2021 UPDATE ON INTERCREDITOR LITIGATION

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1. In re La Paloma Generating Company, 595 B.R. 466 (2018)
   US. District County, D. Delaware

   Background:
   First-lien creditor and group of second-lien creditors filed motions to enforce intercreditor agreement, seeking to define the rights of both entities to distributions under debtors' confirmed joint Chapter 11 plan, which were currently being held by collateral agent.

   Holding:
   Based on the language of the Intercreditor Agreement, the Court found that the First-Lien Creditors were to be paid-in-full prior to the Second-Lien Creditors receiving payment based on the Second-Lien Claim. As a result, the Court granted the LNV Motion (D.I. 739) and denied the Second-Lien Group Motion (D.I. 695).

2. Eurosemillas, S.A. v. PLC Diagnostics Inc., et al., 2019 WL 2088479 (CA. 2019)
   US District Court, N.D. California

   Background:
   PLC and iNDx Technology, Inc. entered into a JV to form iNDx Lifecare, Inc. There was a PLC convertible note secured by all business assets. NMS entered into a product development agreement with iNDx on 8/1/14 and NMS loaned iNDx money in 10/2014 and security interest in same busines assets. iNDx, PLC and NMS signed an intercreditor agreement on 10/28/2014 where iNDx, PLC and NMS agreed that NMS's lien on collateral would have equal priority with PLC lien. Then on 6/2/2015 there was a first amendment to the intercreditor agreement giving NMS lien on new loan the same priority as PLC.

3. Intrepid Investments, LLC v. Selling Source, LLC, 165 A.D.3d 523 (NY S.C. 2018)
   Supreme Court, Appellate Division, First Dept. NY

   Background:
   Junior lender brought action against borrower for breach of a promissory note and moved to amend its complaint to add claims against senior lender for breach of an intercreditor agreement and tortious interference with contract.

   Holding:
   Causes of action related to collateral that sought compensatory damages were not actions to protect collateral within meaning of exception to standstill provision in intercreditor agreement; evidence was sufficient to establish that senior loan was never paid off (as it was a simple refinance) and that the standstill provision continued to apply; allegation that senior lender breached intercreditor agreement by restricting payments from borrowers on junior lender's note was sufficient to allege a material breach of the agreement so as to preclude senior lender from asserting the standstill provision; and guarantor's transaction with a corporation was not a "sale" or "disposition" of the guarantor so as to give senior lender authority to remove junior lender's lien on guarantor's assets.

4. In re La Paloma Generating Company LLC v. LNV Corporation, 609 B.R. 80 (DE DC 2019)
   US District Court, D. Delaware

   Background:
   First-lien creditor and group of second-lien creditors filed motions to enforce intercreditor agreement, seeking to define the rights of both entities to distributions under debtors' confirmed joint Chapter 11 plan, which were currently being held by collateral agent. The United States Bankruptcy Court for the District of Delaware, Christopher S. Sontchi, Chief Judge, 595 B.R. 466, granted first-lien creditor's motion and denied second-lien creditors' motion, and appeal was taken. First-lien creditor moved to dismiss appeal as equitably or statutorily moot.

Holding:
Appeal from bankruptcy court order resolving dispute as to interpretation and application of intercreditor agreement was not equitably moot, as not threatening to undo a settlement that was an integral part of debtors' confirmed Chapter 11 plan; appeal was not statutorily moot; and pursuant to terms of intercreditor agreement, first-lien creditor was to be paid in full prior to second-lien creditors receiving any payment on their second-lien claims.

5. In re PES Holdings, LLC, 2020 WL 1047768 (2020)
US Bankruptcy Ct, D. Delaware

Background:
The Court addressed a complex dispute over the apportionment of business interruption insurance proceeds and property damage insurance proceeds following a catastrophic explosion at an oil refinery in Philadelphia, Pennsylvania. The battle for the proceeds was between and among (1) Debtors and their lender, Cortland Capital Market Services, LLC, who were plaintiffs and counterclaim defendants, (2) ICBC Standard Bank, PLC, which, pursuant to an Intermediation Facility provided supplies and purchased refined product (oil and gas) from Debtors and was a defendant, counterclaim plaintiff, and cross-claim defendant ("ICBCS"), and (3) the Official Committee of Unsecured Creditors, which was an intervenor defendant and counterclaim and cross-claim plaintiff.

Holding:
The Plaintiffs moved for judgment on the pleadings, which the Court treated as a motion for summary judgment with Plaintiffs' consent; and ICBCS and the Committee moved for summary judgment. In summary, the Court found that (1) ICBCS had a first priority lien and Cortland had a second priority lien on the business interruption insurance proceeds, (2) Plaintiffs and ICBCS shared in the property damage insurance proceeds, and (3) the Committee's claims were denied.

6. In re Consolidated Bedding, Inc., 2021 WL 2638594 (2021)
US Bankruptcy Ct, D. Delaware

Background:
Consolidated Bedding and its related companies manufactured and sold mattresses under the trade name and trademark Spring Air and related names pursuant to certain licenses and agreements. On May 29, 2009, Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code. Mr. Giuliano was appointed as the Chapter 7 trustee. At the time of filing, Debtors had two primary debt obligations. Debtors owed approximately $231 million on a senior secured basis to American Capital Financial Services, Inc. L&P, the junior secured creditor, was owed approximately $14.4 million. The claims of American and L&P were secured, respectively, by senior and junior liens on substantially all of the Debtors' assets. Prior to the Petition Date, L&P and American entered into the Intercreditor and Subordination Agreement for the dual purposes of (1) subordinating L&P's liens upon the Debtors' assets to those of American and (2) preserving L&P's position in the collateral as a junior secured creditor/lienholder behind American. On June 4, 2009, a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines was sent to all creditors and parties in interest, including Leggett & Platt. L&P timely filed a proof of claim in the amount of $14,400,994.01. L&P alleged $11,448,889.10 of that amount was the secured claim owed to it by the Debtors. During the course of the bankruptcy, American and the Trustee entered into certain arrangements because the Trustee did not have any money with which to administer the case. The record reflected that the Chapter 7 estate held certain potentially valuable causes of action, and the Trustee and American entered into negotiations to develop a framework for pursuing those causes of action and sharing any recoveries or proceeds resulting therefrom. The negotiations resulted in the Sharing Stipulation and Antitrust Agreement Stipulation. L&P alleged that it was not aware of these negotiations and stipulations.

Holding:
L&P sought an order from the Court instructing the Trustee to pay L&P the remaining 25% of the proceeds retained by the Trustee. However, L&P could not receive payments until American's senior debt was paid

in full. The total proceeds recovered by the Trustee in the last decade amounts to approximately $11.4 million, and that was not enough to give L&P any real stake in those proceeds. Accordingly, the Court denied L&P's cross-motion and entered judgment in favor of the Trustee.

7. Cofund II LLC v. Hitachi Capital America Corp, 2021 WL 1748113 (2021)
US District Court, D. New Jersey

Background:

Plaintiff entered into a Master Participation Agreement with non-party Forest Capital, LLC, on January 12, 2012. Under the agreement, Plaintiff purchased participations in factoring transactions that Forest made with its clients. In return for purchasing participations in the factoring transactions, Forest granted Plaintiff a first-priority security interest in the collateral relating to each factoring transaction to the extent of Plaintiff's pro rata interest in those transactions. However, Plaintiff's interest in any factoring transaction was limited to 50% of the total funds employed in the client account, regardless of Plaintiff's initial investment. Forest was required to hold any funds in excess of Plaintiff's 50% interest in reserve for Plaintiff to use in future participations.

On December 5, 2014, Defendant entered into its own agreement with Forest to lend money to Forest. Under the LSA, Forest granted Defendant a security interest in a broad swath of collateral, as defined by that agreement, but also gave notice that the collateral may be subject to "Permitted Encumbrances," which the agreement identified as Plaintiff's UCC financing statement filed on January 23, 2012. Plaintiff and Defendant executed an Intercreditor Agreement on December 19, 2014, to determine the priorities of their security interests in the collateral covered by their respective agreements with Forest. Under the agreement, the parties agreed, inter alia, that: "The lien or security interest of any kind that [Plaintiff] may now have or hold in the future with respect to the CoFund Priority Collateral shall be superior to any lien or security interest that [Defendant] may now have or hereafter acquire in the CoFund Priority Collateral..." The agreement defined "CoFund Priority Collateral" as "only those amounts received by [Forest] which represent CoFund's Pro Rata interest in a Transaction as well as CoFund's Pro Rata interest in the tangible and intangible assets and property securing the obligations relating to each Transaction."

Subsequently, on December 29, 2014, Forest, Defendant, and non-party Manufacturers and Traders Trust Company ("M&T") entered into a Blocked Account Agreement. Under the terms of the LSA and BAA, Forest and/or Forest's clients deposited all moneys that Forest's clients paid/owed to Forest into a blocked M&T account. Also under the terms of the BAA, Defendant had "sole dominion and control" of the blocked account and Forest was unable to withdraw any moneys from the blocked account to pay Plaintiff. Rather, M&T "transfer[red]... all available funds on deposit in the Blocked Account to the account of [Defendant]." By this process, Defendant received CoFund Priority Collateral that Plaintiff is entitled to under the MPA. Defendant has not turned over these funds to Plaintiff, in breach of the Intercreditor Agreement, which requires Defendant to "hold all funds representing CoFund Priority Collateral in trust for [Plaintiff]."

Holding:
In summary, the Court found that Plaintiff's proposed damages are based on the credible evidence presented at trial, and Defendant's proposed reductions are not. This Court also found that good cause exists to award prejudgment interest at the rate set forth in New Jersey Court Rule 4:42-11(a)(iii) and will therefore adopt Plaintiff's proposed minimum damages. Moreover, the Intercreditor Agreement was found to be a valid and enforceable contract under applicable Michigan law, and Defendant's breach was not excused.

8. Central Bank of India v. U.S. Bank National Association, 2019 WL 1206489 (2019)
US District Court, S.D. NY

Background:
Plaintiffs Central Bank of India ("CBI") and Export-Import Bank of India ("EIBI") (jointly, "Plaintiffs") brought this breach of contract action against Defendant U.S. Bank National Association ("U.S. Bank"),

alleging that U.S. Bank violated the terms of their contract by objecting in a bankruptcy proceeding to Plaintiffs' claim to rights in certain collateral. Before the Court was Plaintiffs' motion for partial summary judgment declaring that U.S. Bank breached the contract.

Holding:
Even in the absence of the qualifying clause, Plaintiffs would still fail to show that the Intercreditor Agreement unambiguously prohibits U.S. Bank's objection, because section 6.1(a) was arguably more specific than section 2.2. "[S]pecific language in a contract will prevail over general language where there is an inconsistency between two provisions...." Paneccasio v. Unisource Worldwide, Inc., 532 F.3d 101, 111 (2d Cir. 2008). Section 6.1(a) specifically concerns the rights of the signatories in the event ESML entered insolvency proceedings, while section 2.2 concerns the obligations of the signatories in "any" proceeding. Plaintiffs argued that section 2.2 also concerns events that occur after bankruptcy; indeed, section 9.3 confirms that the terms of the Intercreditor Agreement continue to apply in bankruptcy and the entire Agreement evidences a consciousness of bankruptcy's possibility. This missed the point. While section 2.2 does apply to proceedings that occur in bankruptcy, it also applies to "any" other proceeding. Section 6.1(a) is only triggered "[i]n the event an Insolvency Proceeding has been commenced...." Thus, it is more specific than section 2.2, at least in this respect.

9. Cofund II LLC v. Hitachi Capital America Corp, 2019 WL 6167952 (2019)
US District Court, D. New Jersey

Background:
See #7

Holding:
The record presented the Court with genuine issues of material facts as to whether Defendant's alleged breach of the Intercreditor Agreement is excused. Therefore, Defendant's Motion for Summary Judgment as to Count One was denied. Here, Plaintiff's tort claims alleged that Defendant's refusal to turn over CoFund Priority Collateral breached Defendant's fiduciary duty to Plaintiff, tortiously interfered with Plaintiff's security interest in the CoFund Priority Collateral, and improperly converted the CoFund Priority Collateral. Because the claims were largely based on the same facts and legal duties giving rise to the breach of contract claim, the economic loss doctrine barred Plaintiff's tort claims. Therefore, Defendant's Motion for Summary Judgment as to Counts Two, Three, and Four were granted. Here, there was no question as to the validity of the Intercreditor Agreement. Plaintiff pleaded its existence and validity in the Complaint, and those allegations are undisputed by Defendant. Plaintiff's unjust enrichment claim also covered the same subject matter as its breach of contract claim. Thus, Plaintiff's unjust enrichment claim was not sustained. See, e.g., Liggett Rest. Grp., Inc. v. City of Pontiac, 676 N.W.2d 633, 639 (Mich. Ct. App. 2003) (affirming dismissal of unjust enrichment claim because "a contract cannot be implied when an express contact already addresses the pertinent subject matter"). Therefore, Defendant's Motion for Summary Judgment on Count Five was granted.

10. McGinley Partners, LLC v. Royalty Properties, LLC, 2020 IL App (1st) 190546 (2020)
App. Ct. of IL, First Distrcict, Fourth Division

Background:
Limited liability company (LLC) to whom note and guaranty was assigned brought action to enforce note and guaranty against horse farm owners and LLC formed by farm owners. The Circuit Court, Cook County, Daniel J. Kubasiak, J., granted assignee's motion for summary judgment, which the Appellate Court affirmed, 427 Ill.Dec. 270, 117 N.E.3d 1207. While the appeal was pending, horse farm owners and LLC petitioned to vacate the judgment, the Circuit Court, Kubasiak, J., dismissed the petition with prejudice, and the Appellate Court affirmed, 431 Ill.Dec. 671, 128 N.E.3d 341. Horse farm owners and LLC filed a second motion to vacate judgment and a motion for a temporary stay. The Circuit Court, Kubasiak J., denied the motions. Horse farm owners and LLC appealed, and appeals were consolidated.

Holding:
Horse farm owners and their LLC failed to establish that parties had reached settlement as justified motion to stay proceedings based on settlement; claims of horse farm owners and LLC could have been raised in their original petition seeking relief from judgment, and thus doctrine of res judicata barred second petition for relief from judgment; and horse farm owners and LLC did not act with due diligence in presenting their second petition for relief from judgment to circuit court.

11. In re Tower Park Properties, LLC, 2021 WL 1199442 (2019)
US. District Court, C.D. CA

Background:
Plaintiff-Appellant's appeal concerned the bankruptcy court's denial of Plaintiff-Appellant's Motion to Remand, and its grant of Defendant-Appellees' Motion to Dismiss. This action had a storied history, with the underlying issues beginning as far back as 2008. The Court relayed the relevant facts as set forth in the parties' memoranda, the Excerpts of Record, and the Supplemental Excerpts of Record

Holding:
Defendant-Appellees' motion to remand the Foreclosure Action involved a state law claim for judicial foreclosure. This Action involved Plaintiff-Appellant's Right of Redemption, a right which arose from the Plan. The question of whether the Right of Redemption existed was not explicitly or implicitly decided in previous dispositions. Judge Russell did not abuse his discretion by not applying the "law of the case" doctrine. Accordingly, the bankruptcy court correctly denied Plaintiff-Appellant's Motion to Remand. Judge Russell's ruling with respect to jurisdiction was therefore affirmed. With respect to Plaintiff-Appellant's desire to add an unjust enrichment claim to its Complaint, Plaintiff-Appellant did not assert such a claim or allege that Defendant-Appellees were unjustly enriched in its initial Complaint. Thus, Plaintiff-Appellant may not make such a claim in its opposition to the Motion to Dismiss. Accordingly, Judge Russell's order dismissing Plaintiff-Appellant's Complaint without leave to amend was affirmed.

12. CoFund II LLC v. Hitachi Capital America Corp, 2021 WL 1689119 (2021)
US District Ct., D. NJ

Background:
See #7

Holding:
Defendant's actions breached the Intercreditor Agreement in multiple respects. First, Defendant "[e]nforce[d]" and "realize[d] [ ] its security interest in" the CoFund Priority Collateral that had been collected and deposited into the blocked account at M&T, despite being an Inferior Creditor for such collateral, in violation of § 4.A. Second, Defendant interfered with Plaintiff's participation interests by collecting CoFund Priority Collateral in the blocked account and not "promptly release[ing]" it to Plaintiff, in violation of § 4.B. Third, Defendant "notif[ied] persons" within its organization to "remit" the CoFund Priority Collateral to itself, in violation of § 4.C. Fourth, Defendant received, and had full control over, 100% of the moneys paid by (or on behalf of) Forest's clients with respect to obligations owed by those clients to Forest. The moneys, all of which were deposited into the blocked account, included (1) repayment of moneys that had been advanced by Plaintiff for its participation interests, and (2) repayment of moneys that had been advanced by Defendant under its LSA. To the extent that moneys deposited into the blocked account represented repayment of the moneys that had been advanced by Plaintiff for its participation interests, Plaintiff was the Superior Creditor and Defendant was the Inferior Creditor. However, contrary to its obligations under § 4.D of the Intercreditor Agreement, Defendant did not "receive[ ] such Collateral (including Proceeds) for the use and benefit" of Plaintiff, did not "hold it in trust" for Plaintiff, and did not "immediately turn it over" to Plaintiff, to be applied upon Forest's indebtedness to Plaintiff. Defendant did not raise the issue of impossibility or impracticability of performance at any time before the commencement of this lawsuit. In fact, as late as February 11, 2016, Mr. Dahm e-mailed Forest regarding his "methodology to provide some protection against the claims that CoFund is asserting," claiming to "maintain a cushion" of "just under $1 million." Meanwhile, Defendant had no difficulty reducing its multimillion-dollar loan with Forest to zero between January and March

2016, while at the same time withholding all money from Plaintiff. This Court therefore found that Defendant's performance under the Intercreditor Agreement was neither impossible nor impracticable.

13. ROI Properties Inc. v. Burford Capital Ltd., 2019 WL 1359254 (2019)
US District Court, D. Arizona

Background:
This lawsuit arose out of a series of contracts—litigation financing agreements called Forward Purchase Agreements ("FPA")—between Defendant Ganymede Investments Limited ("Ganymede") and Epicenter Partners LLC ("Epicenter") and Gary, Meyer, Fannin LLC ("Gary"). Ganymede, a Guernsey corporation with its principal place of business in St. Peter Port, Guernsey, is in the business of litigation financing. Defendant Burford Capital Ltd. ("Burford"), a holding company and the ultimate parent of Ganymede, is also a Guernsey corporation.

Holding:
The FAA provides that, upon determining that an issue in a pending action is subject to a mandatory arbitration provision, a federal court "shall ... stay the action until such arbitration has been had." 9 U.S.C. § 3. "Notwithstanding this statutory language ... the majority of courts ... have held that a stay serves no obvious purpose and dismissal is appropriate where the entire controversy between the parties is subject to and will be resolved by arbitration." Having concluded that arbitration should be compelled, the Court must next consider whether to stay or dismiss this action. The Court, in its discretion, found that a stay of this action is appropriate because the arbitration provision delegates the gateway question of arbitrability to the arbitrator. Thus, the arbitrator will decide which of Plaintiff's claims are subject to arbitration and, if the arbitrator decides that not all of Plaintiff's claims are subject to arbitration, then this litigation can proceed in this Court on those non-arbitrable claims. Therefore, a stay will help advance judicial economy.

14. In re PES Holdings, LLC, 625 B.R. 822 (2021)
US District Court, D. Delaware

Background:
Adversary proceeding was brought to resolve dispute over apportionment of business interruption insurance proceeds and property damage insurance proceeds following a catastrophic explosion at Chapter 11 debtor's oil refinery. The United States Bankruptcy Court for the District of Delaware, Kevin Gross, J., 2020 WL 1047768, entered order determining relative priority of competing security interests, and appeal was taken.

Holding:
The District Court, Richard G. Andrews, J., held that language of intercreditor agreement governed the relative priority of competing creditors in proceeds from Chapter 11 debtor-insured's business interruption loss policy and granted priority to creditor with first priority interest in debtor's accounts and inventory. Affirmed.

15. Hall CA-NV, LLC v. Ladera Development LLC, 2018 WL 4094858 (2018)
US District Court, D. Nevada

Background:
This case arose out of an alleged breach of contract. Pending before the Court is a motion to dismiss the Counterclaim.

Holding:
The elements of intentional misrepresentation (fraud) in Nevada are: (1) a false representation by the defendant; (2) the defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) the defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) the plaintiff's justifiable reliance upon the misrepresentation; and (5) resulting damage. The elements of negligent misrepresentation in Nevada are: (1) a false representation by the defendant; (2) made in the course of the defendant's business or in any

action in which he has a pecuniary interest; (3) for the guidance of others in their business transactions; (4) the plaintiff's justifiable reliance upon the misrepresentation; (5) resulting damage; and (6) failure to exercise reasonable care or competence in obtaining or communicating the information.

16. Eurosemillas, SA v. Uttarwar, 2021 WL 1108611 (2021)
US Ct. Ap., 9th Cir.

Background:
Lender, which had loaned borrower money secured by same collateral that was subject to other creditors' prior loans allegedly covered by intercreditor agreement, brought action under California law against creditors, creditors' corporate officers, and entity jointly operated by creditors for breach of contract, conspiracy to commit fraud, fraud in the inducement, and unfair competition based on creditors' foreclosure on collateral.

Holding:
Allegations were insufficient to support claim for fraud in the inducement; failure to allege fraud equated to failure to allege conspiracy to commit fraud; allegations were insufficient to support claim against entity for breach of contract to which it was nonparty; and creditors did not execute enforceable contract. Affirmed.

17. McGinley Partners, LLC v. Royalty Properties, LLC 2018 IL App (1st) 172976 (2018)
App. Ct. of IL, First District, Fourth Division

Background:
Lender brought action against borrowers to enforce note and guaranty borrowers executed in connection with purchase of a horse farm. Following entry of judgment for lender, borrowers filed petition to vacate the judgment. The Circuit Court, Cook County, John C. Griffin, J., denied debtors' petition. Borrowers appealed.

Holding:
The Appellate Court, Gordon, J., held that borrowers failed to establish due diligence in raising the defense that an intercreditor agreement negated summary judgment for lender. Affirmed

18. In re Cort & Medas Associates, LLC, 626 B.R. 372 (NY ED 2021)
US District Court, E.D. NY

Background:
In lien priority contest between two mortgagees, the United States Bankruptcy Court for the Eastern District of New York rejected one mortgagee's argument that res judicata effect of prior state court foreclosure judgment prevented second mortgagee from asserting priority as to default charges. First mortgagee appealed.

Holding:
The District Court, Brian M. Cogan, J., held that res judicata effect of mortgage foreclosure judgment barred second mortgagee from belatedly asserting its rights under subordination carve-out. Reversed and remanded.

19. North Fork Partners Investment Holdings, LLC v. Bracken, 2020 WL 6899486 (2020)
US District Court, S.D. NY

Background:
Plaintiff North Fork Partners Investment Holdings, LLC is a Delaware limited liability company. Bracken is the former CEO, director, and member of Patriot Finance, LLC, a limited liability company formed under the laws of the state of Georgia and engaged in the business of providing consumer loans. Henagan and Spencer are directors and members of Patriot. Erb and Elias are both corporate officers of Congressional Bank, a Maryland state-chartered bank.

The action arises out of a $650,000 mezzanine loan Plaintiff provided to Patriot pursuant to a Mezzanine Loan and Security Agreement and Promissory Note on August 3, 2018. Prior to the Mezzanine Loan, Congressional Bank had entered into a separate loan with Patriot. On the same day Plaintiff entered into the Mezzanine Agreement with Patriot, Plaintiff also entered into a Subordination and Intercreditor Agreement with both Patriot and Congressional Bank. Pursuant to the Intercreditor Agreement, Congressional Bank was a senior lender, Plaintiff was a subordinated creditor, Patriot was the borrower, and Bracken was a personal guarantor. Patriot ultimately defaulted on both the Mezzanine Loan and the loan from Congressional Bank, and Patriot's assets were eventually transferred to Congressional Bank, causing Plaintiff financial injury.

The Mezzanine Agreement states that it is between Patriot, described as a "Georgia limited liability company," and Plaintiff, described as a "Delaware limited liability company." It directs that "Notices" are to be sent to Patriot in Georgia and to Plaintiff in New York. The Mezzanine Agreement is signed by Bracken on behalf of Patriot and Fernando on behalf of Plaintiff.

<u>Holding:</u>
The motions to dismiss were granted without prejudice. Plaintiff was given another opportunity to amend the complaint to include particularized allegations as to the fraud claims and if applicable, allegations to support a theory of corporate veil-piercing on the fraudulent conveyance claim. The court granted Plaintiff 30 days to file an amended complaint and, if Plaintiff fails to do so, the Court will decide to close the case.

20. Argosy Capital Group III, LP v. Triangle Capital Corp., 2019 WL 140730 (2019)
US District Court, S.D. NY

<u>Background:</u>
Parties are all lenders on a note made by CRS Reprocessing, LLC, a company headquartered in Louisville, Kentucky. In connection with the note, Plaintiffs appointed Defendant Triangle Capital Corporation as their "Collateral Agent," pursuant to which Triangle was to perform any acts necessary to secure the collateral granted to Plaintiffs by CRS. After CRS filed for bankruptcy in 2017, Triangle proposed to loan CRS money in exchange for a first-position lien in the collateral secured by Plaintiffs. Plaintiffs and several other CRS creditors objected repeatedly to this proposal. The bankruptcy court nevertheless approved Triangle's proposal. Plaintiffs subsequently sued Triangle, claiming that it knowingly misrepresented CRS's financial status to them, breached its contractual duties as Collateral Agent, and engaged in tortious conduct to pursue its own financial interest at the expense of Plaintiffs'. Triangle then moved to transfer this action to the U.S. District for the Western District of Kentucky pursuant to 28 U.S.C. §§ 1404(a) and 1412.

<u>Holding:</u>
Assuming arguendo that the Intercreditor Agreement and its attendant forum-selection clause applies to this action, the Court nonetheless concluded that the strong relationship between Plaintiffs' action and core bankruptcy functions suffices to overcome the presumptive enforceability of the forum-selection clause. Having spent almost a year adjudicating the blitz of objections by Plaintiffs and other creditors related to Triangle's financing to (and eventual acquisition of) CRS, the Bankruptcy Court simply was in a better position to adjudicate this action, as is the district in which Bankruptcy Court sits. Understandably, it was for this reason why courts presume that the appropriate venue to hear core proceedings is, in fact, the district in which the underlying bankruptcy action is pending. Indeed, "[i]t is not difficult to conclude that enforcing the forum[-]selection clause here would not serve the interests of justice. The palpable conflict between this action and the [b]ankruptcy [c]ase evokes a public interest sufficient to outweigh the forum[-]selection clause." Given this conclusion, the Court did not decide whether the Intercreditor Agreement and the forum-selection clause included therein was applicable.

21. Iafrate v. Angelo Iafrate, Inc., 827 Fed.Appx 543 (2020)
US Ct. Ap., 6th Cir.

Background:
Family members and sellers of their successful construction company filed securities fraud lawsuit against company that was formed to purchase construction company, via employee stock ownership plan (ESOP), and purchaser company's president for violation of § 10(b) and Rule 10b-5 and state law, by refusing to honor stock warrants, that family received as part of sale and that were redeemable for shares in purchaser company at set price or for cash, allegedly due to expiration of warrants' exercise period, and by president manipulating value of company's stock. The United States District Court for the Eastern District of Michigan, Arthur J. Tarnow, Senior District Judge, 2019 WL 1863816, granted defendants' motion to dismiss for failure to state claim. Plaintiffs appealed.

Holding:
Material misrepresentation or omission was lacking as to warrants and reasonable reliance was lacking as to manipulation of stock value. Affirmed

22. In re: Andreson v. Harbor Bank of Maryland, 599 B.R. 504 (2019)
US District Court, D. Maryland

Background:
Creditor filed adversary complaint against Chapter 7 debtor, who, as president and chairman of the board of directors of commercial fish farming company, had personally guaranteed company's pre-petition loan from creditor, objecting to debtor's discharge and seeking declaration that the debt owed to creditor was non-dischargeable. After the proceeding was consolidated with adversary proceeding brought by other creditors, trial was held. The Bankruptcy Court, Wendelin I. Lipp, J., 2018 WL 1475981, ruled, inter alia, that debt owed to creditor was excepted from discharge as one incurred as the result of "willful and malicious injury," and entered judgment for creditor on its claim. Debtor appealed.

Holding:
Under Maryland law, debtor's wife, who was company's secretary and treasurer as well as a secured creditor of it, did not have "control" over company's deposit account, and so creditor, not wife, had a priority security interest in insurance proceeds deposited in account, and was injured when wife withdrew funds from the account; because creditor's original collateral was not any insurance policy or claim but, rather, company's real property, its interest could be secured and prioritized under the UCC; the injury to creditor was "willful and malicious"; and res judicata did not bar creditor's claims. Affirmed.

23. In re Transcare Corporation, 2020 WL 8021060 (2019)
US Bankruptcy Court, SD NY

Background:
"Salvatore LaMonica, Esq. ("Trustee") commenced this adversary proceeding on behalf of the estates (collectively, the "Estate") of the debtor TransCare Corporation and its debtor-affiliates (collectively, "TransCare" or the "Debtors") to recover damages and avoid certain transfers that occurred before or after the filing of the initial petitions in these cases. He also sought other forms of relief. The Trustee's claims arose, for the most part, from two discrete though related transactions: (1) the strict foreclosure of the Debtors' most valuable assets by an entity controlled by an insider and immediate resale of those assets to another entity controlled by the same insider, and (2) the granting of a lien to yet another entity controlled by the same insider. The Court conducted a multi-day bench trial and based upon the evidence adduced, respectfully recommended to the District Court that it enter a money judgment against defendant Lynn Tilton in the sum of $41.8 million. The Court found that the transfer resulting from the strict foreclosure must be avoided, and the Estate was awarded a judgment in the amount of $39.2 million against PPAS, in addition to the Trustee's reasonable attorneys' fees. Finally, the lien granted to the insider must also be avoided and preserved for the benefit of the Estate.

Holding:
The disposition of the Trustee's claims required further consideration regarding how to proceed. The findings and conclusions relating to the breach of fiduciary duty claim were proposed and the parties were entitled to seek de novo review by the District Court in accordance with Federal Bankruptcy Rule 9033(d). The remaining, core claims, on the other hand, were ready for the entry of judgment subject, however, to the fixing of reasonable attorneys' fees in connection with the intentional fraudulent transfer claim against PPAS. The parties were directed to contact chambers to arrange a conference to discuss the scheduling of the inquest in connection with the award of attorneys' fees, the submission of the report and recommendation to the District Court and the entry of judgment on the core claims.

24. Eurosesmillas, S.A. v. PLC Diagnostics, Inc., 2019 WL 1960342 (2019)
US District Court, N.D. California

Background:
In any event, Eurosemillas had invested in and loaned money to iNDx, and the company was now bankrupt and no longer had the collateral that secured Eurosemillas's loan, which was in LDIP's hands. Eurosemillas asserted four claims for relief. First, it sued PLC and NMS for breach of the ICA. The gist of the claim was that the ICA placed Eurosemillas, PLC and NMS on equal footing with respect to the collateral, but the public auction resulted in all of the collateral going to PLC and NMS. Second, it sued PLC and NMS for breach of the covenant of good faith and fair dealing. Third, it sued Duer, Rieders, PLC and NMS for fraud in inducing Eurosemillas to invest in and loan money to iNDx in the first place. Fourth, Eurosemillas sued Duer, Rieders, PLC and NMS for unfair competition. A conundrum in the SAC is that it listed LDIP as a Defendant in the caption and requested relief against it in the prayer for relief, but none of the claims for relief stated that they are against LDIP.

Holding:
Eurosemillas also asserted its fraud claim against Rieders and Duer. Specifically, Eurosemillas alleged that Rieders and Duer "induced Plaintiff to participate in iNDx's Series A financing round with a $ 200,000 investment and subsequent $ 250,000 loan to iNDx via its pari passu note." The Series A financing occurred "in March 2014." The loan was funded by January 28, 2015. A plaintiff in a fraud case cannot lump alleged misrepresentations by multiple defendants together. Accordingly, the Court scrutinized the SAC for false statements made specifically by Rieders or Duer.

"On December 9, 2013, at a meeting held at PLC's office located at 9568 Topanga Canyon Blvd., Chatsworth, California 91311, Defendant Duer misrepresented to Ricardo Merino of Eurosemillas the state of the PLC technology underlying the Collateral, and assured him that the technology would be ready for market in six (6) months. On October 21, 2014 in a meeting at 4:00-6:45 pm PST at iNDx's office in Los Gatos, Defendant Duer again misrepresented the readiness of the PLC technology underlying Collateral and reassured Javier Cano of Eurosemillas that the technology would be delivered in Q1 2015."

"In August 2013, as part of the due diligence before the parties entered into the JV Agreement, PLC and Defendant Duer represented to Mohan Uttarwar of iNDx Technology, Inc., that the PLC technology had passed the sample tests in the PSA (Prostate Specific Antigen) test kit that had been sent to them in July 2013, in a commercially reasonable manner (i.e. without tuning and adjusting the system for each sample)."

"On January 29, 2015 at 9:30 am PST, in a phone call, Defendant Rieders of NMS welcomed Plaintiff's loan of $ 250,000 to iNDx at the same pari passu terms as PLC and NMS and agreed to enter into the Intercreditor Agreement and fulfill their obligations under this contract." "On October 21, 2014 in a meeting at 4:00-6:45 pm PST at iNDx's office in Los Gatos ... Defendant Duer further assured Javier Cano [of Eurosemillas] that iNDx's existing secured creditors would enter into the Intercreditor Agreement."

"On February 17, 2016, between 6 p.m. - 7 p.m. PST, the members of iNDx's Board convened via telephone to discuss, among other things, the terms of additional bridge financing that NMS considered providing to iNDx at the time. During that meeting, Defendant Rieders expressly acknowledged the pari passu rights that Plaintiff, PLC and NMS had to the Collateral pursuant to the terms of the Intercreditor

Agreement. He made clear that any additional financing extended to iNDx would be contingent on all three existing secured creditors—PLC, NMS and Plaintiff—amending the Intercreditor Agreement."
These allegations were deficient.

25. In re Fencepost Productions, Inc., 629 B.R. 289 (2021)
US Bankruptcy Court, D. Kansas

Background:
Chapter 11 debtors in jointly administered cases filed objections to subordinated creditor's proofs of claim totaling $5.3 million and sought to bar that creditor's participation in the confirmation process based on its pre-petition debt subordination agreements with debtors' principal creditor.

Holding:
Subordination agreement's purported relinquishment of subordinated creditor's bankruptcy plan voting rights to principal creditor was unenforceable; subordination agreements did not preclude subordinated creditor from filing proof of claim; and subordinated creditor lacked prudential standing to participate in the confirmation process. Objections were overruled.

26. In re Empire Generating Co., LLC, 2020 WL 1330285 (2021)
US District Court, S.D. NY

Background:
The following facts were taken from the record generated in the bankruptcy case. On May 19, 2019, ("Petition Date"), Empire Generating Co., LLC ("Empire Generating") and certain of its affiliates (together, "Appellees" or "Debtors") – specifically, Empire Gen Holdco, LLC, ("Holdco"), Empire Gen Holdings, LLC, ("Holdings"), and TTK Empire Power, LLC, ("TTK Empire") – filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, and requested joint administration of their respective cases, which request the Bankruptcy Court granted on May 21, 2019.

Holding:
Before the Court was the appeal of minority lenders ASSF IV AIV B Holdings III, L.P.; AEIF TRADE, LLC; SPT Infrastructure Finance Sub-1, LLC; and SPT Infrastructure Finance Sub-2, Ltd. (together, "Appellants"), from the Bankruptcy Court's Order Authorizing and Directing the Debtors to Assume Restructuring Support Agreement. Appellants also moved for leave to appeal from the Bankruptcy Court's Order (A) Approving Bid Procedures Relating to the Sale of Substantially All the Assets of Empire Generating Co, LLC or Interests in Empire Gen Holdings, LLC, (B) Establishing Procedures in Connection with the Assumption or Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (C) Approving Notice Procedures, (D) Approving Stalking Horse Bid Protections, and (E) Granting Related Relief. Appellants' motion for leave to appeal from the Bid Procedures Order was denied, and the Bankruptcy Court's RSA Order was affirmed.

27. In re Energy Future Holdings, Corp., 773 Fed.Appx. 89 (2019)
US Court of Appeals, Third Circuit

Background:
First lien indenture trustee brought adversary proceeding asserting that adequate protection payments and plan distributions should be subject to post-petition interest allocation method for the benefit of first lien noteholders. Parties filed motions for judgment on the pleadings. The United States Bankruptcy Court for the District of Delaware, Sontchi, J., entered order directing pro rata allocation of payments, and indenture trustee appealed. The District Court, Richard Andrews, J., 585 B.R. 341, affirmed, and indenture trustee appealed.

Holding:
Waterfall provision of intercreditor agreement did not govern allocation of payments; and distributions under Chapter 11 plan, and adequate protection payments distributed per cash collateral order, would be allocated among three different first lien creditors on a pro rata basis. Affirmed.

28. In re Energy Future Holdings, Corp., 748 Fed.Appx. 455 (2018)
US Court of Appeals, Third Circuit

<u>Background:</u>
Deposit letter of credit loan facility lenders brought adversary proceeding in Chapter 11 case against first lien lenders, seeking declaratory judgment that lenders had priority in deposit letter of credit loan collateral account. The Bankruptcy Court for the District of Delaware, Sontchi, J., 548 B.R. 79, granted motion to dismiss by first lien lenders. The District Court, Richard G. Andrews, 2017 WL 1170830, affirmed, and loan facility lenders appealed.

<u>Holding:</u>
Waterfall provision of intercreditor agreement did not give deposit letter of credit loan facility lenders, or their successors, priority over other first lien creditors with regard to deposit letter of credit account; and credit agreement gave only issuers of deposit letters of credit the right to be paid first from deposit letter of credit account. Affirmed.

29. Saltini v. North Sea Development LLC, 118 N.Y.S.3d 372 (2019)
Supreme Court, Suffolk County, NY

<u>Background:</u>
The plaintiff was the owner of three parcels of real property in Southampton, New York (“Lot 1,” “Lot 2,” & “Lot 3”). In 2015, he and the defendant Coast Development Group LLC (“Coast”) formed the defendant North Sea Development LLC to construct high-end homes on the three parcels. North Sea is owned 51% by Coast and 49% by the plaintiff. The members of Coast are the individual defendants, Richard J. Gherardi, Richard F. Gherardi, and Glenn Callahan, each of whom has a one-third membership interest in Coast. In order to obtain financing for the project, the plaintiff conveyed title to the parcels to three separate LLCs (one for each parcel) in which North Sea had a 100% membership interest (the Property LLCs). The Property LLCs then obtained financing from the defendants Acres Capital, LLC, and Reliance Standard Life Insurance Co. On or about February 5, 2016, the Property LLCs borrowed a total of $11,580,000 from the Lender (the “Senior Loan”): $4,212,439 as an acquisition loan, $5,048,300 as a building loan, and $2,319,261 as a project loan. Each of the three loans was evidenced by a promissory note and secured by a mortgage on the three parcels, among other things.

Also, on or about February 5, 2016, the plaintiff sold the three parcels to North Sea for $8,090,000. At the closing, the plaintiff was paid $3,829,806, and North Sea executed a promissory note in his favor for the balance, $4,260,194. The Mezzanine Loan was secured by a pledge agreement executed by Coast granting the plaintiff a security interest in Coast’s membership interest in North Sea. The Mezzanine Note contained two repayment options: (1) at such time and in such amount as provided in paragraph 28(F) of North Sea’s operating agreement, or (2) $784,634 at the closing of the sale of Lot 1, $1,105,860 at the closing of Lot 2, and the balance (unpaid principal and interest) on the sale of Lot 3 or November 1, 2019, whichever was sooner. The relationship between the Lender and the plaintiff is governed by an Intercreditor Agreement dated February 5, 2016.

<u>Holding:</u>
Affording the complaint a liberal construction, accepting the facts alleged therein as true, and granting the plaintiff the benefit of every possible favorable inference, the plaintiff failed to show that the Lender engaged in inequitable conduct that harmed him. The modifications to the Senior Loan were made after the Property LLCs defaulted to provide the Lender with additional security. While the Lender initially increased the release price to $6,000,000, it subsequently reduced it to $5,000,000. Moreover, the properties were not sold, and two of the three were listed for sale at prices well above the reserve amount. The plaintiff’s contention that the Lender’s actions made it impossible for him to be repaid were entirely speculative. Accordingly, the court found that the plaintiff failed to state a cause of action for breach of the covenant of good faith and fair dealing.

30. Juno Investments, LLC v. Miller, 2021 WL 2636479 (2021)
US District Court, D. Delaware

Background:
Plaintiff JUNO is a Delaware limited liability company with offices in New York, New York. Phil Kampf is the Managing Director of JUNO, and Mox Tan is also affiliated with JUNO. Defendant Mr. Miller is a bankruptcy and workout attorney who is licensed to practice law in North Carolina; he is a partner and/or shareholder in Rayburn Cooper. Rayburn Cooper is a law firm and professional association of attorneys licensed to practice law in North Carolina, with offices in Charlotte, North Carolina.

Holding:
The Court agreed with JUNO. Although Count IV largely focused on the possibility that a written contract (i.e., the Engagement Letter) existed between JUNO and Mr. Miller, the Count can also be read to suggest that an implied contract existed between those parties (alleging that Mr. Miller entered into a contract with JUNO by "oral and/or written agreement and/or by operation of North Carolina law"). And it is plausible that Mr. Miller's interactions with JUNO about various legal matters relating to SEMP and JUNO could have created an implied contractual relationship between he and JUNO. Therefore, the Court recommended that Defendants' Motion to dismiss JUNO's breach of contract claim against Mr. Miller be denied.

31. In re Walls, 2020 WL 5997503 (2020)
U.S. Bankruptcy Court, W.D. Tennessee, Western Division

Background:
Walls is sole owner and business manager of AVPOL. AVPOL and iXorp entered into a Factoring and Security Agreement on April 22, 2016, whereby AVPOL agreed to sell some of its accounts receivable to iXorp. The Factoring and Security Agreement was terminated in April 2017, when AVPOL entered into a new factoring agreement with MBE Capital Partners, LLC. At that time, AVPOL was indebted to iXorp in the amount $363,289.10. This is reflected in a Promissory Note given by AVPOL to iXorp dated April 18, 2017. Walls personally guaranteed that obligation. MBE Capital Partners, AVPOL, and iXorp entered into an Intercreditor Agreement whereby MBE agreed to send 3% of invoices purchased from AVPOL to iXorp to reduce AVPOL's obligation to iXorp. As a result of this agreement, the obligation of AVPOL to iXorp was reduced to $295,091.46. iXorp made no additional direct advances to AVPOL after April 18, 2017. Unbeknownst to Walls, MBE and iXorp had entered into a Refactoring Agreement whereby iXorp agreed purchase AVPOL accounts from MBE Capital. Walls then gave notice that AVPOL was breaking ties to MBE. AVPOL filed a Chapter 7 petition on May 1, 2018. In its complaint, Plaintiff-iXorp alleged that the obligation of Walls to iXorp should be excepted from discharge pursuant to sections 523(a)(2)(A) (fraud, false pretenses, false representation or actual fraud), 523(a)(4) (defalcation while acting in a fiduciary capacity), and 523(a)(6) (willful and malicious injury to property) of the Bankruptcy Code. Defendant-Walls answered by denying that acts complained of were done in corporate capacity, not by Walls individually.

Holding:
Walls argued that the Loan Agreement, Promissory Note, and Guaranty represented a novation that extinguished prior obligations under the Factoring and Security Agreement. The issue with Defendant's argument was whether the parties intended a novation. iXorp alleged that they did not, while Walls asserted that they did. The Court noted that intent of parties can be seen by their written agreements. Although not limited to the following, the fact that iXorp agreed to subordinate its rights to collateral arising from the Loan Agreement to the security interest of MBE in the Intercreditor Agreement and Walls, in an email, specifically referred to trying to obtain an accounting of the 3% that was to be withheld by MBE to pay iXorp, point to the intention of the parties to terminate the Factoring and Security Agreement. iXorp further asserts that had Walls not acted improperly with respect to AVPOL's agreement with MBE, the debt under the Promissory Note would have been further reduced. However, this theory failed, partially because the obligations under the Intercreditor Agreement would not have affected the same under the Promissory Note. iXorp's claim to pierce the corporate veil failed. All of iXorp's allegations in support of its three theories to discharge, however, were based upon activities of Walls that occurred prior to the execution of the Loan Agreement, Promissory Note, and Guaranty. The court found that a novation occurred when those

documents were signed. Therefore, none of the activities of Walls leading up to the execution of the new agreement could lead to the basis for excepting the claim based on those agreements from discharge.

32. U.S. Bank National Association, as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2007-ESH v. Lightstone Holdings LLC, 125, N.Y.S.3d 841 (Sup. Ct. N.Y. Co. 2020)
Supreme Court, New York Co. New York

Background:
Wachovia, Bear Stearns and Bank of America (collectively, the "Original Lenders") provided approximately $7.4 billion in financing in connection with Lightstone Holdings LLC's acquisition of the Extended Stay Hotel ("ESH") portfolio of hotels. The loan was secured by mortgages on 664 hotel properties owned by ESH as well as assignments of leases and rents and security agreements pertaining to the various hotel properties. In addition, the sponsors of the ESH transaction issued guaranties of repayment of both the senior and junior debt, and a "bad boy" guaranty capped at $100 million which would be triggered by a bankruptcy of ESH. The Original Lenders divided the financing into senior debt ($4.1 billion) and junior debt (ten tranches of mezzanine/junior debt aggregating $3.3 billion). The Original Lenders, which collectively funded 100% of the both the senior and junior debt, entered in an Inter-creditor Agreement dated June 11, 2007, (the "ICA") which contained a Section 15(q) that was captioned "Non-Recourse Carveout Guaranty" (the "Guaranty") pursuant to which the sponsors guaranteed a capped payment of $100 million in the event of bankruptcy. In addition to the other guaranties the sponsors issued in connection with the financing the sponsors obtained, ESH filed for bankruptcy on June 15, 2009. Accordingly, the Junior Lenders filed suits against the Guarantors to collect the proceeds from the Section 15(q) Guaranty. Plaintiff's claims were based on the general contention that two general subordination provisions of the ICA — Sections 6 and 10 — control which group of creditors have priority to the 15(q) Guaranty as opposed to the more-specific provision of 15(q). The trial of this case presented two issues to the Court for resolution: (1) as between the Senior and Junior Lenders which party or parties was entitled to the proceeds of the $100 million Section 15(q) guaranty; and (2) whether, following the bankruptcy, there was a deficiency on the amounts received on the senior debt which would form the basis of a claim by the Senior Lender under either the $100 million Section 15(q) capped guaranty or the separate guaranty the sponsors gave to the Senior Lender

Holding:
The Court adhered to the ruling it made on the transcript of proceedings with respect to the Junior Lenders entitlement to retain the $31.4 million the three Junior Lenders received pursuant to judgments previously entered by the Court. The Junior Lenders established their entitlement to these funds by a preponderance of the evidence adduced at trial, primarily by testimonial evidence of the lawyers that drafted the intercreditor agreement. Additionally, it was evident that the ICA set the priority of payments amongst the Senior Lender and Junior Lenders both generally and with respect to the 15(q) Guaranty. The Junior Lenders' claim to recover attorneys' fees pursuant to Section 33 of the Inter-Creditor Agreement at issue in this case was granted on the grounds that the Junior Lenders were the prevailing party on their counterclaims seeking a declaration of rights against the Senior Lender. Inasmuch as Section 33 of the Inter Creditor Agreement only provides for the recovery of "reasonable" attorneys' fees related to the enforcement of the Junior Lenders' rights against the senior lender, the Court will determine the quantum of fees absent a stipulation of the parties. In all events, the Court deferred assessing fees until any subsequent appeal from this Court's order is resolved.

33. Hyundai Capital America v. Nemet Motors, LLC, 2019 WL 7598668 (2019)
U.S. District Court, E.D. New York

Background:
Hyundai Capital America ("HCA" or "Plaintiff") entered into an Inventory Loan and Security Agreement ("ILSA") which provided a line of credit to Nemet for the purchase of vehicles for Nemet's inventory. Nemet granted Plaintiff a security interest in all personal property and fixtures, among other things, of Nemet. Section 9(a)(i) of the ILSA includes provision binding Nemet to maintain all franchises necessary to carry on the business proposed to be conducted. At the same time, Nemet had a Nissan Motors franchise.

Nissan then entered into a financing agreement with Nemet as borrower. Subsequently, Plaintiff decided to enter into an intercreditor agreement with Nissan. Section 10(g) of ILSA provides that if Nemet breaches any obligation to any creditor with which Plaintiff has an intercreditor agreement, the breach constitutes an event of default under ILSA. Perlstein, Nemet's president, entered into a guaranty agreement holding Perlstein liable for Nemet's breach under ILSA. Nissan filed suit against Nemet alleging Nemet's failure to repay Nissan about $2.7 million for sale of 192 cars financed by Nissan. Upon learning of this, Plaintiff initiated this action against Nemet Motors, LLC and Scott Perlstein, Sr. on October 10, 2019. Plaintiff alleged that Nemet breached contractual obligations under two agreements and Pelstein, as guarantor of Nemet's obligations, was liable for the amount due and owing to HCA. Plaintiff sought an Order of Seizure for certain inventory serving as collateral to the agreements between HCA and Defendants.

Holding:
Defendants admitted that they have defaulted on the Agreements, but requested that the approximately 138 vehicles in question not be seized because: 1) all Parties will be better off without an order of seizure; 2) Plaintiff cannot seek the equitable remedy of replevin when it had unclean hands—Defendants claimed HCA wrongfully told Hyundai Motors, the manufacturer, to withhold $400,000 due to Nemet for warranty claims, part orders, and manufacturer rebate money after Defendants' defaulted; and 3) Plaintiff had not demonstrated that its lien is superior to the rights of other creditors because Plaintiff had not produced the intercreditor agreement referenced in its Complaint. Defendants' last argument was not persuasive. Defendants argued that Plaintiff had not established a superior claim to the assets because there was an intercreditor agreement between Plaintiff and Nissan which Plaintiff had not produced. This agreement could hypothetically prove whether Nissan or HCA had a superior right to the collateral vehicles. Since Nissan had not come forth with a superior right in this action, and HCA had demonstrated a superior right in the collateral to Defendants under the Agreements, the Judge found that HCA had the superior possessory right to the collateral vehicles. For the foregoing reasons, the Judge respectfully recommended that Plaintiff's request for an order of seizure for the vehicles serving as collateral be granted.

34. In re MPN Silicones, L.L.C., 596 B.R. 416 (2019)
U.S. District Court, S.D. New York

In re MPM Silicones, L.L.C., 2018 WL 6324842 (2018)
U.S. District Court, S.D. New York

Background:
Senior lien holders brought adversary proceeding against junior lien holders whose claims were secured by the same common collateral for allegedly violating terms of intercreditor agreement (ICA) between parties, and junior lienholders moved to dismiss complaints. Specifically, the ICA set forth the priorities, rights, and remedies of the Seniors and Seconds with respect to the Common Collateral. The ICA firmly established the priority of liens on the Collateral and focused on the circumstance that MPM was unable or unwilling to repay its debts. Nonetheless, the United States Bankruptcy Court for the Southern District of New York, Robert D. Drain, J., granted the motions to dismiss. Senior lien holders appealed. The appeal raised five questions. The first regards whether the Bankruptcy Court erred in finding, as a matter of law, that the Appellees did not breach the Intercreditor Agreement ("ICA"), a contract governed by New York law, by voting in favor of MPM's reorganization plan that Appellants opposed. The next three concern whether the Bankruptcy Court erred in finding, as a matter of law, that the Appellants failed to raise a plausible claim for breach of the ICA with regards to three actions: (1) Appellees' receiving equity in reorganized stock in exchange for releasing their claims on certain collateral that Appellees and Appellants shared; (2) Appellees' receiving and retaining a certain "BCA Fee" prior to Appellants receiving a payment in full cash for their liened securities; and (3) Appellees' receiving payment of their professional fees prior to the Appellants receiving a payment in full cash for their liened securities. The fifth question was whether the Bankruptcy Court erred in dismissing, as a matter of law, Appellants' alternative claim for breach of the covenant of good faith and fair dealing.

Holding:
The thrust of Appellant's first argument was that the collective conduct in which the Seconds voted to approve the Chapter 11 Plan (to which the Seniors objected and which ultimately provided the Seniors with

replacement notes allegedly worth less than their over-secured claims) violated the ICA because it "hindered the [Seniors'] exercise of remedies in the manner in which they sought to collect on their claims." Based on the context of the entire integrated agreement and the industry to which it is germane, the Court found it unambiguous that the prohibition on hindering the Seniors' remedies was not intended to mean that the Seconds were waiving all the voting rights that they were otherwise entitled to under bankruptcy law. As there were no express constraints or waivers in the ICA, the Bankruptcy Court correctly concluded that Appellants did not plead a plausible claim. Accordingly, the Bankruptcy Court's decision on the interference claim was affirmed. Next, Appellants alleged that the Seconds violated ICA Sections 3.1(b) and 4.2 by receiving and retaining (i.e. failing to "turn over") various forms of remuneration. Appellants contended that the remuneration unlawfully received and retained included: (1) common stock in the reorganized MPM; (2) professional fee payments; and (3) the BCA fee. Although the term "proceeds" can arguably yield to different meanings outside of the bankruptcy context, here, the Court found it clear beyond a doubt that proceeds were never intended to—and as a matter of economics cannot—refer to the reorganized common stock that the Seconds received in return for giving up their liens to the Common Collateral and restructuring their swath of unsecured debt. The Seniors, who never discharged their liens and claims on the Common Collateral, were not entitled to turnover payments just because the Seconds' did. Appellants next argued that the Seconds were not entitled to retain a $ 30 million Backstop Commitment Fee ("BCA Fee"), which was also paid in reorganized MPM common stock. This Court explained why no claim based on reading "proceeds" of the Common Collateral to include MPM's reorganized stock is legally plausible (dismissed). The Court next turned to the receipt and retention of professional fees, which failed to state claim for relief that was plausible on its face. Lastly, claim for breach of the covenant of good faith and fair dealing was redundant of breach of contract claim. Affirmed.

35. In re La Paloma Generating Company, LLC, 2020 WL 224569 (2020)
U.S. Bankruptcy Court, D. Delaware

Background:

Plaintiff and counterclaim defendant LNV Corporation ("LNV") moved to dismiss the sole counterclaim (the "Counterclaim") asserted by defendants Solus Senior High Income Fund LP, Solus Alternative Asset Management LP, and the Ad Hoc Group of Second Lien Creditors (collectively "Solus") in their Answer to the First Amended Adversary Complaint and Counterclaim. The Counterclaim alleges that LNV breached the covenant of good faith and fair dealing in connection with an Intercreditor Agreement ("ICA") governing the relationship between LNV as First Lien Lender and Solus as Second Lien Lenders to the Debtors. LNV's Motion was brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7012. The Motion was granted, and the Counterclaim was dismissed with prejudice.

Holding:

Solus agreed that the ICA was a valid and binding contract. The ICA specifically allowed LNV to: "enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the [Second Lien Lenders] ... all in such order and in such manner as they may determine in the exercise of their sole discretion." In this Court's prior decision granting the Motion of LNV Corporation to Enforce the Intercreditor Agreement, it found the Disputed Funds to be Collateral that must be turned over to LNV and found that LNV's actions were permitted under the ICA. Those findings are law of the case, and therefore binding. As the Court previously ruled, LNV can proceed against Collateral however it sees fit, including settling the issue of the lapsed financing statement. When acting against the Collateral, LNV was exercising its contractual rights. A party cannot breach the duty of good faith and fair dealing by merely exercising its contractual rights. Solus's counterclaim, therefore, was barred by the law of the case doctrine. For the foregoing reasons, the Defendants' Counterclaim was dismissed with prejudice. The Court entered an order giving effect to this ruling.

36. In re Clearpoint Chemicals, LLC, 2020 WL 7635270 (2020)
U.S. Bankruptcy Court, S.D. Alabama

Background:
ServisFirst extended pre-petition loans to the Debtor with outstanding indebtedness approximating $3,362,635.00. ServisFirst's loans were secured by assets of the Debtor including accounts receivable, equipment and inventory. In November 2018, the Debtor entered into an Advance Plus Revolving Credit and Security Agreement with Marquette Commercial Finance, a division of Marquette Transportation Finance ("MCF") which provided for the factoring of Debtor's receivables ("Factoring Agreement"). To facilitate the Factoring Agreement, ServisFirst entered into an Intercreditor Agreement ("IA") with MCF providing MCF priority over ServisFirst in certain Debtor assets. Pursuant to its terms, the IA was to remain in effect until such time as it is terminated by one party giving the other party at least 60 days' prior written notice. Termination of the IA would return MCF and ServisFirst to the lien positions they held prior to the IA, with ServisFirst having priority over MCF in Debtor's accounts receivable. ServisFirst sought to terminate the Intercreditor Agreement and asserted that: (1) relief from the stay is not required since it was a contract between two non-debtors as to their respective priority to which the Debtor was not a party and (2) even if the Debtor were deemed to have standing to object to termination of the agreement, cause existed to grant relief because ServisFirst was not adequately protected.

Holding:
The initial issue for the Court to address was whether the automatic stay applied to cancellation of a non-debtor's contractual relationship with another non-debtor concerning lien priority. The automatic stay does not prohibit termination of the Intercreditor Agreement ("IA") between ServisFirst and MCF. ServisFirst and MCF are non-debtor entities. The Debtor is not a party to the IA and the terms thereof do not require consent or participation of the Debtor for termination. This Court does not construe the automatic stay to encompass contractual agreements by non-debtors and does not find enlargement of its protections warranted in the context of this Motion for Relief. Further, even if the automatic stay was deemed applicable to what is essentially a subordination agreement between two non-debtors, the facts of this case would nonetheless warrant granting relief to terminate the IA. The Bankruptcy Code provides that on request of a party in interest and after notice and a hearing, the court shall grant relief from the stay by terminating, annulling, modifying, or conditioning such stay for cause, including the lack of adequate protection of an interest in property of such party in interest. As ServisFirst only sought limited relief to protect its interest and preserve its lien position as opposed to another non-debtor entity, in the event the stay was otherwise applicable, the Court found that ServisFirst showed sufficient cause existed to grant relief for the limited purpose of initiating the process to terminate the IA. For the reasons noted above, this Court found that ServisFirst's Motion for Relief from the Automatic Stay pursuant to 11 U.S.C. § 362 was due to be and was hereby granted in that it was not precluded by the Automatic Stay from terminating the Intercreditor Agreement. This Order shall not however, be construed to permit ServisFirst to take any direct actions against the Debtor or Property of the Estate absent further order of this Court.

37. In re Waggoner Cattle, LLC, 2019 WL 469367 (2019)
U.S. Bankruptcy Court, N.D. Texas, Amarillo Division

Background:
Lone Star is a creditor of Debtors. Debtors run a cattle operation; the Debtor entities are owned either entirely or mostly by Michael Quint Waggoner. According to the complaint, Lone Star was the primary lender to the business operations of Debtors until Debtors sought alternative financing from Rabo (the "arrangement" contemplated Lone Star receiving full payment of its loans and for Rabo to take-over as Debtors' lender). Lone Star asserted a first-position lien against most of Debtors' assets. For this reason, when Cliff Hanger received financing from Rabo in December 2014, it was necessary for Lone Star and Rabo to enter into an Intercreditor Agreement, defining each lender's rights to certain collateral. Lone Star alleged that Cliff Hanger failed to honor the agricultural security agreement between Cliff Hanger and Lone Star, and that Rabo thus received proceeds from Cliff Hanger in violation of the terms of the Intercreditor Agreement. Lone Star alleged 16 causes of action, including a breach of Intercreditor Agreement.

Holding:
Court denied Rabo's motion to dismiss the "breach of Intercreditor Agreement" cause of action alleged in Lone Star's complaint; court had "related-to" jurisdiction over said cause of action. With respect to cause of action four - equitable subordination - courts agreed that a creditor asserting equitable subordination must have suffered some particularized injury to satisfy the standing requirement. Thus, particularized injury is a prerequisite of a creditor's equitable subordination claim. Here, Lone Star alleged several injuries it suffered because of Rabo's conduct. An adjudication of allegations in favor of Lone Star would satisfy the particularized injury requirement. But such an adjudication was lacking at this point. Lone Star's equitable subordination claim, therefore, was not ripe. For these reasons, the Court dismissed Lone Star's fourth cause of action, without prejudice to re-arguing the issue if, or when, it becomes ripe. Notwithstanding the ripeness issue, the Court had already issued its order denying Lone Star's standing to prosecute Debtors' causes of action, including fraudulent transfer actions. The § 502(d) claim, therefore, was also dismissed because Lone Star lacked standing. Such dismissal was without prejudice to Lone Star seeking the same relief later. However, causes fourteen (for an accounting) and fifteen (for wrongful offset) were not addressed by Rabo's motion.

38. Hyundai Capital America v. Nemet Motors, LLC, 2019 WL 6337526 (2019)
U.S. District Court, E.D. New York

Background:
See #33 above. HCA filed suit against Nemet on October 10, 2019, alleging Nemet's breach of the ILSA and BLA, and Perlstein's breach of the Guaranty Agreement, and requesting, inter alia, a preliminary injunction and an order of seizure. HCA also submitted an application for entry of an order compelling the Defendants to show cause why the Court should not issue an order of seizure for the vehicles. HCA supported this application with a memorandum of law, a verified complaint, a list identifying the vehicles and the amount due on each vehicle, and copies of the parties' contracts. On October 15, 2019, the Court referred HCA's motion to the Honorable Magistrate Judge Ramon E. Reyes for a report and recommendation. On October 29, 2019, Judge Reyes issued a thorough and well-reasoned report and recommendation recommending that the Court grant HCA's motion for an order of seizure. For the reasons set forth below, the Court adopted Judge Reyes's recommendation and granted HCA's motion for an order of seizure.

Holding:
Defendant made 3 objections: (1) impending sale of Nemet's dealership's assets and real estate rendered HCA's request for an order of seizure unececssary; (2) HCA's unclean hands precluded an award of replevin; and (3) HCA should be required to post an undertaking in order to obtain an order of seizure. As to the first objection, Judge Reyes rejected Defendants' purported defense to seizure because he correctly recognized it as "simply not a defense." In particular, he noted that HCA's right to the Collateral does not depend on the financial impact that seizure would have on the parties, but rather on whether HCA has a superior right over Defendants to the Collateral. The Court agreed with Judge Reyes's recommendation and rejected Defendants' first purported defense to HCA's motion. As to the second objection, Judge Reyes pointed out that under the terms of the ILSA, HCA holds a valid security interest in the receivables it directed to be withheld, "which it can seek recourse against in the event of Defendants' default." Judge Reyes accordingly recommended that this Court reject Defendants' unclean hands defense. Here, HCA's right to seek an order of seizure did not accrue to it because of any alleged misdeeds regarding withholding of these funds but instead existed prior to any alleged misdeeds. As to the third objection, the undertaking requirement has been waived and therefore does not stand as an obstacle to the Court's issuing an order of seizure in favor of HCA. In sum, HCA established a prima facie case for entitlement to an order of seizure, and Defendants failed to present any bona fide defenses to same.

39. In re Lexi Development Company, Inc., 603 B.R. 190 (2019)
U.S. Bankruptcy Court, S.D. Florida

Background:
Lender brought adversary proceeding asserting breach of contract against debtor-condominium developer and its senior lender, asserting that senior lender's failure to send notices of debtor's default on loan, as

required under intercreditor agreement (ICA), caused it damages. The case proceeded to trial. NBV is a Delaware limited liability company whose sole member is NBV Loan Acquisition Member, LLC ("NBV Member"), a Florida limited liability company, whose sole member has been Allen since inception. Lexi is the Debtor-in-Possession and a Florida corporation, owned and controlled by Allen and Scott, which developed a mixed use residential and retail condominium, The Lexi, in North Bay Village. Regions is an Alabama bank and was the administrative agent and co-lender of the Senior Loan.

Holding:
Plaintiff failed to prove that any damages were caused by it not receiving the default notice as required by the ICA. The Court found that, on the evidence presented at trial, Plaintiff cannot recover at all against Regions on any damage theory because Regions' failure to provide copies of the default notices to GFB did not cause non-payment of the GFB-Lexi Loan or any other loss or damage that GFB claims. Instead, the evidence established that Regions acted in the best of good faith. It not only worked with the parties, modifying its loan agreement, extending the maturity date by a full year, and modifying release clauses to allow sales of some condominium units, but it also allowed the use of its cash collateral to pay operating expenses. Additionally, after several negotiations to try to work out the financing problems, it sold the loan to an entity that offered an additional extension of the loan for three years at contract rate interest – which offer was rejected. Although the Plaintiff asserted that the testimony of both Scott Greenwald and Mehdi Ghomeshi established that GFB would have cured the default and avoided additional expenses if it had received notice of Debtor's default, the Court found the testimony of those witnesses to lack credibility and sincerity. In fact, the Court found that GFB, and Mehdi Ghomeshi, were well aware of Lexi's default on the Senior Loan and the ongoing negotiations between Scott Greenwald, on behalf of the Debtor, and Regions Bank; and notwithstanding the knowledge of the default and the negotiations, GFB chose to forego exercising its options to purchase the loan or to cure Lexi's default thereunder. Plaintiff's arguments–that GFB did not contact Regions to provide a cure once it learned of the default because the ICA did not give GFB the right to do so and it did not want to subject itself to lender liability–were similarly insincere and wholly without merit. The evidence proved that GFB always had the right to purchase the Senior Loan at par but failed to exercise that right. Moreover, GFB never sought to mitigate any potential loss by seeking to collect from the Greenwalds, the obligors and guarantors. Thus, the Bankruptcy Court, Jay Cristol, J., held that: senior lender's failure to send notices of debtor's default on loan was not the proximate cause of loss to lender (i.e., Plaintiff failed to prove damages as a result of not receiving default notices), and doctrine of avoidable consequences precluded lender's breach of contract claim.

40. In re Miami Metals I, Inc., 625 B.R. 593 (2021)
U.S. Bankruptcy Court, S.D. New York

Background:
State court lawsuit that lenders had brought against firm that audited the debtor's financial statements, for firm's alleged gross negligence in performing audit, was removed to federal court based on debtor's bankruptcy filing. Lenders filed motion for mandatory or permissive abstention or, in the alternative, for equitable remand. The Bankruptcy Plan and Intercreditor Agreement that served as the background for this lawsuit were governed by New York Law.

Holding:
The Bankruptcy Court, Sean H. Lane, J., held that: by approving proposed Chapter 11 plan that contained a generic and broad boilerplate clause providing that bankruptcy court would retain exclusive jurisdiction over "related to" matters, lenders did not clearly waive their right to seek mandatory abstention, and bankruptcy court had to abstain from hearing removed state court action in debtor's liquidating Chapter 11 case. Mandatory abstention requires six conditions to be satisfied: (1) the abstention motion is timely, (2) the action is based on a state law claim, (3) the action is "related to" a bankruptcy proceeding but does not "arise under" the Bankruptcy Code, (4) federal bankruptcy jurisdiction is the sole basis of federal jurisdiction for the action, (5) the action was commenced in state court, and (6) the action can be timely adjudicated in state court. The Second Circuit evaluates four factors when considering timeliness: (1) the backlog of the state court's calendar relative to the federal court's calendar; (2) the complexity of the issues presented and the respective expertise of each forum; (3) the status of the title 11 bankruptcy proceeding to which the state law claims are related; and (4) whether the state court proceeding would prolong the

administration or liquidation of the estate. Given this assessment of the timeliness factors and the lack of dispute as to the other five conditions for mandatory abstention, the Court found that abstention was mandated by 28 U.S.C. Section 1334(c)(2). Given that abstention was mandatory, the Court did not need to address the doctrines of permissive abstention or equitable remand.

41. In re Integrity Directional Services, LLC, 619 B.R. 739 (2020)
U.S. Bankruptcy Court, W.D. Oklahoma

Background:
In this adversary proceeding, the Plaintiff Douglas N. Gould (the "Trustee"), in his capacity as trustee of the Chapter 7 bankruptcy estate of Integrity Directional Services, LLC ("Debtor"), sought to avoid as a preferential transfer under 11 U.S.C. § 547(c)(1) a "blanket" security interest in Debtor's assets claimed by Defendant Falcon Strategic Partners IV, LP ("Creditor" or "Falcon") which was given to secure a promissory note in the face amount of $18 million. The security interest attached and was perfected within 90 days of the Debtor's filing bankruptcy, fifty-one (51) days after the execution of the promissory note and thirty-two (32) days after the last advance of $1.5 million under the note. The Creditor argued that the Trustee cannot avoid the security interest to the extent of the $1.5 million advance because (1) a condition precedent placed on the advance which was required to be performed by the Debtor and a third-party (a first-priority secured creditor) delayed the perfection of Falcon's security interest, thus making its' perfection timely and (2) the transfer (perfection) was "substantially contemporaneous" with the $1.5 million advance. A critical part of the consideration for the 2019 note was Debtor's covenant to grant Falcon a security interest. The following facts were undisputed. The January 2019 Senior Promissory Note provided as follows: 8(e) Grant of Security Interest – (i) The Company shall use its commercially reasonable efforts to cause to, within 30 days of the date hereof, amend that certain Intercreditor and Subordination Agreement, dated on or about January 20, 2016, by and among TBK Bank, SSB ("Triumph"), Falcon Strategic Investments IV, LP ("Falcon") and the Company; and (ii) Within 30 days of the date hereof, the Company will grant Falcon a security interest in substantially all assets of the Company, which shall include a first priority security interest in all assets not encumbered by the security interest granted to Triumph. However, Debtor failed to cause Triumph to deliver the required amendment, and Falcon did not procure the same until about March 8, 2019. In the first Amended Intercreditor and Subordination Agreement, Triumph agreed to subordinate its security interest in the Equipment to that of the Subordinating Creditor.

Holding:
Section § 547(b) provides the elements of an action to avoid a preferential transfer include: (1) the transfer of an interest of the debtor in property; (2) on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made within 90 days prior to the filing of the bankruptcy petition; (5) that benefits a creditor; and (6) enables the creditor to receive a larger share of the estate if the transfer had not been made. 11 U.S.C. § 547(b). Falcon conceded that "[t]here is no dispute that the issuance of the Security Agreement within 90 days of Debtor's bankruptcy filing satisfies the elements of a preference under § 547(b)." Having determined that the Trustee did satisfy the requirements of § 547(b), the burden shifted to Falcon to show that the transfer should not be avoided as a preference. A transfer may be insulated from attack by a trustee if (1) a creditor extends new value to the debtor, (2) both parties intended the transfer to be a contemporaneous exchange, and (3) the transfer was in fact a substantially contemporaneous exchange. There was no dispute the element of "new value" was given by Falcon nor did there appear to be any dispute that Falcon and the Debtor intended that Falcon's advances under the Note be contemporaneous with the taking of a security interest in Debtor's assets. The record also reflected an Affidavit of Falcon's general partner stating that "Falcon intended that the value advanced under the 2019 Note be contemporaneous with the granting of security interest." Based on the foregoing, the Court found that for summary judgment purposes, Falcon met its burden to show that the parties intended the transfer to be contemporaneous. However, Falcon also had the burden of showing the transfer was "in fact" substantially contemporaneous. Falcon acknowledged the delay in securing and perfecting its loan but claimed this was a result of Debtor's failure to have TBK execute the required Intercreditor and Subordination Agreement despite Falcons best efforts to procure the same until March 8, 2019. Under the "substantially contemporaneous" standard, the Court failed to see why the delay in obtaining the agreement was an

impediment for Falcon obtain and perfect its security interest. Trustee's Motion for Summary Judgment was denied, and the matter proceeded to trial on August 26, 2020.

42. In re Waggoner Cattle, LLC, 2019 WL 4732379 (2019)
U.S Bankruptcy Court, N.D. Texas, Amarillo Division

Background:
Waggoner Cattle, LLC (Waggoner Cattle), Circle W of Dimmitt, Inc. (Circle W), Bugtussle Cattle, LLC (Bugtussle), and Cliff Hanger Cattle, LLC (Cliff Hanger) (collectively, the Debtors) each filed for chapter 11 bankruptcy on April 9, 2018. Lone Star State Bank of West Texas (Lone Star) initiated this adversary proceeding against Rabo Agrifinance, LLC (Rabo), Waggoner Cattle, Cliff Hanger, and Circle W (collectively, Defendants) on June 29, 2018. Rabo filed its motion to dismiss Lone Star's complaint on August 22, 2018, which motion was granted in part and denied in part by the Court's order dated February 6, 2019. Following the Court's February 6 Order, Rabo filed its answer to Lone Star's complaint that also included three counterclaims against Lone Star. Lone Star moved to dismiss Rabo's counterclaims. See #37. Here, Rabo alleged the following three counterclaims against Lone Star: (1) breach of contract, (2) conversion, and (3) unjust enrichment. Lone Star filed its motion to dismiss Rabo's counterclaims arguing that the claims failed to state a claim upon which relief may granted (Rule 12(b)(6)), the Court lacked subject matter jurisdiction to adjudicate the claims (Rule 12(b)(1)), the claims violate the automatic stay, Rabo had no standing to assert the claims because they are property of the Debtors' respective estates, and the claims were barred by the applicable statute of limitations. Lone Star also filed its answer to Rabo's counterclaims. Lone Star recently filed an amended complaint, adding a claim for fraud and realleging its equitable subordination claim. Because it related to the analysis here, and because the amended complaint superseded the claims contained in the original complaint, the Court considered the allegations made by the amended complaint.

Holding:
Given the similarity between Rabo's counterclaims and the claims of Lone Star's complaint, there can be no doubt that the counterclaims arose out of the "same transaction or occurrence that is the basis of" Lone Star's claims. Rabo filed its counterclaims with its answer; it thus met the requirements of § 16.069(b) of the Texas Civil Practice & Remedies Code. The Court denied Lone Star's limitations point. The Court agreed with Rabo that its opinion in a related adversary proceeding controlled on Lone Star's contention that the Court lacked jurisdiction. In Lone Star State Bank of West Texas v. Moseley, the Court held that it had "related-to" jurisdiction of plaintiff's causes of action against a third-party (i.e., not the Debtors) because adjudication of such claims could "conceivably affect" the bankruptcy estates. The same analysis applied here. The allegations contained in Rabo's counterclaim are similar, if not identical, to those raised by Lone Star's complaint. The Court denied Lone Star's motion under Rule 12(b)(1) to dismiss Rabo's counterclaims for lack of jurisdiction. Rabo's three counterclaims were based on the so-labeled Calf Ranch Transfers and the "overpayments." Rabo contends, as did Lone Star for its claims, that its rights were governed by the Intercreditor Agreement between the parties. The three counterclaims were premised upon Rabo's rights under the referenced Intercreditor Agreement. The agreement undergirds the claims of both parties. Assuming that its interest in shared collateral (and proceeds) was, as Rabo alleged, superior to Lone Star's, the Court was satisfied that the motion should be denied. The Court denied Lone Star's remaining ground for dismissal—that Rabo's counterclaims violated the automatic stay. Lone Star's motion to dismiss was denied.

43. Livingstone v. Tough Mudder Incorporated, 2020 WL 1905203 (2020)
U.S. District Court, E.D. New York

Background:
Plaintiff Guy D. Livingstone brought this action against TMI, which allegedly breached its obligations to him under an Intercreditor Agreement, Third Amended and Restated Redemption Agreement, and promissory note ("Note"), and against Active, which allegedly committed tortious interference with respect to certain of those contracts. Specifically, and as relevant here, Livingstone alleged that Active extended credit and financing to TMI through an amendment to a Master Services Agreement ("MSA Amendment") and Services and Governance Agreement ("SGA"), and that through this extension of credit and financing,

Active induced TMI to breach its obligations to him under the Intercreditor Agreement and Note. On January 7, 2020, TMI filed a letter stating that "three creditors of TMI commenced an Involuntary Petition for Bankruptcy against TMI in the United States Bankruptcy Court for the District of Delaware." Accordingly, this case automatically was stayed as to debtor TMI pursuant to 11 U.S.C. § 362(a). On January 24, 2020, non-debtor Active filed the instant Motion to Stay, arguing that there were two independent bases upon which to stay this litigation as to it. First, Active contended that an automatic stay applied to it pursuant to the Second Circuit's holding in Queenie Ltd. v. Nygard Int'l, 321 F.3d 282 (2d Cir. 2003). Second, Active contended that the Court should impose a stay pursuant to its inherent authority to control the efficient resolution of cases on its docket. By letter filed on February 5, 2020, Livingstone stated that it did not oppose Active's request for a stay, without conceding the merits of the request.

<u>Holding:</u>
"Section 362(a)(1) [of 11 U.S.C.] provides that a bankruptcy petition 'operates as a stay' of 'the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor.'" "A suit against a codefendant is not automatically stayed by the debtor's bankruptcy filing." "The automatic stay can apply to non-debtors, but normally does so only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." Even where the automatic bankruptcy stay does not apply, a court may "still invoke its discretionary authority to stay the proceedings." "The proponent of a stay, however, 'bears the burden of demonstrating that such a stay is justified.'" Given that the indemnification clause in the SGA provides that TMI agrees to indemnify Active for any claims arising out of the SGA or the MSA Amendment, and that Livingstone's claim against Active arose out of those agreements, the Court concluded that allowing this litigation to proceed against Active will result in immediate economic consequences for TMI. Accordingly, the Court extended the automatic stay from TMI to non-debtor Active.

44. Dill v. Rembrandt Group, Inc., 474 P.3d 176 (2020)
Colorado Court of Appeals, Division VI

<u>Background:</u>
RGI owed money to PPA, its current senior creditor, and to plaintiff Ernest R. Dill, a subordinate creditor. PPA is wholly owned by Intellitec Executives, LLC (Intellitec), which was not a party to this case. Intellitec, in turn, is owned by five individuals. The same five individuals also own 81.25 percent of RGI's stock. Mr. Dill filed suit against RGI to collect on his subordinate indebtedness after learning that Rocky Mountain Mezzanine Fund II, L.P. (RMMF), the original senior creditor, had assigned RGI's indebtedness to PPA. Mr. Dill argued that, because RGI and PPA (indirectly via Intellitec) shared common owners, they are alter egos of each other. Mr. Dill reasoned that the senior indebtedness was extinguished when RMMF assigned RGI's debt to PPA for a discounted amount, which allowed RGI, through PPA, to effectively acquire a debt payable to itself. Thus, under Mr. Dill's argument, he can collect on his subordinated debt. The trial court agreed. The following facts constitute background on the Intercreditor Agreement: Mr. Dill sold several trade schools to RGI in 2000. RGI financed the purchase (and acquired working capital) by borrowing $3.69 million from RMMF, as evidenced by a note (RMMF note) payable to RMMF, and by Mr. Dill's agreement to carry back $3 million of the purchase price. As a condition of providing financing for RGI's purchase, RMMF required Mr. Dill to execute an "Intercreditor and Subordination Agreement" (IC agreement). As relevant here, the IC agreement designated Mr. Dill the subordinate creditor and his debt the subordinated indebtedness, and it designated RMMF the senior creditor and the RMMF note the senior debt. As well, it authorized RMMF to issue a payment blockage notice to suspend RGI's payments to Mr. Dill under any notes payable to him if RGI defaulted on the senior indebtedness. Such blockage would remain effective until RGI satisfied the senior indebtedness. The IC agreement also expressly precluded Mr. Dill from commencing any legal action against RGI to collect on any notes payable to him "unless and until all of the Senior Indebtedness has been fully paid and satisfied." Importantly, the IC agreement allowed RMMF to assign the RMMF note to any third party without notice to or consent from Mr. Dill.

<u>Holding:</u>
The Court concluded that RGI and PPA were not alter egos of each other because they were separate legal entities that lack common ownership or control and do not otherwise satisfy the alter ego factors. Further,

because the trial court failed to find that (1) RGI was the alter ego of five of its twelve owners; (2) Intellitec was the alter ego of its owners (the same five common owners, who also own 81.25 percent of RGI's stock); and (3) Intellitec and PPA were alter egos of each other, it could not use "horizontal" veil piercing to find that RGI and PPA are alter egos of each other. This Court further concluded that the record did not support the court's finding that PPA acquired RGI's indebtedness for the purpose of defeating Mr. Dill's rightful claim. Therefore, the court erred by holding that RGI and PPA were alter egos and, thus, that the senior indebtedness was extinguished when PPA acquired it. This Court reversed the judgment. Moreover, the Court held that corporation and LLC were entitled to award of appellate attorney fees as prevailing parties under terms of intercreditor agreement between subordinate creditor and senior creditor.

45. In re Aerogroup International, Inc., 601 B.R. 571 (2019)
U.S. Bankruptcy Court, D. Delaware

Background:
On September 15, 2017, Aerogroup International, Inc. and certain related entities (the "Debtors") filed chapter 11 bankruptcy petitions in this Court. On March 6, 2018, the Debtors sold their assets at an auction, receiving net sale proceeds of $ 25,450,000. The assets sold were encumbered by the liens of THL Corporate Finance, Inc. ("THL") and Polk 33 Lending, LLC ("Polk" or the "DIP Lender"). Pursuant to the Final DIP Order and the Order authorizing the sale, the Sale Proceeds were placed in a sale escrow account pending distribution to THL and Polk, either by mutual agreement of THL and Polk or pursuant to an order of this Court. The following matters were before the Court for consideration: (1) Polk 33 Lending, LLC's Motion to Enforce Agreement by and among the Debtors, Polk 33 Lending, LLC and THL Corporate Finance, Inc. in which Polk sought to enforce the parties' agreement to distribute part of the Sales Proceeds; (2) THL Corporation Finance, Inc.'s Motion for Entry of Order (I) Valuing Secured Claims for Purpose of Allocating Sale Proceeds to Such Secured Claims and (II) Ordering Distributions; and (3) The adversary proceeding captioned Polk 33 Lending, LLC v. THL Corporate Finance, Inc. (In re Aerogroup International, Inc.) (Adv. Pro. No. 18-50383), in which Polk asserted a breach of contract action against THL for allegedly failing to comply with certain payment obligations due to Polk under the parties' lender agreement dated February 12, 2018. In connection with a Section 363 sale process, Polk and THL entered into a Lender Agreement dated February 12, 2018 (the "Lender Agreement"). Under the Lender Agreement, Polk and THL agreed to, among other things, a budget and their respective allocations of various operating and other administrative costs (the "Lender Allocation"). Under the Lender Allocation, both Polk and THL agreed each was responsible on a 50/50 basis for the professional fee carve-out (pre- and post-trigger notice), wind-down fees, payroll, U.S. Trustee fees, salaries, retention, and the e-commerce platform. On warehousing and sales tax expenses, Polk covered 100% of the expenses, and on other wind-down costs, THL covered 67%. On April 6, 2018, Polk commenced the Adversary Proceeding to enforce the Lender Agreement and payment of the $ 1,991,162.25 Lender Reimbursement due thereunder prior to resolving the dispute over allocation of the Sale Proceeds.

Holding:
Polk's Motion to Enforce was be dismissed as moot. THL's Allocation Motion was granted, in part, and denied, in part. In the Adversary Proceeding, judgment was entered in favor of plaintiff, Polk, and against defendant, THL, in the amount of $ 1,991,162.25, plus pre-judgment interest. THL refused to pay Polk the Lender Allocation upon closing of the § 363 Sale, thus breaching its obligation under the Lender Agreement.

46. Matter of Trusts Established Under Pooling and Servicing Agreements Relating to Wachovia Bank Commercial Mortgage Pass-Through Certificates, Series 2007-C30, 2020 WL 1304400 (2020)
U.S. District Court, S.D. New York

Background:
This case is about contract interpretation. As is relevant here, the owners of Peter Cooper Village and Stuyvesant Town default on financing obligations in 2010 but sold the property at a substantial profit a few years later. However, there were ambiguities in the relevant agreements concerning the treatment of sale proceeds, and these ambiguities in turn informed the Court's decision to deny the parties' cross-motions for judgment on the pleadings. After an exhaustive discovery, the evidence pointed to the foregoing

conclusion. Approximately $614 million in disputed funds have been allocated to CWCapital Asset Management LLC ("CWC"), which served as the Special Servicer for the Stuy Town property, in the form of Penalty Interest; and an additional $53 million was allocated to the Federal Home Loan Mortgage Corporation ("Freddie Mac") and the Federal National Mortgage Association ("Fannie Mae," and together with Freddie Mac, the "Government-Sponsored Enterprises" or "GSEs") in the form of Yield Maintenance. Appaloosa Investment L.P.I. and Palomino Master Ltd. (collectively, "Appaloosa"), investors in various trusts that held assets secured by a mortgage on Stuy Town, contested those allocations. In Appaloosa's view, the disputed funds constituted Gain-on-Sale Proceeds that must be directly deposited in a Gain-on-Sale Reserve Account for the benefit of certificate-holders like it.

<u>Holding:</u>
The evidence disclosed after more than a year of discovery made clear that the funds in dispute were Penalty Interest and Yield Maintenance, and not Gain-on-Sale Proceeds. This evidence included analogous documents from other transactions in the same shelf registration, the contemporaneous understanding of those involved in the Stuy Town sale and related transactions, the course of performance between and among the parties to the relevant agreements, the custom and practice in the collateralized mortgage-backed securities ("CMBS") industry, and related industry publications. And while Appaloosa did a commendable job in attempting to generate a genuine dispute of fact for trial, its efforts came up short. Its many arguments were belied by the record and, at times, undercut by Appaloosa's own positions in this litigation. Accordingly, CWC's and the GSEs' motions for summary judgment were granted; Appaloosa's motion for partial summary judgment was denied; Appaloosa's motion to exclude CWC's and the GSE's expert testimony was denied in part on the merits and denied in part as moot; and CWC's and the GSEs' motions to exclude Appaloosa's expert testimony were denied as moot.

47. Luxottica of America Inc. v. Gray, 2020 WL 7040980 (2020)
Court of Appeals of Texas, Dallas

<u>Background:</u>
In this interlocutory appeal, appellants contend the trial court erred in denying their motions to dismiss. Appellees sued appellants for multiple claims, including conspiracy to commit fraud by failing to disclose certain facts regarding the operation of two franchise optical stores during store-purchase negotiations. Appellants moved to dismiss appellees' claims on the grounds that the allegedly conspiratorial communications at issue implicated appellants' rights under the Texas Citizens Participation Act (TCPA). With respect to the fraud issue, the Gray Appellees cited additional internal Luxottica communications and Reiter's deposition testimony to show that Reiter knew about the Gutman [Appellants'] termination for fraud and that Luxottica had made the decision to "not get in the middle of the transaction." The Gray Appellees alleged that Reiter had a duty to disclose Gutman Vision's termination yet did not and warranted in the Intercreditor Agreement that there had been "no material defaults ... under the franchise agreement." The trial court did not rule on the motions, which were denied by operation of law. This Court affirmed denial of the motions.

<u>Holding:</u>
The TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them for exercising their rights in connection with matters of public concern. In dismissing a claim pursuant to the TCPA, the movant bears the initial burden of showing by a preponderance of the evidence that the legal action is based on or is in response to the movant's exercise of the right of free speech, the right of association, or the right to petition. If the movant makes this showing, the burden shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of its claims. Because appellants failed to satisfy their initial burden of establishing by a preponderance of the evidence that the TCPA applies to appellees' claims, this Court affirmed the denial of appellants' motions to dismiss by operation of law.

48. KeyBank National Association v. Franklin Advisers, Inc., 600 B.R. 214 (2019)
U.S. District Court, S.D. New York

Background:
This case concerns a contractual dispute among creditors that provided financing to a bankrupt Chapter 11 debtor so that the debtor could continue operating during its reorganization. Plaintiffs KeyBank National Association and Fifth Third Bank initially brought this action in the Supreme Court for the State of New York, New York County, asserting state law claims for breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contract (all of which arose out of Defendants' decision to enter into the Amended DIP Agreement which Plaintiffs allege violated the Original DIP Agreement), and a declaratory judgment against Defendant Franklin Advisers, Inc. and seven mutual funds (collectively, "Defendants"). In short, Plaintiffs alleged that Defendants' decision to enter into a financing agreement with the Chapter 11 debtor, in which Plaintiffs declined to partake, violated the terms of an earlier financing agreement between Plaintiffs, Defendants, the debtor, and related parties. After Plaintiffs filed their Complaints, Defendants timely removed these actions to this Court, pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452. Therefore, before the Court was a threshold dispute over where these cases should proceed: Plaintiffs sought to have these actions remanded to New York State Court, while Defendants sought to have them transferred to the United States District Court for the District of Delaware.

Holding:
These cases were consolidated and both parties' motions denied, such that this case proceeded in this Court, where it will be referred to the Bankruptcy Court for the Southern District of New York, pursuant to the Amended Standing Order of Reference Re: Title 11. Consolidation here was warranted. Both cases involved the same defendants and arose out of the same contractual dispute. The factual allegations, the legal claims and the relief sought were all identical, as were the legal issues. Defendants failed to persuade the Court that "arising under" jurisdiction exists in this case. Courts in this circuit have construed the existence of "arising under" jurisdiction to be dependent upon the plaintiffs' causes of action being asserted under a provision of Title 11 of the Bankruptcy Code. Here, Plaintiffs asserted state law breach of contract and related claims, which do not arise under Title 11. With respect to "arising in" jurisdiction, Plaintiffs' claims were uniquely affected by a core bankruptcy function because they were based on rights that were established in an order to obtain credit and to use cash collateral—the result of a core bankruptcy proceeding. Accordingly, this case "arises in" Title 11, was a core proceeding, and Plaintiffs' demand for mandatory abstention was moot. In addition, "Related to" jurisdiction existed here because, at the time of removal, Defendants had a reasonable legal basis to assert an indemnity claim against Appvion based on the current litigation. With respect to Defendant's motion to transfer, Defendants bear the burden to show that this case should be transferred by a preponderance of the evidence. Here, they failed to meet it. Even though the Court found that "arising in" jurisdiction exists in this case, which would strongly suggest that the Bankruptcy Court from which it arose is the preferred forum, in light of the forum selection clause in the DIP Order, the Court did not conclude that such a countervailing interest outweighed the interest in enforcing the parties' agreement to have this dispute heard in the New York. Defendants' motion to transfer was therefore denied.

49. Skye Mineral Investors, LLC v. DXS Capital (U.S.) Limited, 2020 WL 881544
Court of Chancery of Delaware

Background:
In August 2014, Noble loaned $30 million to CSM (the "Noble Loan") to finance CSM's Phase II capital project. The contract governing the Noble Loan (the "NLA") stated, in its recitals, that it was an agreement "by and between" CSM (as borrower) and Noble (as lender). And CSM and Noble were the only signatories to the NLA. Because it was a part of a broader transaction between Noble, CSM and SMP, the NLA referenced SMP in its definition of "Loan Parties." That definition, in turn, referenced other agreements to which SMP was a party. One of those separate agreements was the "Intercreditor Agreement" whereby SMP agreed to subordinate its loans to CSM to the Noble Loan. As is relevant here, SMP, as Plaintiffs, sought to claim third-party beneficiary standing under the NLA via the Intercreditor Agreement. That Intercreditor Agreement, in its recitals, states, "[SMP] anticipates to benefit directly from the [NLA]."

Holding:
The court reasoned that "even if it were appropriate to look beyond the NLA to establish an intent to benefit SMP with the NLA, a dubious proposition of New York law, a unilateral statement that SMP 'anticipates' benefits from the NLA cannot reflect a mutual intent to provide third-party benefits under the NLA." Both parties to a contract must "specifically intend to confer benefits on a third party" to create third-party beneficiary status. SMP's unilateral, extra-contractual statement that it "anticipates" benefits was hardly an expression of mutual intent.

50. Iafrate v. Warner, Norcross & Judd, LLP, 2021 WL 978805 (2021)
U.S. District Court, E.D. Michigan, Southern Division

Background:
Plaintiffs Angelo Iafrate, Sr., Dominic Iafrate, and Angelo Iafrate, Sr. as trustee of the John Iafrate Irrevocable Trust filed a Complaint on June 28, 2018 alleging Defendant Warner, Norcross & Judd, LLP. (WNJ) furnished improper legal advice during the formation of an Employee Stock Option Plan (ESOP). Plaintiffs filed an Amended Complaint on July 9, 2018. On February 3, 2020, Plaintiffs filed a Motion to file a Second Amended Complaint. Defendants filed a Response on February 7, 2020. Plaintiffs filed a Reply on February 26, 2020. Plaintiffs entered into an Intercreditor Agreement between themselves which provided that their security interests would have equal priority and would be equally enforced for their pro rata benefit. Plaintiffs claimed that under the Intercreditor Agreement, which Defendant drafted, payments on the Senior and Junior Promissory Notes were to be paid pro rata to each family member. Plaintiff's claimed that they did not become aware of the adverse interpretation of the Intercreditor Agreement until January 9, 2018, when Adcock travelled to Florida to tell each Plaintiff in person that their Warrants had expired and would not be honored. Plaintiffs alleged that the Company's adverse position in regards to the exercise of their Warrants is the consequence of "a. Improper advice and counsel furnished to Iafrate family members in the period 2013 through 2017 by WNJ attorneys & employees; b. Improper advice and counsel given, in a conflicting and unethical manner, and in violation of fiduciary duty, to Angelo Iafrate, Inc. and the ESOP entity in 2017 and 2018 by Warner Norcross & Judd attorneys & employees; c. Breach of fiduciary duty by the Defendants in 2013; [and] d. Breach of fiduciary duty in 2017."

Holding:
Plaintiffs' Amended Complaint alleged the following: professional liability and negligence (Count I); breach of fiduciary duty (Count II), fraudulent misrepresentation (Count III), and fraudulent concealment (Count IV). Plaintiffs' proposed Second Amended Complaint added no new parties or claims. It merely sought to highlight issues Plaintiffs learned in the course of discovery. Defendant opposed Plaintiffs' Second Amended Complaint, because of bad faith and undue delay. Specifically, Defendant claimed that Plaintiffs failed to provide a basis for their failure to include the additional information in the Original or Amended Complaint and were therefore unduly seeking to add new legal theories. The Court disagreed with Defendant's arguments. Court held that "considering that discovery in this case is on going and may be extended upon request, the Court finds that Plaintiffs' amendments are not in bad faith and have not been submitted with undue delay. Plaintiffs' may file a Second Amended Complaint with the correction to and clarification to paragraphs 30 and 64, respectively."

51. McWhinney Holding Company, LLLP v. Poag, 2021 WL 1056496 (2021)
U.S. District Court, D. Colorado

Background:
I&G and a group of banks holding a construction loan entered into an Intercreditor Agreement. McWhinney (Plaintiff) first learned that JPMIM (creditor) held a veto power to any extensions or refinancing of the construction loan via its Intercreditor Agreement with the bank group. As a result, McWhinney was hesitant to enter into an extension on the construction loan until he fully understood the Mezzanine Loan documents; thus, McWhinney sought all of the loan documents from Poag & McEwen (Defendants), which were not sent.

<u>Holding:</u>
Court found that P&M (also Defendant) owed fiduciary duties to MCLC and CLC with respect to the Mezzanine Loan transaction. P&M's entry into, and concealment of, the Mezzanine Loan constituted material breaches of its fiduciary duties to MCLC and CLC. The first issue with the Mezzanine Loan was the authority P&M gave in this agreement for JPMIM to make management decisions for CLC. While Poag & McEwen only pledged its ownership interest in CLC as collateral—as opposed to putting up the Shops themselves as collateral—the Mezzanine Loan Agreement gave JPMIM a significant authority over the management of CLC and the Shops. Further, in the Intercreditor Agreement between JPM and JPMIM, JPM agreed that JPMIM's consent was necessary for any modification to the Construction Loan. All of these rights given to JPMIM had a major impact on the management structure of the Shops. Thus, the court found that P&M changed the essence of the Operating Agreement dramatically without the consent of its co-owners, and this was a direct violation of its contractual-fiduciary duties to McWhinney under the Operating Agreement. P&M breached its duties of loyalty and good faith in doing so because the only reason P&M entered into this agreement and gave JPMIM this authority was so that the Poags could buy-out McEwen with the $40 million from the loan. P&M's decision was solely for the benefit of Poag & McEwen and was not in the best interest of CLC.

52. CE Providers v. Stearns Bank, 2018 WL 3448335 (2018)
U.S. District Court, D. Utah

<u>Background:</u>
Plaintiff CE Providers, LLC sold a business to Joppa Capital Ventures, Inc. —a non-party to this action. Plaintiff seller-financed a portion of the purchase and Defendant Stearns Bank National Association provided the remaining funding. As a prerequisite to issuing the funds, Defendant required that Plaintiff and Joppa enter into several agreements, including an intercreditor agreement (the "Agreement"), wherein the parties agreed that the loan issued to Joppa by Plaintiff would be entirely subordinated to the loan issued by Defendant. Also included in the Agreement is a holdback provision wherein the parties agree that Defendant would hold $500,000 of the purchase price as additional security. The Agreement provided Defendant with the right to retain the holdback funds as security if Joppa was in default to Defendant or in Defendant's discretion "pursuant to [the] Agreement." On November 10, 2017, Plaintiff sent a letter to Joppa notifying it that Joppa was in default to Plaintiff. Having learned that Plaintiff considered Joppa in default of Plaintiff's loan, Defendant chose to retain the first holdback payment until Joppa and Plaintiff reached a resolution. A dispute arose between Plaintiff and Defendant regarding Defendant's rights under the Agreement. On January 25, 2018, Plaintiff filed this suit in the Third District Court of Utah in response to Defendant's continued refusal to disperse the holdback funds. Plaintiff's Complaint alleged (1) breach of fiduciary duty and (2) unjust enrichment; and sought declaratory relief that (3) Defendant was obligated to disperse the funds as stated in the Agreement, its failure to do so amounted to a material breach of the Agreement, and, therefore, the Agreement was void and without legal effect such that Plaintiff's loan was no longer subordinated to Defendant's loan; and (4) that Defendant's failure to declare Joppa in default and failure to make the first holdback payment to Plaintiff amounted to a waiver of right to declare Joppa in default. In response, Defendant filed the Motion to Dismiss.

<u>Holding:</u>
In response to Plaintiff's second cause of action (unjust enrichment), the court held that because there was an enforceable contract between the parties, Plaintiff's unjust enrichment claim was invalid, and court dismissed it as such. Moreover, Defendant's retention of the holdback funds was permitted under the Agreement. Therefore, there was no breach, material or otherwise. In regard to Plaintiff's first cause of action (breach of fiduciary duty), the court barred such claim pursuant to the economic loss rule. Specifically, Plaintiff did not allege a breach of duty separate from its contract-related claims. Defendant took possession of the holdback funds in accordance with the Agreement. Now, the dispute between Plaintiff and Defendant arose under their differing interpretations of Defendant's rights to the holdback funds under the language of the Agreement. The alleged breach of fiduciary duty was, therefore, wholly related to the Agreement between the two parties. Plaintiff did not allege a breach of any duty that does not directly relate to the duties imposed on the parties by the Agreement. In regard to the Plaintiff's declaratory judgment claims, the Agreement unambiguously states that a default as to Plaintiff's loan "shall" amount to a default as to Defendant's loan. The Agreement also unambiguously states that Defendant may withhold

the holdback funds in the event of Joppa's default to Defendant. Plaintiff did not allege that Joppa remedied the default or that it no longer considered Joppa in default. Thus, Defendant was within its contracted rights to maintain control over the holdback funds. The Court, therefore, found that Defendant did not violate the Agreement by failing to release the holdback funds on the date set in the Agreement, and dismissed Plaintiff's third cause of action for declaratory judgment that Defendant breached the agreement, among other things. Because the declaration requested by Plaintiff was wholly contradicted by the express language of the Agreement, the Court dismissed Plaintiff's fourth cause of action for declaratory judgment that Defendant has waived its right to declare Joppa in default, among other things.

53. NBV Loan Acquisition, LLC v. Lexi Development Company, Inc., 2019 WL 266404 (2019)
U.S. District Court, S.D. Florida

<u>Background:</u>
This matter was before the Court on Defendant Regions Bank's emergency motion to stay trial in bankruptcy court pending this Court's disposition of Defendant's motion to withdraw the reference.

<u>Holding:</u>
Because a stay is not created simply as a result of the filing of a motion for withdrawal of the reference, the moving party bears the burden of proof in demonstrating to this Court that a stay of these proceedings pending a determination of the motion to withdraw the reference would be proper. "The substance of the [m]otion for a stay pending decision on a motion for withdrawal of reference follows the same standards as any motion for stay. A movant must demonstrate: (1) the likelihood of prevailing on the merits, i.e., that the pending motion will be granted; (ii) that movant will suffer irreparable harm if the stay is denied; (iii) that the other party will not be substantially harmed by the stay; and (iv) that the public interest will be served by granting the stay." The Court found that Regions Bank did not meet that burden because it failed to demonstrate a substantial likelihood of success in its motion or that it will suffer irreparable harm if the stay is denied. Under 28 U.S.C. § 157(d), a "district court may withdraw, in whole or in part, any case or proceeding referred under this section ... for cause shown." The district court should also consider whether a jury demand has been made, and whether the claims are core or non-core. This litigation has been ongoing for approximately 10 years. Trial in this matter was set over 8 months ago and the bankruptcy court has handled all pretrial matters. Consequently, withdrawing the reference on the eve of trial would certainly not be the most efficient use of resources of the courts and would engender, not avoid, delay. Regions Bank's motion rests on their claim that they made a jury demand and that one of their claims was non-core. But the bankruptcy court already heard these arguments and denied them. Indeed, in February 2018, the bankruptcy court found that Region's Bank jury demand was nullified by the jury waiver in the intercreditor agreement. Based on these facts and findings, the Court found that Regions Bank did not show that it will likely prevail on the merits of its motion.

54. In re Tribune Company, 972 F.3d 228 (2020)
U.S. Court of Appeals, Third Circuit

<u>Background:</u>
Here, certain creditors of the Tribune Company, called the "Senior Noteholders," claimed Tribune's plan of reorganization (the "Plan") misapplied their rights under the Bankruptcy Code by not according them the full benefit of their subordination agreements with other Tribune creditors. The Senior Noteholders were assigned their own class (1E) of unsecured creditors in Tribune's Plan. When they did not accept the Plan but other classes did, the Bankruptcy Court confirmed it under the cramdown provision, and they became bound by it. They appealed, contending that "[n]otwithstanding" in § 1129(b)(1) entitles them to their full recovery from the strict enforcement of the subordination agreements, and, in any event, the Plan's proposed distributions were unfairly discriminatory in favor of another unsecured class (1F) that shared in the subordinated sums.

<u>Holding:</u>
This court agreed with the Bankruptcy and District Courts that the text of § 1129(b)(1) supplants strict enforcement of subordination agreements. Instead, when cramdown plans play with subordinated sums, the

comparison of similarly situated creditors is tested through a more flexible unfair-discrimination standard. Applying that standard here, this court affirmed the result determined by prior courts.

55. Zhizheng Wang for Wang Group v. Hull, 2019 WL 5862964 (2019)
U.S. District Court, W.D. Washington, at Seattle

Background:
This matter came before the Court on Intervenor Plaintiff Decathlon Alpha III, L.P.'s ("Decathlon") motion to dismiss Count II of Plaintiff Zhizheng Wang's ("Wang") Crossclaims. Wang and Decathlon are each lenders to G.A.E.M.S., Inc. ("GAEMS"). Wang and Decathlon are parties to a Subordination and Intercreditor Agreement ("Subordination Agreement") which designated Decathlon as the Senior Lender to GAEMS and Wang as the Subordinated Lender. The Subordination Agreement does not contain a specific termination date. Rather, the agreement terminates when GAEMS repays Decathlon in full and/or the parties agree to terminate the Subordination Agreement. The terms of Decathlon's loan to GAEMS are governed by the Revenue Loan and Security Agreement ("Loan Agreement"), to which Wang is not a party. The Loan Agreement grants Decathlon significant discretion to determine when to demand payment from GAEMS. Although Wang's loan predated Decathlon's chronologically, Decathlon's loan was contingent on the subordination of Wang's loan. Wang alleged that Decathlon would violate the implied covenant of good faith and fair dealing by postponing the Maturity Date of its loan to GAEMS, which would have the effect of delaying Wang's recovery from GAEMS. Wang asked this Court to enjoin Decathlon from postponing the loan's maturity date and to award Wang damages for Decathlon's alleged violations. Decathlon sought dismissal of this claim, arguing that Wang did not identify a contractual provision to which the duty of good faith applies and therefore failed to state a claim upon which relief may be granted. The question for the Court on a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6) is whether the facts alleged in the complaint and supporting documents sufficiently state a "plausible" ground for relief.

Holding:
In opposing Decathlon's motion, Wang submitted materials outside the pleadings, to which Decathlon objects. As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule (12)(b)(6) motion." The Court, however, may consider materials attached to the complaint as well as "unattached evidence on which the complaint 'necessarily relies.'" The Court will only consider unattached evidence that meet the following conditions: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party disputes the authenticity of the document. Wang cited to several sources that are outside the pleadings and did not meet any of the above exceptions, including deposition transcripts and correspondence with GAEMS executives. None of these materials were attached to Wang's crossclaims against Decathlon, nor did they form the basis for the crossclaims. The Court therefore did not consider information from the Mercier email correspondence, the Griffith declaration, or the Borchers deposition. Wang's claim that Decathlon breached the duty of good faith and fair dealing can survive Decathlon's Motion to Dismiss if Wang plausibly alleged the following: that Decathlon owed him a duty of good faith to perform an obligation articulated in their contract; that Decathlon failed to honor it; and, in so failing, Decathlon deprived Wang of the benefit of the parties' agreement. Any duty of good faith and fair dealing arising from the Loan Agreement applies only between Decathlon and GAEMS. Because Wang is not a party to that contract (and has not shown that he is a third-party beneficiary entitled to enforce its terms), Decathlon consequently did not owe Wang any duty with respect to its performance of the terms of the Loan Agreement. Even if Wang were a party to the Loan Agreement, Wang's alleged harm only arises from Decathlon's exercise of its rights under that contract and "there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." Wang did not identify a duty Decathlon owed him and therefore failed to state a claim on which relief could be granted. Decathlon's motion to dismiss Count II of Wang's crossclaims was therefore granted.

56. 111 West 57th Investment LLC v. 111 W57 Mezz Investor LLC, 192 A.D.3d 618 (2021)
Supreme Court, Appellate Division, First Dept. NY

Background:
Plaintiff 111 West 57th Investment LLC entered into a joint venture to develop a luxury condominium building at 111 West 57th Street in Manhattan. The construction of the project was financed by two loans. A $400 million loan to the owner, and a $325 million "mezzanine" loan to 111 West 57th Holdings, LLC. The project fell into financial difficulty. The original lender of all amounts, Apollo, declared a default. In or about March 2017, Stern, Maloney, the sponsor and Apollo restructured the loan. The restructuring was a condition of Apollo's forbearance from foreclosing. Apollo assigned the junior mezzanine loan to defendant 111 W57 Mezz Investor LLC. Defendant and the other lenders entered into a revised and amended intercreditor agreement (the ICA). Section 7 of the ICA states that in the event of a UCC strict foreclosure, defendant "shall cause the Construction of the Project to continue to be performed by a Construction Manager," a term defined in the original construction loan to mean, as relevant here, an entity controlled by Stern and Maloney. Section 5(a)(3) of the ICA further states that defendant is authorized "to Transfer a non-controlling indirect interest" in the Project to "a Construction Manager." On June 30, 2017, the date the forbearance period from Apollo ended, defendant sent a demand to Junior Mezz Borrower to pay the balance of the loan, approximately $25 million, because it was in default. Defendant sent Junior Mezz Borrower a notice pursuant to UCC 9–620, stating that, absent objection, defendant would go forward with a "strict foreclosure." As manager of Junior Mezz Borrower, the sponsor forwarded a copy to plaintiff. Because the sponsor refused to send an objection, on July 23, 2017, plaintiff sent its own objection to defendant. Plaintiff commenced this action on July 2017 alleging that through the ICA, defendant had effectively bribed Stern and Maloney not to object to the strict foreclosure. The bribe, as set out in the ICA, was that the two individuals would continue as construction managers on the project and would be entitled to a participation interest in the project. As a result of this bribe, the Company and the Junior Mezz Borrower lost the substantial value of the project, while only receiving forgiveness for $25 million of indebtedness.

Holding:
The complaint failed to state a cause of action for aiding and abetting a breach of fiduciary duty. The parties agreed that Delaware law governs the LLC Agreement. Under Delaware law, contracting parties are free to waive duties, including fiduciary duties. The waiver provision, § 8.5, in the LLC Agreement eliminated all fiduciary duties, and all that remained were contractual duties. The second cause of action for breach of Article 9 of the UCC failed as well. Upon the debtor's default, UCC 9–620 allows a secured creditor to, among other things, seek the collateral by strict foreclosure. This remedy requires the creditor to give notice to the debtor, and, if the debtor does not object within 20 days, the creditor takes the collateral, and the debt is deemed satisfied. However, as a mere member of a limited liability company, plaintiff was not a person that was entitled to notice or could object to the strict foreclosure of the LLC's property by defendant lender. Moreover, defendant's rights under the UCC could not be waived by the words or actions of the debtor (UCC 9–602[10]). While it is possible for the creditor to waive remedies, defendant did not do so merely by extending a loan to an entity with internal governance disputes. Plaintiff's cause of action for constructive trust should be dismissed because there was no confidential or fiduciary relationship. The claim for a permanent injunction should be dismissed because plaintiff failed to show that it lacked an adequate remedy at law. This court agreed with the Supreme Court that the cause of action for conversion was duplicative of the UCC claim. However, the complaint stated a derivative cause of action for breach of the duty of good faith and fair dealing by alleging that defendant, in which the pledge agreement vested discretion as to the exercise of UCC remedies, suborned insiders to allow it to exercise that discretion to plaintiff's detriment. The crux of plaintiff's case was that insiders were bribed into giving away the company's right to a sale by auction, which gutted the value received by the company. Thus, the company allegedly was the victim of the scheme by insiders who completely abandoned its interests, and the derivative claims were not barred by the doctrine of in pari delicto. Nor were the derivative claims barred by the exculpatory clause in the parties' pledge agreement. Here, plaintiff alleged that the failure to meet the condition, that is to give notice of the claim, was brought about by defendant's scheme to suborn Stern and Maloney.

57. Regions Bank v. Lexi Development Company, Inc., 2021 WL 1650986 (2021)
U.S. District Court, S.D. Florida

Background:
In December 2005, Regions and its co-lenders made a loan to Lexi for approximately $56 million for the development of a condominium project (the "Senior Loan"), secured by a first mortgage on the property. On that same day, Allen and Jill Greenwald (the "Greenwald Parents")—parents of Lexi's principal, Scott Greenwald—made a $6 million mezzanine loan to Lexi, secured by a pledge of equity interest in Lexi (the "Junior Loan"). In connection with the Senior and Junior Loans, Regions and the Greenwald Parents entered into an Intercreditor Agreement ("ICA"), which provided, among other things, that in the event Regions notified Lexi of a default on the Senior Loan, Regions was required to provide the Greenwald Parents with a concurrent default notice. Regions, the Greenwald Parents, and GFB executed an addendum to the ICA, called the Letter Agreement ("LA"), which granted GFB the same rights guaranteed to the Greenwald Parents under Paragraph 12 of the ICA. In May 2010, GFB sued Lexi, Regions, and Regions' co-lenders in Florida state court. In the state-court complaint, GFB claimed that because it did not concurrently receive the default notices Regions sent to Lexi, it lacked the ability to cure the default or purchase the Senior Loan. That action, however, was automatically stayed when Lexi filed its bankruptcy petition. On December 17, 2015, Florida Community Bank, as successor by merger to GFB, sold the GFB-Lexi Loan to NBV Loan Acquisition, LLC's ("NBV"), and NBV subsequently pursued the claims initiated by GFB. On August 9, 2016, MRB filed a crossclaim on behalf of Lexi against Regions in the state-court action, also asserting a claim for breach of the ICA and LA. NBV filed an amended complaint in the state-court action on August 26, 2016, alleging a single count against Regions and its co-lenders for breach of the ICA, for their failure to send GFB concurrent default notices. NBV subsequently sought leave to file an amendment to the amended complaint, in which NBV asserted a breach-of-contract claim against Lexi. On May 1, 2018, Lexi (represented by MRB), NBV, and all defendants except Regions agreed to mediate. Through mediation, the parties entered into a settlement agreement, pursuant to which Regions' co-lenders agreed to pay NBV a total of $825,000, and NBV's claim against the bankruptcy estate was reduced by that $825,000 payment. On July 17, 2019, MRB filed its Summary of Final Fee Application for Allowance and Payment of Compensation and Reimbursement of Expenses. In connection with the NBV adversary proceedings, MRB sought to recover $1,262,455 in fees. Regions objected to the Final Fee Application, arguing that the services MRB rendered in relation to the NBV adversary proceeding were "unreasonable, unnecessary, and duplicative."

Holding:
On September 19, 2019, the bankruptcy court issued its order granting in part MRB's Final Fee Application. Regions appealed the Fee Order. The sole issue on appeal was whether the bankruptcy court erred in awarding MRB fees in the amount of $890,000 for services rendered in connection with the NBV adversary proceeding and costs in the amount of $34,467.21. Compensation was not permitted for "unnecessary duplication of services," or for services that were "not ... reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." The bankruptcy court made the factual finding that "MRB's services were necessary to achieve the $825,000 settlement with the other defendants in the NBV Adversary, which settlement benefitted the estate by reducing NBV's claim against it by $825,000." On appeal, Regions offered no evidence to contradict this factual finding. Instead, Regions argued that the finding must be erroneous because "MRB presented no evidence that its participation at mediation was necessary to achieve the settlement." But based on the express terms of the Mediated Settlement Agreement, the settlement was "the result of a joint and collaborative effort by and among the Parties and their attorneys." Lexi was specifically identified as a "Party" under the Mediated Settlement Agreement, and MRB, as counsel for Lexi, thus contributed to the "joint and collaborative effort" needed to reach the settlement. The Court found that Regions failed to carry its burden of showing that the bankruptcy court's factual finding with respect to the necessity of MRB's services in achieving the $825,000 settlement was clearly erroneous. The Court found that the bankruptcy court did not abuse its discretion in awarding fees to MRB after applying a substantial reduction based on a determination of the potential benefit the bankruptcy estate could obtain from MRB's continued participation in the litigation. For the foregoing reasons, the bankruptcy court's final order awarding fees and costs to MRB in the amount of $890,000 was affirmed.

58. In re Licking River Mining, LLC, 605 B.R. 153 (2019)
U.S. Bankruptcy Court, E.D. Kentucky, Ashland, London and Lexington Divisions

Background:
Trustee's Complaint asserted two claims against Defendants for judicial declarations pursuant to 28 U.S.C. § 2201. First, Trustee requested a declaration that she holds interests in equipment sales proceeds that are senior in priority to any interests Defendants hold (Count 1). Second, she requested a declaration that Defendant not hold a lien on certain claims Trustee has filed (or may file) to bring assets into Debtors' estates, or the proceeds of such claims (Count 2). Trustee's Motion raised four primary arguments. She contended that (1) based on the perfection dates of security interests and by avoidance and assignment, she holds an interest in certain collateral that is senior in priority to Defendants' interests; (2) intercreditor agreements that ECM and ECM II executed establish that they have interests subordinate to Trustee's interests; (3) the Court's Order approving a settlement in Debtors' jointly-administered bankruptcy case has res judicata effect and precludes Defendants from disputing that Trustee has a senior interest in the collateral; and (4) the terms of a Cash Collateral Order in Debtors' case provide that Defendants do not have liens on the claims or proceeds at issue. Since the sale, Defendants have asserted that their security interests in the Equipment Collateral are senior in priority to Trustee's interests, leading to this declaratory judgment action.

Holding:
In 2015, the Court granted the Settlement Motion and entered the Settlement Order. No party appealed the Settlement Order, and it is a final order. Yet Defendants now claim to have interests in the Equipment Collateral superior to Trustee's interests. This amounts to a collateral attack on a final order. The doctrine of res judicata precludes this collateral attack and requires entry of a declaratory judgment in Trustee's favor on Count 1. The Settlement Order satisfies all four elements of the Sixth Circuit's test for applying res judicata. First, Defendants do not dispute Trustee's contention that the Settlement Order, which resolved all potential claims that Debtors could assert against the JAD Lenders under Bankruptcy Rule 9019, is a final order that the Court had jurisdiction to enter. Second, this declaratory judgment action involved the same parties that were involved in connection with the Settlement Motion in Debtors' jointly administered main bankruptcy case, and Defendants do not argue otherwise. Third, it was apparent from the Settlement Motion that the proposed settlement involved the avoidance and conveyance of the JAD Lenders' interests in the Equipment Collateral, and Defendants had a full and fair opportunity to object to the Settlement Motion to assert their interests in that collateral. Finally, as stated above, the parties' rights to and interests in the Equipment Collateral—and the ability of Debtors' Estates to retain the equipment collateral and dispose of same in their sole discretion—were at issue in April 2015 in connection with the Settlement Motion and the Settlement Order's entry, and the same operative facts are at issue in this action. In Count 2 of her Complaint, Trustee requested a declaration that, based on the Cash Collateral Order's terms, Defendants do not hold "Adequate Protection Liens" on "Avoidance Actions," "Specified Litigation Claims," or the proceeds thereof. The plain language of the Cash Collateral Order supported her argument and Trustee was entitled to the relief requested.

59. In re Vetter Assets Service, LLC, 609 B.R. 279 (2019)
U.S. Bankruptcy Court, W.D. Oklahoma

Background:
This is an adversary proceeding brought by Plaintiff ValorBridge Partners, LLC, a secured creditor of the Debtor, Source One Capital, LLC ("SOC"), against Defendant Intrust Bank, N.A., another secured creditor of SOC, seeking to equitably subordinate Intrust's claim pursuant to 11 U.S.C. §§ 510 and 506. Pursuant to Fed.R.Civ.P. 12(b)(6), applicable to bankruptcy proceedings by Fed.R. Bankr.P. 7012(b)(6), Intrust moved to dismiss ValorBridge's Amended Complaint on the basis that it failed to state a claim for relief upon which relief can be granted. Under the terms of the Intrust Loan No. 1, as modified by Intrust Loan Amendment Two, the Debtors were prohibited from borrowing funds from any other lender without the express written consent of Intrust. Prior to closing and funding the VBP Note, the Debtors and ValorBridge sought and obtained the express written consent of Intrust to the terms and conditions of the VBP Loan Documents. On December 28, 2017, Intrust executed and delivered to ValorBridge an "Acknowledgment and Consent" to the VBP Note, the VBP Security Agreement and the VBP Pledge Agreement (the "Intrust

Consent"). By the Intrust Consent, Intrust consented to the first priority security interest granted by the Debtors to ValorBridge in the VBP collateral and acknowledged and consented to the filing of the financing statements by VBP to perfect its first priority security interest in the VBP Collateral. Under the terms of the VBP Note, as acknowledged and consented to by Intrust, the Debtors were prohibited from amending or modifying the terms of the Intrust Loan Amendment Number Two Note or any agreement or instrument in connection therewith or incurring any additional indebtedness (including with Intrust) without the express written consent of ValorBridge. On or about September 18, 2018, without the express written consent of ValorBridge, Intrust and SOC modified the terms of the Intrust Loan Amendment Number Two Note by extending the maturity date for repayment of the balance of January 18, 2021, to October 2, 2021, and by increasing the monthly payments due from SOC.

<u>Holding:</u>
Tenth Circuit equitable subordination case law requires that three elements be established by the Plaintiff: (1) that the claimant has engaged in some type of inequitable conduct; (2) that the misconduct has resulted in injury to the creditors or conferred an unfair advantage to the claimant; and (3) that subordination of the claim is not inconsistent with the Bankruptcy Code. The Tenth Circuit has identified three categories of misconduct: (1) fraud, illegality, and breach of fiduciary duties; (2) undercapitalization; or (3) claimant's use of the debtor as a mere instrumentality or alter ego. Plaintiff only alleged that Intrust's modifying its loan agreements and extending additional financial accommodation to SOC in alleged violation of the Acknowledgment and Consent Agreement was "inequitable". ValorBridge argued that given the flexible definition of "fiduciary" under Oklahoma law, its allegations in the Amended Complaint that "Intrust knew or should have known that ValorBridge was relying on the restrictions set forth in the VBP Note" ... and that it "reasonably relied upon such restrictions in the VBP Note and Intrust's Consent" sufficiently constituted facts stating a claim of fiduciary status. Under the Oklahoma law cited above, however, those allegations do not state a claim of establishing fiduciary status. The Amended Complaint was devoid of any allegation of any conduct by Intrust that was sufficiently egregious to meet the higher standard that applies to non-insiders and non-fiduciaries. For the reasons stated above, the Court concluded that Oklahoma law would not recognize the circumstances alleged as involving a fiduciary relationship. Furthermore, the Amended Complaint did not allege any act required to state a claim for equitable subordination by a non-insider, non-fiduciary creditor. Accordingly, Intrust Bank's Motion to Dismiss for Failure to State a Claim was granted.

60. Chengdu Gaishi Electronics, Ltd. v. G.A.E.M.S., Inc., 11 Wash.App.2d 617 (2019)
Court of Appeals of Washington, Division 1

<u>Background:</u>
In 2017, GAEMS entered into financing agreements with Chengdu, an electronics manufacturing company. That same year, DWG, GAEMS's parent company, entered into a loan agreement with the Wang Group, with GAEMS as a guarantor. In June 2017, GAEMS entered into another loan agreement, this time with Decathlon. Simultaneously, DWG, GAEMS, the Wang Group and Decathlon entered into a "Subordination and Intercreditor Agreement," pursuant to which the Wang Group subordinated its loan to Decathlon's and, with limited exceptions, agreed that no payments would be made toward the Wang loan until full payment was made on the Decathlon loan. In October 2017, the Wang Group sued GAEMS and two DWG board members seeking payment on its loan. Later, the Wang Group voluntarily dismissed the case. However, 11 months later, the Wang Group filed this lawsuit, naming Chengdu as an additional plaintiff. The defendants in this action are GAEMS, the previously-sued DWG members, Decathlon, and DWG. In October 2018, Chengdu moved for the trial court to appoint a receiver to assume control of GAEMS and DWG. In its motion, it argued that GAEMS was insolvent and that Chengdu had a probable right to GAEMS's property. GAEMS and DWG, in response, disputed these contentions and presented evidence that GAEMS remained able to pay obligations as they came due, had future prospects, and was not an appropriate candidate for receivership. Separately, Decathlon opposed receivership on the basis that, as the senior lender, it had priority over the Wang Group to assert rights in GAEMS's property. Chengdu filed a motion for reconsideration of the trial court's denial of its motion to appoint a receiver, alleging that the trial court had used the incorrect test to determine whether GAEMS was insolvent, and requesting further explanation as to why the motion was denied.

Holding:
Chengdu first assigned error to the trial court's dismissal of its action on the stated basis of insufficient service of process. Chengdu asserted that this decision was erroneous because a motion based on insufficient service of process is an allegation that the trial court lacks personal jurisdiction over the defendant, and any objection by DWG to the trial court's personal jurisdiction over it was waived when it sought affirmative relief in the form of a cross claim. This court agreed. By asserting its cross claim, DWG sought affirmative relief, thus invoking the jurisdiction of the court. By invoking the jurisdiction of the court, it waived its defense of lack of personal jurisdiction over it. The trial court erred by not so ruling. Chengdu then asserted that the trial court erred by declining to appoint a receiver over GAEMS's affairs. The trial court had before it ample evidence aside from the balance sheet test that indicated receivership was not warranted, and its decision was in fact premised on tenable reasons. Even if the receivership statute requires establishing insolvency on a balance sheet test, it does not require a trial court to appoint or deny appointment of a receiver based on this measure alone. The trial court did not abuse its discretion by declining to appoint a receiver.

61. KeyBank National Association v. Franklin Advisers, Inc., 616 B.R. 14 (2020)
U.S. Bankruptcy Court, S.D. New York

Background:
First-priority pre-petition and debtor-in-possession (DIP) lender brought action against other DIP lenders for their alleged breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference and breach of fiduciary duty. Defendants moved to dismiss for failure to state claim.

Holding:
The Bankruptcy Court, Michael E. Wiles, J., held that: lender was not collaterally estopped, by bankruptcy court orders approving DIP credit facility and sale of debtors' assets, from asserting claims against other DIP lenders; prohibition against collateral attacks on bankruptcy court's orders approving debtor-in-possession credit facility and sale of Chapter 11 debtors' assets did not bar lender's claims; provisions of DIP credit agreement did not impose obligations on DIP lenders vis-a-vis each other, such as could support breach-of-contract claim; allegations in lender's complaint, regarding these other DIP lenders' failure to share disproportionate payments that they had received, stated a claim for breach of contract that was plausible on its face; lender stated claim for breach of implied covenant of good faith and fair dealing that was plausible on its face and not duplicative of its breach-of-contract claims; and lender stated claim for breach of fiduciary duty based on other DIP lenders' withholding of stock to which it was entitled. Motion granted in part and denied in part.

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