SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ANTARA CAPITAL MASTER FUND LP, CORBIN ERISA OPPORTUNITY FUND LTD, CORBIN OPPORTUNITY FUND, L.P.

Plaintiff,

- v -

BOMBARDIER INC.,BANK OF NEW YORK MELLON, CANSO INVESTMENT COUNSEL LTD.,

Defendant.

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INDEX NO. 650477/2022

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 113, 114, 119
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 110, 115, 120
were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 111, 116, 117, 118
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, a Decision and Order of this Court dated March 17, 2023 (the **Prior Decision**; NYSCEF Doc. No. 73) which is incorporated herein, and for the reasons set forth on the record (12.19.23) and below, Bombardier's motion (Mtn. Seq. No. 003) and the Trustee's motion (Mtn. Seq. No. 002) to dismiss are granted solely to the extent that the sixth cause of action (declaratory judgment) is dismissed. The facts are discussed extensively in the Prior Decision. Familiarity is presumed.

Briefly, among other things, as discussed in the Prior Decision, the Plaintiffs allege that a Section 9.07 covenant breach occurred on January 29, 2021 because they engaged in the Transactions. For the purposes of this breach, the New Notes were not part of the Section 5.14 "[h]olders of a majority in aggregate principal amount of the Securities at the time Outstanding[1] with respect to which a default ***or breach*** or Event of Default shall have occurred and be continuing" (emphasis added), and thus the New Notes could not be part of any waiver of any past default or breach of Event of Default. As discussed in the Prior Decision, this understanding is consistent with the balance of the Indenture which provides that **Bombardier could go to the Holders of a majority in aggregate principal amount of the Outstanding Securities either (i) before the**

[1] The term Outstanding is defined in the Indenture:

> "Outstanding", when used with respect to Securities, means, as of the date of determination, all such Securities theretofore authenticated and delivered under this Indenture, except:
>
> (i) Securities theretofore cancelled by the Trustee or delivered to the Trustee for cancellation;
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> (ii) Securities, or portions thereof, for whose payment or redemption money in the necessary amount has been theretofore deposited with the Trustee or any Paying Agent (other than the Corporation) in trust or set aside and segregated in trust by the Corporation (if the Corporation shall act as its own Paying Agent) for the Holders of such Securities; provided that, if such Securities are to be redeemed, notice of such redemption has been duly given pursuant to this Indenture or provision therefor satisfactory to the Trustee has been made;
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> (iii) Securities which have been paid pursuant to Section 3.07 or have been mutilated, lost, stolen or destroyed and in exchange for or in lieu of which other Securities have been authenticated and delivered pursuant to this Indenture, other than any such Securities in respect of which there shall have been presented to the Trustee proof satisfactory to it that such Securities are held by a bona fide purchaser in whose hands such Securities are valid obligations of the Corporation; and
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> (iv) Securities which have been defeased pursuant to Article Eleven;
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> provided, however, that in determining whether the Holders of the requisite principal amount of the Securities then Outstanding have voted or have signed or given any request, demand, authorization, direction, notice, consent, requisition, waiver or other instrument or have taken any action or constitute a quorum at any meeting of Holders hereunder, Securities owned by the Corporation, or any other obligor upon the Securities, or any Subsidiary or any Affiliate of the Corporation or of such other obliger shall be disregarded and deemed not to be Outstanding, except that in determining whether the Trustee shall be protected in relying upon any such request, demand, authorization direction, notice, consent, requisition, waiver or other instrument or action or on the Holders present or represented at any meeting of Holders, only Securities which the Trustee knows to be so owned shall be so disregarded;

Transaction and ask for their consent, or (ii) Bombardier could go after the Transactions to the same Holders of a majority in aggregate principal amount of the Outstanding Securities at the time of the breach and ask them to waive the breach. To wit, Section 9.10 provides that:

> The Corporation may omit in any particular instance to comply with any term, provision or condition set forth in Section 9.05 and 9.07 through 9.08, inclusive, with respect to the Securities ***if before the time for such compliance*** the Holders of at least a majority in aggregate principal amount of the Outstanding Securities, by Act of such Holders, either shall waive such compliance in such instance or generally shall have waived compliance with such term, provision or condition, but no such waiver shall extend to or affect such term, provision or condition except to the extent so expressly waived, and, until such waiver-shall become effective, the obligations of the Corporation and the duties of the Trustee in respect of any such term, provision or condition shall remain in full force and effect[2]

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[2] It is also consistent with Section 8.02(f) and Section 5.08 of the Indenture. Section 8.02 generally provides that, to issue a supplemental indenture, Bombardier must obtain "the consent of the Holders of a majority in aggregate principal amount of the Securities then Outstanding and affected by such supplemental indenture." Section 8.02(a)-(f) of the Indenture is designed to protect against domination of the minority. Any supplemental indenture having the effect of anything denoted in Section 8.02(a)-(f) required Bombardier to obtain "the consent of the Holder of each Outstanding Security adversely affected thereby." Section 8.02(f) requires such consent to modify Section 5.14 of the Indenture except to increase the percentage required to waive a default. Section 5.08 of the Indenture provides:

> Section 5.08 Limitation on Suits
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> No Holder of any Security shall have any right to institute any action, suit or proceeding, judicial or otherwise, with respect to this Indenture, for payment of any principal, premium, if any, or interest owing on any Security, or for the execution of any trust or power hereunder or for the appointment of a custodian, receiver, liquidator, assignee, trustee, sequestrator or other similar official, or to have the Corporation wound up, or for any other remedy hereunder, unless:
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> (a) such Holder shall have previously given written notice to the Trustee of the occurrence of a continuing Event of Default hereunder with respect to the Securities;
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> (b) the Holders of not less than a majority in aggregate principal amount of the Securities then Outstanding shall have made written request to the Trustee to institute such proceeding in its own name as Trustee hereunder;
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> (c) such Holder or Holders shall have offered to the Trustee, when so requested by the Trustee, reasonable indemnity satisfactory to it against the costs, expenses and liabilities to be incurred therein or thereby in compliance with such request;
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> (d) the Trustee for 60 days after its receipt of such notice, request and offer of indemnity shall have failed to institute such action, suit or proceeding; and

(emphasis added). Section 5.14 provides:

> Section 5.14 Waiver of Past Defaults
>
> Prior to the declaration of acceleration of the Maturity of the Securities as provided by Section 5.02, ***the Holders of a majority in aggregate principal amount*** of the Securities ***at the time Outstanding with respect to which a*** default or ***breach*** or an Event of Default ***shall have occurred*** and be continuing shall have the right exercisable by Act of such Holders to waive any past default or breach or Event of Default and its consequences, except a default not theretofore cured:
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> (a) in the payment of the principal of or any premium or interest on any Security, or
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> (b) in respect of a covenant or provision hereof which under Article Eight cannot be modified or amended without the consent of all Holders of all Outstanding Securities affected thereby.
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> Upon any such waiver, such default or breach shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured, for every purpose of this Indenture, but no such waiver shall extend to any subsequent or other default or breach or Event of Default or impair any right consequent thereon

(emphasis added). Indeed, any other reading of the Indenture twists logic beyond recognition.

To be clear, Bombardier did not receive before January 29, 2021, *i.e.*, the day that the last of the Transactions closed and the Section 9.07 breach occurred, a waiver of the compliance of the Holders of a majority in the aggregate principal amount of the Outstanding Securities pursuant to

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> (e) no direction inconsistent with such written request shall have been given to the Trustee during such 60 day period by the Holders of not less than a majority in aggregate principal amount of the Securities then Outstanding (voting as one class);
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> ***it being understood and intended that no one or more Holders of Securities shall have any right in any manner whatsoever by virtue of, or by availing of, any provision of this Indenture to affect, disturb or prejudice the rights of any other Holder of the Securities, or to obtain or to seek to obtain preference or priority over any other such Holder or to enforce any right under this Indenture, except in the manner herein provided and for the equal and ratable benefit of all Holders of Securities***

(emphasis added).

Section 9.10. In fact, they did not receive it afterwards either from the relevant majority note holders. Following receipt of the Plaintiffs' declaration of default on April 22, 2021 (Second Amended Complaint [**SAC**], ¶ 83 [NYSCEF Doc. No. 80]; NYSCEF Doc. No. 105), on May 3, 2021, Bombardier went to the then note holders (including the Plaintiffs) and solicited consent, and the then note holders holding a majority of the principal aggregate of the amount of the then issued 2034 Notes did not consent:

> 83. On April 22, 2021, counsel for Plaintiffs sent a letter to the Company to provide formal notice of default and material breach (the "Notice of Default"). The Notice of Default explained that the Company had breached Sections 9.07 and 7.01 of the Indenture by engaging in the Transactions. The letter also explained that, because the Transactions had already closed, the breaches could not be cured and would constitute Events of Default.
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> 84. On May 3, 2021, the Company's counsel responded to the letter simply to assert, based on its own conclusory assertions about the Company's financial projections, that the Company was in compliance with its obligations under the Indenture.
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> 85. But the Company's actions spoke louder than its words. On the same day, the Company launched a series of consent solicitations for the 2034 Notes as well as the Company's 5.75% Senior Notes due 2022, 6.00% Senior Notes due 2022, 6.125% Senior Notes due 2023, 7.5% Senior Notes due 2024, 7.5% Senior Notes due 2025, 7.35% Debentures due 2026, and 7.875% Senior Notes due 2027 (the "Consent Solicitations").
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> 86. The Consent Solicitations, which are a tacit concession as to the legitimacy of Plaintiffs' core claim, sought the noteholders' consent to waive any "Defaults or Events of Default" arising in connection with the Transactions. As they acknowledged, "[e]ach Consent Solicitation require[d] consent from holders representing the requisite majority of the outstanding aggregate principal amount of such series of notes." Upon obtaining the requisite consent, the Company would execute a supplemental indenture reflecting the proposed amendments (the "Supplemental Indenture"). In exchange for the noteholders' consent, the Company would pay each consenting holder $1.25 per $1,000 principal amount of the applicable series of notes. The deadline to consent was set for May 11, 2021.
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> 87. The Company appointed Citigroup Global Markets Inc. and UBS Securities LLC as its Solicitation Agents for the Consent Solicitations. The Consent Solicitations explained that the Solicitation Agents "will solicit consents" on the Company's behalf from their locations in New York, New York.

> 88. On May 12, 2021, the Company announced that it had obtained the requisite consent from the holders of the 6.00% Senior Notes due 2022, 6.125% Senior Notes due 2023, 7.5% Senior Notes due 2024, and 7.5% Senior Notes due 2025. However, the Company failed to secure consent from the holders of the other series of notes, including the 2034 Notes. The Company then extended the consent deadline until May 13, 2021. By May 14, 2021, the Company had once again failed to obtain consent from the 2034 Notes but yet again extended the Consent Solicitation deadline, this time until May 18, 2021.
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> 89. All of this served no purpose other than to stall for more time while the Company could plot a new strategy to address the 2034 Notes. The Company knew its current offer would never garner a majority of the 2034 Noteholders. No rational Noteholder would accept the Company's offer of $1.25 per $1,000 principal amount (roughly 12.5 basis points) knowing that it was entitled to receive the Make Whole amounting to roughly 159% of the face value of the Notes. And by withholding their consent, the majority of Existing Notes had made clear that they believed a default had occurred. It was only a matter of time until the Consent Solicitations for the 2034 Notes would fail and the Company would have to answer for its breaches of the Indenture

(NYSCEF Doc. No. 80, ¶¶ 84-89; NYSCEF Doc. Nos. 79, 106).

When they could not obtain the requisite consent from the relevant holders of a majority in interest of the 2034 Notes, Bombardier attempted a work-around. Bombardier went to Canso (a then unnamed institution investor) and issued New Notes to Canso at a discount (*i.e.*, at par when the notes were trading at approximately 105% of par) increasing the total amount of the debt from $250 million to $510 million so that Bombardier would have a new, friendly holder of a majority in interest of the 2034 Notes. This as alleged was done in exchange for Canso providing consent in attempt to waive Bombardier's prior breaches pursuant to a Supplemental Indenture (NYSCEF Doc. No. 80, ¶¶ 91-97). As discussed in the Prior Decision and above, because Section 5.14 provides that "the Holders of a majority in aggregate principal amount of the Securities at the time Outstanding with respect to which a default ***or breach*** or an Event of

Default ***shall have occurred and***[3] be continuing ***shall have the right exercisable by Act of such Holders*** to waive any past default ***or breach*** or Event of Default and its consequences…" (emphasis added) and Canso's New Notes were not issued as of January 29, 2021 or even as of 60 days later in accordance with Section 5.08, Canso New Notes are not counted for Section 5.14 purposes. This is sufficient to allege breaches of the Indenture.

With respect to the Trustee, the SAC alleges that the Trustee breached Section 5.02 by failing to declare the principal due and payable because, as of April 26, 2022, the default had ripened into an Event of Default under Section 5.01 and that the Trustee also breached Section 6.01(c) by failing to exercise the same degree and skill of a "prudent" person as required by Section 6.01(c). The Trustee is also alleged to have breached Sections 5.14 and 9.10 because they acted negligently. As to the pre-Event of Default conduct, Section 6.01(d) provides that no provision of the Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct and although Section 6.01(d) has a carve-out for "errors of judgment made in good faith" the carve-out does not apply if it is proved that the Trustee "was negligent in ascertaining the pertinent facts." As discussed in the Prior Decision, the Indenture is not ambiguous, and the New Notes can not be considered for purposes of the aggregate principal majority under Sections 5.14 or 9.10. Thus, as alleged, as to pre-Event of Default (**EOD**) conduct, the SAC sufficiently alleges negligence on behalf of the Defendant Trustee. The well pled SAC also properly alleges a breach of Section 8.02 of the Indenture:

[3] Section 5.14 requires the relevant Notes to be Outstanding at two points in time – first, when the breach occurred, and second, when the waiver pursuant to Section 5.14. is obtained. It is not disputed that the New Notes were not Outstanding when the breach of Section 9.07 occurred.

> 114. The Indenture Trustee and the Company also breached Section 8.02 of the Indenture. Under that provision, to execute the Supplemental Indenture, the Indenture Trustee and the Corporation required "the consent of the Holders of a majority in aggregate principal amount of the Securities then Outstanding and affected by such supplemental indenture." Ex. A, Indenture at 50. This Court confirmed in its Decision that the New Notes were not entitled to waive the Company's covenant default because they were not "at the time Outstanding . . . with respect to which the breach, default, or Event of Default shall have occurred." NYSCEF Doc. No. 73 at 19- 20. Equally, the New Notes cannot be the majority "of the Securities then Outstanding and affected by such supplemental indenture" for purposes of Section 8.02, because, here, ***the sole purpose of that Supplemental Indenture was to waive that same past default***. *See* Ex. B, Consent Solicitation Statement at i

(NYSCEF Doc. No. 80, ¶ 114 [emphasis added]). As alleged, the Trustee knew that the New Notes were being issued to dilute the note holders who had already not consented to the transactions, *i.e.*, Bombardier had not obtained their consent prior to entering into the transactions pursuant to Section 9.10 of the Indenture and, to the extent they tried after the breach to obtain a waiver pursuant to Section 5.14 of the Indenture, Canso's New Notes could not be counted based on the clear, unambiguous language set forth in the Indenture. Thus, inasmuch as the Supplemental Indenture was an attempt to memorialize a waiver by counting Canso's New Notes, the Trustee is adequately alleged to have been negligent in facilitating Bombardier's continued breach.[4]

As to post-EOD conduct, the Trustee has enhanced common law duties. As alleged in the SAC, and as discussed above, the Trustee had notice of the Section 9.07 default as required by Section 6.01(d)(v) of the Indenture and acted negligently and certainly did not act as a prudent person would:

[4] As set forth in the Directors' Resolutions attached to the Officers' Certificate delivered to the Trustee for the purpose of issuing the New Notes, the purchaser (Canso) had already agreed to waive the prior breach and otherwise agreed to the issuance of the New Notes pursuant to the Supplemental Indenture (NYSCEF Doc. No. 92, at 6).

112. The Indenture Trustee's breaches of Sections 5.14 and 9.10 of the Indenture are not exculpated. By purporting to waive any breach of Section 9.07, the Company negligently ignored the plain words of the Indenture. Section 6.01(d) of the Indenture provides that "[n]o provision of this Indenture shall be construed to relieve the Trustee . . . from liability for its own negligent action, its own negligent failure to act or its own willful misconduct." Ex. A, Indenture at 39. Although Section 6.01(d) carves out "any error of judgment made in good faith by a Responsible Officer," there is a further carve-out that applies if "it shall be proved that the Trustee was negligent in ascertaining the pertinent facts." *Id*. As the Decision confirms, there is no ambiguity in respect of the consent requirements under Sections 5.14 and 9.10 of the Indenture. See NYSCEF Doc. No. 73 at 19-20.

113. No other provision of the Indenture exculpates the Indenture Trustee's breaches of Sections 5.14 and 9.10. Section 6.01(e) provides that "[w]hether or not therein expressly so provided, every provision of this Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee shall be subject to the provisions of this Section." *Id*. at 40. "This Section" includes Section 6.01(d), which is imported elsewhere in the Indenture by 6.01(e). Furthermore, the additional exculpatory provisions in Section 6.02 of the Indenture are expressly stated to be "[s]ubject to the provisions of Section 6.01." *Id*.

...

126. The Indenture Trustee had clear notice of the Company's covenant default under Section 9.07, as required by Section 6.01(d)(v). For example, in the "Certain Significant Considerations" section: "*One of the Company's bondholders has claimed that the Transactions resulted in one or more defaults of certain covenants under the Indentures*. On April 22, 2021, we received a purported notice of default under the 2034 Indenture which alleged that we had breached certain covenants under the 2034 Indenture." Ex. B, Consent Solicitation Statement at 13 (emphasis in original); *see also id*. at 8. Further, on January 31, 2022, Plaintiffs, as holders of the majority of "Securities then Outstanding affected thereby" the defaults, provided written notice to the Company and the Indenture Trustee that Events of Default (including the Company's breach of Section 9.07) had occurred and were continuing. Even if not already Events of Default, the defaults would have matured into Events of Default sixty days thereafter, on April 1, 2022. On April 26, 2022, Plaintiffs sent the Indenture Trustee a Notice of Continuing Default, to confirm clearly "continuing Events of Default, as referenced in the January Notice, for sixty days without any counter-direction or suit by the Indenture Trustee." Finally, on March 17, 2023, this Court issued its Decision confirming that the New Notes were not capable of waiving Bombardier's covenant default under Section 9.07 of the Indenture, and that any such purported waiver was ineffective. *See* NYSCEF Doc. No. 73 at 19-20. The Decision thus confirmed that an Event of Default has occurred and is continuing.

127. In breach of Section 6.01(c) of the Indenture, the Indenture Trustee has negligently failed to exercise any of its contractual rights and powers to secure the redemption of the 2034 Notes and specific performance of the Make Whole.

a. A prudent person would have known that the Consent Solicitation was a tacit admission of the Company's breach of Section 9.07 of the Indenture.

b. It also would have known that no rational Noteholder would accept the Company's offer of $1.25 per $1,000 principal amount (roughly 12.5 basis points), when it was entitled to receive the Make Whole amounting to roughly 159% of the face value of the 2034 Notes. When the Consent Solicitation twice failed to obtain the requisite consents from holders of the 2034 Notes, a prudent person would have realized that this was because the Company's offer was facially inferior to the Make Whole and that, through the rejection of that offer, a majority of Existing Noteholders had made their views known that an Event of Default occurred and was continuing.

c. When the Company proposed the issuance of the New Notes, a prudent person would have, under Section 3.02 of the Indenture, exercised its "right to decline to authenticate and deliver any Securities under this Section," because not doing so "would affect the Trustee's rights, duties or immunities under the Securities or this Indenture in a manner which is not reasonably acceptable to the Trustee." Ex. A, Indenture at 20.

d. A prudent person would have realized that the New Notes could not waive the Company's breach of Section 9.07 of the Indenture, because Section 5.14 only permitted "a majority in aggregate principal amount of the Securities at the time Outstanding with respect to which a default or breach or an Event of Default shall have occurred," to waive retroactively a breach of Section 9.07. *Id*. at 37.

e. A prudent person also would not have executed the Supplemental Indenture without "the consent of the Holders of a majority in aggregate principal amount of the Securities then Outstanding and affected by such supplemental indenture," as required by Section 8.02. *Id*. at 50.

f. A prudent person would take a direction from Existing Noteholders, as the rightful "majority in aggregate principal amount of the Securities at the time Outstanding" under Section 5.13 of the Indenture.

g. And a prudent person would have exercised its rights under Section 5.02 to notice an Event of Default and file suit to secure the redemption of the 2034 Notes and specific performance of the Make Whole.

128. By failing to pursue the rights of the Existing Noteholders, the Indenture Trustee breached its obligations as a prudent person and acted negligently. It had actual knowledge that the Company was carrying out the Consent Solicitation to waive a default alleged by Plaintiffs. It stood ready to participate willingly in the Consent Solicitation by, for example, executing the Supplemental Indenture. When the Consent Solicitation failed twice, the Indenture Trustee did not reflect on whether that failure was because the Company had made Existing Noteholders a facially inferior offer or whether, with a majority of Existing Noteholders now having refused to waive the default, this was tantamount to an Event of Default that should have caused the Indenture Trustee to take action on behalf of Existing Noteholders.

129. The Indenture Trustee further knew that the New Notes' sole purpose was to dilute Plaintiffs and attempt to prevent them from exercising their right to seek redemption of the 2034 Notes and specific performance of the Make Whole.

a. Yet, it still authenticated and delivered the New Notes to Canso (even though it could have declined to do so under Section 3.02 of the Indenture).

b. It then breached Section 5.14 of the Indenture by purporting to waive the Company's breach of Section 9.07 in reliance on less than a majority "at the time" of the breach.

c. It also breached Section 9.10 of the Indenture because the Supplemental Indenture purported to waive compliance retroactively, rather than prospectively as required under Section 9.10.

d. It further breached Section 8.02 of the Indenture, by executing the Supplemental Indenture without regard to whether the Existing Notes, which were the only Notes "affected thereby," had given their majority consent.

e. It ignored that the New Notes should not count as "Outstanding" Plaintiffs in connection with the defaults alleged herein, including for purposes of determining the "majority" of the "Securities then Outstanding" under Section 5.08(b) of the Indenture and the "majority" of the "Securities at the time Outstanding" under Section 5.13, because to do so would render the consent rights of Existing Noteholders meaningless under Section 5.14.

f. And the Indenture Trustee has continually breached Section 5.02 of the Indenture and negligently failed to act by refusing to use its powers to notice an Event of Default or institute proceedings in its own name to secure the redemption of the 2034 Notes and specific performance of the Make Whole.

130. Remarkably, this paralysis has continued even after this Court's Decision confirmed that the New Notes did not (and cannot) waive the Event of Default arising from the Company's breach of Section 9.07 of the Indenture. NYSCEF Doc. No. 73 at 19-20. That Decision confirms that an Event of Default has

occurred and is continuing. The Indenture Trustee has actual knowledge of the Decision: Counsel for Plaintiffs provided counsel for the Indenture Trustee with a copy of the Decision on March 17, 2023, and a copy of the hearing transcript on March 23, 2023. After reviewing the Decision and the transcript, a prudent person would have exercised its rights under Section 5.02 to secure the redemption of the 2034 Notes and specific performance of the Make Whole. The Indenture Trustee, instead, confirmed on March 28, 2023, that it still would not file suit because, in its view, Canso, as holder of the New Notes, may have "a cognizable legal basis to claim to hold the relevant majority of the outstanding notes." That cannot be correct: If the New Notes were treated as a majority for purposes of directing the Indenture Trustee in respect of the relevant covenant default under Section 9.07, then that would be tantamount to a waiver of the default that this Court has now confirmed is not permitted by the New Notes. In other words, such a reading of the Indenture would render Plaintiffs' consent rights meaningless.

131. The Indenture Trustee stipulated that it "relied in good faith on, among other things, the advice of counsel, Opinions of Counsel . . . in authenticating and holding the New Notes as custodian for DTC." NYSCEF Doc. No. 5 at 3. However, Section 6.01(b) provides that the Indenture Trustee may only rely on such advice "absent bad faith on its part." Ex. A, Indenture at 38. The Indenture Trustee obtained this advice prior to the issuance of the Court's Decision. On information and belief, the Indenture Trustee has not obtained any further opinions of counsel following the Court's Decision. Accordingly, any reliance on outdated opinions of counsel is not in good faith.

132. Lastly, the proviso in Section 5.02 that the Indenture "Trustee shall not be required to give such notice if the Trustee in good faith shall have decided that the withholding of such notice is in the best interests of the Holders of the Securities then Outstanding affected thereby," does not apply to Plaintiffs' claim for breach of Section 5.02. Ex. A, Indenture at 33. A determination to do nothing in these circumstances, particularly in light of this Court's Decision, cannot be a good faith decision.

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158. Plaintiffs incorporate the foregoing paragraphs by reference as if they were fully stated herein.

159. The Indenture is a valid and enforceable agreement. The Company and the Indenture Trustee are parties to the Indenture and Plaintiffs, as Noteholders, are express, intended third-party beneficiaries to the Indenture entitled to enforce its terms.

160. Under Section 5.02 of the Indenture, if "an Event of Default shall have occurred and be continuing the Trustee shall, within 30 days after a Responsible Officer becomes aware of the occurrence of such Event of Default, give notice of

such Event of Default to the Holders of the Securities then Outstanding affected thereby in the manner provided in Section 1.07."

161. The Indenture Trustee breached Section 5.02, including by failing to give the required notice to Noteholders after an Event of Default occurred and is continuing.

162. In addition, under Section 6.01(c) of the Indenture, where an "Event of Default has occurred and is continuing of which a Responsible Officer of the Trustee has actual knowledge, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs."

163. The Indenture Trustee breached Section 6.01(c) because it did not exercise the same degree of care and skill as a prudent person when it, among other things:

a. failed to acknowledge that the Consent Solicitation was a tacit admission of the Company's breach of Section 9.07;

b. failed to acknowledge that no rational 2034 Noteholder would accept the Company's offer of $1.25 per $1,000 principal amount (roughly 12.5 basis points), when it was entitled to receive the Make Whole amounting to roughly 159% of the face value of the 2034 Notes;

c. failed to acknowledge that the Company's offer was facially inferior even after two failed attempts at the Consent Solicitation;

d. failed to recognize that, through rejection of the Consent Solicitation, a majority of Existing Noteholders had made clear that an Event of Default occurred and was continuing;

e. did not avail itself of its right to "decline to authenticate and deliver any Securities under this Section" under Section 3.02;

f. entered into the Supplemental Indenture without "the consent of the Holders of a majority in aggregate principal amount of the Securities then Outstanding and affected by such supplemental indenture," as required by Section 8.02;

g. executed a Supplemental Indenturing purporting to waive the Company's breach of Section 9.07 of the Indenture without the consent of a majority in aggregate principle amount of Notes Outstanding "at the time" of the default, in violation of Section 5.14 of the Indenture;

> h. executed a Supplemental Indenturing purporting to waive the Company's breach of Section 9.07 retroactively, rather than prospectively, in violation of Section 9.10 of the Indenture;
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> i. failed to issue a notice to Noteholders that an Event of Default had occurred and was continuing under Section 5.02;
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> j. negligently failed to recognize that the New Notes do not qualify as Outstanding for any purpose under the Indenture in relation to the defaults alleged herein, including for purposes of determining the "majority" of the Securities then Outstanding" under Section 5.08(b) of the Indenture, because to do so would render the consent rights of Existing Noteholders meaningless under Section 5.14; and
>
> k. did not institute suit "to protect and enforce its rights and the rights of the Holders of Securities by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any such rights, whether for the specific enforcement of any covenant or agreement in this Indenture or in aid of the exercise of any power granted herein, or to enforce any other proper remedy," consistent with Section 5.02.
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> 164. As a result of the Indenture Trustee's material breach of the Indenture, Plaintiffs have suffered damages in an amount to be proven at trial

(*id.*, ¶¶ 112-113, 126-132, 158-164).

Indeed, even following the issuance of the Prior Decision, the Trustee has failed to accelerate the maturity of the notes and payment of the Make-Whole premium as required by the Indenture or even, at a bare minimum, filed a lawsuit seeking a declaration and order from this Court if they thought they needed any such further declaration or order before seeking to cause the Make-Whole premium to be paid pursuant to Section 5.01 of the Indenture.

This is more than sufficient under the circumstances to allege negligence and bad faith under Section 6.01(b) of the Indenture.

With respect to the Trustee, additionally, the Court notes that demand futility is adequately alleged based on, among other things, the Trustee's participation in the alleged breaches such that it would be compelled to sue itself (*Velez v Feinstein*, 87 AD2d 309, 316 [1st Dept 1982]; *see* NYSCEF Doc. No. 89; *see*, *e.g.*, NYSCEF Doc. No. 80, ¶¶ 12-13, 23, 99-102, 135, 136, 137-142). In addition, and as indicated above, the Court notes that to the extent that the Trustee had any confusion as to whether the Plaintiffs constituted a "majority in aggregate principal amount of the Securities then Outstanding" (although given the Prior Decision how could they) they could have brought suit seeking a declaratory judgment or otherwise brought suit against Bombardier for breach with indemnity from the Plaintiffs in this case and instead indicated that it would not do so even with indemnity (NYSCEF Doc. No. 42).

As discussed above and in the Prior Decision, neither Bombardier nor the Trustee are entitled to dismissal of the first cause of action (breach of Section 9.07 of the Indenture, asserted against Bombardier), the second cause of action (breach of Sections 5.14, 8.02 and 9.10 of the Indenture, asserted against Bombardier and the Trustee) or the third cause of action (breach of Sections 6.01[c] and 5.02 of the Indenture, asserted against the Trustee).

Bombardier is also not entitled to dismissal of the breach of the covenant of good faith and fair dealing claim. The covenant of good faith and fair dealing is implicit in every contract and is a pledge that neither party to the contract will do anything that will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct (*25 Bay Terrace Assoc., L.P. v Public Service Mut. Ins. Co.*, 144 AD3d 665, 667 [2d Dept 2016]). Even where a party does not breach the

express contractual obligations, it may still be in breach of the implied covenant where it exercises a contractual right as part of a scheme to deny or deprive the other party of the benefit of its bargain (*Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]). "Even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to benefit under the agreement" (*LCM XXII LTD v Serta Simmons Bedding, LLC*, 2022 WL 953109, * 16 [SD NY 2022], quoting *Richbell Info. Servs., Inc. v Jupiter Partners, LP*, 309 AD2d 288, 302 [1st Dept 2003]; *see Octagon Credit Invs., LLC v NYDJ Apparel LLC*, Index No. 656677/2017, NYSCEF Doc. No. 91 [Sup Ct, NY County 2018]; *ICG Global Loan Fund 1 DAC v Boardriders, Inc.*, 2022 WL 10085886 [Sup Ct, NY County 2022]).

As alleged in the SAC, the New Notes were issued below market at a discount and only in an attempt to circumvent the Plaintiffs' bargained-for rights set forth in the Indenture by attempting to immunize the Transactions rather than paying the Make-Whole premium to the Plaintiffs as Bombardier was required to do.

Put another way, although Bombardier certainly has the unfettered right to issue new debt and the Plaintiffs did not bargain for the right not to be diluted, Bombardier is alleged to have breached the covenant of good faith and fear dealing in issuing new debt at a discount and without redeeming the existing note holders so as to avoid their obligation to pay the Make-Whole premium, which would cost Bombardier significantly more and which was owed to the Plaintiffs following the Transactions and after having failed to obtain their waiver/consent, and which Make-Whole premium the existing note holders ***did*** bargain for. Thus, their conduct as

alleged deprived the Plaintiffs of the benefit of the bargain (*CSI Inv. Partners, LP v Cendant Corp.*, 507 FSupp2d 384, 425 [SD NY 2007]).

As discussed above, the fifth cause of action (declaratory judgment against Bombardier and the Trustee that the notes are a majority outstanding in relation to the defaults set forth in the SAC) is not ripe for dismissal.

The sixth cause of action predicated on the claim that Bombardier could not issue the New Notes are dismissed. Nothing in the Indenture prevents Bombardier from issuing new debt:

> Section 3.01 Title and Terms
>
> The aggregate principal amount of Securities which may be authenticated and delivered under this Indenture, except for Securities authenticated and delivered upon registration of transfer of, or in exchange for, or in lieu of, other Securities pursuant to this Indenture, is limited to US$250,000,000; provided, however, that the Corporation may from time to time, without notice to or the consent of the Holders, "reopen" the series of Securities established hereunder by increasing the aggregate principal amount of the series and issue Additional Securities in the future. Any Securities issued in connection with such a reopening shall have the same terms as the Securities other than the date of original issuance and the date on which interest shall begin to accrue. The Securities and any Additional Securities issued by the Corporation in connection with any such reopening shall constitute a single series of Securities for purposes of this Indenture.
>
> The Securities shall be known and designated as the "7.45% Notes due 2034" of the Corporation. The Stated Maturity of the Securities shall be set forth in the Securities. The Securities shall be redeemable as provided in Article Ten and the terms of the Securities. All amounts payable in respect of the Securities shall be made in U.S. Dollars.
>
> The Securities shall bear interest at the rate per annum set forth in the Securities from April 21, 2004 or from the most recent Interest Payment Date to which

> interest has been paid or duly provided for, payable on each Interest Payment Date until the principal thereof is paid or duly provided for

(Indenture, § 3.01 [NYSCEF Doc. No. 3]). Section 3.01 does not indicate that the right to issue debt is conditioned on Bombardier not being in breach. In fact, the Indenture provides for the issuance of Additional Securities. This matters because it explains why the Indenture has protections for existing note holders like the Plaintiffs. Indeed, and as discussed in the Prior Decision, because Bombardier is permitted to issue new debt, the drafters of the Indenture carefully struck a balance between permitting Bombardier to issue new debt which would have the effect of diluting existing note holders like the Plaintiffs and by providing for remedy when transactions selling, transferring, leasing out, lending, or otherwise disposing of the whole or substantially the whole of Bombardier's undertaking or assets have occurred (*i.e.*, payment of the Make-Whole premium if the then note holders did not consent to such Transactions) and avoiding Bombardier immunizing a prior breach of Section 9.07 merely by issuing new debt to a friendly investor on the cheap – as they did in this case while depriving the existing debt holders of their bargained for remedy (*i.e.*, the Make Whole Premium and redemption).

The seventh cause of action, however, is not dismissed because, as alleged, the Supplemental Indenture was issued to memorialize the waiver of the prior breach based on Canso's New Notes which, as discussed above, could not be counted for this purpose.

Canso's motion (Mtn. Seq. No. 004), however, is granted and the eighth cause of action (tortious interference claim) levelled against Canso is dismissed. It is well-settled that only a stranger to a

contract can be liable for tortious interference with contract (*Bradbury v Israel*, 204 AD3d 563, 564 [1st Dept 2022]). Canso is not a stranger to the Indenture. To be clear, the contract with which Canso is alleged to have tortiously interfered is the original Indenture not the Supplemental Indenture and not the notes. Canso was an owner of the 2034 Notes issued pursuant to the Indenture as of April 2021 (NYSCEF Doc. No. 117, ¶¶ 4-5; NYSCEF Doc. No. 92, at 6). The tortious interference with contract claim therefore fails. The Court notes that, although Canso submitted evidence establishing its status as a third-party beneficiary in its reply papers, which is generally not permitted (*Yakobowicz v Yakobowicz*, 217 AD3d 733, 737 [2d Dept 2023]), this information had previously been submitted to the Court by the Trustee in its moving papers on its motion to dismiss in documents that the Plaintiffs already had available to them. In a document called Directors' Resolutions dated May 12, 2021, and sent by Bombardier to the Trustee as an attachment to an Officers Certificate dated May 17, 2021, Bombardier wrote:

> WHEREAS, certain holders of the Debt Securities (the "Purchasers") have approached the Corporation with an offer to purchase up to US$400 million (and, in any case, at least US$251 million) aggregate principal amount of newly issued additional notes of the same series, with the same terms and under same 2034 Indenture, as the existing 2034 Notes (such notes the "Additional 2034 Notes" and such offer, the "Offer to Purchase");
>
> WHEREAS, as part of the Offer to Purchase, the Purchasers are agreeable to consent to the Proposed Amendments under the 2034 Indenture upon becoming holders of the Additional 2034 Notes

(NYSCEF Doc. No. 92, at 6). This was sufficient for the Plaintiffs to have known that Canso was already a holder of 2034 Notes and therefore a third-party beneficiary under the Indenture, such that the Plaintiffs could not be prejudiced by the addition of this evidence in Canso's reply. It is also undisputed that the Plaintiffs became aware of Canso and its holdings during discovery. In addition, at oral argument the Plaintiffs did not contest that Canso was an owner of the 2034 Notes as of April 2021 and only argued that its de minimis interest should be ignored or

disregarded for the purpose of the "stranger to the contract" analysis. There is no such materiality test recognized under New York law. Therefore, Canso's motion to dismiss is granted.

It is hereby ORDERED that Bombardier's motion (Mtn. Seq. No. 003) and the Trustee's motion (Mtn. Seq. No. 002) to dismiss are granted solely to the extent of dismissing the sixth cause of action; and it is further

ORDERED that Canso's motion (Mtn. Seq. No. 004) to dismiss is granted; and it is further

ORDERED that the Trustee and Bombardier shall file their answers to the SAC by January 16, 2024.

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12/22/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE