

Alesco Preferred Funding VIII, Ltd. v ACP Re, Ltd.

2025 NY Slip Op 33053(U)

August 8, 2025

Supreme Court, New York County

Docket Number: Index No. 655881/2017

Judge: Andrew Borrok

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

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ALESCO PREFERRED FUNDING VIII, LTD., ALESCO PREFERRED FUNDING XI, LTD., ALESCO PREFERRED FUNDING XII, LTD., ALESCO PREFERRED FUNDING XIII, LTD., ALESCO PREFERRED FUNDING XIV, LTD., HILDENE OPPORTUNITIES MASTER FUND II, LTD., NFC PARTNERS, LLC, NFC INSURANCE PARTNERS, LLC, WOLF RIVER OPPORTUNITY FUND LLC, WOLF RIVER PARTNER FUND, WT HOLDINGS, INC., PREFERRED TERM SECURITIES XVI, LTD., PREFERRED TERM SECURITIES XXIII, LTD., PREFERRED TERM SECURITIES XXIV, LTD., PREFERRED TERM SECURITIES XXVIII, LTD.,

Plaintiff,

- v -

ACP RE, LTD., ACP RE HOLDINGS, LLC, AMTRUST FINANCIAL SERVICES, INC., CASTLEPOINT BERMUDA HOLDINGS, LTD., CASTLEPOINT MANAGEMENT CORP., INTEGON NATIONAL INSURANCE COMPANY, NATIONAL GENERAL HOLDINGS CORP., PRESERVER GROUP, INC., TECHNOLOGY INSURANCE COMPANY, INC., TOWER GROUP, INC., TOWER GROUP INTERNATIONAL, LTD., WILLIAM F. DOVE, WILLIAM F. FOX, WILLIAM E. HITSSELBERGER, MICHAEL H. LEE, HERBERT LEMMER, ELLIOT S. OROL, WILLIAM A. ROBBIE, JAMES E. ROBERTS, STEVEN W. SCHUSTER, ROBERT S. SMITH, JAN R. VAN GORDER, AUSTIN P. YOUNG, MEGHAN ZEIGLER, GEORGE KARFUNKEL, LEAH KARFUNKEL, ESTATE OF MICHAEL KARFUNKEL, BARRY ZYSKIND, MICHAEL KARFUNKEL FAMILY 2005 TRUST, MICHAEL KARFUNKEL 2005 GRANTOR RETAINED ANNUITY TRUST

Defendant.

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PREFERRED TERM SECURITIES XXV, LTD., PREFERRED TERM SECURITIES XXVII, LTD., TROPIC CDO V LTD.,

Plaintiff,

-against-

ACP RE, LTD., ACP RE HOLDINGS, LLC, AMTRUST FINANCIAL SERVICES, INC., CASTLEPOINT BERMUDA HOLDINGS, LTD., ESTATE OF MICHAEL KARFUNKEL, INTEGON NATIONAL INSURANCE COMPANY, MICHAEL

INDEX NO. 655881/2017

MOTION DATE 11/08/2024,
11/19/2024,
11/19/2024

MOTION SEQ. NO. 011 012 013

**DECISION + ORDER ON
MOTION**

INDEX NO. 653820/2022

MOTION DATE 11/08/2024,
11/19/2024,
11/19/2024

MOTION SEQ. NO. 004 005 006

KARFUNKEL 2005 GRANTOR RETAINED ANNUITY TRUST, MICHAEL KARFUNKEL FAMILY 2005 TRUST, NATIONAL GENERAL HOLDINGS CORP., TECHNOLOGY INSURANCE COMPANY, INC., TOWER GROUP, INC., TOWER GROUP INTERNATIONAL, LTD., GEORGE KARFUNKEL, LEAH KARFUNKEL, BARRY ZYSKIND

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 602, 839, 840, 841, 842, 843, 844, 845, 885, 886, 893, 900

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 012) 418, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 887, 888, 891, 894, 895, 896, 897, 898, 899

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 419, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 889, 890, 892, 901, 902

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141,

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were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 005) 167, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 638, 639, 642, 645, 646, 647, 648, 649, 650

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 168, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 640, 641, 643, 652, 653

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth below, (i) Alesco Preferred Funding VIII, Ltd. et al. (**Alesco**)'s motion (Mtn. Seq. No. 011) for summary judgment in Index No. 655881/2017 (**TruPS I**) and (ii) Preferred Term Securities XXV, Ltd. et al. (**Preferred**)'s motion (Mtn. Seq. No. 004) for partial summary judgment in Index No. 653820/2022 (**TruPS II**) against Tower Group, Inc. (**Tower Group**), CastlePoint Bermuda Holdings, Ltd. (**CP Bermuda**), CastlePoint Management Corp. (**CP Management**, and together with CP Bermuda, collectively, **CastlePoint**), and Preserver Group, Inc. (**Preserver**, and together with Tower Group and CastlePoint, collectively, the **Issuer Defendants**) are GRANTED.

The Tower Group Directors and Officers, William Fox, William Hitselberger, Michael Lee, Elliot Orol, and Steven Schuster (collectively, the **D&O Defendants**)’s (i) motion (Mtn. Seq. No. 012) for summary judgment in TruPS I and (ii) motion (Mtn. Seq. No. 005) for summary judgment in TruPS II against Alesco and Preferred (collectively, the **Plaintiffs**) are DENIED.

Preserver, CastlePoint, Tower Group, and Tower Group International, Ltd. (**TGIL**) (collectively, the **Tower Group Defendants**)’s and ACP Re, Ltd., ACP Re Holdings, LLC (**ACP**), AmTrust Financial Services, Inc., Technology Insurance Company, Inc., and National General Holdings (collectively, the **Karfunkel Defendants**)’s (i) motion (Mtn. Seq. No. 013) for summary judgment in TruPS I and (ii) motion (Mtn. Seq. No. 006) for summary judgment in TruPS II against the Plaintiffs are DENIED.

DISCUSSION

Summary judgment shall be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.* [citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985)]). Once this showing has been made, the burden shifts to the party opposing the motion to produce

evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

I. The Plaintiffs are entitled to Summary Judgment as to their Breach of Contract claims (TruPS I and TruPS II first causes of action) against the Issuer Defendants

To prevail upon a cause of action for breach of contract, a plaintiff must prove that: (i) a contract exists; (ii) plaintiff performed in accordance with the contract; (iii) the defendant breached its contractual obligations; and (iv) the defendant's breach resulted in damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]).

As relevant, the Plaintiffs are holders of Trust Preferred Securities (**TruPS**) debentures that were issued by the Issuer Defendants between 2003 and 2007. The aggregate principal amount of the TruPS is \$228 million, and the TruPS's indenture agreements (the **Indentures**; NYSCEF Doc. Nos. 352-361)¹ require that interest be paid quarterly each year until maturity:

“Interest Payment Date” means each March 15, June 15, September 15 and December 15 of each year during the term of this Indenture, or if any such day is not a Business Day, then the next succeeding Business Day, commencing in December 2007.

“Interest Rate” means for the period beginning on (and including) the date of original issuance and ending on (but excluding) the Interest Payment Date in December 2012 the rate per annum of 8.39% and for each Distribution Period thereafter, the Coupon Rate.

(*e.g.*, NYSCEF Doc. No. 353 at 4). Absent a continuing Event of Default, the Issuer Defendants are entitled to defer interest payments for up to twenty consecutive quarterly periods upon notice to the trustees under the Indentures (the **Trustees**), but any extension cannot continue beyond the

¹ Unless otherwise indicated, the NYSCEF document citations refer to TruPS I. 655881/2017 ALESCO PREFERRED FUNDING vs. ACP RE, LTD. Motion No. 011 012 013

final Maturity Date (*e.g., id.* § 2.11). In addition, the Issuer Defendants are required to make a payment of all accumulated interest at the end of the deferral period.

Failure to make payment of any interest for more than 30 days past the due date or the court appointment of a receiver, liquidator, or similar official of the Issuer Defendants for any substantial part of the Issuer Defendants' property constitutes an Event of Default:

Section 5.1. Events of Default. "Event of Default," wherever used herein, means any one of the following events (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):

- (a) the Company defaults in the payment of any interest upon any Debenture when it becomes due and payable, and fails to cure such default for a period of 30 days; provided, however, that a valid extension of an interest payment period by the Company in accordance with the terms of this Indenture shall not constitute a default in the payment of interest for this purpose; or

....

- (d) court of competent jurisdiction shall enter a decree or order for relief in respect of the Company in an involuntary case under any applicable bankruptcy, insolvency, reorganization or other similar law now or hereafter in effect, or shall appoint a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of the Company or for any substantial part of its property, or shall order the winding-up or liquidation of its affairs and such decree or order shall remain unstayed and in effect for a period of 90 consecutive days;

(*e.g., id.* § 5.1[a], [d]).

Pursuant to the Indentures, upon an Event of Default, the holders may declare the total principal of all the TruPS immediately due and payable:

Section 5.2. Payment of Debentures on Default; Suit Therefor. The Company covenants that upon the occurrence and during the continuation of an Event of Default pursuant to Section 5.1(a) or Section 5.1(b) then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders of the Debentures the whole amount that then shall have become due and payable on all Debentures for principal and premium, if any, or interest, or both, as the case may be, with Additional Interest accrued on the Debentures (to the extent that payment of such interest is enforceable under applicable law and, if the Debentures are held by the Trust or a trustee of such Trust, without duplication of any other amounts paid by the Trust or a trustee of the Trust in respect thereof); and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and any other amounts due to the Trustee under Section 6.6. In case the Company shall fail forthwith to pay such amounts upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled and empowered to institute any actions or proceedings at law or in equity for the collection of the sums so due and unpaid, and may prosecute any such action or proceeding to judgment or final decree, and may enforce any such judgment or final decree against the Company or any other obligor on such Debentures and collect in the manner provided by law out of the property of the Company or any other obligor on such Debentures wherever situated the moneys adjudged or decreed to be payable.

(*e.g., id.* § 5.2).

On June 18, 2014 and July 2, 2014, Tower Group provided notice to the Trustees on behalf of the Issuer Defendants that it would start deferring interest payments as they were permitted to do for up to 20 consecutive periods (*i.e.*, for up to five years) (NYSCEF Doc. Nos. 388-397). On July 27, 2016, Tower Group's insurance company subsidiaries were placed into conservatorship in California, and a conservation order was entered (the **Conservatorship**; NYSCEF Doc. No. 400). On March 30, 2017, a Liquidation Order (NYSCEF Doc. No. 402) was entered in the Conservatorship proceeding. The Trustees then sent the Issuer Defendants notices of default (NYSCEF Doc. Nos. 403-411). When the TruPS were not paid and an Event of Default declared, the holders of the TruPS sued.

In the instant motions, the Plaintiffs now move for summary judgment on their breach of contract claims against the Issuer Defendants *for their failure to pay the monies due pursuant to the TruPS when due as deferred*, alleging that they are owed their entire principal of \$228 million, along with accumulated pre and post-judgment interest of \$190.4 million, for a total of \$418.4 million.

In their opposition papers, the Issuer Defendants argue that, although the Issuer Defendants were unable to pay the TruPS after their insurance subsidiaries were placed into conservatorship and liquidation, summary judgment should be denied because each plaintiff is not entitled to judgment as against every Sponsor across every contract in both TruPS I and TruPS II. The argument fails.

It is undisputed that (i) the Indentures are valid contracts and that the Plaintiffs are the holders of the TruPS (the **Answer**; NYSCEF Doc. No. 312 ¶¶ 217, 232), (ii) the obligations to pay the TruPS when due has been breached (*id.* ¶¶ 176, 214-216;), and (iii) that the Plaintiff holders of the TruPS have been damaged in that they have not received the principal and all accrued interest which is past due (*id.* ¶¶ 214-215). Thus, there are no issues of fact and the Plaintiff holders of the TruPS are entitled to summary judgment as to their breach of contract claims. For the avoidance of doubt, although correct that each obligor must be tied to each breached obligation, the Issuer Defendants are not correct that there are any material issues of fact warranting further proceeding. The Joint Statement of Material Facts (NYSCEF Doc. No. 885) makes clear which

Issuer Defendants are responsible for which TruPS obligations. As such, the Plaintiffs may submit judgment on notice.

With respect to the interest due, the Indentures provide for a specified interest rate for past due amounts during “applicable periods:”

Section 2.8. Payment of Interest and Additional Interest. Interest at the Interest Rate and any Additional Interest on any Debenture that is payable, and is punctually paid or duly provided for, on any Interest Payment Date for Debentures shall be paid to the Person in whose name said Debenture (or one or more Predecessor Securities) is registered at the close of business on the regular record date for such interest installment except that interest and any Additional Interest payable on the Maturity Date shall be paid to the Person to whom principal is paid.

Each Debenture shall bear interest for the period beginning on (and including) the date of Original issuance and ending on (but excluding) August 15, 2003 at a rate per annum of 5.41125%, and shall bear interest for each successive period beginning on (and including) August 15, 2003, and each succeeding Interest Payment Date, *and ending on (but excluding) the next succeeding Interest Payment Date* (each, a “Distribution Period”) at a rate per annum equal to the 3-Month LIBOR, determined as described in Section 2.10, plus 4.10% (the “Coupon Rate”); provided, however, that prior to May 15, 2008, the Coupon Rate shall not exceed 12.50%, applied to the principal amount thereof, until the principal thereof becomes due and payable, and on any overdue principal and to the extent that payment of such interest is enforceable under applicable law (without duplication) *on any overdue installment of interest (including Additional Interest) at the Interest Rate in effect for each applicable period compounded quarterly*. Interest shall be payable (subject to any relevant Extension Period) quarterly in arrears on each Interest Payment Date with the first installment of interest to be paid on August 15, 2003.

(e.g., NYSCEF Doc. No. 356 § 2.8 [emphasis added]). As such, the judgement shall reflect the contractually provided for interest for each applicable period compounded quarterly. However, Section 2.8 does not address an interest rate for amounts not paid post applicable period – *i.e.*, following maturity where there would be no further “applicable period.” Thus, the submitted

judgment shall provide for interest as set forth in CPLR 5001(a) and as fixed by the Clerk of the Court.

II. The Affirmative Defenses are Dismissed

A. The Defense of Prior Material Breach (TruPS I Affirmative Defense No. 7 and TruPS II Affirmative Defense No. 6) is Dismissed

“[A] party’s obligation to perform under a contract is only excused where the other party’s breach of the contract is so substantial that it defeats the object of the parties in making the contract” (*Catlyn & Derzee, Inc. v Amedore Land Devs., LLC*, 132 AD3d 1202, 1206 [3d Dept 2015]). The Plaintiffs argue that the prior material breach affirmative defense must be dismissed because, other than the tendering of money to purchase the TruPS debentures, the Plaintiffs have no performance obligations under the Indentures. The Plaintiffs contend that, as it is undisputed that the Plaintiffs paid for the TruPS, the Issuer Defendants fail to offer any factual basis to support a defense of prior material breach.

In their opposition papers, the Issuer Defendants do not dispute the fact that they have failed to adduce evidence that the Plaintiffs have breached the Indentures in a manner which defeats the purpose of the Indentures. As such, the affirmative defense of prior material breach is dismissed.

B. The Defenses of Acquiescence, Waiver, and Estoppel (TruPS I Affirmative Defense No. 20 and TruPS II Affirmative Defense No. 14) Are Dismissed

The defenses of acquiescence, waiver, and estoppel are predicated on an email (NYSCEF Doc. No. 617), dated December 10, 2008, from Christopher Slaybaugh, the CastlePoint Trustee, Wilmington Trust, to Roger Brown, counsel for CastlePoint, **which does not mention Sections**

14.1 Successors (the Successor Obligor Clause), 14.11 Assignment (the Assignment

Provision), 11.1 Company May Consolidate, etc. on Certain Terms (the Successor Obligor Supplemental Indenture Provision) or 11.2 Successor Entity to be Substituted (collectively, hereinafter, the **Successor Obligor Provisions) of the Indentures at all.** The email upon which the defendants rely instead discusses the right to obtain a Supplemental Parental Guaranty under Section 8.2—*i.e.*, not the Successor Obligor Provisions set forth in Sections 14.1, 14.11, 11.1 or 11.2 of the Indenture. For completeness, the entire chain of communications is as follows:

From: Brown, Roger
Sent: Thursday, November 20, 2008 4:34 PM
To: Slaybaugh, Christopher

Chris, here are documents drafted by Tower's outside counsel (and also placement agents' outside counsel) in connection with the parent guarantee in the context of the Tower-CastlePoint merger. I am mostly a middleman here and am forwarding to you for WTC's review and comment. I noticed that Ocean 1, the merger sub into which CPH will merge, has become the guaranteeing parent under these documents. I would have thought Tower Group, Inc., the ultimate parent, would be the favored parent that guarantees these obligations for the piece of mind of the security holders. am I missing something here?

Thanks.

From: Slaybaugh, Christopher
Sent: Monday, December 08, 2008 5:09 PM
To: Brown, Roger

Roger,

Good afternoon and Happy Holidays.

To follow up on our dialogue from a couple of weeks ago, was the suggestion of having Tower Group, Inc. added as a signatory to this supplemental Guarantee accepted? If so, do you have an updated turn of these documents?

Thanks,
Chris

From: Brown, Roger
Sent: Tuesday, December 09, 2008 5:33 PM
To: Slaybaugh, Christopher

Chris,

as a further follow-up, the new general counsel at Tower is not in favor of Tower voluntarily signing on as a new parental guarantor. it would appear that under sec. 8.2 of the parental guarantee, while WTC as t'ee has to be ok with Ocean 1's form of guarantee, it has no right to insist upon adding Tower as another guarantor. Thus, there is no legal requirement that Tower sign a parental guarantee. on the other hand, if you can provide reasons why it is in Tower's best interests to sign such a guarantee, | am sure Tower would give it full consideration.

thanks..

From: Slaybaugh, Christopher
Sent: Wednesday, December 10, 2008 7:45 AM
To: Brown, Roger

Roger,

We were not insisting on Tower signing as a guarantor. It was a suggestion based on our interpretation of your earlier email where you thought the preference would be to have Tower Group, as the ultimate parent, included in the docs. After discussing with FTN Financial and KBW, they indicated that it was their desire to have Tower linked to this documentation, and the suggestion of having Tower act as a co-signer to the supplement was the proposed solution. You are 100% correct that from a legal standpoint, the only party we can insist on signing the supplement is the true successor to CPH, which we know to be Ocean 1.

Inclusion of Tower as a guarantor, would be either at the direction of the holders, or if FTN/KBW can make a business case with them directly.

Regards,
Chris

From: Brown, Roger
Sent: Thursday, December 11, 2008 11:43 AM
To: Orol, Elliot Subject: FW

there is no legal requirement that Tower sign a parental guarantee on the trust preferreds. Only Ocean 1 has to sign a parental guarantee acceptable to WTC.

so its a non-issue although | am surprised that the agreements are not written , and had expected that the agreements be written, with more protection for the holders, Or that the placement agents and Trustee would make a hard request notwithstanding the absence of language.

From: Orol, Elliot

Sent: Thursday, December 11, 2008 1:58 PM
To: Brown, Roger Subject:

Roger,

Thanks for your note. Strangely enough, Jon Kukulski told me this morning that the merger agreement required Tower to execute the parental guarantees. I have asked him to forward me the language in the agreement that provides for this, and am awaiting his reply.

Elliot

From: Brown, Roger
Sent: Thursday, December 11, 2008 2:04 PM
To: Orol, Elliot

This is the language in the merger agreement. WTC has not and cannot require Tower to sign new guarantee.

Replacement Guarantees. Parent shall execute and deliver guarantees, in a form satisfactory to Wilmington Trust Company, and shall take such other actions and do such other things as are necessary or desirable to cause Merger Sub (or, if required by Wilmington Trust Company, Parent) to expressly assume, as of the Effective Time, (a) the due and punctual payment of any and all obligations of Company under the Parent Guarantee Agreement, dated as of December 1, 2006, between Company and Wilmington Trust Company and the Parent Guarantee Agreement, dated as of December 14, 2006, between Company and Wilmington Trust Company, and (b) the performance and observance of all the covenants and conditions thereunder required to be kept and performed by Company.

a lot of misdirection here. I just think everyone can't believe that the new ultimate parent wouldn't have to sign but apparently not. go figure.

From: Orol, Elliot
Sent: Thursday, December 11, 2008 2:08 PM
To: Brown, Roger Subject:

Roger,

Thanks for forwarding the language. Which company is the Parent?

Elliot

From: Brown, Roger
To: Orol, Elliot
Date: Thu, 11 Dec 2008 14:10:28

Parent is Tower.

here is the whole fricken agreement for your reading pleasure. enjoy.

(*id.*). Nothing in this email or the chain of emails raises an issue of fact as to whether there has been a “voluntary and intentional relinquishment of a contract right” as to the right to enforce Sections 14.1, 14.11, 11.1 or 11.2 of the Indenture (*see Coniber v Cntr. Point Transfer Station, Inc.*, 137 AD3d 1604, 1606 [4th Dept 2016]; *El-Kam Realty Co. v Epstein*, 148 Misc2d 835, 836 [1st Dept 1990]).

As set forth above, the email chain in fact is a discussion of the transaction and the parties evolving understanding of what they were entitled to require as to the execution of a Supplemental Parental Guaranty. Subsequent emails indicate that although they initially thought that their right to require execution of a Supplemental Parental Guaranty (and not the right to enforce Sections 14.1, 14.11, 11.1 or 11.2 of the Indenture) was limited to Ocean I, they came to inquire about Tower Group as parent as to this other obligation. Putting that aside, nothing in the chain of emails set forth above addresses the separate Section 14.1, 14.11, 11.1 or 11.2 Successor Obligor Provisions, or raises an issue of fact as to whether there was a knowing, voluntary relinquishment of the right to enforce Sections 14.1, 14.11, 11.1 or 11.2 of the Indenture. It is also worth noting that, at the time of the email chain, there was no default (*see Coniber*, 137 AD3d at 1606; *El-Kam Realty Co.*, 148 Misc2d at 836). As such, the affirmative defenses of acquiescence, waiver, and estoppel are dismissed.

C. The Defense of Unclean Hands (TruPS I and TruPS II Affirmative Defense No. 3) is Dismissed

“The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct” (*Citimortgage, Inc. v Heyman*, 186 AD3d 1487, 1488-89 [2d Dept 2020]).

On the fully developed record before the Court following fulsome discovery, the Plaintiffs’ dismissal of the affirmative defense of unclean hands is warranted because the Issuer Defendants have failed to establish any evidence to support the finding that the Plaintiffs have engaged in any immoral or unconscionable conduct or that the Issuer Defendants have been injured by any such alleged conduct. The defendants are not correct that there are any issues of fact barring dismissal of this defense based on their read of the “assurances” discussed above. Nothing raises any issue of fact as to whether the Plaintiffs engaged in immoral or unconscionable conduct or otherwise suffer from unclean hands. Additionally, given the Proxy Statement’s (discussed below) representation that the transaction represented the best “opportunity” for the *assumption* of the obligation to pay the TruPS, the defendants can not be said to be injured by the Plaintiffs holding them to this representation:

The board also believed that the merger would provide the best opportunity for the Company to protect the Company’s existing policyholders and provide for the assumption or repayment of the Company’s indebtedness, including the Convertible Notes and Company’s \$235 million in outstanding principal of trust preferred securities.

(NYSCEF Doc. No. 688 at 41 [emphasis added]). As such, the affirmative defense of unclean hands is also dismissed.

D. The Defense of Laches (TruPS I Affirmative Defense No. 20 and TruPS II Affirmative Defense No. 14) is Dismissed

The equitable doctrine of laches bars the claims of a plaintiff whose unreasonable delay in prosecuting a claim or protecting a right has worked to prejudice rights of the defendant (*SCA Hygiene Products Aktiebolag v First Quality Baby Products, LLC*, 580 US 328, 333 [2017]). A delay of as little as one year has been held sufficient to establish the defense (*Philippine Am. Lace Corp. v 236 W. 40th St. Corp.*, 32 AD3d 782, 784 [1st Dept 2006]); *Bennigson v Solomon R. Guggenheim Found.*, 214 NYS3d 628 [Sup Ct 2024]). Courts have held that laches is appropriate where the delay results in deceased witness, faded memories, lost documents, hearsay testimony of questionable value, and the “injustice” of having “to defend under these circumstances” (*Solomon R. Guggenheim Found. v Lubell*, 153 AD2d 143, 149 [1st Dept 1990], *affd*, 77 NY2d 311 [1991]). Where the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, the issue may be resolved as a matter of law (*In re Peters*, 34 AD3d 29, 38 [1st Dept 2006]).

The record before the Court establishes no unreasonable delay or prejudice. The transactions as announced include representations in the proxy statement that the transaction was the best opportunity for the **assumption** of the obligation to pay the TruPS obligation. At the time the statement was made, no default had occurred. In fact, it was not until Tower Group’s insurance company subsidiaries were placed into the Conservatorship in 2016 that there was an Event of Default. The Plaintiffs then brought suit six months later. This is insufficient as a matter of law to support the defense of laches. Thus, the defense of laches is dismissed.

III. Summary Judgment Dismissal of the Fraud Claim (TruPS I fourth cause of action) asserted against the D&O Defendants is Denied

The elements of a cause of action sounding in fraud are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Although fraud claims must be pled with sufficient particularity (CPLR 3016[b]), this requirement should not be interpreted to prevent an otherwise valid cause of action where the concrete facts are peculiarly within the knowledge of the party charged with the fraud (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491-492 [2008]).

The D&O Defendants argue that they are entitled to summary judgment dismissal of the fraud claims because (i) TGIL's publicly filed proxy statement accurately reflected the TGIL Board's subjective belief as to potential future events, (ii) at least four entities other than TGIL's Board independently and contemporaneously agreed that the 2014 transaction was the "best opportunity" to repay the TruPS and conveyed this view to the board, (iii) the reason that the TruPS ultimately went unpaid could not have been foreseeable to the D&O Defendants when the ACP Transaction closed in September 2014, (iv) during a July 2015 phone conversation between Mr. Hitselberger and Doug Duncan, representative of Wolf River, Mr. Hitselberger merely stated that he subjectively "fe[lt] good" about their capital levels and "would expect that we would start paying interest" on the TruPS by the end of 2015 or 2016, which was "a far cry" from a definitive representation that the TruPS would be paid, and (v) the Plaintiffs cannot prove reliance, as the Proxy Statement was issued to TGIL's shareholders rather than any past or potential TruPS investors. As discussed below, the arguments all fail.

The Plaintiffs' claims sounding in fraud are predicated on the allegations that plaintiffs Wolf River, NFC, and Hildene purchased TruPS between 2014 and 2016 in reliance on the following misrepresentations: (i) a statement in TGIL's publicly filed proxy statement representing that the TGIL board believed the ACP Transaction provides the best opportunity for the assumption of the Company's \$235 million outstanding principal of trust preferred securities when the defendants themselves indicate that they had no basis for this statement as they did not intend for the TruPS obligation to be assumed, and (ii) statements made by Mr. Hitselberger to Mr. Duncan during a July 2015 phone conversation, where Mr. Hitselberger assured Mr. Duncan that the TruPS were being assumed by ACP and would be repaid.

A. The Proxy Statement

The proxy statement was alleged to have been at least materially misleading, if not just plain false, because it said that the board believed that the merger would provide the best opportunity for the company to provide for the *assumption* of the company's TruPS obligation (NYSCEF Doc. No. 688 at 41) when they themselves indicate that they had no basis for this statement as they did not intend for this obligation to be assumed. This alone requires denial of the motion. It did not *merely say* that the Board believed it was the best opportunity for the *repayment* of the Company's *other* indebtedness or for the assumption of the Company's *other* indebtedness. To be sure, it did say that and there was assumption of certain obligations, but it said more than that. It indicated that the TruPS obligation was also being "assumed."

The D&O Defendants are also incorrect in stating that this was a mere statement of belief and that their precatory language makes this statement inactionable because this was not a belief as to

future performance or anything like that and they themselves indicate that there was no factual basis for this belief (*i.e.*, the belief as to the assumption of the TruPS obligation) when the statement was made (*see BML Properties Ltd. v China Const. America, Inc.*, 2024 WL 4525334 *45 [NY Sup Ct Oct 18, 2024]; *Cordaro v AdvantageCare Physicians, P.C.*, 208 AD3d 1090, 1093 [1st Dept 2022]; *Shear Enterprises, LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020]; *DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303 [1st Dept 2005]; *Curiale v Peat, Marwick, Mitchell & Co.*, 214 AD2d 16, 28 [1st Dept 1995]). To wit, the record before the Court demonstrates that the TGIL board failed to even consider the assumption or the interests of the TruPS holders when they approved the transactions. Thus, the D&O Defendants are not entitled to dismissal of this claim based on Mr. Hitselberger deposition testimony that the “best opportunity” phrase in the proxy statement applies only to protecting the company’s existing policyholders (NYSCEF Doc. No. 605 at 172:4-173:18).²

Additionally, the D&O Defendants are not entitled to dismissal based on the fairness opinions issued by Bank of America and JP Morgan (NYSCEF Doc. Nos. 690 and 692). ***Bank of America itself concedes that it did not consider the fairness of the transaction to the TruPS holders in rendering its fairness opinion:***

Q: The distinction here that’s important is the reference to the fairness, from a financial point of view, to the company and its shareholders. DO you remember providing an opinion to the Tower board that the transaction was fair to the company as distinct from shareholders?

....

² As discussed below, the internal documents suggest that they knew they were not being forthright with the regulators or the holders of the TruPS. For example, on December 15, 2016, Caleb Muhs wrote an email to Mr. Hitselberger which indicates that they might not have been forthright with the TruPS holders: “Bill, I tell the auditors your word is as good as gold. Although I tell the TRUPS holders the same thing too :)” (NYSCEF Doc. No. 800).

A: Yeah, I wouldn't have done that. I would have read exactly what's in the opinion.

Q: And as we've reviewed, the opinion letter was restricted to the fairness, from a financial point of view, to Tower's shareholders, correct?

A: Correct.

Q: Do you have any an opinion as to why there would be a suggestion that you provided a fairness opinion of the transaction to the company?

A: Just whoever does these is obviously not very good at taking notes and summarizing,

Q: So you would agree that you did not provide a fairness opinion of the transaction as it relates to the company.

A: Correct.

....

Q: Were you at any time, you meaning Bank of America/Merrill Lynch, ever retained to provide a fairness opinion with respect to the transaction as it relates to the company, meaning Tower?

A: No.

(NYSCEF Doc. No. 689 at 119:18-121:14). In fact, and as discussed above, according to the D&O Defendants, the obligation to pay the TruPS was never assumed and this was not what was intended (*tr.7.18.25*). The proxy statement is no less misleading because this was the "only deal around" or that this deal was the best opportunity for repayment of the Company's indebtedness including the TruPS obligation. Stated differently, according to the D&O Defendants, it is irrelevant that the proxy statement at a bare minimum suggests that the obligation to pay the TruPS was being assumed requiring dismissal of this claim. This twists logic beyond recognition.

The D&O Defendants are also not right that they are entitled to dismissal of the fraud claim based on their argument that there was a lack of reliance or because at the time the statements were made that the holders of the TruPS had already purchased certain portions of their TruPS holdings. The record before the Court also establishes that there are at an absolute bar minimum issues of fact as to reliance including whether (i) Mr. Duncan, as managing director of Wolf River, relied on the proxy statement in sending an email to his broker and purchasing TruPS issued by Tower Group in September 2014 on behalf of Wolf River (NYSCEF Doc. No. 697), and (ii) Kevin Parks, an employee of Hildene, purchased TruPS issued by Tower Group in October 2014 in reliance on the proxy, as evidenced by his emails and Bloomberg chats (NYSCEF Doc. No. 717).

B. The July 2015 Phone Call

The D&O Defendants are also not correct that they are entitled to dismissal of the fraud claim to the extent that it is based on Mr. Hitselberger's alleged misrepresentation to Mr. Duncan during the July 2015 phone conversation. According to Mr. Duncan, Mr. Hitselberger represented to him that ACP would assume the balance sheet, including the TruPS:

Q: With respect to the integration of the balance sheet into ACP Re, is this— is it your understanding that ACP Re would be assuming the—the assets as well as the liabilities of Tower in the transaction?

....

A: It was my assumption that they would be assuming the assets and liabilities of Tower.

....

Q: Is it your understanding that the Tower TruPS sat as a liability on the balance sheet of Tower prior to the ACP Re Tower acquisition?

A: It is my understanding that the Tower trust preferred sat as the liability on the Tower balance sheet prior to the ACP Re acquisition.

Q: So then . . . what is your understanding of the liabilities of Tower, vis-à-vis ACP Re through the Tower/ACP merger?

....

A: My understanding of . . . this conversation was that ACP Re was = assuming the balance sheet, including the trust preferred securities of Tower, and that they were integrating those businesses into ACP Re—the balance sheet into ACP Re, based upon the conversation that I had with Bill Hitselberger.

(NYSCEF Doc. No. 628 at 394:15-396:23).³ It does not matter that Mr. Hitselberger does not recall (or denies) saying that. The D&O Defendants are also not correct that the evidence does not include reasonable reliance by certain of the plaintiffs. According to Mr. Duncan, not only did he refrain from selling the TruPS that he had purchased on behalf of Wolf River in September 2014, but also he decided to purchase additional TruPS on behalf of NFC in October 2015 (*id.* at 140:6-141:23, 144:3-7, 154:15-18).

Unquestionably, there are issues of fact as to damages. It is irrelevant that the Plaintiffs held the securities prior to the alleged misstatements as it relates to the fraud cause of action because the damages asserted are specifically for the loss of investment – *i.e.*, out of pocket costs including as to additional TruPS acquired (*Bullen v CohnReznick, LLP*, 194 AD3d 637, 639 [1st Dept 2021]; *BML Properties Ltd.*, 2024 WL 4525334 at *45). As such, the D&O Defendants are not entitled to summary judgment dismissal of the fraud claim to the extent that they are based on Mr. Hitselberger's July 2015 phone call either.

³ It is also irrelevant that this liability was recorded as a **negative asset** instead of being under the heading of liability on the consolidated financial statement.

IV. The D&O Defendants are Not Entitled to Summary Judgment on Wolf River's Breach of Fiduciary Duty Claim (TruPS I sixth cause of action)

To plead a cause of action for breach of fiduciary duty, a plaintiff must allege (i) that a fiduciary duty existed, and (ii) that the defendant breached that duty (*McKenna v Singer*, 2017 WL 3500241, at * 15 [Del Ch Ct 2017]). The duty of loyalty “requires that directors act in the best interest of the company and prohibits them from using their positions as directors to further their own self-interest” (*Kahn v Portnoy*, 2008 WL 5197164, at *5 [Del Ch Dec. 11, 2008]). The duty of loyalty also requires fiduciaries to act in “good faith” to advance the interests of the beneficiary (*U.S. W., Inc. v Time Warner Inc.*, 1996 WL 307445, at *21 [Del Ch June 6, 1996]). The duty of care and its associated business judgment rule create a presumption that in making business decisions, the directors of a corporation (or in this case the managers of limited liability companies) act on an informed basis, *i.e.*, with due care, in good faith, and in the honest view that their action was in the best interest of the company (*Cede & Co. v Technicolor, Inc.*, 634 A2d 345, 360 [Del 1993], *decision mod on rearg.*, 636 A2d 956 [Del 1994]).

The D&O Defendants argue that the Plaintiffs' breach of fiduciary duty claims fail because the Plaintiffs lack standing to bring the claims derivatively under Bermuda law, which they argue applies. More specifically, the D&O Defendants argue that (i) directors have no fiduciary duties to consider the interests of a subsidiaries' creditors, and (ii) even if the Plaintiffs were direct creditors, they nonetheless cannot bring claims against directors of a solvent company. The D&O Defendants claim that, because the Plaintiffs were creditors of TGIL's subsidiaries, and TGIL was itself a solvent company, then the D&O Defendants did not have a fiduciary duty to consider the Plaintiffs' interests when approving the ACP Transaction.

Even were the Plaintiffs to have standing, the D&O Defendants additionally argue that the claims of all Plaintiffs except the Wolf River plaintiffs are barred by the “solely corporate obligations” clauses (the **No Recourse Clause**) contained in all Indentures. As to the Wolf River plaintiffs, the D&O Defendants contend that their claims are nonetheless barred because TGIL’s and CastlePoint’s bylaws contain preemptive waivers of any fiduciary duty claims against directors and officers.

The D&O Defendants also argue that, even if the Court does not grant the motion based on the foregoing, the Court should nonetheless grant their motion because their decision to approve the ACP Transaction was a valid exercise of business judgment as a good faith attempt to maximize the economic value of TGIL and its subsidiaries, including the economic value available to creditors. The D&O Defendants argue that the evidence available to them at the time indicated that the ACP Transaction was the best opportunity to repay the TruPS debt and that there were no other options available.

Lastly, the D&O Defendants argue that the Plaintiffs will not be able to prove that their approval of the ACP Transaction caused the Plaintiffs any damages because no other transaction would have paid the TruPS debts.

A. The Plaintiffs Have Standing to Bring the Derivative Claims

Previously, the D&O Defendants moved to dismiss (TruPS I Mtn. Seq. No. 007) on the basis that the Plaintiffs lacked standing under both Bermuda and Delaware law because (i) neither

Bermuda nor Delaware law allows creditors to sue directors, officers, or shareholders directly, (ii) Bermuda law does not recognize derivative actions by creditors on behalf of an insolvent company, and (iii) the Plaintiffs were required to make a formal demand on the board to bring a derivative suit under Delaware law.

In their opposition papers, the Plaintiffs argued that they had standing to sue derivatively because (i) New York, Delaware, and Bermuda law all recognize that when a company is insolvent, directors must consider the interests of creditors, and (ii) demand is not required under Delaware law, as Delaware courts have expressly declined to decide whether creditors must meet such requirements to assert a derivative action.

In response, the Court reviewed both Bermuda law and Delaware law as to the issues briefed by the parties with respect to TGIL and one Issuer which are incorporated in Bermuda and the other Issuers which are incorporated in Delaware (NYSCEF Doc. No. 294 at 14 n 2). The Court did not however at that time make a decision as to whether Bermuda law, Delaware law or New York law applies to the claims in this case. As to the issues briefed by the parties, the Court held that creditors may bring a derivative claim in the place of shareholders for breach of fiduciary duty where the company is insolvent:

Under Delaware law, creditors may bring derivative claims where a company is insolvent because the creditors take the place of the shareholders (*North Am. Catholic*, 930 A2d at 94). This may well be the case under Bermuda law as well as Mr. Attride-Sterling attests that there are no cases prohibiting or authorizing creditor derivative actions (NYSCEF Doc. No. 82, ¶ 25). Given the absence of Bermuda law to the contrary, under Delaware law, the Plaintiffs have standing to bring its breach of fiduciary duty claims derivatively.

Although not clear whether alleging demand futility in the context of a creditor derivative action is required, to allege demand futility under Delaware law, a

derivative plaintiff must make a threshold showing, alleging particularized facts, to create a reasonable doubt that (i) that the directors are disinterested and independent, or (ii) the challenged transaction was otherwise the product of a valid exercise of business judgment (*Rales v Blasband*, 634 A2d 927, 933 [Del 1993]). The Plaintiffs have more than met their burden here at this stage of the litigation (*see, e.g.*, NYSCEF Doc. No. 158, ¶¶ 204-223).

(*id.* at 14).

Now, on the fully developed record, the D&O Defendants are not correct that the Plaintiffs do not have standing under Bermuda law to bring the claims as creditors of TGIL's subsidiaries. The Plaintiff's expert, Kevin Taylor, indicates that the board of directors can be held liable for the role of subsidiaries in committing fraud or acting in bad faith (NYSCEF Doc. No. 888 ¶ 65). Moreover, Bermuda law obligates a board of directors to take the interests of creditors into consideration when the company is insolvent:

I. Do directors or officers of an insolvent company have a duty to consider the interests of the company's creditors?

55. The answer is yes. When a company is insolvent or in danger of becoming insolvent (the latter sometimes referred to as being in the "zone" of insolvency), directors' duties shift from having regard to the interests of the company's shareholders to include consideration of the interests of the company's creditors. The duty has been generally described as follows:

“When a company is solvent the directors' duties include having regard to the interest of the general body of shareholders. However, when a company is insolvent, or in danger of becoming insolvent, the directors' duties include having regard to the interest of the general body of creditors.” Kawaley, *Offshore Commercial Law in Bermuda* 2nd edn, para. 9.26 [TAB 22].

(*id.* ¶ 55; *see also id.* ¶¶ 56-65).

Thus, the D&O Defendants can be held liable because, at a minimum, TGIL acted in bad faith in approving the ACP Transaction without giving due consideration to the holders of the TruPS despite the fact that TGIL was insolvent. The D&O Defendants are simply not correct that there are no issues of fact as to TGIL's solvency in 2014.⁴ Due to Tower Group's 2013 annual report and the fact that TGIL's net income was nearly -\$1 billion, there was substantial doubt and growing concern about whether TGIL could continue. This is sufficient to establish that TGIL was insolvent such that the D&O Defendants owed a fiduciary duty to the Plaintiffs as creditors. As such, the Plaintiffs have standing to bring derivative breach of fiduciary duty claims against the D&O Defendants.

B. Wolf River's Claims are Not Barred by the No Recourse Clause or the Bylaws

Certain Indentures at issue contain "solely corporate obligations" clauses (the **No Recourse Clause**) that bar recourse against officers and directors of a company for obligations under the Indentures:

Section 13.1. Indenture and Debentures Solely Corporate Obligations. No recourse for the payment of the principal of or premium, if any, or interest on any Debenture, or for any claim based thereon or otherwise in respect thereof, and no recourse under or upon any obligation, covenant or agreement of the Company in this Indenture or in any supplemental indenture, or in any such Debenture, or because of the creation of any indebtedness represented thereby, shall be had against any incorporator, stockholder, employee, officer or director, as such, past, present or future, of the Company or of any successor Person of the Company, either directly or through the Company or any successor Person of the Company, whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise, it being expressly understood that all such liability is hereby expressly waived and released as a condition of, and as a consideration for, the execution of this Indenture and the issue of the Debentures.

⁴ As the Court previously explained, in November 2013, TGIL disclosed that it was balance sheet-insolvent (NYSCEF Doc. No. 234 at 7).

(*see, e.g.*, NYSCEF Doc. No. 17 § 13.1). However, (and the D&O Defendants concede) the Indentures held by the Wolf River plaintiffs do not contain the No Recourse Clauses or any other provision limiting liability to the corporation. As such, the Wolf River plaintiffs did not agree to limit the exposure of the directors and officers for these trusts in the same way that the parties agreed to in other trusts. This omission is material. As such, Wolf River's claims are not barred by the No Recourse Clause that does not appear in Indentures that govern their TruPS.

As to the non-Wolf River plaintiffs, the No Recourse Clause precludes the breach of fiduciary duty claims to the extent that they are asserted based on principal and interest owed under the Indentures. As such, the branch of the motion seeking dismissal of the breach of fiduciary duties asserted by the non-Wolf River plaintiffs seeking principal and interest is dismissed.

Lastly, the D&O Defendants are not correct that the TGIL and CastlePoint bylaws preemptively waived any fiduciary duty claims brought against the directors and officers by the holders of the TruPS. The bylaws themselves do not refer to creditors – *i.e.*, holders of the TruPS. The bylaws only waive fiduciary duties owed to shareholders (*see* NYSCEF Doc. No. 476 at C-6; NYSCEF Doc. No. 477 § 53.1). As such, the bylaws do not serve to bar claims by the holders of the TruPS.

C. The Business Judgment Rule Does Not Protect the D&O Defendants from Liability

Business judgment rule protection is not available to the D&O Defendants because the D&O Defendants were neither disinterested nor independent parties (*see Citron v Fairchild Camera & Instrument Corp.*, 569 A2d 53, 64 [Del 1989]). Where directors face “potential conflicts of

interest because of the decisional dynamics present in particular recurring and recognizable situations,” a court will apply “enhanced scrutiny” rather than business judgment (*Quadrant Structured Products Co., Ltd. v Vertin*, 102 A3d 155, 182-83 [Del Ch 201]). Unquestionably, the D&O Defendants were neither disinterested nor independent when they approved the transaction which benefitted the Tower Group shareholders entitling them to business judgment rule protection. Because Tower Group was insolvent, D&O Defendants owed fiduciary duties to the TruPS creditors. The ACP Transaction had the result of benefiting the Tower Group shareholders at the expense of the TruPS creditors. This is the opposite of what should have happened. Creditors are supposed to be paid before shareholders.

In fact, the fully developed record is bereft of any evidence that contemporaneous consideration was given to the TruPS obligation warranting dismissal of the breach of fiduciary duty claims (NYSCEF Doc. No. 891 at 20). As discussed, the JP Morgan and Bank of America Fairness Opinions upon which the D&O Defendants rely contemplated only whether the ACP Transaction was fair to the TGIL shareholders and failed to analyze the fairness to any creditors, including the holders of the TruPS. As such, the D&O Defendants are not entitled to deference for their decision to approve the ACP Transaction, and the business judgment rule does not shield them from liability.

D. The Plaintiffs Can Prove Damages

The Plaintiffs allege that, with respect to damages on their fiduciary duty claims against the D&O Defendants, they are entitled to all principal owed on the Wolf River TruPS for (i) Tower Trust II (NYSCEF Doc. No. 519) in the amount of \$10.3 million, (ii) Preserver Capital Trust I

(NYSCEF Doc. No. 520) in the amount of \$12.4 million, and (iii) Tower Trust V (NYSCEF Doc. No. 523) in the amount of \$20.6 million, plus interest under all three TruPS.

In approving the ACP Transaction when TGIL was insolvent, without any consideration of the holders' interests, including any mechanism for repayment or assumption of the TruPS, the D&O Defendants' conduct caused damages. Before approving the ACP Transaction, the D&O Defendants were fully aware of TGIL's insolvency and the damage to TGIL's balance sheet that the merger would cause. Whether and to the extent to which the TruPS debt would have been repaid had they considered the TruPS been properly considered (as the other debt was) can not be determined on this record. As such, summary judgment on the basis of damages is not appropriate as to the breach of fiduciary duty claims against the D&O Defendants.⁵

V. The Tower Group Defendants and Karfunkel Defendants are Not Entitled to Summary Judgment on the Breach of Contract Claim (TruPS I and TruPS II first causes of action)

By way of background, previously, the Tower Group Defendants and Karfunkel Defendants moved to dismiss (TruPS I Mtn. Seq. Nos. 04 and 05) the contract claims on the basis that they are not successor obligors under the Indentures, and responsibility under each of the Indentures remains with the original Issuer, because in each transaction, either (i) the clauses applied only to a merger, consolidation, or transfer of assets of the Issuer rather than a purchase of stock, or (ii) the Issuer was the surviving company of a merger with the TGIL subsidiary. The Court held that dismissal of contractual successor liability was not appropriate and that the Plaintiffs may assert their breach of contract claims pursuant to §§ 14.1 and 14.11, 11.1 and 11.2 of the Indentures:

⁵ Put another way, it does not matter that the D&O Defendants argue that there was no other deal around because that did not entitle them to allocate the asset that could be used to pay the TruPS as they did.

Reference is made to a series of indentures (the Indentures) between (i) Tower Group, Inc. and U.S. Bank N.A., governing debentures issued to the Tower Group Statutory Trust I, dated May 15, 2003; (ii) Tower Group, Inc. and JPMorgan Chase Bank, governing debentures issued to the Tower Group Statutory Trust II, dated September 30, 2003; (iii) Tower Group, Inc. and Wilmington Trust Company, governing debentures issued to the Tower Group Statutory Trust III, dated December 15, 2004; (iv) Tower Group, Inc. and JPMorgan Chase Bank, governing debentures issued to the Tower Group Statutory Trust IV, dated December 21, 2004; (v) Preserver Group, Inc. and Wilmington Trust Company, governing debentures issued to the Preserver Capital Trust I, dated May 26, 2004; (vi) CastlePoint Management Corp. and Wilmington Trust Company, governing debentures issued to the CastlePoint Management Statutory Trust I, dated December 1, 2006; (vii) CastlePoint Management Corp. and Wilmington Trust Company, governing debentures issued to the CastlePoint Management Statutory Trust II, dated December 14, 2006; and (viii) CastlePoint Bermuda Holdings, Ltd. and Wilmington Trust Company, governing debentures issued to the CastlePoint Bermuda Holdings Statutory Trust I, dated September 27, 2007 (NYSCEF Doc. Nos. 17-24).

The Indentures include provisions intended to protect investors from corporate transactions that may harm the ability of the Issuers to make the required payments to the trusts, which the trusts are obligated to pay to holders of the TruPS. These provisions require, among other things, that no consolidation, merger, sale or transfer of assets of the Issuer may occur unless the successor entity expressly assumes all obligations in the Indentures (Amend. Compl., NYSCEF Doc. No. 158, ¶¶ 59-61, citing e.g., §§ 3.7 and 11.1 of Ex. 2 to the Amend. Compl., NYSCEF Doc. No. 160). The Indentures also provide that successors and assigns are bound to their terms even in the absence of an express agreement to that effect (*id.*, ¶¶ 62-63, citing §§ 14.1 and 14.11 of Ex. 2 to the Amend. Compl., NYSCEF Doc. No. 160).

In connection with these transactions, the parties also entered into guarantees, which provide that the holders of the TruPS are intended third-party beneficiaries who may sue the Issuers directly for nonpayment (Amend. Compl., NYSCEF Doc. No. 158, ¶¶ 50-51; e.g., Ex. 3 to the Amend. Compl., NYSCEF Doc. No. 161). These guarantees also bind successors and assigns (*id.*, ¶ 64, citing e.g., Ex. 3 to the Amend. Compl., NYSCEF Doc. No. 161, § 8.1). Plaintiffs maintain that these successor obligor provisions are intended to protect the TruPS holders from transactions that would increase the risk of the Indentures, i.e., exactly what happened here (*id.*, ¶¶ 65-70).

In March of 2013, Tower Group, Inc. completed a reverse-merger transaction with a Bermuda company (the Canopus Transaction). The successor company was renamed TGIL and became the ultimate parent company of Tower Group, whose operations continued in New York. Pursuant to public filings, TGIL concedes that it is the successor to Tower Group (*id.*, ¶ 83). In August of 2013,

TGIL disclosed that its loss reserves had been misstated with respect to certain commercial lines business dating back to 2009 (id., ¶¶ 101-106). However, the amended complaint alleges that its personal lines business remained a valuable asset, unrelated to the bad loss estimates, and the commercial lines business, thus, remained valuable notwithstanding any losses because of future earned premiums, renewal rights and runoff rights (id., ¶ 107).

In November of 2013, TGIL's auditors warned that "there is substantial doubt about the Company's ability to continue as a going concern" (id., ¶ 105). The Karfunkel Defendants allegedly saw this as an opportunity, and exploited TGIL's financial difficulties at the TruPS holders' expense. To wit, in 2014, they acquired TGIL and its insurance businesses through three related and interdependent agreements negotiated and executed in New York (id., ¶¶ 7, 142, 192). TGIL was acquired by ACP for approximately \$143 million (the ACP Merger) pursuant to an agreement and plan of merger dated January 3, 2014 (the ACP Merger Agreement; NYSCEF Doc. No. 120), pursuant to which ACP became the direct 100% owner of TGIL's capital stock (Amend. Compl., ¶¶ 143-44).

Following the execution of the ACP Merger Agreement, but before closing the transaction, TGIL disclosed that it was balance-sheet insolvent and that regulators were scrutinizing the company (id., ¶ 164). However, ACP did not expressly assume or pay the TruPS notwithstanding the fact that defendants purportedly represented in securities disclosures that the ACP Merger "would" provide for the TruPS to be assumed or paid (id., ¶¶ 9, 189, 269, 164, 193-98). Rather, to obtain approval of the ACP Merger, plaintiffs allege that the defendants misled insurance regulators by falsely assuring them that following the merger, ACP would "retain the liability related to the legacy Tower business" (id., ¶¶ 183-84).

TGIL also agreed to certain reinsurance-related transactions and a transfer of renewal rights between the Insurance Companies and certain companies under common ownership with ACP (the Reinsurance Transactions). As a result of these Reinsurance Transactions, AmTrust and National General – which were controlled by the Karfunkel Defendants (see NYSCEF Doc. No. 200) – had the option to review Tower's existing portfolio and to handpick which policies AmTrust and National General wanted to reinsure (the Reinsurance Agreements) (NYSCEF Doc. No. 158, ¶¶ 150-153). The plaintiffs allege that this caused the Karfunkel Defendants to realize millions of dollars in net premiums on their own hand-picked, valuable insurance policies of Tower (id., ¶¶ 343-50). Tower, however, was left to suffer hundreds of millions of dollars of losses on its remaining poorly performing policies.

ACP, as the new owner of TGIL, agreed to related-party deals with AmTrust and National General to transfer Tower's renewal rights for future business following the close of the ACP Merger (the Renewal Rights Agreements; id., ¶¶ 156-59). The plaintiffs allege that through these Renewal Rights Agreements, the Karfunkel Defendants acquired Tower's valuable book of business going forward,

which the Karfunkel Defendants have publicly stated “is a well-performing book of business and, as we expected, has contributed to [AmTrust’s and National General’s] financial and operating performance” (id., ¶ 343).

In short, the plaintiffs allege that the ACP Merger Agreement resulted in TGIL shareholders (including TGIL officers and board members) being paid \$143 million for shares that were otherwise worthless due to balance sheet insolvency, as part of a plan to strip TGIL of its valuable insurance policies and renewal rights to the Karfunkel Defendants (id., ¶¶ 10, 144, 177). Thus, the Karfunkel Defendants allegedly realized hundreds of millions in value to themselves, and left the Issuers with over \$220 million in TruPS obligations that they had no ability to repay (id., ¶¶ 343-46).

In 2016, the Issuers stopped making payments under the TruPS and the Trustees sent notices of Events of Default and acceleration under the TruPS Indentures (id., ¶¶ 214-216).

....

There is no meaningful dispute that the Issuers are in default on their obligations with respect to the TruPS and that plaintiffs may sue to pursue their claims for payment. The amended complaint alleges that TGIL publicly acknowledged that it is the successor to Tower following the 2013 Canopus Transaction (NYSCEF Doc. No. 158, ¶¶ 82-83) and this claim was not enjoined in California. Therefore, the plaintiffs may assert breach of contract claims pursuant to §§ 14.1 and 14.11, 11.1 and 11.2 of the Indentures. As noted above, section 14.1 provides:

Successors. All of the covenants, stipulations, promises and agreements of the Company in this Indenture *shall bind its successors and assigns whether expressed or not.*

(NYSCEF Doc. No. 17-24, § 14.1 [emphasis added]).

Section 14.11 provides:

Assignment. The Company will have the right at all times to assign any of its rights or obligations under this Indenture to a direct or indirect wholly owned Subsidiary of the Company, provided that, in the event of any such assignment, the Company will remain liable for all such obligations. Subject to the foregoing, this Indenture is binding upon and inures to the benefit of the parties hereto and their respective successors and assigns. This Indenture may not otherwise be assigned by the parties hereto.

(id., § 14.11).

“Consolidation, Merger, Sale, Conveyance and Lease” is also addressed:

Successor Entity to be Substituted. In case of any such consolidation, merger, sale, conveyance, transfer or other disposition and upon the assumption by the successor entity, by supplemental indenture, executed and delivered to the Trustee and satisfactory in form to the Trustee, of the due and punctual payment of the principal of and premium, if any, and interest on all of the Debentures and the due and punctual performance and observance of all of the covenants and conditions of this Indenture to be performed or observed by the Company, such successor entity shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as the Company, and thereupon the predecessor entity shall be relieved of any further liability or obligation hereunder or upon the Debentures. Such successor entity thereupon may cause to be signed, and may issue in its own name, any or all of the Debentures issuable hereunder which theretofore shall not have been signed by the Company and delivered to the Trustee or the Authenticating Agent; and, upon the order of such successor entity instead of the Company and subject to all the terms, conditions and limitations in this Indenture prescribed, the Trustee or the Authenticating Agent shall authenticate and deliver any Debentures which previously shall have been signed and delivered by the officers of the Company, to the Trustee or the Authenticating Agent for authentication, and any Debentures which such successor entity thereafter shall cause to be signed and delivered to the Trustee or the Authenticating Agent for that purpose. All the Debentures so issued shall in all respects have the same legal rank and benefit under this Indenture as the Debentures theretofore or thereafter issued in accordance with the terms of this Indenture as though all of such Debentures had been issued at the date of the execution hereof

(NYSCEF Doc. No. 17, § 11.2, similar provision at NYSCEF 19, 20, 22, 23, 24 § 11.2; NYSCEF Doc. No. 18, §§ 8.2 (a) & (b) Successor Company Substituted; NYSCEF Doc. No. 21, § 10.02; see also chart, NYSCEF Doc. No. 7 at 8).

Accepting the facts alleged as true, as the court must on a motion to dismiss, the plaintiffs have stated a claim for breach of contract and may assert claims for breaches of the successor obligor provisions.

(NYSCEF Doc. No. 235 at 5-9, 17-18).

Subsequently, the defendants once again moved to dismiss (TruPS I Mtn. Seq. No. 07) the contract claims based on their argument that Section 11.1 of the Indentures requires the execution of a Supplemental Indenture only upon a consolidation, merger, sale, conveyance,

transfer, or other disposition. The Court also rejected this argument and explained that successor liability under the Indentures is not contingent upon the execution of a supplemental obligation and that the defendants were conflating a breach of Section 11.1's obligation to execute a Supplemental Indenture with whether they were successors under the terms of the Indenture requiring payment of the monies due the holders of the TruPS:

The definition of the Company in Section 1.1 of the Indentures (*see, e.g.*, NYSCEF Doc. No. 17) includes “successors and assigns” such that by virtue of the stock sale they became the successor-in-interest to the obligors of TruPS. ***The Defendants’ argument that the sale of stock did not trigger Section 11.1 because it wasn’t a merger or consolidation and no such supplemental indenture was executed conflates a breach Section 11.1 with the definition of Company and their obligations as “successors” under the indenture. Thus, dismissal must be denied.***

....

The claims for successor liability are predicated on the Karfunkel Defendants’ express and implied assumption of the obligations of TGIL, including as TGIL’s successor under the definition of the Company in the Indentures (NYSCEF Doc. No. 17, § 1.1). As the defendants argue, a new agreement is required under Section 11.1 of the Indentures upon a consolidation, merger, sale, conveyance, transfer, or other disposition. Failure to execute the supplemental indenture contemplated by Section 11.1 would constitute a breach, but ***liability for a successor to TGIL is not predicated on a supplemental indenture because a successor’s liability is expressly included in the definition of Company in Section 1.1 of the Indentures.***

(NYSCEF Doc. No. 294 at 13, 15-16 [emphasis added]).

On appeal, the Appellate Division affirmed holding that the Indentures do not require that the issuer’s corporate existence be extinguished by the transaction to trigger the obligations under Sections 11.1 and 11.2:

The court properly denied defendants’ motion to dismiss the first cause of action for breach of contract and third cause of action for tortious interference asserted against TGIL, ACP, and the Karfunkel Defendants as asserted ***based on the***

indenture clauses providing for the assumption of liability for indenture payments by entities that succeed to those obligations based on the occurrence of certain consolidation, merger, or asset/stock disposition transactions. Plaintiffs adequately stated these causes of action against these defendants based on allegations that there were certain merger transactions in which the indenture issuer “was not the surviving corporation” so as to trigger the indentures’ Section 11.1 and 11.2 successor liability provisions requiring an assumption of liabilities by the other entity involved in the merger transaction. ***Contrary to defendants’ contention, the plain language of those provisions does not require, as a matter of law, the finding that the transactions at issue were ones in which the indenture issuer company was “the surviving corporation,” merely based on the fact that the issuer’s corporate existence was not entirely extinguished by the transaction and the issuer continued as an indirect subsidiary of the merger counterparty.*** Nor does the plain language require the finding that the transactions did not trigger the provisions based on the fact that there was no execution of a supplemental indenture, as the failure to execute a supplemental indenture in connection with a merger where the issuer was not the surviving corporation would have constituted a breach of the required promise by the merger counterparty to execute such a document. ***Plaintiffs’ reading of the successor liability provisions finds support from TGIL’s proxy statement, which stated that TGIL was “deemed” a “successor” of TGI “pursuant to Rule 12g-3(a)” of the Securities Exchange Act⁶ and “is the successor issuer to TGI, succeeding to the attributes of TGI as registrant.”***

(*Alesco Preferred Funding VIII, Ltd. v ACP Re, Ltd.*, 209 AD3d 558, 559 [1st Dept 2022])

[emphasis added]). In its decision, the Appellate Division did not modify the Court’s holding

⁶ Rule 12g-3(a) provides as follows:

§ 240.12g-3 - Registration of securities of successor issuers under section 12(b) or 12(g).

(a) Where in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise, securities of an issuer that are not already registered pursuant to section 12 of the Act (15 U.S.C. 78l) are issued to the holders of any class of securities of another issuer that is registered pursuant to either section 12 (b) or (g) of the Act (15 U.S.C. 78l (b) or (g)), the class of securities so issued shall be deemed to be registered under the same paragraph of section 12 of the Act unless upon consummation of the succession:

- (1) Such class is exempt from such registration other than by § 240.12g3-2;
- (2) All securities of such class are held of record by fewer than 300 persons, or 1,200 persons in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841); or
- (3) The securities issued in connection with the succession were registered on Form F-8 or Form F-80 (§ 239.38 or § 239.41 of this chapter) and following succession the successor would not be required to register such class of securities under section 12 of the Act (15 U.S.C. 78l) but for this section (17 CFR § 240.12g-3[a]).

that under the other Successor Obligor Provisions of the Indenture (including Section 14.1 and 14.11), the Karfunkel Defendants and the Tower Group Defendants were liable for the TruPS obligation and the Plaintiffs' breach of contract claim. As such, the Plaintiffs are correct that it is the law of the case the Tower Defendants and the Karfunkel Defendants are liable for breach of contract pursuant to those provisions.

In this motion, the Tower Group Defendants and the Karfunkel Defendants yet again argue that they are entitled to dismissal of the breach of contract claims asserted against them because they again argue that Section 11.1 of the Indenture which requires the execution of a supplemental indenture has two triggers, neither of which occurred and that under Bermuda law which they say governs this dispute, there is no common law successor liability. Additionally, they argue that even if New York law governs the dispute, they are entitled to dismissal because under New York law, the provision requiring the execution of a supplemental indenture has not been triggered.

More specifically, as to contractual successor liability, the defendants argue that (i) none of the Issuers were partially extinguished, nor did they cease business, as each one indisputably "survived" each transaction and continued to meet its Indenture obligations through 2016, (ii) the Sponsors retained 100% ownership of their primary assets (*i.e.*, the Insurance Subsidiaries) through the conservatorship in 2016, and thus neither transferred "more than 51%" (for the CastlePoint entities) or "substantially ... an entirety" (for Preserver and Tower Group) of its assets, and (iii) no TruPS Sponsor transferred its capital stock in a prohibited way. Additionally, under Bermuda law, the Defendants argue a company is strictly a legal entity distinct from its

shareholders, except in situations involving concealment or evasion such that there is no common law successor liability. Lastly, they argue that even if New York law applies, the claims still fail because there was no express or implied assumption of the TruPS liability, de factor merger, mere continuation, or fraud supporting the claim, all appropriate corporate formalities were observed, and the Plaintiffs accepted the risk of unforeseen insurance liabilities. Finally, the Tower Group and Karfunkel Defendants argue that the claims against them should be dismissed because every Indenture other than the Tower II Indenture contains a No Recourse Clause barring recourse against the Issuers' stockholders (*see, e.g.*, NYSCEF Doc. No. 17 § 13.1).

The Tower Defendants and the Karfunkel Defendants however do not address their contractual liability under the other Successor Obligor Provisions (including Sections 14.1 or 14.11) of the Indenture in their papers. As such, their motion is denied.

Putting that aside, the Plaintiffs additionally argue that the Tower Group and Karfunkel Defendants are once again conflating the obligation to execute a supplemental indenture with the issue of whether as successors they are liable for the Company's obligations under the Indentures. As this Court previously explained (and as set forth above), they are correct. The Indentures present a coordinated set of provisions to protect the holders of the Company's obligations. As discussed previously, in Section 1.1, the "Company" in the Indentures is defined as the Sponsor and its successors and assigns. By way of example, the Tower Trust III Indenture provides:

"Company" means Tower Group, Inc., a Delaware corporation, and, subject to the provisions of Article XI, shall include *its successors and assigns*.

(NYSCEF Doc. No. 521 at 2 [emphasis added]).

A. The Successor Obligor Supplemental Indenture Provision

The Indentures further provide that, while the Indentures are outstanding, the Company may merge, consolidate, or sell, or convey its property, assets, or capital stock,⁷ provided that the successor entity executes a supplemental indenture. By way of example, Section 11.1 of the Tower Trust III Indenture provides:

Section 11.1. Company May Consolidate, etc., on Certain Terms. Nothing contained in this Indenture or in the Debentures shall prevent any consolidation or merger of the Company with or into any other Person (whether or not affiliated with the Company) or successive consolidations or mergers in which the Company or its successor or successors shall be a party or parties, or shall prevent any sale, conveyance, transfer or other disposition of the property, assets or capital stock of the Company or its successor or successors as an entirety, or substantially as an entirety, to any other Person (whether or not affiliated with the Company, or its successor or successors) authorized to acquire and operate the same; provided, however, that the Company hereby covenants and agrees that, upon any such consolidation, merger (where the Company is not the surviving corporation), sale, conveyance, transfer or other disposition, the due and punctual payment of the principal of (and premium, if any) and interest on all of the Debentures in accordance with their terms, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this Indenture to be kept or performed by the Company, shall be expressly assumed by supplemental indenture satisfactory in form to the Trustee executed and delivered to the Trustee by the entity formed by such consolidation, or into which the Company shall have been merged, or by the entity which shall have acquired such property or capital stock.

(*id.* § 11.1).

⁷ The individual Indentures contain different variations of the phrase “or shall prevent any sale, conveyance, transfer or other disposition of the property, assets or capital stock of the Company or its successor or successors as an entirety, or substantially as an entirety,” with some Indentures providing for solely property, solely assets, solely capital stock, or a combination of two of the three, and some Indentures providing for more than 51% of assets.

Additionally, and as the Court previously discussed, in Section 14.1, the Indentures also provide that successors and assigns are liable for the obligation to pay the TruPS. This provision obligating successors and assigns does not have any triggers to it whatsoever requiring the actual or effective extinguishment of a prior entity. It also does not say that it is subject to Article XI.

It merely provides:

Section 14.1. Successors. All the covenants, stipulations, promises and agreements of the Company in this Indenture shall bind its successors and assigns whether so expressed or not.

(e.g., *id.* § 14.1). As the Court previously explained, this provision binds the Karfunkel Defendants and the Tower Group Defendants. As discussed below, this was not a mystery to them. Their own internal financial documents and communications indicate that they understood that they were assuming the obligation pay the TruPS.

As to the Successor Obligor Supplemental Indenture Provision, and relying on *In re BankAtlantic Bancorp, Inc. Litigation*, 39 A3d 824 (Del Ch 2012), the Plaintiffs additionally argue that even that provision was in fact triggered because (and as the Appellate Division held here [*Alesco Preferred Funding VIII, Ltd.*, 209 AD3d at 559]) the extinguishment of the original obligor is not required and under the *In re BankAtlantic* analysis the provision was triggered.

In that case, Vice Chancellor Laster enjoined a proposed sale of a bank owned by a holding company because the proposed transaction triggered the Successor Obligor Supplemental Indenture Provision of the TruPS at issue without the extinguishment of the transferor entity. As the learned Vice Chancellor explained:

The Indenture for BBC Capital Trust IX, like all the Indentures, generally prohibits Bancorp from transferring all or substantially all of its assets. Section 3.07 provides that Bancorp

will not, while any of the Debt Securities remain outstanding, ... sell or convey all or substantially all of its property to any other Person unless the provisions of Article XI hereof are complied with.

JX 14 at 21. Section 11.01 qualifies the general prohibition as follows:

Nothing contained in this Indenture or in the Debt Securities ... shall prevent any sale, conveyance, transfer or other disposition of the property or capital stock of the Company or its successor or successors as an entirety, or substantially as an entirety, to any other Person (whether or not affiliated with the Company, or its successor or successors) authorized to acquire and operate the same; *provided, however,* that the Company hereby covenants and agrees that, upon any such ... sale, conveyance, transfer or other disposition, the due and punctual payment of all payments due on all of the Debt Securities in accordance with their terms, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this Indenture to be kept or performed by the Company, shall be expressly assumed by supplemental indenture reasonably satisfactory in form to the Trustee executed and delivered to the Trustee by ... the entity which shall have acquired such property or capital stock.

...⁸

1. The Interpretation Of A Successor Obligor Provision

“Successor obligor provisions in bond indentures consist of market-facilitating boilerplate language.” Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp., 29 A.3d 225, 241 (Del.2011) (applying New York law). Boilerplate terms in indentures are “not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture.” Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1048 (2d Cir.1982). “Therefore, in interpreting boilerplate indenture provisions, courts will not look to the intent of the parties, but rather the accepted common purpose of such provisions.” Liberty Media, 29 A.3d at 241 (internal quotation omitted). “Courts strive to give indenture provisions a consistent and uniform meaning because uniformity in interpretation is important to the efficiency of capital markets.” Concord Real Estate CDO 2006–1, Ltd. v. Bank of Am. N.A., 996 A.2d 324, 331 (Del.Ch.2010) (internal quotation omitted), *aff’d*, 15 A.3d 216 (Del.2011) (TABLE).

“Courts enhance stability and uniformity of interpretation by looking to the multi-decade efforts of leading practitioners to develop model indenture

⁸ This provision mirrors the Successor Obligor Supplemental Indenture Provision in the Indentures at issue in this case.

provisions.” *Id.* The authoritative commentary on indenture provisions begins with a 1971 volume, published by the American Bar Foundation, entitled *Commentaries on Model Debenture Indenture Provisions 1965, Model Debenture Indenture Provisions All Registered Issues 1967, and Certain Negotiable Provisions* [hereinafter the *Commentaries*]. The *Commentaries* “provide powerful evidence of the established commercial expectations of practitioners and market participants.” *Concord Real Estate*, 996 A.2d at 331.

Article Eight of the *Commentaries* addresses successor obligor provisions and sets out a model provision comparable in all material respects to those in the Indentures. It states: “The Company shall not ... convey or transfer its properties and assets substantially as an entirety to any Person....” *Commentaries* at 292. ***The Commentaries explain that a covenant of this type is necessary because, if the issuer transferred substantially all of its assets, then “the obligor named in the indenture would cease to operate the business to which, in practical effect, the debenture holders have looked for payment of the debentures.”*** *Id.* at 423.

Courts have described successor obligor provisions in similar terms. ***In the seminal Sharon Steel case, the United States Court of Appeals for the Second Circuit explained that the provisions “protect lenders ... by assuring a degree of continuity of assets.”*** *Sharon Steel*, 691 F.2d at 1050.

The decision to invest in the debt obligations of a corporation is based on the repayment potential of a business enterprise possessing specific financial characteristics.... Obviously, if the enterprise is changed through ... disposition of assets, the financial characteristics and repayment potential on which the lender relied may be altered adversely.

Id. (quoting *Commentaries* at 290). “[A] borrower which sells all its assets does not have an option to continue holding the debt. It must either assign the debt or pay it off.” *Id.* ***At the same time, successor obligor provisions ensure that borrowers have the flexibility to “to sell entire businesses and liquidate, ... or to liquidate their operating assets and enter a new field free of the public debt,” so long as the debt is transferred along with substantially all of the assets or is otherwise paid.*** *Id.* at 1051.

New York law teaches that when determining whether a transaction conveys “substantially all” of a company's assets for purposes of a successor obligor provision, courts consider both quantitative and qualitative factors. *HFTP Invs., L.L.C. v. Grupo TMM, S.A.*, 2004 WL 5641710, at *2 (N.Y.Sup.Ct. June 4, 2004), *aff'd*, 18 A.D.3d 369, 795 N.Y.S.2d 555 (2005).

(*id.* at 828-829, 837-838). In other words, and as Vice Chancellor Laster explains, the Model Indenture Commentaries make clear that Section 11.1 is meant to protect against sham transactions designed to avoid payment of the TruPS where “the obligor named in the indenture would cease to operate the business to which, in practical effect, the debentureholders have looked to for payment of the debentures” (*see Amer. Bar Found., Commentaries On Model Debenture Indenture Provisions, 1965: Model Debenture Indenture Provisions, All Registered Issues, 1967, And Certain Negotiable Provisions Which May Be Included In A Particular Incorporating Indenture 2* at 423 [1971]). The Successor Obligor Supplemental Indenture Provision thus requires the execution of a Supplemental Indenture – which if not executed creates an immediate cause of action for breach. Debt holders thus do not have “to wait to sue.” But, as discussed previously, the failure to execute a supplemental indenture based on the Successor Obligor Supplemental Indenture Provision being triggered (based on the two triggers identified by the Karfunkel Defendants and the Tower Defendants) is not the breach that forms the predicate for the claims in this case.⁹

As to that provision, however, the Plaintiffs argue that the Karfunkel Defendants and the Tower Defendants are nonetheless successors because there was a transfer of substantially all of the Issuer’s assets. They argue that the only significant assets of the Issuers were their insurance subsidiaries, and the acquisitions of those subsidiaries by the Tower Group and Karfunkel Defendants constitute a transfer of substantially all of the Issuer’s assets such that Tower Group,

⁹ It merely confirms the fact that transactions structured to do what the Defendants did here make them successors. Section 14.1 confirms that as such they are responsible for the obligation.

TGIL, and ACP each became a successor under the Successor Obligor Supplemental Indenture Provision requiring them to execute a Supplemental Indenture.¹⁰

More specifically, the Plaintiffs argue that Tower Group, TGIL, and ACP automatically became responsible for the TruPS obligations as Successors when (i) Tower Group became successor to Preserver in 2006 because Preserver's transfer of 100% of its capital stock and its ownership in its insurance subsidiaries to Tower Group because it constituted a sale of substantially all of Preserver's assets, (ii) Tower Group became a successor to CastlePoint when Tower Group became CastlePoint's owner as a result of a merger between Tower Group and CastlePoint's parent company, CP Holdings, in 2008, (iii) TGIL became successor to Tower Group in 2013 when it became the parent of Tower Group after a reverse-merger transaction and publicly acknowledged that it was Tower Group's successor, (iv) ACP became successor to TGIL in 2014 when TGIL and ACP merged, and TGIL subsequently disposed of all its capital stock and allowed ACP's affiliates to enter into renewal rights and reinsurance agreements for policies previously issued by TGIL.

Indeed, ACP's own internal documents reflect the understanding that they were responsible for the TruPS liabilities (NYSCEF Doc. No. 787). ACP included the TruPS as a negative asset on its unconsolidated balance sheet post-transaction, indicating that ACP's business plan considered the TruPS liability their obligation and that they were responsible for it (NYSCEF Doc. Nos. 743, 744). In an April 2014 memorandum, TGIL indicated that "the outstanding trust preferred

¹⁰ To be clear, the Plaintiffs are not suing the Karfunkel Defendants and Tower Group Defendants for their failure to execute a Supplemental Indenture. They are suing them for failing to pay the TruPS obligation as successors pursuant to the Successor Obligor Provisions.

securities, including those which were assumed by the Company through acquisitions, are summarized in the following table,” and proceeded to list the Tower TruPS in said table (NYSCEF Doc. No. 600). In an internal presentation in January 2014 regarding ACP’s acquisition of Tower Group, ACP indicated that, after the acquisition, “ACP Re will retain all other TWGP companies and all of TWGP loss reserves and administer the run-off of TWGP legacy business” (NYSCEF Doc. No. 747 at 4).

Not only did their internal documents reflect the understanding that they were responsible for the obligation to pay the TruPS, ACP and Tower Group also made external representations that they would be responsible for the TruPS. By way of example, the Tower Group submitted notices of deferral to the Trustee for the CastlePoint TruPS interest payments on behalf of CastlePoint, and it did so on Tower Group company letterhead (NYSCEF Doc. Nos. 790-791). Lastly, the Court notes that the market understood that ACP was assuming TGIL’s existing debt. In fact, the A.M. Best credit report indicated that their 2014 ratings for TGIL assumed that ACP would be responsible for the payment of TGIL’s existing debt, including the TruPS (NYSCEF Doc. No. 821).

Thus, on this record, the Tower Group and Karfunkel Defendants are not entitled to dismissal of the breach of contract claims as successor obligors based on their arguments that Successor Obligor Supplemental Indenture Provision for this reason either.

B. Common Law Successor Obligor

As an initial matter, the Court did not previously hold that Bermuda law or Delaware law governs this dispute. As discussed above, the Defendants argued the fiduciary duty claims failed under Bermuda law and under Delaware law because the Company was solvent and that, as such, there was no fiduciary duty claim. The Plaintiffs argued the Company was not solvent and that in the event of insolvency, fiduciary duty claims were not ripe for dismissal. In response, the Court denied the motion to dismiss given the factual dispute surrounding the Company's insolvency but did not resolve definitively what law governs the dispute (NYSCEF Doc. No. 294 at 14).

1. New York Law Governs This Dispute

The first step under New York's choice of law analysis is to determine whether there is an actual conflict between the laws of the two jurisdictions involved (*In re Allstate Ins. Co. and Solarz*, 81 NY2d 219, 223 [1993]). Courts will not engage in a choice of law analysis in the absence of an actual conflict.

The Plaintiffs concede that if Bermuda law applies, dismissal of their claims for breach of contract based on common law successor liability is required. Under New York law, a business entity that acquires assets from another business generally results in no successor liability unless: (i) the buyer expressly/impliedly assumed the debt at issue, (ii) there was a consolidation or merger of the buyer and the seller, (iii) the buyer was a mere continuation of the seller, or (iv) the transaction was a fraud so as to escape other obligations (*Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC*, 94 AD3d 506, 507 [1st Dept 2012]). As such, an actual

conflict exists between the laws of Bermuda and New York as to successor liability, and the Court must conduct a choice of law analysis.

New York courts conduct an “interest analysis” to determine which jurisdiction’s laws should apply to successor liability claims (*In re General Motors LLC Ignition Switch Litigation*, 2017 WL 3382071 at *13 [Aug 3, 2017 SDNY]). Relying on *In re General Motors*, the Tower Group and Karfunkel Defendants argue that New York courts generally apply the law of the state of incorporation to successor liability claims and, as ACP and TGIL are both incorporated in Bermuda, the Court should apply Bermuda law to resolve the issue of common law successor liability. In response, the Plaintiffs argue that the interest analysis requires more than rote referral to the place of incorporation, and upon proper consideration of the interest analysis, the Court should apply New York law.

The interest analysis is a “flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation” (*id.* [quoting *Finance One Public Co. Lmtd. v Lehman Brothers Special Financing*, 414 F3d 325, 337 (2d Cir 2005)]). The contacts of the parties and occurrences with each jurisdiction are thus factors to be considered in applying interest analysis, together with the policies underlying each jurisdiction's rules, the strength of the governmental interests embodied in these policies, and the extent to which these interests are implicated by the contacts (*id.*).

In applying the interest analysis test, Tower Group and the Karfunkel Defendants were headquartered in New York, operated out of New York, and consummated the transaction in New York while relying on their attorneys in New York (NYSCEF Doc. No. 605 at 18:13-24, 38:3-12, 131:17-20). The record is bereft of any evidence which purports to connect these transactions to Bermuda. Meaningful contact with Bermuda on this record is limited to it being the place of incorporation. As such, under the interest analysis test, New York applies.

2. The Tower Group and Karfunkel Defendants are Common Law Successors Under New York Law

Under New York law, the Indentures do not displace common law successor liability because the common law theory is not a separate cause of action, but rather, as the Plaintiffs note, merely works to expand the Plaintiffs' theory of recovery (*see Tribeca Space Managers, Inc. v Tribeca Mews Ltd.*, 200 AD3d 626, 628 [1st Dept 2021]).

Successor liability is an issue for trial under the circumstances because the burden is on the movant to demonstrate that none of the relevant exceptions apply. The Tower Group and Karfunkel Defendants fail to meet their burden because, as discussed above, the record is replete with admissions by TGIL and ACP Re and other contemporaneous evidence that indicate an assumption of the TruPS liability is what was intended (or at least what they were telling the market was to occur) and the Karfunkel Defendants assumed all of TGIL's liabilities (*e.g.*, NYSCEF Doc. No. 738 at 4).

Additionally, the Plaintiffs adduce evidence of a de facto merger, as (i) the trust structure of each Issuer was preserved through each transaction and continued to be wholly owned by the holding

companies both prior to and subsequent to each transaction, and (ii) AmTrust and NatGen took all of TGIL's business operations after the transaction, demonstrating a continuity of management, personnel, physical location, assets, and general business operation in the successor entities.

As to mere continuation, and as the Court previously indicated, the predecessor entities became "empty shell companies" after the transactions (NYSCEF Doc. No. 235 at 3). Indeed, Mr. Hitselberger admitted that none of the entities are operating entities or earn revenue (NYSCEF Doc. No. 731 at 3).

Lastly, summary judgement would be entirely inappropriate in light of the evidence of fraud, and given that the record reflects that Michael Karfunkel (who made all of the relevant decisions) spoliated evidence. His email account was deleted after a litigation hold was implemented, and the defendants submitted a false affidavit to the Court (*cf.* NYSCEF Doc. Nos. 615 and 616).¹¹ In addition, to the extent that ACP's financial statements indicated that the TruPS would be assumed, this too is evidence of fraud, not just by the TruPS Issuers, but also of the regulators as well. Thus, the Tower Group and Karfunkel Defendants are also not entitled to summary judgment on the Plaintiffs' common law theory of successor liability.

C. Alter Ego Liability

In order to pierce the corporate veil, a plaintiff must show that (i) the owners exercised complete domination of the corporation in respect to the transaction at issue, and (ii) such domination was

¹¹ As discussed above, *see, e.g.*, NYSCEF Doc. No. 800.
655881/2017 ALESCO PREFERRED FUNDING vs. ACP RE, LTD.
Motion No. 011 012 013

used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]). Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity (*Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]; *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]).

As discussed above, other than being the place of incorporation, Bermuda has no connection to any relevant conduct or issues in this litigation. Indeed, the Indentures themselves indicate that New York law governs (NYSCEF Doc. Nos. 518-523). As such, New York law governs the alter ego theory of liability.

The Plaintiffs have adduced sufficient evidence to demonstrate that piercing the corporate veil is warranted under New York law under the circumstances. The allegations are not that the Tower Group and Karfunkel Defendants did something that they were permitted to do under the law (*i.e.*, a statutorily authorized consensual foreclosure pursuant to the UCC), but that they did something that they were not permitted to do under the law by misleading the regulators and the investing public, including the Plaintiffs, that the TruPS obligations were to be assumed (*cf. 47 E. 34th St. [NY] L.P. v BridgeStreet Worldwide, Inc.*, 219 AD3d 1196, 1204 [1st Dept 2023]).

There is no question of fact on this record that Michael Karfunkel dominated and controlled the Karfunkel Defendants.¹² To wit, AmTrust, NatGen, Michael Karfunkel, the Michael Karfunkel Family 2005 Trust, and the Michael Karfunkel 2005 GRAT dominated and controlled ACP, which was a shell company. Not only that, but also after the ACP Transaction, he continued to dominate and control TGIL and the Issuers. TGIL did not conduct separate board meetings, had no revenue after the merger, and held assets totaling less than \$1 million. The Tower Group and Karfunkel Defendants then used their control to perpetrate wrongdoing on the Plaintiffs by representing to the marketplace that the obligation was being assumed when they record reflects that this was false and leaving the Issuers with no ability to repay the TruPS. Thus, the Tower Group and Karfunkel Defendants are not entitled to summary judgment as to the Plaintiffs' alter ego theory of liability.

D. The No Recourse Clause

The Court previously rejected the suggestion that the No Recourse Clause found in some, but not all, relevant Indentures bars claims against TGIL, Tower Group, or the Karfunkel Defendants:

The defendants argue that the “solely corporate obligations” clause in the indentures other than those for the Wood River Plaintiffs bar claims brought against TGIL, ACP, and the Karfunkel Defendants as direct or indirect shareholders of the Issuers. The argument fails. The definition of the Company in Section 1.1 of the Indentures (see, e.g., NYSCEF Doc. No. 17) includes “successors and assigns” such that by virtue of the stock sale they became the successor-in-interest to the obligors of TruPS. The Defendants’ argument that the sale of stock did not trigger Section 11.1 because it wasn’t a merger or consolidation and no such supplemental indenture was executed conflates a breach Section 11.1 with the definition of Company and their obligations as “successors” under the indenture. Thus, dismissal must be denied.

¹² By way of example, on January 23, 2014, Mike Saxon of AmTrust indicated by email that AmTrust would not make any decisions without Michael Karfunkel’s approval (NYSCEF Doc. No. 830).

(NYSCEF Doc. No. 294 at 13 [emphasis added]). As the Tower Group and Karfunkel Defendants are the assignees and successors to the Issuers, the No Recourse Clause does not work to shield them from liability.

V. The Karfunkel Defendants are Not Entitled to Summary Judgment on the Tortious Interference Claim (TruPS I third cause of action)

To state a cause of action for tortious interference with contract, the plaintiff must prove “the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom” (*330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 293 AD2d 314, 315 [1st Dept 2002] [citing *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424 (1996)]). However, one cannot tortuously interfere with their own contract (*see Ashby v ALM Media, LLC*, 110 AD3d 459 [1st Dept 2013]).

The Karfunkel Defendants argue, in sum and substance, that (i) they reasonably believed that the insurance companies would profitably run off their existing liabilities, including paying the TruPS, (ii) their actions were justified because ACP acquired TGIL and its subsidiaries through the ACP Transaction, (iii) final approval of the ACP Transaction, which was the Issuer Defendants’ best chance to pay the TruPS, resided with TGIL’s thousands of public shareholders, (iv) the TruPS ultimately went unpaid due to unforeseen liabilities on insurance policies from 2013 and earlier rather than because of the 2014 transaction, and (v) the Karfunkel Defendants were not third parties to the Indentures but first parties as the Issuer Defendants’ successors or alter egos. The arguments all fail.

The Karfunkel Defendants are not entitled to dismissal of the tortious interference claim because they had no economic stake in the Indentures prior to the ACP Transaction. Thus, they cannot now claim the benefit of the economic interest defense (*White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422 [2007]). More importantly, to the extent that the Karfunkel Defendants rely on the fairness opinions and the approval of the ACP Transaction, the approval is tainted for at least two reasons. First, it is tainted by the fact that the Defendants represented to the marketplace that they were assuming the TruPS. Second, the fairness opinions did not consider the value of the TruPS. Having stripped out certain of the assets from the Issuers, the Karfunkel Defendants cannot now claim that they expected the Issuers to be able to perform to pay the TruPS such that they themselves are not liable. Additionally, inasmuch as the record reflects spoliation of evidence, and the submission of a false affidavit to this Court (discussed above), this too mandates denial of the motion. As such, the Karfunkel Defendants are not entitled to summary judgment as to the tortious interference claim asserted against them.

VI. The Tower Group Defendants and Karfunkel Defendants are Not Entitled to Summary Judgment on the Fraud and Aiding and Abetting Fraud Claims (TruPS I fourth and fifth causes of action)

To properly state a claim for aiding and abetting fraud, the complaint must allege (i) the existence of the underlying fraud; (ii) “knowledge of this fraud on the part of aider and abettor;” and (iii) “substantial assistance by the aider and abettor in the achievement of the fraud” (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]).

The Tower Group Defendants and Karfunkel Defendants argue that the fraud claim against TGIL and the aiding and abetting fraud claim against the Karfunkel Defendants fail for the same reasons that the fraud claims against the D&O Defendants fail. Inasmuch as the fraud claims are not dismissed, this argument fails. Additionally, the record evidence demonstrates substantial aid from Michael Karfunkel and the Karfunkel Defendants such that the Karfunkel Defendants are not entitled to dismissal of this claim either.

VII. The Tower Group Defendants and Karfunkel Defendants are Not Entitled to Summary Judgment on the Breach of Fiduciary Duty Claim (TruPS I sixth cause of action)

The Tower Group Defendants and Karfunkel Defendants argue that (i) the fiduciary duty claim against ACP fails because ACP did not owe the Plaintiffs a fiduciary duty since the Plaintiffs had no direct relationship with ACP either before or after the ACP Transaction, and (ii) the aiding and abetting breach of fiduciary duty claim against the Karfunkel Defendants fails because the TGIL board followed appropriate governance procedures, including appointing independent directors, and thus did not substantially assist the D&O Defendants.

As discussed above, ACP owed fiduciary duties to its insolvent subsidiary TGIL. Following the ACP Transaction, ACP became the parent company to TGIL, which was then an insolvent subsidiary. The Karfunkel Defendants then participated in the D&O Defendants' breach of their fiduciary duties in among other things negotiating and finalizing the transaction. As discussed above, this included stripping out valuable assets for a fee that ultimately went to ACP rather than the insurance subsidiaries. As such, the Tower Group and Karfunkel Defendants are not entitled to summary judgment on the breach of fiduciary duty claims against them.

The Court has considered the parties' remaining arguments and finds them unavailing.

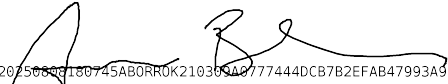
Accordingly, it is hereby

ORDERED that (i) Alesco's motion (Mtn. Seq. No. 011) for summary judgment in TruPS I and (ii) Preferred's motion (Mtn. Seq. No. 004) for summary judgment in TruPS II against the Issuer Defendants are GRANTED; and it is further

ORDERED that the Plaintiffs may submit judgment on notice in accordance with the rulings set forth herein; and it is further

ORDERED that the D&O Defendants' (i) motion (Mtn. Seq. No. 012) for summary judgment in TruPS I and (ii) motion (Mtn. Seq. No. 005) for summary judgment in TruPS II against the Plaintiffs are DENIED; and it is further

ORDERED that the Tower Group Defendants and Karfunkel Defendants' (i) motion (Mtn. Seq. No. 013) for summary judgment in TruPS I and (ii) motion (Mtn. Seq. No. 006) for summary judgment in TruPS II against the Plaintiffs are DENIED.


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DATE

ANDREW BORROK, J.S.C.

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