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,	Index No. 652243/2020
Plaintiffs,	Hon. Andrea Masley
-against-	Motion Sequence No. 1
Serta Simmons Bedding, LLC, Advent International Corporation, Eaton Vance Corp., Invesco Ltd., Credit Suisse Group AG, Barings LLC, and Does 1-50,	
Defendants.	

SERTA SIMMONS BEDDING, LLC'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER, A PRELIMINARY INJUNCTION, AND EXPEDITED DISCOVERY

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Serta Simmons Bedding, LLC ("SSB" or "Company") respectfully submits this Memorandum of Law in Opposition to Plaintiffs' Application for Temporary Restraining Order, Preliminary Injunction, and Expedited Discovery (the "Motion").[1]

I. PRELIMINARY STATEMENT

In the midst of a global pandemic, SSB constructed a competitive process between competing lender groups—including Plaintiffs—to provide the Company with much-needed liquidity and a corresponding path to deleverage its balance sheet. Plaintiffs lost that good faith, competitive process after a finance committee comprised of independent directors of SSB's parent committee (the "Committee") chose—on the Company's behalf—the safer alternative with its majority lenders instead of Plaintiffs' riskier structure. Plaintiffs now come before this Court with unclean hands seeking to destroy the Company's only likely opportunity to stave off a path toward an eventual restructuring. It is indeed ironic that Plaintiffs complain of the Company "changing the loan market" when it is Plaintiffs that would have had the Company pursue an asset-drop-down strategy that is the hallmark of aggressive borrower tactics in complex finance. And if Plaintiffs have their way, the competitive dynamic that drove hundreds of millions of dollars in benefits for the Company will be lost; the Company will be left to deal with a monolithic lender group that will likely not agree to the benefits the Company achieved as part of a highly competitive and fair process.

The Company has acted appropriately throughout and in compliance with its credit documents, and it is the Company and its stakeholders that will be irreparably harmed if Plaintiffs are successful in this litigation. The Company implores this Court to deny Plaintiffs' request for injunctive relief and see Plaintiffs' process for what it is—a selfish attempt by distressed lenders

[1] Submitted herewith is the Barry Canipe Affidavit ("Canipe Aff."); Roopesh Shah Affidavit ("Shah Aff."); and the David Lender Affirmation ("Lender Aff.").

to harm the Company, eliminate any competitive dynamic among the lender groups and drive the Company toward an eventual change of control in their favor.

More specifically, given the impact of COVID-19 on its operations, SSB engaged with various groups of lenders to explore potential liquidity solutions. Two separate proposals emerged, each led by a separate lender group. One was led by Plaintiffs, including Apollo, who had sought to acquire its debt three months ago on the secondary market at significant discounts in violation of the credit agreement that prohibited it from holding SSB debt. The second was led by the holders of a majority of SSB's debt including Defendants Eaton Vance Corp., Invesco Ltd., and Credit Suisse Group AG, and includes Barings LLC (the "Defendant Lenders"). Plaintiffs would have the Court believe that they were innocent victims that were somehow taken advantage of by the Defendants. Not so. To the contrary, Apollo tried to take advantage of SSB's liquidity issues by proposing a transaction that would have done the very thing it now accuses the Defendant Lenders of doing—stripping hundreds of millions of dollars of existing collateral away from the other lenders, and placing them and the other Plaintiffs in an exclusive "super-priority" position in the event of a default because the other lenders would no longer have liens or claims on the stripped collateral. Plaintiffs' proposal would have been an exclusive deal for them alone. Plaintiffs' proposal also contained other onerous terms that would have made it very difficult for the Company to restructure in the future.

Conversely, the Defendant Lenders made a proposal that was far superior to Plaintiffs' proposal. It results in immediate liquidity of $200 million and long-term deleveraging, reducing SSB's total net debt by nearly $400 million. (In comparison, the Apollo proposal was ***higher cost*** and actually resulted in ***increasing*** the amount of SSB's debt). It also fully complied with the Credit Agreement —it does not change the waterfall or release any collateral as Plaintiffs claim.

The Committee, which was delegated full authority to select the winning proposal, chose the Defendant Lenders' far superior proposal (the "Proposed Transaction"). Now sore about losing the opportunity to take over the Company, Plaintiffs have filed suit (as they had threatened to do if their proposal wasn't selected), and seek to stop a transaction that is better for the Company, far less prejudicial for non-participating lenders, and puts the Company on far surer footing than had it accepted Plaintiffs' bid. The equities clearly do not support stopping the Proposed Transaction. Indeed, as discussed below, Plaintiffs cannot show by clear and convincing evidence any of the elements necessary to obtain the extraordinary remedy of a preliminary injunction.

First, it is black letter law that harm is not irreparable where money can make a plaintiff whole. Here, any harm caused by the Proposed Transaction could be addressed by money damages. Additionally, the alleged harm is speculative at best and not imminent. SSB has made all of its required interest and amortization payments and is current on its debt payments. Plaintiffs' alleged harm would only materialize—if at all—in the event that SSB were to default and the secured parties exercised remedies against the collateral. Until that time, any alleged harm is hypothetical and cannot support a preliminary injunction.

Plaintiffs also cannot establish that the equities are in their favor because they are guilty of proposing the same kind of "scheme" that they decry here. The truth is that the Proposed Transaction is not only fully compliant with the Credit Agreement but is the type of transaction that is routinely done in the credit markets to attract potential lenders and additional liquidity. Apollo undisputedly knows this, having made a similar, albeit more punitive proposal, that was ultimately rejected. Given the state of the market, if the Court were to enjoin the Proposed Transaction, the Company will lose this golden opportunity to successfully deleverage its balance sheet out of court.

Finally, because the Credit Agreements expressly allows for the Proposed Transaction, Plaintiffs will not be able to show a likelihood of success on the merits.

For all these reasons, Plaintiffs' motion for a preliminary injunction should be denied.

II. STATEMENT OF FACTS

A. SSB and the Credit Agreements

SSB is one of the largest manufacturer and distributor of mattresses in North America, and owns and manages some of the best-selling bedding brands in the mattress industry: Serta®, Beautyrest®, iComfort®, Simmons®, and Tuft & Needle®. Canipe Aff. ¶ 3. SSB distributes its brands through national, hospitality, and regional and independent retail channels as well as through direct-to-consumer channels. SSB has manufactured mattresses for nearly 150 years and operates 27 plants in the U.S. and Canada employing thousands of people. *Id.* ¶ 3.

On November 8, 2016, SSB entered into three separate credit agreements: [redacted] *Id.* ¶ 4.

B. SSB Engaged in a Competitive Bidding Process

In 2019, SSB faced significant headwinds from the restructuring of its largest retail partner and strong competition from new direct-to-consumer market entrants. *Id.* ¶ 5. SSB undertook several key initiatives to improve its economic position, including hiring new executives, launching new direct-to-consumer websites, expanding its distribution channels and launching several new lines under its Beautyrest®, Simmons® and Serta® iComfort® brands. *Id.* ¶ 6. SSB successfully tracked its 2020 Adjusted EBITDA budget through the middle of March 2020, when the COVID-19 pandemic spread throughout the United States. *Id.* ¶ 6.

In March 2020, SSB began exploring various alternatives for raising preventative liquidity, as well as reduce debt and interest expense. Shah Aff. ¶ 4. To assess SSB's options, on March 11, 2020, the Board established the Committee and appointed two independent directors as its members. Canipe Aff. ¶ 8. The Board authorized the Committee to evaluate strategic alternatives for SSB and, if in the Company's best interests, recommend to the Board to pursue a transaction. *Id.* The Committee met twice weekly with management and advisors to discuss strategic alternatives. *Id.* ¶ 9. The Committee considered options to capture debt discount given the trading prices of SSB's debt and, as the COVID-19 pandemic spread throughout the United States, began to consider liquidity enhancements as SSB began to experience a substantial contraction in sales that materially impacted SSB's liquidity. *Id.* ¶¶ 9-11.

Over the course of April and May, SSB solicited proposals for liability management transactions and additional liquidity, both from existing holders of SSB's debt and lenders outside of its capital structure. Shah Aff. ¶ 5. SSB entered into confidentiality agreements with a number of parties, including a group consisting of Plaintiffs and a group consisting of the Defendant Lenders. *Id.* The confidentiality agreements contained customary "no talk" provisions to prevent parties negotiating with each other to the detriment of SSB's financing process. *Id.*

As these negotiations progressed, by early June, the Committee identified Plaintiffs and the Defendant Lenders as the preferred parties for the transaction, given that a deal with these parties would allow SSB to both raise liquidity with a new money financing and capture debt discount through an exchange transaction. *Id.* ¶ 9. During the negotiations, SSB expressly pushed for a debt exchange as part of the transaction in order to reduce its financial leverage with the hope of improving its debt position going forward. *Id.* ¶ 10.

On June 3, 2020, the Board delegated full decision-making authority to the Committee to approve, negotiate and implement a transaction to restructure SSB's indebtedness or incur financing. Canipe Aff. ¶ 13. On June 5, 2020, the Committee selected the Defendant Lenders as the preferred bidder because they offered superior terms and involved considerably less litigation risk than Plaintiffs' convoluted structure. Shah Aff. ¶ 11.

On June 8, 2020, the Defendant Lenders—comprising 50.1% of holders of the First Lien Term Loans—and SSB entered into the Transaction Support Agreement ("TSA"). *Id.* ¶ 27. The TSA is currently set to expire on [redacted]—meaning that SSB has until [redacted] to close the Proposed Transaction or risk returning to square one, while still facing the ever-present uncertainty of COVID-19 and retail headwinds. *Id.*

On June 8, 2020, SSB issued a press release announcing the Proposed Transaction to the market. *Id.* ¶ 28. Plaintiffs, bitter from their loss, filed suit in this Court to temporarily restrain and preliminarily enjoin the Proposed Transaction.

C. Plaintiffs' Proposal Included Draconian Terms Aimed at Putting Plaintiffs First-in-Line Upon SSB's Default

Plaintiffs—comprised of entities managed by Apollo, Angelo Gordon ("AG") and Gamut Capital SSB, LLC ("Gamut")—claim to "hold" approximately [redacted] First Lien Term Loans. *See* Motion at 1; Shah Aff. ¶12. AG, which owns [redacted] in the aggregate amount of secured debt issued by SSB, and Gamut, which owns approximately [redacted], purchased their holdings on the secondary market, with significant purchases over the past three months at substantial discounts. Shah Aff. ¶¶ 12-13.

Apollo, on the other hand, does not currently hold any SSB debt. Rather, Apollo attempted to purchase approximately [redacted] of SSB's First Lien Term Loans starting in March 2020, again at substantial discounts, but that transaction has not yet closed because Apollo is identified

as a Disqualified Institution under the Credit Agreement and is not permitted to purchase any of that debt. Canipe Aff. ¶ 22. To attempt to circumvent this, Apollo attempted to hide its identity behind an affiliate—North Star—but was ultimately discovered by SSB. *Id.* As such, Apollo is currently not a debt holder and has no standing to bring this action.

Given its terms, it should come as no surprise that Plaintiffs' proposal was not selected because it would have resulted in Plaintiffs obtaining unfettered control over the Company, completely taken away significant assets from non-participating lenders, required a series of complex structuring steps that would have risked a violation of the Credit Agreements, and did not yield the debt reduction that SSB was seeking. Shah Aff. ¶¶ 15-20. Specifically, Plaintiffs' proposal included $200 million in new money and an exchange of approximately $630 million of existing First and Second Lien Term Loans into approximately $470 million of exchanged debt. *Id.* ¶ 15. Thus, under Plaintiffs' proposal, SSB's total debt would have ***increased*** by approximately $38 million (compared to ***a decrease*** of [redacted] under the Defendant Lenders' proposal) and total interest payments would have ***increased*** by approximately $37 million (compared to [redacted] under the Defendant Lenders' proposal). *Id.* ¶ 18.

In return, Plaintiffs sought to transfer substantial First Lien Term Loan collateral, including Simmons® and Tuft & Needle® intellectual property and royalty streams associated with other third-party intellectual property licenses worth hundreds of millions of dollars, ***away from*** non-participating first lien lenders to newly-created SSB subsidiaries that would have served as borrowers and/or guarantors of the new debt, but not the existing first or second lien debt. *Id.* ¶ 15. In addition, Plaintiffs' proposal also contemplated adding new collateral for only Plaintiffs' benefit, including a pledge of both Serta, Inc. stock, which would have given Plaintiffs an 82% interest in the entity holding Serta® brand products intellectual property, and certain real estate.

Id. ¶ 16. These transfers and new liens would have had the effect of ***stripping approximately $465-$590 million in first lien collateral from the existing, non-participating lenders***, and adding approximately $300-$375 million in new collateral, for a total of approximately $765-$965 million. *Id.* ¶ 17.

Further, since Plaintiffs' proposal created a structurally senior loan and collateral package with control over SSB's valuable intellectual property, it would have given Plaintiffs a blocking position in any future restructuring, which would have significantly limited SSB's flexibility going forward.[2] *Id.* ¶ 19.

D. The Defendant Lenders' Proposal Provides Significantly More Favorable Terms

The Defendant Lenders' proposal, on the other hand, is significantly less complex and less risky for the ongoing survival and operations of the Company. Under the Proposed Transaction, the Defendant Lenders will provide SSB with $200 million in new money, and exchange [redacted] of First Lien Term Loans and Second Lien Term Loans into a super-priority facility with a face value of [redacted] (the "PTL Loans"). *Id.* ¶ 22. The Proposed Transaction will allow SSB to capture approximately $400 million in debt discounts because the exchanged debt will have a value of [redacted], and will exchange more debt in aggregate than Plaintiffs' proposal. *Id.* ¶ 23. Thus, even accounting for the $200M in new money loans, the net result is a discount capture of nearly $400M. In addition, the Proposed Transaction results in lower all-in interest expense. *Id.*

[2] Plaintiffs' proposal also required the newly formed entities to be bankruptcy remote entities, meaning Plaintiffs' proposal sought to preclude SSB's ability to include those entities in any Chapter 11 restructuring. Shah Aff. ¶ 20. Instead, Plaintiffs could leverage their position outside the Chapter 11 case for concessions and privileges not available to those within the bankrupt capital structure. *Id.* This would have further restricted SSB's ability to reorganize and could have enhanced Plaintiff's control over any future restructuring and bankruptcy filing. *Id.*

Plaintiffs suggest that they should be permitted to participate in the Proposed Transaction, but Plaintiffs' participation would not accomplish the goal of deleveraging the Company. If every First Lien Term Loan lender was permitted to exchange their debt into the new facility, there would be no reduction in debt because the participating lenders would not be incentivized to sell their debt at a discount, whereas now, with the Defendant Lenders, the net reduction is nearly $400 million. *Id.* ¶ 38. Apollo knows this; which is why, even in its proposed transaction, Apollo fully endorsed a collateral stripping exchange that was only available to themselves. *Id.* ¶ 17.

[redacted] Thus, unlike Plaintiffs' proposal, the Proposed Transaction does not contemplate stripping away any of the first lien collateral from existing non-participating lenders and, in fact, [redacted] *Id.*

The Proposed Transaction also provides the Company with liquidity, less debt, and a sufficient runway for the future. *Id.* ¶ 32. The Proposed Transaction will provide a debt reduction of $200 million and provide the Company $200 million in new money, which will [redacted]. Canipe Aff. ¶ 16. SSB currently projects revenue of [redacted] in 2021. *Id.*

E. The Proposed Transaction Complies with the Credit Agreement

The Proposed Transaction contemplates a new facility with two tranches: (i) $200 million in new money incurred as incremental debt, and (ii) a debt-to-debt exchange of approximately [redacted] of First Lien Term Loans and Second Lien Term Loans. Under the Credit Agreement, the

Company is expressly allowed to incur $200 million in incremental equivalent debt without offering it to all lenders. *See* Ex. 1, Section 6.01(z) [redacted] Moreover, the Credit Agreement expressly permits the [redacted] debt-to-debt exchange on a non-pro rata basis as part of an open market transaction. *See* Ex 1, Section 9.05(g) [redacted]

The Defendant Lenders and the Company will also enter into certain permitted amendments to the Credit Agreement to allow the PTL Loans to have senior payment priority. Shah Aff. ¶ 26. Since the amendments do not affect the so-called "sacred rights" under the Credit Agreement, the Plaintiffs' consent is not required. Rather, the Credit Agreement requires only [redacted] Section 9.02(b) provides, in relevant part:

> (b) [redacted]

See, Ex 1, Section 1.01 [redacted]

As Apollo well knows, having made a similar proposal, this is the way restructuring transactions are commonly done.

III. ARGUMENT

"[A] preliminary injunction is a 'drastic' remedy" that "substantially limits a defendant's rights." *H.D. Smith Wholesale Drug Co. v. Mittelmark*, 941 N.Y.S.2d 538 (Sup. Ct. N.Y. C'ty. 2011). As such, a party seeking injunctive relief bears a heavy burden, and must demonstrate by clear and convincing evidence: "(1) a likelihood of success on the merits; (2) irreparable injury; and (3) that the balance of equities are in its favor." *IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 A.D.3d 464, 465 (1st Dep't 2016); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Plaintiffs have not met a single one of these elements, much less all of them, and, thus, their Motion should be denied.

A. Plaintiffs Will Not Be Irreparably Harmed Absent a Preliminary Injunction

"Irreparable harm is the lynchpin to the issuance of a preliminary injunction." *Pegasus Strategic Partners, LLC v. Stroden*, No. 653523/2015, 2016 WL 3386980, at *5 (Sup. Ct. N.Y. C'ty. June 20, 2016). The "movant must show that the irreparable harm is imminent not remote or speculative." *Family Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 (2d Dep't 2010). Indeed, Plaintiffs "must establish 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*, 2016 WL 3386980, at *5 (emphasis original). It is blackletter law that "economic loss, which is compensable by money damages, does not constitute irreparable harm." *Family Friendly Media*, 74 A.D.3d at 739.

There can be no irreparable harm here because Plaintiffs' purported damages have a determinable value and each Plaintiff can "still be returned to the position it previously occupied by an award of monetary damages." *See Pac. Elec. Wire & Cable Co. v. Set Top Int'l Inc.,* No. 03 Civ. 9623, 2003 WL 23095564, at *5 (S.D.N.Y. Dec. 30, 2003). Plaintiffs claim that the Proposed Transaction will "strip Plaintiffs of their liens" and that their "loans will lose—and indeed, already

have lost—value."[3] Motion at 18. First, no one is stripping Plaintiffs of their liens in the collateral. Under the Proposed Transaction, [redacted] But even so, the liens only protect Plaintiffs' right to be paid *money*, just as the allegedly depreciating value of the loans is measured in dollars and cents. All that would be required to make Plaintiffs whole is a simple calculation of the value of their debt. Thus, to the extent Plaintiffs could show any injury (and they cannot), it is indisputable that money damages would make them whole. *See Chiagkouris v. 201 W. 16 Owners Corp.*, 54 N.Y.S.3d 5, 6 (1st Dep't 2017) ("damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable"); *see* Ex. 2, *Octagon Credit Investors, LLC v. NYDJ Apparel LLC*, No. 656677/2017 (N.Y. Sup. Ct.), at 3–7 (denying preliminary injunction because plaintiff failed to demonstrate irreparable harm and if plaintiff prevails on merits, restructuring could be unwound and money damages granted).

Separately, Plaintiffs cannot show irreparable harm because Plaintiffs' purported harm is purely speculative. A preliminary injunction is only appropriate to prevent "imminent" irreparable harm. *Golden v. Steam Heat*, 216 A.D.2d 440, 442 (2d Dep't 1995). Plaintiffs' alleged harm will not occur at the close of the Proposed Transaction. Rather, it will occur, if at all, only if SSB defaults sometime in the future and is forced to sell its collateral. But until then, [redacted]. Thus, the harm that Plaintiffs allege is hypothetical and purely speculative, and cannot constitute irreparable harm. *Accord Cipriani Fifth Ave., LLC v. RCPI Landmark Properties, LLC*, 4 Misc.3d 850, 853 (N.Y. Sup. Ct. 2004).

To manufacture an aura of inevitability, Plaintiffs allude to the possibility that SSB may someday in the future seek reorganization. But to the extent that Plaintiffs are implying that SSB

[3] Plaintiffs' claim that they have already suffered harm in lost value dooms their request for an injunction because it clearly demonstrates that their harm is compensable by money damages.

is insolvent and will not be able to satisfy any award of monetary damages, that assertion would fail both as a matter of fact (the Proposed Transaction will materially improve SSB's financial position) and law, since courts have repeatedly held that mere allegations of insolvency "do[] not generally support a claim for injunctive relief." *AIU Ins. Co. v. Robert Plan Corp.*, No. 603159/2005, 2007 WL 2811366, at *6 (Sup. Ct. N.Y. C'ty. Sept. 26, 2007); *see also, e.g., UBS Securities LLC v. Highland Capital Mgmt., L.P.*, 42 Misc.3d 580, 592 (Sup. Ct. N.Y. C'ty. 2013) ("[A]n injunction may not be granted on the ground that the defendant threatens to dispose of assets and to render itself judgment proof.").

Ultimately, Plaintiffs are left claiming a vague harm to their bargaining "leverage," relying predominantly on distinguishable cases from other jurisdictions. *See* Motion at 25. But this form of irreparable harm has been rejected by New York State courts. In *Eaton Vance Mgmt. v. Wilmington Sav. Fund Soc'y*, *FSB*, No. 654397/2017 (N.Y. Sup. Ct.), the court expressly rejected plaintiff's argument that loss of their bargained-for-right to collateral and their "negotiating position" as a secured creditor constituted irreparable harm, and denied the motion for preliminary injunction. *See* Ex. 3, Tr. of Hr'g and Order on Mot. for Prelim. Inj., at 32–35, 48. Moreover, any purported rights Plaintiffs seek to enforce are not bargained for rights since Plaintiffs opportunistically purchased the debt on the secondary market at deep discounts.

Further, the cases Plaintiffs rely on from outside this jurisdiction are inapposite. Those cases did not involve a transaction that was explicitly permitted under the Credit Agreement nor one that could be remedied with cash if a court found it impermissible. Indeed, most of the cases Plaintiffs rely on involve unique contractual rights concerning corporate voting or corporate control and management that were violated, which are not at issue here. For example, *Telcom-SNI Inv'rs, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505 (Del. Ch. Sept. 7, 2001), involved the

dilution of ownership interests and voting rights through the issuance of new stock and debt. *Id.* at *9-10. Moreover, the provisions allegedly breached were specifically negotiated for by plaintiffs in connection with their investment. Similarly, *Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC*, 582 F. Supp. 2d 616 (S.D.N.Y. 2008), involved a specific bargained-for contractual right to control a real estate development company upon the event of a default, which the court found "difficult if not impossible to value" and where the plaintiff pled facts showing actual risk of loss (namely that foreclosure proceedings were pending which, if successful, would render the company insolvent). *Id.* at 626. Likewise, *Bank of America v. PSW NYC LLC*, 29 Misc.3d 1216(A) (2010), involved the "right to control the management" of property coupled with a provision that prohibited junior lenders from acquiring ownership and control of the property. *Id.* at *11-12. None of these cases is "strikingly similar" to the facts here. Motion at 19. Indeed, in-the-moment voting rights and corporate control are a far cry from the run-of-the mill-contract provisions and liens at issue here, which can be compensated by money.

This should come as no surprise to Plaintiffs since the transaction contemplated here is common-place in the industry and similar to the one Apollo proposed. Shah Aff. ¶¶ 36-37, 39. Moreover, in one of the cases that *Plaintiffs* rely on, the Second Circuit warned that not "all bargained-for contractual provisions provide a basis for injunctive relief upon breach or threatened breach" as "such a broad holding would *eviscerate* the essential distinction between compensable and non-compensable harm." *Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 114 (2d Cir. 2003) (emphasis added). Indeed, the Second Circuit specifically cautioned that its holding was limited to situations where the contractual "rights are central to preserving an agreed-upon balance of power (*e.g.*, preserving the *management role* of minority directors) *in corporate management*." *Id.* (emphases added). This rule was just a small extension of the general principle

that "denial of a controlling ownership interest in a corporation may constitute irreparable harm." *Id.* Plaintiffs' allegedly bargained-for rights—to protect the value of their liens on the collateral—fall squarely on the compensable side of the line.

Plaintiffs' remaining two cases do not help them either. They are both from lower courts in Delaware, and have never been cited by this Court. Indeed, Plaintiffs cite no analogous case from New York extending this doctrine beyond the corporate management context. For example, *Boesky v. CX Partners LP*, 1988 WL 42250 (Del. Ch. 1988), involved a planned—rather than hypothetical—distribution to limited partners as part of a dissolution in contemplation of a litigation settlement. *Id.* at *1. *Boesky* also involved what the court determined was a "clear breach" of the agreement because it only allowed amendments prior to dissolution, not while the company was liquidating. *Id.* at *8, 13. Similarly, *Trilogy Portfolio Co. v. Brookfield Real Estate Fin. Partners LLC*, 2012 WL 120201 (Del. Ch. 2012), is distinguishable because it "*inverted* the bargained-for priority" that advantaged the junior-most lender to the detriment of more senior lenders. *Id.* at *7 (emphasis added).[4] Here, Plaintiffs will be on equal footing with the other first lien lenders on the date the Proposed Transaction closes, and will continue to be on equal footing in the future unless SSB defaults.[5]

[4] *Trilogy* was also decided under Delaware's less-restrictive TRO standard where Defendants "failed to identify any contractual provision" that permitted the proposed transaction. *Id.* at *9.

[5] Plaintiffs also cherry-picked Delaware cases. For example, *Angelo, Gordon & Co. v. Allied Riser Commc'ns Corp.*, 805 A.2d 221 (Del. Ch. 2002), a case involving one of the Plaintiffs but omitted from their brief, is instructive. Although it arose in the context of a proposed merger, it involved the subordination of notes. The Court found that there was no irreparable harm because the subordination had "not been shown to be inconsistent with the contractual terms." *Id.* at 230. Additionally, the potential harm that they might not be repaid in full was both "speculative" and would not result from the transaction itself but would "only be felt, if at all, with the passage of time" after the transaction. *Id.* at 231. The same is true here.

B. The Balance of the Equities Favors SSB

Plaintiffs also cannot show that the equities tilt in their favor. In balancing the equities, courts consider, among other things, whether the movant has unclean hands and the potential injury from the injunction against the alleged harm to the party seeking the injunction. *See Credit Index LLC v. Riskwise LLC*, 282 A.D.2d 246, 247 (1st Dep't. 2001); *United for Peace & Justice v. Bloomberg*, 5 Misc.3d 845, 849 (Sup. Ct. N.Y. C'ty. 2004). As explained above, Plaintiffs face no imminent, irreparable harm. Because that is the only equitable consideration Plaintiffs place on their side of the scale, Motion at 21-22, the equities cannot tip in their favor. The Court should deny the preliminary injunction for that reason alone.

Separately, the equities do not favor Plaintiffs because they have acted with unclean hands or, at a minimum, tried to do precisely what they now accuse the Defendant Lenders of doing, albeit in a much more onerous way. To start, Apollo attempted to purchase roughly [redacted] of SSB's debt over the past three months, even though Apollo is disqualified under the Credit Agreement and therefore not permitted to hold SSB debt. To attempt to circumvent this, Apollo hid its identity behind an affiliate to make its purchases but was caught and denied. Not only does this raise questions of standing to assert these claims, it also shows a level of deceit that should not be rewarded by this Court.

Additionally, Plaintiffs' proposal was essentially a loan-to-own scheme that would have resulted in Plaintiffs obtaining unfettered control over the Company. In fact, Plaintiffs' proposal was, on almost every metric, *worse* for SSB, the Defendant Lenders, and all other lenders than the Proposed Transaction would be for Plaintiffs. Plaintiffs' proposal would have ***increased*** the Company's total debt by $38 million and ***increased*** the total interest payments by $37 million. Shah Aff. ¶ 18. Moreover, Plaintiffs' proposal would have stripped approximately $600 million in first lien collateral away from existing, non-participating first lien lenders to newly created

subsidiaries outside the reach of all other lenders that would have served exclusively as guarantors to the new debt. *Id.* ¶ 17. Plaintiffs' control over the collateral would have also given them substantial influence over any future restructuring SSB might pursue, and allow Plaintiffs to steer the restructuring to their own benefit. *Id.* ¶ 20.

On the other hand, if the Proposed Transaction is enjoined, the Company will suffer significant harm. There is no question that the Proposed Transaction is a major win for the Company and the direct result of a carefully conducted competitive process. If the Proposed Transaction is enjoined, SSB will lose a golden opportunity to deleverage its balance sheet successfully out of court, and will return to square one in an uncertain market plagued by COVID-19 at the mercy of its lenders. As a result, it is highly unlikely that SSB will be able to secure a new restructuring transaction with terms as beneficial as those offered by the Defendant Lenders. This would send SSB (and all of its stakeholders) into a highly uncertain future, and will most likely put SSB on a path to an eventual restructuring.

C. Plaintiffs Cannot Establish Likelihood of Success on the Merits

Plaintiffs also cannot show that they are likely to succeed on the merits of their claims. *See* Motion at 14. In order to obtain preliminary relief, Plaintiffs must "demonstrate a clear right to relief which is plain from the undisputed facts, to establish its likelihood of success." *URI Aaron Blackman*, 2013 WL 6506834, at *1. This burden is "particularly high," *Laig v. Medanito S.A.*, 130 A.D.3d 466, 466 (1st Dep't 2015), and met only by a showing of "clear and convincing evidence*." Platinum Equity Advisors, LLC v. SDI, Inc.*, 132 A.D.3d 420, 420 (1st Dep't 2015).

1. The Proposed Transaction is Expressly Permitted by the Credit Agreement

Plaintiffs claim that the Proposed Transaction will breach the "waterfall provision" under Section 2.18(b) of the Credit Agreement. According to Plaintiffs, the Proposed Transaction would

"change the pro rata sharing provision of the waterfall fundamentally by putting more than $1 billion in debt ***ahead*** of Plaintiffs in the Section 2.18(b) waterfall." Motion at 15. Plaintiffs are wrong. No changes would be made to Section 2.18(b). As discussed *supra*, section 6.01(z) of the Credit Agreement expressly permits the Company to incur $200 million in incremental equivalent debt and does not require the Company to offer the opportunity to all lenders. Moreover, the Credit Agreement expressly permits the [redacted] debt-to-debt exchange on a non-pro rata basis as part of an open market transaction under Section 9.05(g) (so this too expressly does not need to be offered to all lenders). Defendant Lenders and the Company will then enter into a series of permitted amendments to the Credit Agreement to allow the PTL Loans to have senior payment priority with the requisite majority lender consent. *See supra* II.E. Finally, and upon amendment of the Credit Agreement, the parties will direct the administrative agent to enter into a separate intercreditor agreement to establish senior payment priority for the PTL Loans, which is also expressly permitted by the Credit Agreement. *See supra* II.E.

2. The Proposed Transaction Does Not Breach the Waterfall Provision

Plaintiffs' claim that the Proposed Transaction will breach the waterfall provision in the Credit Agreement is premised on a fundamental misunderstanding of the deal. First, section 2.18(a) provides for [redacted] *See* Ex. 1, §2.18(a) [redacted] Since the PTL Loans will be entered into pursuant to an entirely separate facility, the PTL Loans are outside of the Credit Agreement, not in the same Class, and not subject to Section 2.18(b). Second, section 2.18(b), which governs payment priority rights in the event of default and the sale of proceeds of the collateral, is [redacted]

[redacted] *Id.* §2.18(b) [redacted] The intercreditor agreement entered into in connection with the Proposed Transaction will set forth the new payment priority rights. Since the PTL Loans and the First Lien Term Loans are not in the same class of debt, are established under separate credit agreements permitted by the Credit Agreement, and subject to a separate intercreditor agreement that will establish payment priority, the Proposed Transaction does not violate the waterfall provision.

Moreover, the Proposed Transaction does not contemplate any amendment to the waterfall provision, which will remain the same. In fact, the amendment provision of section 9.02(b), which Plaintiffs say does not permit amendments to the waterfall provision without its consent, expressly carves out transactions under section 9.05(g), like the exchange included in the Proposed Transaction, and thus expressly does not require the consent of all the lenders. Specifically, Section 9.02(b) provides

[redacted]

Id. § 9.02(b)(A)(6).

Finally, Plaintiffs' reliance on *BDCM Opportunity Fund II, LP v. Yucaipa American All. Fund*, 112 A.D.3d 509 (1st Dep't 2013), is misplaced because the proposed amendment was found to be expressly prohibited by the contract at issue. In that case, the borrower entered into a first lien credit agreement under which one or more lenders holding more than 50% of the total first lien debt (*i.e.*, "Requisite Lenders") had the authority to make certain key decisions affecting the

rights of all lenders. *See BDCM Opportunity Fund II, LP v. Yucaipa Am. All. Fund*, 2013 WL 1290394, *1 (N.Y. Sup. Ct. Mar. 8, 2013). The credit agreement provided, in relevant part, that "[w]ithout the written consent of each Lender . . . affected thereby," no amendment or modification "shall be effective ***if the effect thereof*** would . . . amend the definition of 'Requisite Lenders.'" *Id*. at *5 (emphasis added). The court found that the proposed amendment in that case altered a term incorporated into the definition of Requisite Lenders, and thus "had the 'effect' of amending the definition of Requisite Lenders" such that unanimous Lender consent was required. *Id*. Here, unlike in *BDCM*, there is no attempt to amend the waterfall provision or any other key terms of the Credit Agreement to circumvent the consent requirements. Thus, Plaintiffs' reliance on *BDCM* is misplaced.

3. Plaintiffs Cannot Establish Likelihood of Success on the Merits of their Implied Covenant Claim

Since the Proposed Transaction is expressly permitted under the plain terms of the Credit Agreement, Plaintiffs' implied covenant of good faith and fair dealing claim will also fail.[6] *Fesseha v. TD Waterhouse Inv'r Servs., Inc.*, 761 N.Y.S.2d 22, 23 (1st Dept. 2003) ("While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"); *Maxon Intern. Inc. v. Int'l Harvester Co.*, 82 A.D.2d 1006, 1007 (3d Dep't 1981) (same); *Silvester v. Time Warner, Inc.*, 1 Misc.3d 250, 258 (N.Y. Sup. Ct. 2003) (same).

And Plaintiffs' argument that the Proposed Transaction "would clearly destroy Plaintiffs' right to receive the benefit of their bargain in the Credit Agreement" is a complete red herring. Motion at 17. As discussed *supra*, Plaintiffs did not negotiate for any rights in the Credit

[6] Plaintiffs' reliance on *Octagon Credit Investors, LLC v. NYDJ Apparel LLC*, No. 656677/2017 (N.Y. Sup. Ct.) is equally misplaced. In *Octgaon*, the defendants did, in fact, amend the waterfall provisions in the credit agreement. And, importantly, even under those facts, the court denied preliminary injunctive relief.

Agreement and will retain [redacted] even after the Proposed Transaction is consummated. Accordingly, Plaintiffs cannot establish a likelihood of success on the merits of its breach of good faith and fair dealing claim.

D. Plaintiffs Are Not Entitled to Expedited Discovery

Since the plain terms of the Credit Agreement control, there is no need for expedited discovery. Motion at 22-23. And, Plaintiffs have all the relevant discovery they need. Plaintiffs have the Credit Agreement and the Company produced the TSA and term sheet for the Proposed Transaction. As discussed, *supra*, the lock-up period under the TSA expires on [redacted]. Since time is of the essence, the Court should deny Plaintiffs' request for expedited discovery and proceed immediately to a preliminary injunction hearing.

E. Plaintiffs Must Provide a Substantial Undertaking as a Precondition to Any Relief

The CPLR requires that a movant give an undertaking to secure the issuance of a preliminary injunction, sufficient to reimburse SSB if the injunction "later proves to have been unwarranted." *See Kazdin v. Putter*, 177 A.D.2d 456, 457 (1st Dep't 1991); CPLR §6312(b). Here, any injunction would risk harm to SSB far greater than any Plaintiffs could possibly suffer, and could send SSB (and all of its stakeholders) into a highly uncertain future. *See* Canipe Aff. ¶ 19. In light of the significant damages SSB would suffer should the Proposed Transaction fail, Plaintiffs should be required to provide a substantial undertaking, of at least $600 million, in the event of any injunction here. *See Bank of Am., N.A.*, 29 Misc.3d 1216(A), at *13.

IV. CONCLUSION

Accordingly, SSB respectfully requests that this Court deny Plaintiffs' Motion.

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CERTIFICATION OF COMPLIANCE
(NYS COMMERCIAL DIVISION RULE 17)

Pursuant to Rule 17 of the Rules of the Commercial Division, Supreme Court, New York County, I hereby certify that this memorandum of law, based on a computerized word-count, contains 6,980 words, excluding the caption, table of contents, table of authorities, and signature block, which are exempted under Rule 17. I further certify that this memorandum of law complies with the word count limit set forth in Rule 17.

Dated: New York, New York
June 16, 2020

/s/ David J. Lender
David J. Lender