and 2L Loans into New Loans, Serta would enter into open market purchases of such loans under Section 9.05(g) the Credit Agreement (and 2L Credit Agreement). Section 9.05(g) provides that lenders may assign its loans under the Credit Agreement to certain "affiliated lenders," including the borrower, Serta, "***on a non-pro rata basis*** . . . through open market purchases[.]" CA § 9.05(g) (emphasis added); *see also id.* § 1.01 (defining "Affiliated Lender" to include the "Top Borrower [Serta] and/or any subsidiary of the Top Borrower"); *id.* § 2.18(c)(ii)(B) (carving out the proceeds of an assignment or sale of loans pursuant to § 9.05 from the pro rata sharing provision). Because Serta's debt is currently trading on the market at a discount, this would allow Serta to take advantage of that market pricing at this critical moment, and provide \$0.74 of New Loans in exchange for each \$1.00 of 1L Loans—a key feature in the transaction to allow the Company to reduce its overall debt and thereby materially de-lever its capital structure.[21]

The amendments to the Credit Agreement required to implement the New Credit Facility would leave Section 2.18(b) and (c) completely untouched, and do not otherwise implicate any 100% Exception. The Proposed Transaction would not remove any collateral or guarantee protection afforded to the First Lien Lenders. The entire New Credit Facility is designed to be implemented with the consent of the Required Lenders and is, therefore, permitted under the Credit Agreement, pursuant to its express terms. Plaintiffs' rights under the Credit Agreement would be otherwise unchanged.

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[21] Shah Aff. ¶ 10.

E. Plaintiffs Bring The Instant Lawsuit

On June 11, 2020, having learned of the Proposed Transaction and reeling from the rejection of their Predatory Proposal, Plaintiffs filed the Complaint, which alleges three causes of action against Lender Defendants—(1) breach of the Credit Agreement; (2) breach of the covenant of the implied covenant of good faith and fair dealing; and (3) a declaratory judgment count seeking a declaration that consummation of the Proposed Transaction "would violate the Credit Agreement"—and asks that the Court issue a declaration that "temporarily, preliminarily, and permanently enjoin[] Consummation of the Proposed Transaction." Compl. ¶¶ 101, 108(a). Plaintiffs also filed an application for a TRO, preliminary injunction, and expedited discovery. The Court granted the TRO ex parte pending a hearing on Tuesday, June 16, 2020.

Lender Defendants submit this Memorandum of Law in Opposition to Plaintiffs' application, and ask that this Court deny Plaintiffs' request to renew the TRO upon its expiration at the forthcoming hearing, reject in full Plaintiffs' request for a preliminary injunction enjoining the Proposed Transaction, deny Plaintiffs' request for expedited discovery,[22] and dismiss outright Plaintiffs' claims against Defendants for the reasons set forth below.

III. LEGAL STANDARD

A temporary restraining order is an extraordinary remedy that requires the proponent demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent a restraining order, and (3) a balance of equities tipping in its favor. *Silvestre v. De Loaiza*, 820 N.Y.S.2d 440, 441 (N.Y. Sup. Ct. 2006). The requirements are the same for a preliminary injunction. *Marsh & McLennan Cos., Inc. v. Feldman*, 2019 WL 4750381, at *3 (N.Y. Sup. Ct. Sep. 30, 2019) (Masley,

[22] The Court has discretion to deny the request for expedited discovery and should deny Plaintiffs' request here because no further evidence is necessary to find that Plaintiffs cannot meet the requirements for provisional injunctive relief. *See Charter Comm'ns, Inc. v. Local Union No. 3,* 166 A.D.3d 468, 468–69 (1st Dep't 2018).

J.). "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996). If a plaintiff fails to meet its heavy burden on any one of these prongs, a temporary restraining order and preliminary injunction should not be granted. *Pop Intern. Galleries Inc. v. Swarts*, 2012 WL 858432, at *3 (N.Y. Sup. Ct. Mar. 6, 2012).

Provisional injunctive relief, moreover, should "only be granted if the movant establishes a *clear right* to it under the *law* and the *undisputed facts* found in the moving papers." *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001) (emphasis added). This burden is "particularly high," *Laig v. Medanito* S.A., 130 A.D.3d 466, 466 (1st Dep't 2015), and can be met only with "clear and convincing evidence," *Platinum Equity Advisors, LLC v. SDI, Inc.*, 132 A.D.3d 420, 420 (1st Dep't 2015).

IV. ARGUMENT

Plaintiffs have not met their burden on a single one of the three elements necessary for imposing the "drastic remedy" of provisional injunctive relief; their Motion must therefore be denied. *Schonfeld Strategic Advisors LLC v. Sassun*, 2019 WL 1517742, at *1 (N.Y. Sup. Ct. Apr. 3, 2019) (Masley, J.).

A. Plaintiffs Have Failed to Establish a Likelihood of Success on the Merits

Plaintiff cannot come close to demonstrating likelihood of success on the causes of action they assert against Defendant Lenders for two independent reasons. First, the plain terms of the Credit Agreement permit the Proposed Transaction, while the implied covenant claim is duplicative. Second, Plaintiffs lack standing to even pursue these claims.

1. Plaintiffs Have Failed to Establish That They Are Likely to Succeed on the Claims Asserted Against the Lender Defendants.

a) Breach of Contract Claim.

Plaintiffs cannot show a likelihood of success on their breach of contract claim because the Proposed Transaction is authorized by the express terms of the Credit Agreement. Courts including this one have routinely rejected motions for preliminary injunctions sounding in contract "based on the clear, unambiguous language of the Agreement." *The European Fine ART Foundation v. Artvest Partners LLC*, 2018 WL 2432183, at *3 (N.Y. Sup. Ct. May 30, 2018) (Masley, J.); *see also U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007).

Plaintiffs allege that the Proposed Transaction will "change the *pro rata* sharing provision of the [Section 2.18(b)] waterfall" by incurring senior debt that subordinates their 1L Loans, and that because such a "change" requires the "consent of each Lender," Defendants breached the "sacred rights" protected by Section 9.02(b) by amending Section 2.18(b) and (c) without consent of all lenders. Pls.' MOL at 15. Plaintiffs are wrong.

First, Plaintiffs' argument is premised on an assertion that the very fact of a super-senior facility subordinating their 1L Loans violates the Credit Agreement. It does not. As set forth above, there is no anti-subordination clause in the Credit Agreement (as there are in many others, *see* note 8, supra).

Second, the structure of the Proposed Transaction does not "by its terms alter the pro rata sharing of payments required [by Sections 2.18(b) or (c)]." CA § 9.02(b)(A)(6). Sections 2.18(b) and (c) remain completely untouched by the Proposed Transaction. The Proposed Transaction would not modify this "sacred right" or any other (or any exception to a "sacred right"), Pls.' MOL at 8-9, so the consent of all affected lenders is simply not required.

Third, the few amendments of the Credit Agreement that the Proposed Transaction would involve only require the consent of the Required Lenders, which was obtained here. *See* CA § 9.02(b).

Fourth, there is nothing about Serta offering open market purchases of loans owned by any lender (including the Majority Lenders) pursuant to Section 9.05(g) that violates any provision of the Credit Agreement. Contrary to Plaintiffs' assertion, Section 9.02(b)(A)(6)—the provision requiring 100% lender approval—contains an explicit carve-out for "any transaction permitted under Section[] . . . 9.05(g)."

Accordingly, Plaintiffs cannot demonstrate any likelihood of success on the merits on their breach of contract or declaratory judgment claims. *See Marsh USA, Inc. v. Alliant Ins. Services, Inc.*, 2015 WL 6499525, at *3-4 (N.Y. Sup. Ct. Oct. 19, 2015); *Purvi Enterprises, LLC v. City of New York*, 62 A.D.3d 508, 508 (1st Dep't 2009).[23]

b) Implied Covenant of Good Faith and Fair Dealing Claim.

Under New York law, courts will dismiss implied covenant claims as "duplicative of the breach of contract claim," *Englhard Corp. v. Research Corp.*, 268 A.D.2d 358, 358–59 (1st Dep't 2000), where such claims "ar[i]se from the same facts" or seek identical damages as a breach of contract claim, *Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588, 588 (1st Dep't 2011); *3P-733 LLC v. Davis*, 2019 WL 1517732, at * 1 (N.Y. Sup. Ct. Apr. 2,

[23] Plaintiffs' cases to the contrary are inapposite. In *BDCM Opportunity Fund II LP v. Yucapia American Alliance Fund I, LP*, the agreement required the written consent of each lender to amend the applicable definitions, while the Agreement here only requires the consent of a majority of the lenders. Nor does this case involve a "lack [of] equal bargaining power" or "destr[uction]" of Plaintiffs' rights as in *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153–55 (2002). Finally, in *Octagon Credit Investors LLC v. NYDJ Apparel LLC*, Justice Ramos denied the affected lenders' motion to dismiss an implied covenant of good faith and fair dealing claim after finding that an amendment relating to a 100% Exception was not communicated to all lenders, giving the impression that defendants were "trying to get over on somebody." Dkt. 8, *NYDJ* Transcript, at 30:8-24. Here Plaintiffs were fully aware of the Company's need for liquidity and the multiple proposals it was considering and there is no evidence of bad faith.

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2019) (Masley, J.) (affirming dismissal of plaintiff's implied covenant of good faith and fair dealing claim since it was premised on the same set of facts as alleged breach of contract claim).

Plaintiffs' implied covenant claim must be dismissed as duplicative because it is premised on the same theory as their breach of contract claim, namely, that, by entering into the Proposed Transaction, Defendants will purportedly "destroy Plaintiffs' rights to receive the fruits of the Credit Agreement" and "alter[] the provisions for payment in the Event of Default." Compl. ¶¶ 83–87; *see* Compl. ¶¶ 76–82 (similar allegations as breach of contract claim). Plaintiffs also fail to identify any remedy they could receive from prevailing on their implied covenant claim that is distinct from any remedy were they to prevail on the breach of contract claim, because none exists. *Compare* Compl. ¶ 81-82 *with* Compl. ¶ 86-87 (both alleging Plaintiffs have no adequate remedy at law and that the Proposed Transaction "should be enjoined" and "restrained"); *see also Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D. 3d 423, 426 (1st Dep't 2010).

Because Plaintiffs cannot point to any existing provision of the Credit Agreement that prohibits the Proposed Transaction, Plaintiffs attempt to use the covenant of good faith and fair dealing to imply a provision to prevent subordination of their debt. But courts regularly reject implied covenant claims where, as here, plaintiffs attempt to "imply an obligation inconsistent with other terms of the contractual relationship," *Keifer v. Sony Music Ent. Inc.*, 8 A.D.3d 107, 107 (1st Dep't 2004), or "add a new term to a contract, especially to a commercial contract between two sophisticated commercial parties represented by counsel," *D&L Holdings v. Goldman Co.*, 287 A.D.2d 65, 73 (1st Dep't 2001). Therefore, Plaintiffs cannot establish a likelihood of success on the merits for their implied covenant of good faith and fair dealing claim.

2. Plaintiffs Cannot Prevail on the Merits Because They Have No Standing to Bring This Action

Plaintiffs' likelihood of success is further undermined because they lack standing under the Credit Agreement's "no-action clause," which requires suit by the designated agent rather than the individual lenders. *See Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 561 (2014). Here, the Credit Agreement's no-action clause provides that "no Secured Party shall have any right individually to realize upon any of the Collateral or to enforce the Loan Guaranty . . . [that right] may be exercised solely by the [1L] Agent on behalf of the Secured Parties."[24]

Only the necessary Required Lenders can direct the Agent to take action, and Plaintiffs here do not constitute a sufficient majority to be the Required Lenders. Yet Plaintiffs have sued, alleging that the Proposed Transaction would "have the effect of effectively releasing all or substantially all of the First Lien collateral" and "all or substantially all of the value of the guarantees that protect the First Lien Lenders." Compl. ¶ 55. Because such individual lender claims are flatly prohibited by the plain language of the no-action clause, Plaintiffs lack standing, which is fatal to their likelihood of success. *See, e.g.*, *Alden Global Value Recovery Master Fund, L.P. v. KeyBank Nat'l Assoc.*, 159 A.D. 3d 618, 626–27 (1st Dep't 2018).

B. Plaintiffs Cannot Show Irreparable Harm

To meet the irreparable harm requirement—"the lynchpin to the issuance of a preliminary injunction"—Plaintiffs must demonstrate "not a mere possibility that [they] will be irreparably harmed, but that [they are] likely to suffer irreparable harm if equitable relief is denied," *Pegasus Strategic Partners, LLC v. Stroden*, 2016 WL 3386980, at *5 (Sup. Ct. N.Y. Cty. June 20, 2016), and also that "the irreparable harm is imminent not remote or speculative," *Family Friendly Media,*

[24] The 1L Agent also must act at the direction of the Required Lenders, CA § 8 at 129, defined as "Lenders having Loans or unused Commitments representing more than 50% of the sum of the total Loans and such unused commitments at such time." *Id.* at 49.

Inc. v. Recorder Television Network, 74 A.D.3d 738, 739 (1st Dep't 2010) (citation omitted). Moreover, "[a] quantifiable remedy precludes a finding of irreparable harm." *Marsh & McLennan*, 2019 WL 4750381, at *3.

This case is about the consequences of a proposed deal, and who will make more or less money as a result. Therefore, even if there were any injury suffered by these Plaintiffs—and there is none—it would be fully compensable by quantifiable, money damages. *See Adwar v. Sachs*, 2018 WL 1461070, at *2 (N.Y. Sup. Ct. Mar. 21, 2018) ("[H]arm is not irreparable if an adequate remedy at law exists such as damages.") (Masley, J.).

Each and every one of Plaintiffs' assertions in support of its irreparable harm claim are sharply disputed (and, in fact, incorrect), entirely speculative, and/or support that any claimed harm can be adequately remedied at law.

First, Plaintiffs claim that the Proposed Transaction "effectively strips" Plaintiffs of their liens and harms their prospects of recovery. Pls.' MOL at 18. But that is patently wrong; incurring additional debt supported by the Collateral is fundamentally different than "stripping" away the Collateral supporting the First Lien Lenders' debt.

Second, Plaintiffs insist that the Proposed Transaction will cause them to lose "leverage" in Serta's "impending restructuring." *Id*. But Plaintiffs' reference to Serta's "impending restructuring" is Plaintiffs' own creation, not based in reality. And Plaintiffs' purported loss of supposed "leverage" that they have no contractual right to under the Credit Agreement would not be cognizable harm.

Third, Plaintiffs' argument that the value of their loans may decrease as a result of the consummation of the Proposed Transaction is similarly speculative. Pls.' MOL at 18. And if any such decrease were to come to pass at some point in the future, it could be remedied by money damages. Plaintiffs make the conclusory (and false) claim that "it would be difficult, if not impossible, to ascertain the magnitude of this negative impact . . . [on] the value of loans." Pls.' MOL at 18. But, even setting aside the fact that any damages here would be readily quantifiable, it is well established that "[d]amages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable." *Marsh & McLennan*, 2019 WL 4750381, at *3.

The remainder of Plaintiffs' irreparable harm arguments rely on the entirely speculative assertions that, at some uncertain time in the future, Serta may have to file for Chapter 11 reorganization, or that unwinding any prospective trading of loans could be complicated. These arguments are, on their face, precisely the type of far-off, theoretical contingencies that courts routinely reject as unacceptable bases for the issuance of a TRO or preliminary injunction. *See, e.g.*, *Schonfeld*, 2019 WL 1517742, at *3; *Event Cardio Grp. Inc. v. Life Medical Tech., Inc*., 2017 WL 81031, at *5 (Sup. Ct. N.Y. Cnty. Jan. 9, 2017) (rejecting allegation that proposed acquisition would deplete company's resources and result in default on financial obligations as "speculative [and] conclusory claims of potential financial losses").

The authorities Plaintiffs rely on—few of which are from this jurisdiction—are inapposite. Plaintiffs principally point to TRO decisions by the Delaware Chancery Court, which, in addition to not being binding on this Court, employ a different, more permissive TRO standard. *See, e.g.*, *Triology Portfolio Co., LLC v. Brookfield Real Estate Financial Partners, LLC*, 2012 WL 120201, at *4 (Del. Ch. Jan. 13, 2012) (Delaware TRO standard focuses "less upon the merits," and more on whether "the claim is frivolous" and the "relative harm"). Delaware's "less exacting merits-based scrutiny" departs from New York law, *id*. at *4, and the Court should not give any weight to Plaintiffs' authorities that rely upon it.[25] In any event, Plaintiffs would fail even under that standard, because, as detailed above, not only do their claims fail on the merits, they have failed to show irreparable harm.

C. The Balance of the Equities Favors Defendants

Plaintiffs must show that the "balance of the equities" weighs in their favor. *Credit Index LLC v. Riskwise LLC*, 282 A.D.2d 246, 247 (1st Dep't. 2001). It does not—it favors Defendants.

First, Plaintiffs filed this suit with unclean hands and without disclosing the full story to the Court. *See United for Peace & Justice v. Bloomberg*, 5 Misc. 3d 845, 849 (Sup. Ct. N.Y. Cnty. 2004) (denying injunction where "plaintiff does not come to court with 'clean hands'"). Plaintiffs became 1L Lenders only three months ago, and only for the purpose of positioning themselves for a deal designed to take advantage of Serta's financial challenges solely for their own benefit. Having lost out on their bid, Plaintiffs now seek retribution by trying to block this one. The Court should not reward Plaintiffs' underhanded tactics.

Second, denial of the motion serves the public interest. An injunction here would prevent the Company from obtaining necessary capital as it works to overcome the serious challenges resulting from the COVID-19 pandemic. The effects of the protracted withholding of loan proceeds will impact every level of Serta's organization, starting with its employees and culminating with injury to its shareholders and all of its lenders.

[25] Plaintiffs' reliance on New York federal authorities evaluating different types of transactions or agreements are similarly flawed. *See, e.g.*, *Greenlight Capital LP v. Apple*, 2013 WL 646547, at *9 (S.D.N.Y. Feb. 22, 2013) (discussing "injunctive relief in the proxy context"); *Oracle Real Estate Holdings LLC v. Adrian Holdings Co. I*, 582 F.Supp.2d 616, 624–25 (S.D.N.Y. 2008) (finding irreparable harm in foreclosure context). The few New York state cases that Plaintiffs cite present factual patterns markedly distinct from the case at bar. *See, e.g.*, *Sirius Satellite Radio v. Chinatown Apts., Inc.*, 303 A.D.2d 261 (1st Dep't 2003) (requiring specific performance for removal of equipment); *Wasilkowski v. Amsterdam Medical Hospital*, 92 A.D.2d 1016 (3d Dep't 1983) (reinstating employment).

Finally, Plaintiffs' efforts to block the Proposed Transaction will cripple Serta's ability to carry its existing debt obligations under the Credit Agreement—an important consideration in crafting the Proposed Transaction. In short, an extended injunction preventing the Proposed Transaction would cause enormous harm to all parties involved—including Plaintiffs. Accordingly, Plaintiffs have "failed to clearly show or articulate any continuing harm to merit a tipping of the equities in [their] favor," and their motion should be denied. *Schonfeld*, 2019 WL 1517742, at *3.

V. CONCLUSION

For the reasons stated above, this Court should reject all relief, claims, and applications sought by Plaintiffs.

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Certification of Compliance with Word Count

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of New York, I certify that this brief contains 6,856 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

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