SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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AUDAX CREDIT OPPORTUNITIES OFFSHORE LTD., AUDAX CREDIT OPPORTUNITIES (SBA), LLC, AUDAX CREDIT BDC INC., AUDAX SENIOR LOAN INSURANCE FUND SPV, LLC, AUDAX SENIOR LOAN FUND III SPV, LLC, AUDAX SENIOR LOAN FUND III (OFFSHORE) SPV, LTD., KOCAA/AUDAX PRIVATE DEBT FUND, LP, AUDAX SENIOR DEBT (AZ) SPV, LLC, AUDAX SENIOR DEBT (MP) SPV, LLC, AUDAX SENIOR LOAN FUND I (OFFSHORE) SPV, LTD., AUDAX SENIOR LOAN FUND (ST) SPV, LLC, AUDAX SENIOR LOAN FUND I (OFFSHORE) SPV II, LTD., BLUEMOUNTAIN CLO 2012-2 LTD, BLUEMOUNTAIN CLO 2013-1 LTD, BLUEMOUNTAIN 2013-2 LTD, BLUEMOUNTAIN CLO 2015-2 LTD, BLUEMOUNTAIN CLO 2015-4 LTD, BLUEMOUNTAIN CLO 2016-1 LTD, BLUEMOUNTAIN CLO 2016-2 LTD, BLUEMOUNTAIN CLO 2018-2 LTD, BLUEMOUNTAIN CLO 2018-3 LTD, BLUEMOUNTAIN CLO XXII LTD, BLUEMOUNTAIN FUJI US CLO II LTD, BLUEMOUNTAIN FUJI US CLO III LTD, GOLUB CAPITAL PARTNERS CLO 19(B)-R, LTD., GOLUB CAPITAL PARTNERS CLO 22(B)-R, LTD., GOLUB CAPITAL PARTNERS CLO 23(B)-R, LTD., GOLUB CAPITAL PARTNERS CLO 26(B)-R, LTD., GOLUB CAPITAL PARTNERS CLO 35(B), LTD., GOLUB CAPITAL PARTNERS CLO 37(B), LTD., GOLUB CAPITAL PARTNERS CLO 39(B), LTD., GOLUB CAPITAL PARTNERS CLO 40(B), LTD., ICG US CLO 2014-1, LTD., ICG US CLO 2014-2, LTD., ICG US CLO 2014-3, LTD., ICG US CLO 2015-2R, LTD., ICG US CLO 2016-1, LTD., ICG US CLO 2017-1, LTD., ICG US CLO 2017-2, LTD., ICG US CLO 2018-1, LTD., ICG US CLO 2018-2, LTD., ICG US CLO 2013-3, LTD., NEW MOUNTAIN FINANCE DB, L.L.C., NEW MOUNTAIN FINANCE HOLDINGS, L.L.C., NEW MOUNTAIN GUARDIAN III SPV, L.L.C., ROMARK CLO-I LTD., ROMARK CLO-II LTD., ROMARK WM-R LTD., BROOKSIDE MILL CLO LTD., JEFFERSON MILL CLO LTD., JACKSON MILL CLO LTD., ADAMS MILL CLO LTD., SUDBURY MILL CLO LTD., YORK CLO-1 LTD., YORK CLO-2 LTD., YORK CLO-3 LTD., YORK CLO-4 LTD., YORK CLO-5 LTD., YORK CLO-6 LTD., Z CAPITAL CREDIT PARTNERS CLO 2018-1 LTD., Z CAPITAL CREDIT PARTNERS CLO 2019-1 LTD.,

Plaintiffs,

- v -

INDEX NO.	565123/2020
MOTION DATE	02/01/2021, 02/01/2021, 02/01/2021, 02/01/2021
MOTION SEQ. NO.	002 003 004 005

DECISION + ORDER ON MOTION

TMK HAWK PARENT, CORP., CENTERBRIDGE PARTNERS, L.P., BLACKSTONE TACTICAL OPPORTUNITIES FUND L.P., OAKTREE STAR INVESTMENT FUND II, L.P., SEVENTH STREET HOLDINGS 1, L.P., SEVENTH STREET HOLDINGS 2, L.P., SEVENTH STREET HOLDINGS 3, L.P., SEVENTH STREET HOLDINGS 4, L.P., SEVENTH STREET HOLDINGS 5, L.P., SEVENTH STREET HOLDINGS 6, L.P., SEVENTH STREET HOLDINGS 7, L.P., SEVENTH STREET HOLDINGS 8, L.P., SEVENTH STREET HOLDINGS 9, L.P., SEVENTH STREET HOLDINGS 10, L.P., SEVENTH STREET HOLDINGS 11, L.P., SEVENTH STREET HOLDINGS 12, L.P., SEVENTH STREET HOLDINGS 13, L.P., SEVENTH STREET HOLDINGS 14, L.P., OAKTREE HUNTINGTON INVESTMENT FUND II, L.P., ASOF HOLDINGS I L.P., ARES INSTITUTIONAL LOAN FUND, L.P., ARES XXVII CLO LTD., ARES XXVIIIR CLO LTD., ARES XXIX CLO LTD., ARES XXXIR CLO LTD., ARES XXXIIR CLO LTD., ARES XXIV CLO LTD., ARES XXXVR CLO LTD., ARES XXXVII CLO LTD., ARES XXXVIII CLO LTD., ARES XXXIX CLO LTD., ARES XL CLO LTD., ARES XLI CLO LTD., ARES XLII CLO LTD., ARES XLIII CLO LTD., ARES XLIV CLO LTD., ARES XLV CLO LTD., ARES XLVI CLO LTD., ARES XLVII CLO LTD., ARES XLVIII CLO LTD., ARES XLIX CLO LTD., ARES L CLO LTD., ARES LI CLO LTD., ARES LII CLO LTD., ARES LIII CLO LTD., ARES LIV CLO LTD., DENALI CAPITAL CLO X LTD., ARES SENIOR LOAN TRUST, FUTURE FUND BOARD OF GUARDIANS ON BEHALF OF FUTURE FUND AND MEDICAL RESEARCH FUTURE FUND, TRANSATLANTIC REINSURANCE COMPANY, RSUI INDEMNITY COMPANY, INC., CIBC ASSET MANAGEMENT INC. AS TRUSTEE OF RENAISSANCE FLOATING RATE INCOME FUND, STICHTING PENSIOENFONDS HOOGOVENS, ARES INSTITUTIONAL CREDIT FUND LP, SEI INVESTMENTS MANAGEMENT CORPORATION ON BEHALF OF SEI INSTITUTIONAL INVESTMENTS TRUST, BOWMAN PARK CLO, LTD., BRISTOL PARK CLO, LTD., BURNHAM PARK CLO, LTD., BUTTERMILK PARK CLO, LTD., CATSKILL PARK CLO, LTD., CHENANGO PARK CLO, LTD., COLE PARK CLO LIMITED, CUMBERLAND PARK CLO, LTD., DEWOLF PARK CLO, LTD., DORCHESTER PARK CLO DESIGNATED ACTIVITY COMPANY, GILBERT PARK CLO, LTD., GRIPPEN PARK CLO, LTD., JAY PARK CLO, LTD., LONG POINT PARK CLO, LTD., SENECA PARK CLO, LTD., STEWART PARK CLO, LTD., TACONIC PARK CLO, LTD., THACHER PARK CLO, LTD., THAYER PARK CLO, LTD., TREMAN PARK CLO, LTD., WEBSTER PARK CLO, LTD., WESTCOTT PARK CLO, LTD., SCOTTISH WIDOWS PENSION TRUSTEES LIMITED AS TRUSTEE OF SCOTTISH WIDOWS RETIREMENT BENEFITS SCHEME, OZLM XVII, LTD., OZLM FUNDING, LTD., OZLM FUNDING IV, LTD., OZLM

XIX, LTD., OZLM XI, LTD., OZLM XXI, LTD., OZLM XXII, LTD., OZLM XVI, LTD., OZLM FUNDING II, LTD., OZLM FUNDING III, LTD., OZLM VI, LTD., OZLM VII, LTD., OZLM VIII, LTD., OZLM IX, LTD., OZLM XII, LTD., OZLM XIII, LTD., OZLM XV, LTD., OZLM XVIII, LTD., OZLM XX, LTD., OZLM XIV, LTD., ABR REINSURANCE LTD., CHUBB EUROPEAN GROUP SE, ACE PROPERTY & CASUALTY INSURANCE COMPANY, J.P. MORGAN BANK (IRELAND) PUBLIC LIMITED COMPANY ON BEHALF OF BLACKROCK BANK LOAN FUND, BLACKROCK ADVISORS, LLC ON BEHALF OF BLACKROCK FLOATING RATE INCOME TRUST, BLACKROCK LIMITED DURATION INCOME TRUST, BLACKROCK CREDIT STRATEGIES FUND, BLACKROCK FUNDS II, AND BLACKROCK FUNDS V, BLACKROCK MULTI-STRATEGY CREDIT FUND LTD., COMMISSION DE LA CONSTRUCTION DU QUEBEC, CORPORATION DES MAITRES ELECTRICIENS DU QUEBEC ON BEHALF OF FONDS DE FORMATION DES SALARIES DE L'INDUSTRIE DE LA CONSTRUCTION DU QUEBEC, BLACKROCK DEBT STRATEGIES FUND, INC., BLACKROCK FLOATING RATE INCOME STRATEGIES FUND, INC., BLACKROCK FUND MANAGEMENT COMPANY S.A. ON BEHALF OF BLACKROCK GLOBAL INVESTMENT SERIES, LOAN FUNDING II, LLC, MAGNETITE XII, LTD., MAGNETITE XIV-R, LIMITED, MAGNETITE XV, LIMITED, MAGNETITE XVI, LIMITED, MAGNETITE XVII, LIMITED, MAGNETITE XVIII, LIMITED, MAGNETITE XIX, LIMITED, MAGNETITE XX, LIMITED, MAGNETITE XXI, LIMITED, MAGNETITE XXII, LIMITED, MAGNETITE VII, LIMITED, MAGNETITE VIII, LIMITED, BLACKROCK MULTI-STRATEGY CREDIT MASTER FUND LTD., CAAPS TRUSTEE LIMITED AS TRUSTEE OF CIVIL AVIATION AUTHORITY PENSION SCHEME, NC GARNET FUND, L.P., FIXED INCOME OPPORTUNITIES NERO, LLC, BLACKROCK SENIOR FLOATING RATE PORTFOLIO

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 61, 62, 63, 64, 65, 66, 67, 68, 93, 94, 96, 97, 98, 99, 137

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 69, 70, 71, 72, 73, 74, 75, 76, 95, 138

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 77, 78, 79, 80, 81, 82, 83, 84, 101, 139

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 44, 45, 46, 47, 85, 86, 87, 88, 89, 90, 91, 92, 100, 140

were read on this motion to DISMISS.

A syndicated loan is a loan extended by a group of lenders (*i.e.*, a syndicate) to a single borrower, typically under a single agreement with common terms. By pooling their resources, the lenders share the benefits and risks of the transaction. Generally speaking, the spirit of such arrangements among lenders is all for one, one for all. But not always.

This dispute arises from the amendment of a syndicated credit agreement that left one group of First Lien lenders (Plaintiffs) subordinated, without their consent, to the interests of another group of First Lien lenders (the Lender Defendants).[1] The Lender Defendants purportedly worked with the Borrower Defendant (TriMark), in a carefully-crafted multi-step process, to swap their First Lien loans for a new category of "super senior" debt that is to be repaid in full before Plaintiffs' nominally "first" priority loans are repaid at all. According to Plaintiffs, the Defendants sought to insulate their maneuver from scrutiny by amending the credit agreement to make it "extraordinarily difficult," if not impossible, for Plaintiffs to challenge the transaction in court.

The results, as alleged by Plaintiffs, were stark and unevenly distributed. On the positive side, the transaction injected $120 million in fresh liquidity for TriMark, a restaurant-supply business struggling in the throes of the COVID-19 pandemic. It also benefited TriMark's Equity

[1] "Plaintiffs" refers to the entities listed in Schedule 1 appended to the Complaint (NYSCEF 1 at 54-55 ["Compl."]). And the term "Lender Defendants" refers to the entities listed in Schedule 2 appended to the Complaint (Compl. at 56-59).

Sponsors, Defendants Centerbridge and Blackstone, who had a financial interest in TriMark receiving additional funding. And of course, it benefited the Lender Defendants, who secured a place at the front of the repayment line, albeit at the cost of extending additional credit to a troubled borrower. Plaintiffs, on the other hand, were left with loans that likely would be worthless in the event of a default. The transaction purportedly caused the rating and market value of Plaintiffs' loans to plummet.

In this action, Plaintiffs denounce Defendants' conduct as a "cannibalistic assault," "lender-on-lender violence," and outright "theft." They seek a declaratory judgment that the amended credit agreement crafted by the Lender and Borrower Defendants is void. They also assert claims for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and violations of the New York Uniform Voidable Transactions Act. Defendants, for their part, assert that they simply were exercising contractual rights as holders collectively of more than 50% of the outstanding loan amount in the syndicate to amend the credit agreement. Moreover, they argue that certain "no-action" provisions contained in the amended credit agreement preclude Plaintiffs from bringing this lawsuit. They move to dismiss the Complaint.

For the reasons set forth below: (i) Defendants' motions to dismiss the claims for declaratory relief (first cause of action) and breach of contract (second and third causes of action) are **denied**; and (ii) Defendants' motions to dismiss the claims for breach of the implied covenant of good faith and fair dealing (fourth cause of action), tortious interference with contract (fifth cause of action), and violation of the UVTA (sixth cause of action) are **granted**.

FACTUAL BACKGROUND

A. The Original Agreement

1. <u>The TriMark LBO</u>

TriMark, a Delaware corporation with its principal place of business in Massachusetts, is a leading distributor of food service equipment (Compl. ¶20).[2] In August 2017, two private equity firms, Centerbridge Partners, L.P. ("Centerbridge") and Blackstone Tactical Opportunities Fund, L.P. ("Blackstone"), acquired a combined 86.6% equity interest in TriMark through a $1.265 billion leveraged buyout ("LBO") (*id.* ¶¶40-41).

An LBO, as its name suggests, is an acquisition financed with a substantial amount of debt (*id.* ¶34, 36). Loans financing such transactions tend to be riskier than traditional commercial loans because, by definition, they are made to heavily leveraged borrowers with lower credit ratings (*id.*). Case in point, at the time of the TriMark LBO, TriMark was rated B3 by Moody's and B by Standard & Poor's (*id.* ¶40). Such borrowers often must work with banks to structure, arrange, and eventually sell (or "syndicate") leveraged loan interests to other investors to diffuse the risk exposure of the loan (*id.* ¶36).

The TriMark LBO was financed by an $820 million syndicated loan (the "Leveraged Loan") (*id.* ¶41), which was eventually syndicated to lenders that include Plaintiffs and the Lender Defendants (*id.*). The Leveraged Loan had two tranches – First Lien and Second Lien – both secured by the same collateral, which included TriMark's capital stock and other assets (*id.* ¶42). As the name suggests, the First Lien tranche (a total of $585 million) had priority above

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[2] The following statement of facts is based on the allegations in the Complaint, which are taken to be true solely for purposes of this motion to dismiss (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]).

the Second Lien tranche (*id.* ¶43). In other words, in the event of a default, TriMark had to pay the First Lien Lenders in full before it paid the Second Lien Lenders anything (*id.*). Plaintiffs and the Lender Defendants were all Lenders in the First Lien tranche (*id.*).

The First Lien Lenders made the $585 million loan to TriMark under a First Lien Credit Agreement, issued on August 28, 2017 and amended on September 27, 2017 (the "Original Agreement") (NYSCEF 23). In Plaintiffs' view, the Original Agreement guaranteed that all first-lien lenders would share pro rata in the loans' benefits and losses and have priority claims to the collateral above anyone else in the event of a liquidation. For the next three years – until September 2020 – TriMark made quarterly payments under the Original Agreement without issue (*id.* ¶44).

2. <u>"Required Lenders" and "Sacred Rights"</u>

The Original Agreement provides that any of its provision, except for certain so-called "sacred rights" provisions, could be "waived, amended or modified . . . pursuant to an agreement or agreements in writing" by the Company and the "Required Lenders" (Original Agreement §9.02 [b]).[3] "Required Lenders" are defined to mean:

> [A]t any time, Lenders having or holding more than 50.0% of the outstanding Term Loans and unused Commitments at such time; provided that (a) the total outstanding Term Loans subject to Section 9.04(g) and unused Delayed Draw Commitments of the Borrower or any Affiliate thereof (other than any Affiliated Debt Fund) and (b) whenever there are one or more Defaulting Lenders, the total outstanding Term Loans and Commitments of each Defaulting Lender shall, in the case of each of clauses (a) and (b), be excluded for purposes of making a determination of Required Lenders.

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[3] The term "sacred rights" does not appear in the agreements at issue, but both sides use the term to denote the subset of contract rights guarded by special consent requirements in section 9.02 [b] and for convenience the Court will do the same (*see N. Star Debt Holdings, L.P. v Serta Simmons Bedding, LLC*, 2020 N.Y. Slip Op. 31954[U], 3 [Sup Ct, New York County 2020] [referencing "sacred rights" in a credit agreement].

Section 9.02 [b] requires that "an agreement or agreements" between or among TriMark and any Required Lenders to amend the Original Agreement must have "the written consent of each Lender directly and adversely affected" by such agreement or agreements if it would impact certain sacred rights, which Section 9.02 [b] groups in two categories.

First, Lenders have the right to veto any amendment that "directly and adversely" affects that Lender by: (a) increasing the Commitment of any Lender; (b) reducing the principal amount or rate of interest of any Loan; (c) postponing the maturity of any Loan; or (d) changing the "waterfall" provisions in section 7.03 of the Original Agreement or Section 4.02 of the Collateral Agreement (*see id.* §§9.02 [b] [i] [A]-[D]). ***Second***, all Lenders – whether or not they are affected by any such change – must consent to any amendment that reduces the percentages set forth in the definitions of "Required Lenders" or "Majority in Interest" or releases Guarantees or Collateral (*see id.* §§9.02 [b] [ii]-[v]).

B. The Liquidity Transaction

1. TriMark Announces the Liquidity Transaction

The COVID-19 pandemic brought about the suspension of indoor restaurant dining in many states and, predictably, put tremendous strains on TriMark's business (Compl. ¶45). In June 2020, Moody's downgraded TriMark's debt to Caa2 (*id.*). And by August 2020, the First Lien Debt was trading in the high 70s cents on the dollar (*id.*). "TriMark's financial outlook remained grim" that summer (*id.* ¶45).

During the late spring and summer of 2020, a group of Lenders formed a committee to engage with TriMark to try to understand whether the company needed additional liquidity to weather the stress caused by the pandemic and, if needed, to explore potential pro rata financing options (*id.* ¶46). TriMark allegedly denied to the committee, and to the public markets, that it

had any near-term cash issue, that it required additional liquidity, or that it had spoken to outside financing sources (*id.*).

Then, on September 14, 2020, TriMark announced a new transaction (the Liquidity Transaction), which included an agreement between TriMark and the Participating Lenders to amend the terms of the Original Credit Agreement to eliminate the restrictions on TriMark's issuance of incremental senior debt (*see* NYSCEF 25, Art. VI [redline showing changes in Amendment]; *compare with* Original Credit Agreement §6.01 [a] ["The Borrower will not, and will not permit any Restricted Subsidiary to, incur or permit to exist any Indebtedness, except [specified exceptions]"]; *see* Oral Arg. Tr. at 11-12 [NYSCEF 170] [TriMark's counsel noting "we couldn't issue more senior secured debt without amending the credit agreement"]).

Plaintiffs were not given advance notice of the Liquidity Transaction (Compl. ¶47). That, Plaintiffs say, was by design. According to Plaintiffs, Defendants (including members of the Lenders committee) "were huddled in a back room to cut a deal with TriMark that would not only provide new cash to the company, but would also benefit Lender Defendants while breaching contractual duties owed to Plaintiffs and causing Plaintiffs to incur substantial financial losses" (*id.* ¶46). Plaintiffs further allege, on information and belief, that "this scheme was chiefly hatched and led by TriMark's private equity sponsor, Centerbridge, and two of the Lender Defendants, Oaktree and Ares," and that "these parties induced TriMark and the remaining Lender Defendants to enter into the unlawful transaction challenged herein" (*id.*).

2. <u>Features of the Liquidity Transaction</u>

The Liquidity Transaction had three main components, effected through a series of interlocking agreements executed the same day, principally among TriMark, the Lender Defendants, and non-party Alter Domus (US) LLC ("Alter Domus").

First, TriMark entered into a Super Senior Credit Agreement (the "Super Senior Credit Agreement"). Pursuant to that Agreement, the company issued new "First-Out Super Senior Debt" to a group of unidentified Lenders, which on information and belief included one or more Lender Defendants, for $120 million. This new debt was secured by the same collateral that secured TriMark's existing First Lien Debt. If TriMark defaulted, it purportedly would repay this new First-Out Super Senior Debt before paying any other debt—including its existing First Lien Debt. TriMark did not offer to issue this new debt to Plaintiffs (*id.* ¶48).

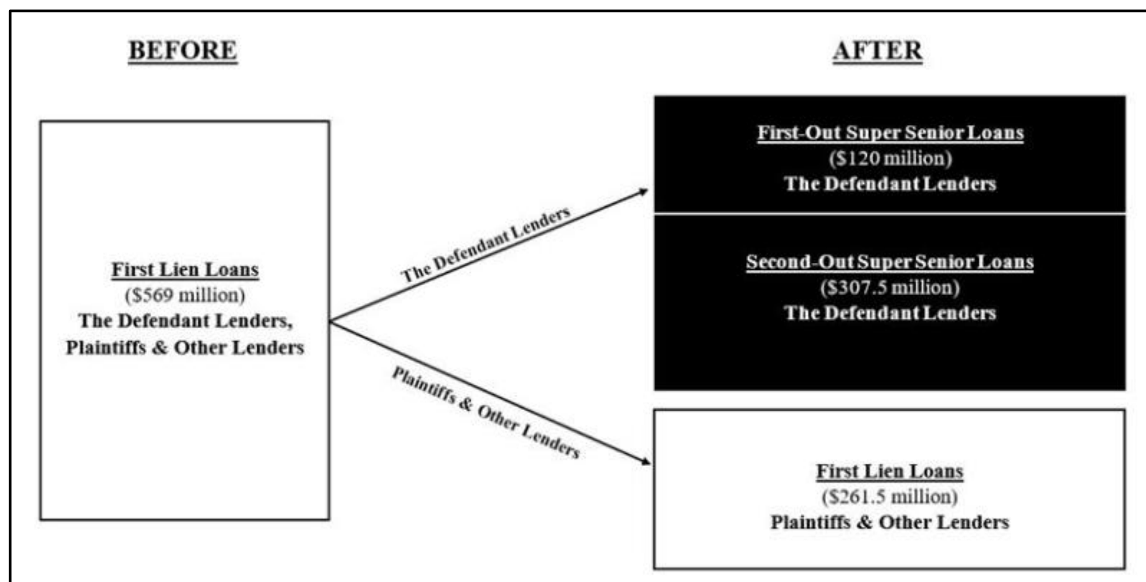
Second, TriMark issued $307.5 million in new "Second-Out Super Senior Debt" to Lender Defendants in a dollar-for-dollar exchange for their existing $307.5 million face amount of First Lien Debt, which was automatically retired upon assignment back to TriMark. At this time, the Lender Defendants' First Lien Debt was trading at about 78 cents on the dollar, representing a total market value of about $239.85 million. As a result, the Second-Out Super Senior Debt-for-First Lien Debt exchange would net the Lender Defendants approximately $67.65 million in increased value. The Second-Out Super Senior Debt was secured by the same collateral as the First Lien Debt but had a higher priority claim to that collateral. So, if TriMark defaulted, it purportedly would repay this Second-Out Super Senior Debt right after repaying the First-Out Super Senior Debt, but before paying any of Plaintiffs' First Lien Debt. As a result, the Second-Out Super Senior Debt was significantly more valuable than the First Lien Debt it replaced. By exchanging the First Lien Debt for an identical face amount of Second-Out Super Senior Debt, TriMark valued the First Lien Debt at an above-market price. TriMark did not offer or issue this new debt to Plaintiffs (*id.* ¶¶49-50).

Third, Plaintiffs allege that Lender Defendants and TriMark stripped covenants from the First Lien Credit Agreement, which removed bargained-for protections for Plaintiffs' investment.

Among other things, this alleged covenant-stripping removed Plaintiffs' rights to information regarding their investment, thereby restricting Plaintiffs' ability to make informed decisions about whether to keep or sell their debt (*id.* ¶51).

3. The Impact of the Liquidity Transaction

From Plaintiffs' perspective, the Liquidity Transaction was immediately detrimental to their interests because it effectively transformed their First Lien Debt into third lien debt, ranking below in priority to $427.5 million in new First-Out and Second-Out Super Senior Debt (*id.* ¶57).



(*id.* at 28).

This negative impact was reflected in the market's assessment of the exchange. S&P soon lowered its "recovery rating" on TriMark's First Lien Debt, and the market price of the First Lien Debt dropped (Compl. ¶¶58-59).

C. The Amended Agreement

As described by Plaintiffs, the Amended Agreement was the linchpin to the Liquidity Transaction. It lifted restrictions on TriMark's ability to take on new "super senior" debt, enabled the Lender Defendants to usurp Plaintiffs' right to Collateral proceeds, and restricted Plaintiffs' right to challenge the transaction in court.

1. Amended Debt and Collateral Provisions

In sections 2.11 [a] [ii], [e] [i], and [f] [i], the Original Agreement permits TriMark to offer to prepay First Lien Debt only on a "pro rata basis" (Compl. ¶64). Deleting those sections, in section 2.11 [a] [i] [A], the Amended Agreement purportedly lets TriMark prepay Term Loans "at, below, and/or above par at its sole discretion[] … on a non-pro rata basis" (*id.* ¶74). In section 2.20, the Original Agreement lets TriMark incur new debt only if it ranks equal in priority of payment and security or lower than existing First Lien Debt (*id.* ¶62). Deleting that section, in section 2.21, the Amended Agreement purportedly lets TriMark refinance debt senior to the First Lien Debt on a non-pro rata basis with any Lender (*id.* ¶74). And in section 2.25, the Original Agreement lets TriMark offer to exchange debt only with "all" First Lien Lenders on a pro rata basis (*id.* ¶63). Modifying that provision, the Amended Agreement purportedly lets TriMark exchange debt with "one or more" Lenders on a non-pro rata basis (*id.* ¶¶63, 74).

In a similar vein, in sections 6.01 and 6.02 of the Original Agreement, TriMark covenants not to incur new debt or new liens on the Collateral senior in right of payment or security to the First Lien Lenders' interests, such as the Super Senior Debt (*id.* ¶62). The Amended Agreement deletes Article VI in its entirety (*id.* ¶68).

Next, Defendants purported to rewrite the First Lien Lenders' priority rights to collateral proceeds in a liquidation. Section 4.02 of the Collateral Agreement sets up a waterfall among

three separate constituents in the credit arrangement, with collateral proceeds going first to reimburse certain costs and expenses of the Collateral Agent, then pro rata "to the payment in full of [the First Lien Debt]", and then to other parties. This structure is "[s]ubject to the terms of the Intercreditor Agreements," a defined term incorporated from the Original Agreement (see Collateral Agreement §1.01 [a]; Compl. ¶73; Original Agreement at 48). Under the Original Agreement, the structure ensured that First Lien Lenders had priority over other Lenders in rights to Collateral proceeds. But the Amended Agreement modifies the definition of "Intercreditor Agreements" to include the new Super Senior debt, which means that the Super Senior Lenders now take priority above the First Lien Lenders in the order of distribution (Compl. ¶¶73-74).

2. <u>Amended No-Action Provisions</u>

The Original Agreement contained a narrow "no-action" provision that prohibited Lenders from bringing suit in their own name "to realize upon any of the Collateral or to enforce any Guarantee of the Secured Obligations," requiring instead that such actions be pursued by the Administrative Agent, which at the time was Barclays Bank PLC (Compl. ¶¶ 60, 72, 74).

The Amended Agreement imposed substantial new restrictions on First Lien Lenders' ability to bring suit to enforce their rights. Specifically, Section 9.18 of the Amended Agreement precludes any First Lien Lender from "tak[ing] or institut[ing] any actions or proceedings, judicial or otherwise, for *any ... right or remedy* or assert[ing] *any other Cause of Action*" not only against TriMark but also, "in a notable departure from industry norms," the Lender Defendants (*id.* ¶72 [emphasis added]). Instead, "the remaining First Lien Lenders purportedly had to direct [the Administrative Agent] to sue." (*id.* ¶¶ 72, 74).

However, the ability to "direct" had a new and significant catch. Under Section 9.03[f] of the Amended Agreement, the Administrative Agent may not proceed unless the Lenders post

a cash indemnity "of ***not less than*** the sum of (x) all fees, costs and expenses of the Administrative Agent determines, ***in its sole discretion***, could foreseeably be incurred in connection with such action and (y) the amount of any claims, obligations or liability, via counter-claims or otherwise, that the Administrative Agent determines, ***in its sole discretion***, could foreseeably could be awarded to the defendants in connection with such action" (NYSCEF Doc. No. 24 at p. 196-97 [emphasis added]; Compl. ¶ 72, 74). For good measure, the Amended Agreement purportedly indemnifies the Administrative Agent "for acts taken in bad faith." (*id.* ¶ 71).

These new restrictions were "intended to make it extraordinarily difficult for Plaintiffs to bring suit – if the Amended Agreement was valid" (*id.* ¶ 72). According to Plaintiffs, Barclays Bank PLC "refused to participate in this illicit Scheme and resigned as Administrative Agent" (*id.* ¶¶60-61). Defendants then replaced Barclays with Alter Domus (US) LLC, which allegedly "has engineered a variety of similar illicit transactions" (*id.* ¶61).

Finally, while section 9.03 [b] of the Original Agreement required TriMark to indemnify the First Lien Lenders for "any and all losses, claims, damages and liabilities" and related "legal fees and expenses" (*id.* ¶74; *see id.* ¶¶71-72), the Amended Agreement strips those indemnification rights (*id.* ¶71) while at the same time, as noted above, broadening the indemnification of the Administrative Agent to include "acts taken in bad faith."

D. The Instant Action

On November 7, 2020, Plaintiffs commenced this action by Summons and Complaint (NYSCEF 1), bringing claims against the Lender Defendants and Tri-Mark for (1) a declaratory judgment that the Amended Agreement is void because it was invalidly adopted (First Cause of

Action; (2) breaches of the Original Agreement (Second and Third Causes of Action); (3) breaches of the implied covenant of good faith and fair dealing (Fourth Cause of Action); and (4) violations of the New York Uniform Voidable Transactions Act ("UVTA") (Sixth Cause of Action). Plaintiffs also bring a claim against the Equity Sponsor Defendants (Centerbridge and Blackstone) for tortious interference with contract (Fifth Cause of Action).

DISCUSSION

"On a CPLR 3211 motion, the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Int'l*, 80 AD3d 448, 449 [1st Dept 2011], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[H]owever, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017] [citations omitted]).

A motion to dismiss under CPLR 3211(a)(1) on the basis of documentary evidence outside the Complaint "may be granted 'only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law'" (*id.* at 449-50 [alteration in original], quoting *Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

A. The Amended No-Action Provisions Do Not Mandate Dismissal of Plaintiffs' Claims

As a threshold matter, Defendants assert that Plaintiffs do not have standing to assert their claims because they failed to comply with the amended no-action provisions requiring

Plaintiffs to pre-fund a cash indemnity and request the Administrative Agent to initiate litigation on their behalf. The Court rejects that argument.

The Court of Appeals has cautioned that "no-action clauses are to be *construed strictly* and thus *read narrowly*" (*Quadrant Structured Products Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014] [emphasis added]). The "primary purpose" of such provisions, which are found in a variety of multiparty financial agreements, "is to protect issuers from the expense involved in defending [individual] lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors" (*id*. at 565). "These limitations … protect[] against the risk of strike suits" and "make[ ] it more difficult for individual bondholders to bring suits that are unpopular with their fellow bondholders" (*id.* at 565-66; *see also Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 184 [SD NY 2011] ["[t]he purpose of no-action clauses … is to protect the securitizations—and in turn other certificateholders—from the expense of litigating an action brought by a small group of certificateholders that most investors would consider not to be in their collective economic interest"]).

Within those parameters, no-action clauses typically are "not unenforceable as violative of public policy, given [their] salutary purpose of preventing undue expense to certificate holders and inconvenience to the investment vehicle in general," and are "not unconscionable" (*Anato Opportunity Fund I, LP v Wells Fargo Bank, N.A.*, 153 AD3d 1161, 1162 [1st Dept 2017]).

This is not, however, a typical case. The parties have not cited, and the Court has not found, any case in which a no-action provision was strategically deployed in the manner alleged here – by a subset of lenders, without notice or consent, as part of a larger scheme to breach and then exit the agreement. The amended no-action provisions were, according to Plaintiffs,

purpose-built to prevent *these Plaintiffs* from suing *these Defendants* in connection with *this transaction* – a preemptive self-pardon, of sorts. Subtle this was not.

Moreover, in addition to prohibiting Plaintiffs from suing directly, the provisions require Plaintiffs to fund a cash indemnity with no upper boundary – "not less than" the costs of litigation plus the defendants' potential damages with respect to unspecified counterclaims – that rests in the "sole discretion" of an entity hand-picked by the Lender Defendants for the task. That requirement is particularly burdensome here, according to Plaintiffs, because "many of the lenders here are collateralized loan obligations whose investors may number in the hundreds," and which "do not typically have the liquidity to post an indemnity of this magnitude or potentially even the legal right to do so," rendering the entire process "futile" (*see* Oral Arg. Tr. at 46 [NYSCEF 170]). Finally, Plaintiffs allege that the amended no-action provisions are themselves integral components of Defendants' broader scheme to deprive Plaintiff of "sacred rights" protections for which their consent is expressly required in the Amended *and* Original Agreements.

No-action provisions are enforceable, first and foremost, because they reflect an *ex ante agreement* to sacrifice certain individual rights for the "salutary purpose" of benefiting the venture as a whole (*see, e.g.*, *Sass v New Yorker Towers, Ltd.*, 23 AD2d 105, 107-08 [1st Dept 1965] [no-action provision was not "unconscionable" or "unreasonable" where "[a] mere reading of the debenture reveals the terms and conditions are set forth clearly," "the high rate of interest provided would, under ordinary conditions, provoke more than a casual interest in the reading in order to ascertain what limitations were consequent upon the enjoyment of such a generous return," and "the stockholders bound themselves because of a common interest—the protection of their investment already made in the corporation"]; *Feldbaum v McCrory Corp.*, CIV. A.

11866, 1992 WL 119095, at *7 [Del Ch June 2, 1992] ["courts systematically conclude that, in consenting to no-action clauses by purchasing bonds, plaintiffs waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee, unless they first comply with the procedures set forth in the clause"]; *Friedman v Chesapeake & Ohio Ry. Co.*, 261 F Supp 728, 730 [SD NY 1966] [enforcing restriction to sue under indenture where the provision "fairly places the bondholder on notice that his rights to sue before the stated maturity date are restricted and conditioned by the indenture" and "plaintiff has had knowledge of the indenture's provisions for at least ten years"], *affd sub nom. Friedman v Chesapeake & O. Ry. Co.*, 395 F2d 663 [2d Cir 1968]).

Here, taking Plaintiffs' allegations as true, there was no *ex ante* agreement to the no-action provisions *or* salutary benefit. Plaintiffs signed on to the substantially narrower no-action provisions in the Original Agreement and did not consent to the amendment. Moreover, the amended provisions lack any semblance of arm's-length agreement because the Lender Defendants allegedly crafted them with a view to *immediately exiting the contract*, thus gaining the protective benefit of the no-action provisions' amended terms without ever having to abide by them as parties to the contract. Even assuming the Original Agreement permitted (or at least did not expressly prohibit) "Required Lenders" to amend the no-action provision in some respects, it cannot reasonably be construed to give Defendants *carte blanche* to make it exorbitantly expensive, if not impossible, for Plaintiffs to enforce their *un*-amendable consent rights under Section 9.02 [b] of the Original Agreement.

Nor does the amendment of the no-action provisions serve the "salutary purpose of preventing undue expense to certificate holders and inconvenience to the investment vehicle in general" (*Anato*, 153 AD3d at 1162). Regardless of the ultimate merit of Plaintiffs' claims, it

cannot seriously be questioned — at least on this motion to dismiss — that Defendants' amendment of the no-action provisions was an act of *self*-interest, not a consensual decision to promote the interest of the "investment vehicle in general." And it certainly was not one to which the other First Lien Lenders willingly signed on.[4]

The authorities on which Defendants rely are inapposite. Most of them simply interpreted or enforced no-action clauses that were unquestionably valid (*Quadrant*, 23 NY3d at 565-66 [answering certified question regarding scope of no-action provision]; *Emmet & Co.*, 37 Misc. 3d at 858-61; *Feldbaum*, 1992 WL 119095, at *7-8; *RBC Capital Mkts., LLC v Educ. Loan Tr. IV*, 2011 WL 6152282, at *5-7 [Del. Ch. Dec. 6, 2011]). Defendants also cite to *Eaton Vance*, in which the Court enforced an amended no-action provision because – as here – "amendment of the no-action clause [did] not require unanimous consent of the Lenders, but only consent of the Required Lenders (which indisputably was procured)" (2018 WL 1947405 at *4 n.12). But that case is distinguishable in several respects. Most notably, the court in *Eaton Vance* did not address the argument, raised by Plaintiffs here, that the amendment itself was instrumental to the disputed transaction. Indeed, the disputed transaction in *Eaton Vance*

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[4] The Court sees no basis for Defendants' conclusory assertion that Plaintiffs' claims would be barred under the no-action provision in the *Original Agreement* (NYSCEF 7 at 10-11 n.4). That provision states that: "[N]o Secured Party shall have any right individually to ***realize upon any of the Collateral or to enforce any Guarantee of the Secured Obligations***, it being understood and agreed that all powers, rights and remedies under the Loan Documents may be exercised solely by the Administrative Agent on behalf of the Secured Parties in accordance with the terms thereof" (Original Agreement at 170 [emphasis added]). In this action, Plaintiffs do not seek to "realize upon any of the Collateral" or to "enforce any Guarantee of the Secured Obligations" here. In the absence of a clear provision prohibiting First Lien Lenders from pursuing claims such as those presented here, the Court will not construe them so broadly, at least on a motion to dismiss (*Quadrant*, 23 NY3d at 560 [no-action provisions must be "construed strictly" and "read narrowly"]). Defendants clearly knew how to draft such a provision when that was their intention. They did so in the Amended Agreement, but not in the Original Agreement.

(another debt restructuring) was being discussed (and objected to) by the plaintiffs months before the amendment occurred (*id.* at *3); they were not part of a single choreographed maneuver, as alleged here. In any event, the court in *Eaton Vance* found that *both* versions of the no-action clause barred at least some of the plaintiffs' claims (*id.* at *7 n.16), which is not the case here.

For the foregoing reasons, and consistent with the mandate that such provisions be construed narrowly to reflect the agreement among the parties, the Court finds that the amended no-action provisions are unenforceable and inapplicable to the claims asserted in this action. They were never agreed to by the parties to the Original Agreement, do not serve the "salutary purpose" that generally supports enforceability of such restrictions on access to the courts, and are alleged to be an integral part of Defendants' breach of contract. This holding is confined to the allegations made in the Complaint and does not reflect hostility to no-action provisions in general.

B. Declaratory Judgment (First Cause of Action)[5]

Turning to the merits of Plaintiffs' claims, their first cause of action seeks "a declaration that the Amended Agreement is not a valid and enforceable contract, and is thus void" (Compl. ¶91) because (1) the amendments lacked the consent of "Required Lenders" under section 9.02

[5] The first, fourth, and sixth causes of action are brought on behalf of all Plaintiffs against TriMark and all Plaintiffs except the Golub Lenders against the Defendant Lenders. The Golub Lenders also do not join in the third cause of action against the Defendant Lenders, and in the fifth cause of action against the Equity Sponsors. For simplicity's sake, though, the Court will use the term "Plaintiffs" throughout this opinion.

[b] (*id.* ¶84) and, independently, (2) the amendments lacked the additional consent required to approve changes to sacred rights under section 9.02 [b] (*id.* ¶¶84-89).

In a case such as this one, in which Defendants rely principally on the text of the parties' contract, dismissal is warranted only when the agreement "unambiguously contradicts the allegations supporting a [plaintiff's] cause of action" (*150 Broadway N.Y. Assocs., L.P. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). An agreement is unambiguous if "the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference in opinion" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 [2002] [quotations omitted]). Where the parties have set down their agreement in a clear, complete document, their writing should be enforced as to its unambiguous terms (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]).

An agreement does not become ambiguous "simply because the parties to the litigation argue different interpretations" (*Riverside S. Planning v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008] [internal citation omitted], aff'd 13 NY3d 398 [2009]). "To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation. The existence of ambiguity must be determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording considered in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017]). Whether an agreement is ambiguous is "a question of law for the court" to decide (*Taussig v Clipper Grp., L.P.*, 787 NYS2d 10, 11 [1st Dept 2004]).

With those principles in mind, we turn to the parties' specific arguments.

1. Approval by the Required Lenders

First, Plaintiffs' assertion that the Amended Agreement is invalid because it lacked the approval of the "Required Lenders," as that term is used in section 9.02 [b] of the Original Agreement, is unavailing. As noted above, Required Lenders are defined as "Lenders having or holding more than 50.0% of the outstanding Term Loans and unused Commitments **at such time**" (Original Agreement §1.01 [emphasis added]), with crucial caveats. Excluded from the 50% tally are "the total outstanding Term Loans subject to Section 9.04(g) and unused Delayed Draw Commitments of the Borrower or any Affiliate thereof (other than any Affiliated Debt Fund)" (*id.*).

Even assuming the truth of Plaintiffs' factual allegations, the Participating Lenders' Term Loans were not "subject to" section 9.04 [g] "at such time" as they consented to the amendments.[6] Section 9.04 [g] permits "[a]ny Lender," "at any time," to "assign all or a portion of its Term Loans, and its related rights and obligations under th[e] Agreement," and then sets out the consequences flowing from such an assignment. By its terms, section 9.04 [g] only applies to the extent Term Loans have actually changed hands (*see, e.g.*, Original Agreement §9.04 [g] [3] ["[I]n connection with ***any assignment effected*** pursuant to a Dutch auction or open market purchase, ..."] [emphasis added]; *id.* §9.04 [g] [4] [calculating Affiliated Lender Cap "at the time such Loans are purchased"]; *id.* §9.04 [g] [7] ["[A]ny Term Loans ***acquired by*** Holdings, the Borrower or any of their respective Restricted Subsidiaries shall, to the extent permitted by applicable Requirements of Law, be retired and immediately canceled promptly upon the acquisition thereof"] [emphasis added]).

[6] Consequently, the Court need not – and does not – wade into the dispute over "the rule of the last antecedent."

It is undisputed that the amendments at issue here preceded the assignment of Term Loans to TriMark (Compl. ¶86 [alleging that "the Amended Agreement t[ook] effect 'immediately prior' to the Open Market Purchase Agreements"]; *see* Amended Agreement §10 [a]). Therefore, the Participating Lenders' Term Loans were not "subject to" Section 9.04 [g] when they agreed to the amendment.

Faced with analogous provisions, courts have hewn strictly to the chronology required by the contracts (*see In re Murray Energy Holdings Co.*, 616 BR 84, 97-98 [Bankr SD Ohio 2020] [rejecting argument that "Lenders' consents to the Third Amendment should not be counted because they had already committed to sell their loans back to Murray at the time they executed the Third Amendment" as "unwarranted logical leap" since "[c]ommitting to do something is not, of course, the same thing as doing it"]; *MeehanCombs Glob. Credit Opportunities Funds, LP v Caesars Entertainment Corp.*, 80 F Supp 3d 507, 517 [SD NY 2015] [notes were not "owned" by company and therefore not disqualified from "count[ing] toward the required majority needed for" amendment approval "[b]ecause the . . . [t]ransaction was structured so that the [f]avored [n]oteholders' consents were given *before* the notes were sold"]).

The Court accepts as true, for present purposes, that the Participating Lenders understood, prior to the amendment, that they were going to transfer their First Lien Debt to TriMark under section 9.04 [g] (Compl. ¶75). That said, the Participating Lenders' intent prior to the assignment is only relevant to section 9.04 [g] if section 9.04 [g] can apply prior to an assignment. But Plaintiffs do not identify any part of section 9.04 [g] that works that way.[7]

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[7] In arguing for a broader "common usage" of the term, Plaintiffs cite only to one context-specific example – the U.S. Supreme Court's opinion in *Auer v Robbins* (519 US 452 [1997]), which applied deferential review to a federal agency's analysis of the phrase in the Fair Labor Standards Act. That case is inapposite here.

Moreover, other parts of the contract confirm that the order of operations matters. Section 9.02 [d], for example, states that only "the Term Loans of any Lender that is ***at the time*** . . . an Affiliated Lender" are excluded from being "Required Lenders" for a given vote.

Accordingly, Plaintiffs' argument the Lender Defendants were not Required Lenders when they approved the Amended Agreement fails as a matter of law.

2. Breach of "Sacred Rights" Provisions

Plaintiffs have, however, stated a viable claim that the Amended Agreement was invalid because it impinged upon Plaintiffs' "sacred rights" under section 9.02 [b] [i] of the Original Agreement without their consent.

a. "Agreement or Agreements"

Initially, the Court finds that the undefined term "agreement or agreements" in section 9.02 [b] reasonably can be read to implicate the Liquidity Transaction *as a whole*, rather than only to the portion of the alleged "scheme" that involved amending the credit agreement itself (*see Bitsight Techs., Inc. v SecurityScorecard, Inc.*, 143 AD3d 619, 620 [1st Dept 2016] [declining to dismiss contract claim because definition of term "Confidential Information" was ambiguous]; *see also Rudman v Cowles Commc'ns, Inc.*, 30 NY2d 1, 13 [1972] ["Whether the parties intended to treat both agreements as mutually dependent contracts . . . is a question of fact . . . ."]). Agreements "executed at the same time, by the same parties, and for the same purpose . . . are, in the eye of the law, one instrument" (*Fernandez v Cohen*, 110 AD3d 557, 558 [1st Dept 2013]). The Liquidity Transaction allegedly comprised a suite of contracts that "are interdependent, repeatedly refer to each other, involve substantially the same parties, and were designed to effectuate the same purpose" (Compl. ¶86). Arguably, then, the Liquidity Transaction is a single "agreement" for purposes of Section 9.02 [b]. Defendants' argument that

the provision can *only* be read as applying to the portion of the Liquidity Transaction on which they choose to focus is unavailing on this motion to dismiss.

b. Implicating Sacred Rights

Taking Plaintiffs' factual allegations as true, and giving them the benefit of all reasonable inferences, Plaintiffs state a viable claim that the Liquidity Transaction required their consent under, at least, section 9.02 [b] [i] [D].[8]

That provision states as follows:

> [N]o such agreement shall . . . without the written consent of each Lender directly and adversely affected thereby: . . . **(D) waive, amend, or modify (i) Section 7.03 or (ii) Section 4.02 of the Collateral Agreement in a manner that would by its terms alter the order of application of proceeds**; . . .

Section 4.02 of the Collateral Agreement, in turn, sets up a waterfall among three separate constituents in the credit arrangement. It provides that, "[s]ubject to the terms of the Intercreditor Agreements, the Administrative Agent shall apply the proceeds of any collection or sale of Collateral, including any Collateral consisting of cash" to those three groups in a prescribed order (*id.*)

The Amended Agreement changed the definition of "Intercreditor Agreements" to include the new Super-Priority Intercreditor Agreement (NYSCEF 25 at 36 [redline showing changes in Amendment]), which effectively modifies section 4.02. That modified definition is then expressly incorporated in the Collateral Agreement. So, working back to section 4.02, this means the waterfall is now "[s]ubject to" Defendants' new super-senior tranches of debt.

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[8] In view of this ruling, the Court does not at this point reach the merits of Plaintiffs' claim that their consent was also required under other subsections of 9.02 [b] [i].

One reasonable way to read section 9.02 [b] [i] [D] is that it prohibits Defendants from placing any tranche of debt above Plaintiffs' place in the waterfall, even if the order of distribution in section 4.02 remains facially unaffected. Under the revised section 4.02, Plaintiffs do not have the right to receive a dollar of collateral upon default until $427 million is paid back to the new cadre of super-senior lenders (including the Lender Defendants). Although it may be that Plaintiffs are still "first" when compared to the other groups in section 4.02, Plaintiffs have a plausible argument that the Liquidity Transaction required their consent under section 9.02 [b] [i] [D] because it "alter[ed] the order of application of proceeds" by subordinating Plaintiffs' priority interest to the new Super-Priority Intercreditor Agreement.

In response, Defendants argue that "application of proceeds" can refer only to the *Administrative Agent's* application of proceeds among the categories covered by the agreement. In Defendants' view, the Administrative Agent's task remains the same before and after the amendment – it still applies the "proceeds" (whatever is left of them) in the order specified in section 4.02. Under this approach, section 9.02 [b] [i] [D] is inapplicable because the amendment does not "alter" the order in which the Administrative Agent doles out those proceeds. Even assuming the Defendants' interpretation is plausible, it is not the only reasonable way to read the contract.

The "order of application of proceeds" could be read to encompass all of the Administrative Agent's obligations under section 4.02 of the Collateral Agreement. This reading is supported by section 7.03 of the Original Agreement, titled "Application of Proceeds," which instructs that "amounts received on account of the Secured Obligations shall be applied by the Administrative Agent ***in accordance with Section 4.02 of the Collateral Agreement.***" To apply the proceeds "in accordance with Section 4.02" means applying them in a specified order

"[s]ubject to the terms of the Intercreditor Agreement." And because "the terms of the Intercreditor Agreement" have changed, so too have the Administrative Agent's obligations. Therefore, the change to "Intercreditor Agreements" could be said to have altered the "order of the application of proceeds."

Because the agreement reasonably can be read to require Plaintiffs' consent for the Amended Agreement, taking Plaintiffs' factual allegations as true, the motions to dismiss Plaintiffs' first cause of action for declaratory judgment are **DENIED**.

C. Breach of Contract (Second and Third Causes of Action)

Plaintiffs' second and third causes of action assert claims for breach of contract based on alleged breaches of sections 2.11(a)(ii), (e)(i)-(f)(i), 2.18, 2.20(b), 2.25(a)(i), 6.01, and 6.02 of the Original Agreement (Compl. ¶¶96-98, 107). Defendants mainly argue that the contract claims should be dismissed because the Original Agreement was superseded by the Amended Agreement, which permitted the Liquidity Transaction in full (NYSCEF 96 at 18-19).[9] Because the contract claims turn on whether the Amended Agreement was valid – which, for the reasons stated above, Defendants have not conclusively established – the contract claims also survive.

Accordingly, the motions to dismiss Plaintiffs' second and third causes of action are **DENIED**.

[9] Defendants also argue that the Liquidity Transaction was permitted under section 9.04 [g] of the Original Agreement, which provided that "[a]ny Lender may, at any time, assign all or a portion of its Term Loans . . . on a non-pro rata basis through . . . open market purchases." The term "open market purchase" is undefined and the parties, predictably, reach conflicting interpretations about its meaning.

D. Breach of the Implied Covenant of Good Faith and Fair Dealing (Fourth Cause of Action)

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance," which imputes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389-90 [1995]). This includes covenants not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.*, quoting *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]), and "not to act arbitrarily or irrationally in exercising . . . discretion" (*id.*).

However, "[t]he duty of good faith and fair dealing does not imply obligations inconsistent with contractual provisions (*Gottwald v Sebert*, 193 AD3d 573, 582 [1st Dept 2021]) or "that were not bargained for" (*King Penguin Opportunity Fund III, LLC v Spectrum Group Mgt. LLC*, 187 AD3d 688, 690 [1st Dept 2020]). Nor can it "impose obligations . . . beyond the express terms of the parties' agreement" (*Darabont v AMC Network Entertainment LLC*, 193 AD3d 500 [1st Dept 2021]. Stated differently, an implied covenant claim "may not be used as a substitute for a nonviable claim of breach of contract" (*StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012]).

Moreover, a claim for breach of the implied covenant will be dismissed if it "relies on the same facts that form the basis for the breach of contract claim and seek[s] the exact same damages" (*320 W. 115 Realty LLC v All Bldg. Constr. Corp.*, 194 AD3d 511, 512 [1st Dept 2021] [citation omitted]). To warrant dismissal, "[t]he conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts" (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104-05 [1st Dept 2014]).

In this case, Plaintiffs' entitlement to relief rests on their assertion that the Liquidity Transaction breached various terms of the Original Credit Agreement. If Defendants were within their contractual rights to amend the Original Credit Agreement without Plaintiffs' consent, that is the end of the story. If so, the implied covenant cannot be used to impose obligations or restrictions going beyond what is set forth in the contract (*Veneto Hotel & Casino, S.A. v German Am. Capital Corp.*, 160 AD3d 451 [1st Dept 2018]; *Tr. Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 29-30 [1st Dept 2017]). If not, Plaintiffs will prevail on their contract claims. In that event, the implied covenant claim is duplicative of Plaintiffs' breach of contract claims, in that they arise from the same operative facts and seek essentially the same relief (*see* Compl. ¶¶87-88).

Accordingly, the motions to dismiss Plaintiffs' fourth cause of action are **GRANTED**.

E. Tortious Interference with Contract (Fifth Cause of Action)

Plaintiffs' claim for tortious interference with contract targets the Equity Sponsors, Centerbridge and Blackstone, for their alleged roles in orchestrating the Liquidity Transaction. To state such a claim, Plaintiffs must plead facts showing "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" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). "Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal" (*Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 [1st Dept 2002]).

Here, Plaintiffs fail to show that the Equity Sponsors acted without economic justification in procuring a breach of the Original Agreement.[10] Under New York law, "a defendant may raise the economic interest defense" in response to a claim for tortious interference with contract – essentially, that the interfering party "acted to protect its own legal or financial stake in the breaching party's business" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The defense derives from the principle that "[p]rocuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse and is justification for what would otherwise be an actionable wrong" (*Felsen v Sol I Mfg. Corp.*, 24 NY2d 682, 687 [1969]; *Morrison v Frank*, 81 NYS2d 743, 744 [Sup Ct, New York County 1948] ["One who has a financial interest in the business of another possesses a privilege to interfere with the contract between the other and someone else if his purpose is to protect his own interests and if he does not employ improper means"] [cited by *Felsen*, 24 NY2d at 687]). "The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other" (*Foster v Churchill*, 87 NY2d 744, 750 [1996]).

Although economic interest is cast as a defense, courts routinely dismiss tortious interference claims at the pleading stage when it is evident, on the face of the complaint, that the doctrine applies (*see, e.g.*, *Johnson v Cestone*, 162 AD3d 526, 527 [1st Dept 2018] [dismissing claim because "the allegations show that [individual defendant] was acting in the economic interest of the corporate defendants"]; *Rather v CBS Corp.*, 68 AD3d 49, 60 [1st Dept 2009] [holding "the court correctly applied the economic interest doctrine to dismiss this claim against the corporate defendant"]; *Collins v E-Magine, LLC*, 291 AD2d 350, 351 [1st Dept 2002]

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[10] The Court need not – and does not – reach the Equity Sponsors' other arguments for dismissing this claim.

[holding that "[a]s a general matter, economic interest precludes a claim for tortious interference with a contract unless there is a showing of malice or illegality, and no such showing has been made by plaintiff"]; *U.S. Bank N.A. v Triaxx Asset Mgt. LLC*, 18 CIV. 4044 (VM), 2019 WL 4744220, at *8 [SD NY Aug. 26, 2019] ["The economic interest defense to a claim of tortious interference with contract may be raised at the motion to dismiss stage"] [applying New York law]; *GCA Advisors, LLC v Onion, Inc.*, 2019 N.Y. Slip Op. 32341[U], 3 [Sup Ct, New York County 2019] [Scarpulla, J.]).

In this case, the allegations in the Complaint show that the Equity Sponsors' economic interests were closely aligned with TriMark's. Plaintiffs allege that Centerbridge and Blackstone together hold an 86.6% equity stake in the company (Compl. ¶40), and that both of them "stand to gain or to lose money on their investments depending on TriMark's financial performance" (*id.* ¶¶21-22; *see also id.* [noting that Equity Sponsors purchased equity in TriMark "in the hope of delivering returns to clients of those funds when TriMark is sold or otherwise divested"]; *id.* ¶34 [explaining that LBO debt "is serviced using the cash flows from the company's operations"]). Consequently, the same events that battered TriMark's financial performance during the pandemic also threatened the Equity Sponsors' economic interests. As Plaintiffs allege, TriMark's financial outlook was "grim" in summer 2020. The pandemic "put tremendous strains on TriMark's business", and the company's debt was downgraded to Caa2 (*id.* ¶45). The Liquidity Transaction then, by Plaintiffs' own reckoning, "provide[d] new cash to the company" at a precarious time and "also benefited its Equity Sponsors" (*id.* ¶46, NYSCEF 139 at 2 [Pls.' opp.]).

Because the "defendants were significant stockholders in the breaching party's business" and acted to protect the financial value of their stakes, the economic interest defense bars

Plaintiffs' claim (*see White Plains Coat & Apron Co., Inc.*, 8 NY3d at 426; *Foster*, 87 NY2d at 750-51 [affirming dismissal of tortious interference claim against "venture capital firms" that held majority stake in allegedly breaching company, where defendants "acted . . . to save [the company] from paying out money it could not afford"]; *Felsen*, 24 NY2d at 687 [affirming dismissal of tortious interference claim where defendant, "as the sole stockholder of Sol Cafe, had an existing economic interest in the affairs of Sol Café which it was privileged to attempt to protect when it 'interfered' with plaintiff's contract of employment with Sol Cafe"]; *U.S. Bank N.A.*, 18 CIV. 4044 (VM), 2019 WL 4744220, at *8 [finding that senior noteholder was entitled to economic interest defense]; *Kuhns v Ledger*, 202 F Supp 3d 433, 442 [SD NY 2016] [finding that defendant who "owns 47% of the outstanding shares of" company had "a significant interest"]; *GCA Advisors, LLC*, 2019 N.Y. Slip Op. 32341[U], 3 [applying economic interest defense where defendant had "acquired a 40.5% interest in" company]).

To overcome the economic interest defense, Plaintiffs must plead specific facts showing that the Equity Sponsors caused the alleged contractual interference through illegal or fraudulent means or were otherwise motivated by malice toward Plaintiffs (*Foster*, 87 NY2d at 750). While the Complaint states, in conclusory fashion, that the Equity Sponsors "acted with malice, in bad faith, and without justification" (Compl. ¶¶53, 128), "bare allegations of malice do not suffice to bring the claim under an exception to the economic interest rule" (*Rather*, 68 AD3d at 60, citing *Ruha v Guior*, 277 AD2d 116 [1st Dept 2000]). Indeed, even bad faith, without more, does not satisfy the malice requirement (*see Foster*, 87 NY2d at 750). And there is no allegation that the actions taken by the Equity Sponsors were fraudulent or illegal.

Contrary to Plaintiffs' argument in its opposition papers, the Complaint does not allege that "the Equity Sponsors' and TriMark's interests diverged" (NYSCEF 137 at 49, citing Compl.

¶¶46, 52-53 [emphasis omitted]). While the Complaint states that the Liquidity Transaction "did not provide any economic benefit to TriMark" (Compl. ¶129), it alleges elsewhere that the amendment was for "TriMark and the Lender Defendants' benefit" (*id.* ¶116). And Plaintiffs do not dispute that TriMark received and retained an additional $120 million of financing by virtue of the deal. What the Complaint alleges, at most, is that Defendants could have secured a *better* deal for TriMark had Plaintiffs been let into the fold. Even so, Plaintiffs cite to no authority holding that the economic interest defense turns on whether the challenged transaction was "the best deal [the breaching party] could secure at the time" (NYSCEF 137 at 48). That is not surprising. Asking whether a company received "the best deal it could secure at the time" licenses judicial second-guessing of rational actors' economic decisions and demands the kind of fact-intensive inquiry that would render tortious interference claims virtually impervious to dismissal at the pleading stage. At bottom, Plaintiffs' allegations fail to decouple – and indeed, serve to highlight – the shared economic interests between TriMark and the Equity Sponsors.

Accordingly, the Equity Sponsors' motions to dismiss Plaintiffs' fifth cause of action, which is the only claim asserted against them (and is asserted only against them), is **GRANTED**. The Complaint thus is dismissed in its entirety as against the Equity Sponsor defendants.

F. Violations of New York Uniform Voidable Transactions Act (Sixth Cause of Action)

Finally, Plaintiffs allege that TriMark and the Lender Defendants violated New York's Uniform Voidable Transactions Act (UVTA) by transferring property – *i.e.*, senior security interests – with the intent to "hinder, delay, or defraud Plaintiffs" (Compl. ¶¶135, 137). Essentially, Plaintiffs argue that the Super Senior Liens, which usurped their own First Lien debt in the order of priority, constituted fraudulent transfers because they impaired Plaintiffs' right to

be repaid on a pro rata basis. As a result, Plaintiffs contend, "pursuant to New York Uniform Voidable Transactions Act §§ 273, 276(a), and 276-a, all transfers made and obligations incurred by TriMark to the benefit of the Lender Defendants are voidable and should be unwound" (*id.* ¶143).

This claim fails at the threshold because it purports to plead violations of New York law that do not apply to the disputed transaction. Under the UVTA, a fraudulent transfer claim "is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred," and if the debtor has more than one place of business, it "is located at its chief executive office" (NY UVTA §279 [b]). As the Complaint acknowledges, TriMark's chief executive office is in Massachusetts (Compl. ¶20). Accordingly, it is Massachusetts law that governs any fraudulent transfer claim here, and Plaintiffs' claim, as pleaded, cannot survive (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521, 523 [1994] [affirming grant of summary judgment dismissing New York law claims because "Massachusetts law was properly applied"]; *see also Oberlander v Monarch Life Ins. Co.*, 274 AD2d 563, 564 [2d Dept 2000] [affirming dismissal pursuant to CPLR 3211 [a] [7] because complaint pleaded violation of the wrong state's statute]).

Contrary to Plaintiffs' assertion, the choice-of-law provision in the Original Agreement, which specified New York law, does not control their fraudulent-transfer claim. Section 9.09 [a] of the Original Agreement (which is unchanged in the Amended Agreement) provides, in relevant part:

> This Agreement shall be construed in accordance with and governed by the law of the State of New York . . . regardless of the laws that might otherwise govern under applicable principles of conflicts of laws

Both sides agree that Plaintiffs' UVTA claim sounds in tort (*see* NYSCEF 137 at 51 [Pls.' opp. to motions to dismiss]; NYSCEF 95 at 2 [Def. Lenders' reply mem. of law]; *see also Morgenthau v A.J. Travis Ltd.*, 184 Misc 2d 835, 843 [Sup Ct, New York County 2000] ["A cause of action for fraudulent conveyance is a species of tort"]), so the key question is whether section 9.09 [a] imputes New York's substantive law on an extra-contractual claim like this one.

Section 9.09 [a] cannot be read to encompass Plaintiffs' UVTA claim. New York law provides that "tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract" (*Fin. One Pub. Co. Ltd. v Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 335 [2d Cir 2005]). "That the parties agreed that their contract should be governed by an expressed procedure does not bind them as to causes of action sounding in tort" (*Knieriemen v Bache Halsey Stuart Shields Inc.*, 74 AD2d 290, 293 [1st Dept 1980] [holding that contractual choice-of-law provision that "(t)his contract shall be governed by the laws of the State of New York" did not cover fraud claim]; *see H.S.W. Enterprises, Inc. v Woo Lae Oak, Inc.*, 171 F Supp 2d 135, 141 [SD NY 2001]). "*Knieriemen* indicates a reluctance on the part of New York courts to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action" (*Fin. One*, 414 F3d at 334; *see Twinlab Corp. v Paulson*, 283 AD2d 570, 571 [2d Dept 2001] ["[T]he choice of law provision in the consultant agreement between Changes and the appellant did not preclude the plaintiffs from asserting a tort cause of action against him based on the Florida statute"]). Because the choice-of-law provision here is limited to "constru[ing]" the "Agreement," and not all disputes relating to the Agreement, the same reasoning holds in this case.

To be sure, these highly sophisticated parties could have drafted a broader choice-of-law provision that encompasses extra-contractual claims relating to the Original Agreement, but they

did not do so (*see, e.g.*, *Capital Z Fin. Services Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 109 [1st Dept 2007] [holding that extra-contractual claims fell within scope of choice-of-law provision "broadly stat[ing] that Delaware law governs 'all issues' concerning 'enforcement of the rights and duties of the parties'"]; *Avnet, Inc. v Deloitte Consulting LLP*, 187 AD3d 430, 433 [1st Dept 2020] [holding that choice-of-law provision stating "all matters relating to this Agreement and each Work Order, shall be governed by . . . the laws of the State of New York" covered negligence claim]). As written, the provision does not reach Plaintiffs' UVTA claim (*see Refco Group Ltd., LLC v Cantor Fitzgerald, L.P.*, 13 CIV. 1654 RA, 2014 WL 2610608, at *40 [SD NY June 10, 2014] ["Unlike choice-of-law provisions that apply to disputes 'arising out of' or 'relating to' a contract, those that provide that the contract will be 'governed by' or 'construed in accordance with' the law of a particular state are not sufficiently broad to reach tort claims such as fraudulent conveyance"]; *Drenis v Haligiannis*, 452 F Supp 2d 418, 426 [SD NY 2006] [holding "the choice-of-law provision at issue does not compel the application of Delaware law" to "plaintiffs' tort claims for fraudulent conveyance"]).

The cases on which Plaintiffs' argument rests are inapposite. In *Ministers and Missionaries Ben. Bd. v Snow*, 26 NY3d 466 [2015], there was no dispute that the New York choice-of-law provisions applied to the claims in the case. The dispute focused, instead, on "interpret[ing] the phrase 'laws of . . . New York'", and specifically whether such "laws" included EPTL 3-5.1 [b] [2], a statutory choice-of-law directive (*id.* at 470). Simply put, the main question in *Ministers and Missionaries* concerned the nature of a statute, not the scope of a contractual provision (*id.* at 471 ["The question is whether section 3-5.1 (b) (2) should be characterized as part of New York's substantive or 'local law,' . . . or whether it is simply a conflict-of-laws rule"]). Absent in *Ministers and Missionaries* is any discussion about whether a

choice-of-law clause like the one here extends to extra-contractual claims. The other key authority on which Plaintiffs rely, *Turtur v Rothschild Registry Int'l., Inc.*, 26 F3d 304 [2d Cir. 1994], is also irrelevant. As the Second Circuit later noted, "*Turtur* did not apply New York law to determine the scope of the contractual choice-of-law clause at issue in that case" (*Fin. One*, 414 F3d 325 at 333-35).

Accordingly, the motions to dismiss Plaintiffs' sixth cause of action are **GRANTED**.

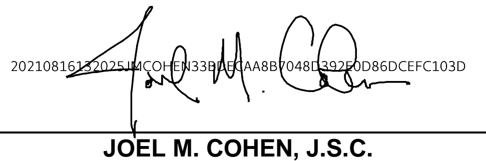
* * * *

Therefore, it is

ORDERED that Defendants' motions to dismiss are GRANTED with respect to Plaintiffs' fourth (implied covenant of good faith and fair dealing), fifth (tortious interference with contract), and sixth (NY Uniform Voidable Transactions Act) causes of action, and are otherwise DENIED; and it is further

ORDERED that the Complaint is dismissed in its entirety as against Centerbridge Partners, L.P. and Blackstone Tactical Opportunities Fund, L.P., which are named as defendants only in the now-dismissed fifth cause of action.

This constitutes the Decision and Order of the Court.



8/16/2021						
DATE				**JOEL M. COHEN, J.S.C.**		
CHECK ONE:	☐	**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**	
	☐	**GRANTED**	☐ **DENIED**	X	**GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐ **REFERENCE**