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**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| In re | Chapter 11 |
| WAYPOINT LEASING HOLDINGS LTD., *et al.*, | Case No. 18-13648 (SMB) |
| Debtors. | Jointly Administered |
| MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED, | |
| Plaintiff, | |
| v. | Adversary Proceeding No. 19-01107 |
| LCI HELICOPTERS (IRELAND) LIMITED, | |
| Defendant. | |

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**MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED'S OBJECTION TO LCI HELICOPTERS (IRELAND) LIMITED'S MOTION TO DISMISS**

Plaintiff Macquarie Rotorcraft Leasing Holdings Limited ("Macquarie" or "Plaintiff"),[1] files this brief in opposition to *LCI Helicopters (Ireland) Limited's Motion to Dismiss* [Docket Nos. 6 & 9][2] (the "Motion to Dismiss") filed by Defendant LCI Helicopters (Ireland) Limited ("LCI" or "Defendant"), and states:

## I. PRELIMINARY STATEMENT

As the Court made crystal clear before overruling Macquarie's prior objections to the sale of the WAC 9 assets to Lombard, it was not then foreclosing, and explicitly leaving "for another day," any claims Macquarie may advance based upon allegations of willful misconduct:

> Moreover, in terms of the mutual – the releases, the releases that's being given is consistent with the releases identified in the bidding procedures order except that there is now a carveout for willful and malicious injury, and I'm not (indiscernible), willful misconduct and gross negligence.
>
> ***And you can make the argument, Mr. Edelman, that if you've gotten that claim and somebody knowing[ly] violated, I guess, a provision restricting the use of confidential information, they engaged in willful misconduct but that's for another day.***

Sale Hr'g Tr., 251:21–252:6.

Indeed, as both the Court and Debtors' counsel then observed, the operative release contained within the Macquarie Sale Order specifically carved out and preserved for Macquarie

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Amended Complaint ("FAC").

[2] This Opposition addresses the points and authorities raised in each of the two briefs filed to date by LCI in support of its Motion to Dismiss: the initial brief it filed on May 3, 2019 [AP Docket No. 6] directed to Macquarie's Adversary Complaint filed by Macquarie on April 3, 2019 [AP Docket No. 1], as well as what LCI styled as its "Reply Brief" filed on May 17, 2019 [AP Docket No. 9], which was filed in the wake of and purported to address Macquarie's FAC, filed by Macquarie on May 14, 2019 [AP Docket No. 7]. At the initial status conference held on May 21, 2019, the Court set a briefing schedule to address LCI's Motion to Dismiss, observing that the filing of the FAC had the effect of superseding and mooting the original Adversary Complaint. Macquarie will treat LCI's self-styled "Reply Brief" as a supplemental brief, and refer to the arguments made therein as though part of LCI's Motion to Dismiss. Where separate reference is necessary, LCI's "Reply Brief" will be referred to as its "Supplemental Brief."

the right to pursue any claims (including claims it acquired from the Debtor) flowing from violations of either the Bidding Procedures or the Bidding Procedures Order predicated upon allegations of intentional misconduct. Each of the three claims asserted by Macquarie in this Adversary Proceeding fits squarely within the express exception to the claims released by the prior Macquarie Sale Order, as each claim is quite clearly premised on allegations of intentional or willful misconduct of the type which this Court directed were to be addressed at a later date.

Notwithstanding the clear reservation of Macquarie's right to pursue the claims at issue in this proceeding, LCI strains mightily to avoid this litigation by mistakenly arguing that Macquarie already had its day in court and should be denied any opportunity to be heard on the claims it has alleged. Remarkably, in advancing its estoppel argument, LCI completely ignores this Court's direct and clear recognition that any claims possessed or acquired by Macquarie based upon intentional misconduct were not foreclosed by the Lombard Sale Order or the associated releases. Despite LCI's overheated rhetoric, this Adversary Proceeding is an appropriate vehicle to present and litigate each of the claims alleged in Macquarie's FAC. Macquarie should not be deprived of its right to pursue claims that not only vindicate its own rights, but also implicate compliance with established orders of this Court. LCI further raises misguided attacks at the pleading stage by arguing on the basis of numerous facts that are not only outside the pleadings, but outside of the Court's findings of fact and conclusions of law in the Chapter 11 Cases, and even wholly outside the record in those cases. LCI does this in a hope to avoid the discovery to which Macquarie is entitled, and which will allow Macquarie to gather relevant evidence peculiarly within LCI's control that is supportive of its contentions. Macquarie should not be deprived of its right to seek such evidence and this Court should allow the litigation to proceed so as to ensure that the claims are adjudicated after a

fulsome record is developed, in order for both Macquarie and the Court to have the full and fair opportunity to evaluate a complete factual record of what occurred.

## II. THE ESSENTIAL ALLEGATIONS OF THE FAC[3]

### A. LCI's Execution of a Non-Disclosure Agreement with the Debtors

On November 25, 2018, Waypoint Leasing Holdings Ltd. ("Waypoint") and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the "Debtors"), filed voluntary cases under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). FAC, ¶ 10. During the pre-petition marketing process for the Debtors assets, the Debtors and LCI executed a non-disclosure agreement dated August 29, 2018 (the "NDA"). *Id*. at ¶ 11; NDA (attached to the FAC as Ex. A). LCI executed the NDA in order to obtain Confidential Information (as that term is defined in the NDA) about the Debtors' assets, in anticipation of potentially bidding on such assets, including the assets of Waypoint Asset Co 9 Limited ("WAC 9"). *Id*. at ¶ 12.

The NDA significantly restricted the information provided by Waypoint that LCI could consider during the sale process and in contemplation of acquiring the Debtors' assets, as well as the purposes for which such information could be used. *Id*. In executing the NDA, LCI agreed to use such Confidential Information "***solely*** for the purpose of evaluating and participating in discussions with the Company[4] regarding, a possible Transaction ***and for no other purpose***." NDA § 2(a) (emphasis added). The NDA defines Confidential Information as:

> . . . all notes, memoranda, summaries, analyses, compilations, forecasts, data, studies, interpretations or other documents or materials prepared by the Company or its Representatives, or [LCI] or [its] Representatives, which use, contain, reflect or are based upon or derived from, in whole or

[3] The factual summary contained herein is based upon the well-pleaded allegations of the FAC which, for purposes of the pending Motion to Dismiss, must of course be presumed to be true.

[4] "Company," as defined in the NDA, generally refers to Waypoint and its subsidiaries.

> in part, information furnished to [LCI] or [its] Representatives by or on behalf of the Company.

*Id*. § 1(a). The definition of Confidential Information included information obtained from sources "***known by you (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information***." *Id*. (emphasis added). This would include information obtained from Lombard North Central plc ("Lombard"), the sole lender and agent of the WAC 9 secured debt facility, and any other lender under any other Waypoint secured debt facility. FAC, ¶ 19.

The FAC alleges that LCI obtained information from Lombard, an entity also subject to confidentiality obligations to the Debtors. *Id*. at ¶ 27. Such information constituted Confidential Information under the NDA, and, as such, could not be used for any purpose other than to analyze an acquisition of assets directly from the Debtors. *Id*. at ¶¶ 12–13. LCI did not abide by this provision, and instead used such Confidential Information to acquire the WAC 9 assets from Lombard outside of the court-ordered sale process. *Id*. at ¶ 14.

In addition to the confidentiality obligations, the NDA also imposes a no-contact obligation on LCI:

> **[LCI] further agree[s] that, without the prior written consent of Houlihan Lokey,[5] neither [LCI] nor any of [its] Representatives shall, directly or indirectly, initiate, solicit or maintain, or cause to be initiated solicited or maintained, contact with any** officer, director, employee, any person known to [LCI] to be a former (within the past twelve (12) months) employee of the Company or its affiliates, stockholder, **creditor**, affiliate, supplier, distributor, vendor, customer, provider, agent, regulator (other than as permitted in Section 2(b) [of the NDA]) **or other commercial counterparty of the Company or any subsidiary of the Company regarding the Company or its business**, financial condition, operations, strategy, prospects, **assets**, or liabilities (except as such communications regarding the Company's business,

[5] Houlihan Lokey Capital, Inc. ("Houlihan Lokey") has served as the Debtors' investment banker in the Chapter 11 Cases.

> financial condition, operation, strategy, prospects, assets or liabilities may occur in the ordinary course of business on matters unrelated to, and otherwise not in connection with, the Possible Transaction) or concerning any Confidential Information, any Transaction Information or any Possible Transaction.

NDA at § 4 (emphasis added). This obligation prohibited LCI from discussing the acquisition of any of the Debtors assets without first obtaining express written permission to do so from Houlihan Lokey. FAC, ¶ 26.

**B. Macquarie Agrees to the Stalking Horse APA with the Debtors**

On December 7, 2018, Macquarie and certain of its affiliates entered into an agreement to purchase certain assets of Waypoint pursuant to that certain Stock and Asset Purchase Agreement [Docket No. 64, Ex. C] (the "Macquarie APA," as amended, supplemented, or otherwise modified). The Macquarie APA initially contemplated the sale of substantially all of the Debtors' assets—including the WAC 9 assets—to Macquarie for a total consideration of approximately $650 million, plus the assumption of certain assumed liabilities. FAC, ¶ 15. On December 10, 2018, the Debtors filed the *Motion of Debtors for Entry of Orders Approving: (I) (A) Bidding Procedures, (B) Bid Protections, (C) Form And Manner of Notice of Auction, Sale Transaction, and Sale Hearing, and (D) Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (II) (A) Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Related Relief* (the "Bidding Procedures Motion") [Docket No. 64], which attached as Exhibit C a redacted copy of the Macquarie APA. *Id*. at ¶ 16. LCI was aware and on notice that Macquarie had entered into a contract for the purchase of those assets, including the WAC 9 assets. *Id*. at ¶ 47.

### C. The Court Enters the Bidding Procedures and Lombard and LCI Enter Into a Side Agreement for LCI to Acquire the WAC 9 Assets

On December 21, 2018, the Bankruptcy Court entered the *Order Approving (A) Bidding Procedures, (B) Bid Protections, (C) Form and Manner of Notice of Cure Costs, Auction, Sale Transaction, and Sale Hearing, and (D) Date for Auction, If Necessary, and Sale Hearing* [Docket No. 159] (the "Bidding Procedures Order") which set forth and attached the specific "Bidding Procedures" (which were attached to the Bidding Procedures Order) that would govern the sale process for the Debtors' assets. FAC ¶ 17. The Bidding Procedures Order prohibited Macquarie from matching or exceeding a streamlined credit bid by Lombard, if Lombard's credit bid was for the full amount of its claim against the Debtors estates. *Id*. at ¶ 19. Lombard was the only creditor to insist on such language and refused to agree to the Bidding Procedures and the sale process unless such language was included in the Bidding Procedures Order. *Id*. Notably, such language was not included in the proposed bidding procedures submitted with the Bidding Procedures Motion. *Id*.

The Bidding Procedures Order reflected and affirmed a provision of the Macquarie APA that provided Macquarie with a Break-Up Fee and an Expense Reimbursement, should a third party acquire any of the assets subject to the Macquarie APA. *Id*. at ¶ 37. The Bidding Procedures Order set out the terms for the payment of the Break-Up Fee and Expense Reimbursement:

> Specifically, Macquarie shall be entitled to payment of (i) an expense reimbursement up to a cap of $3,000,000 (the "**Expense Reimbursement**") for the actual, documented and reasonable out of pocket costs, fees and expenses that are incurred or to be incurred by Macquarie in connection with or related to the authorization, preparation, investigation, negotiation, enforcement, execution, implementation and performance of the transactions contemplated by the Macquarie APA and (ii) a break-up fee in an amount equal to three percent (3%) of the Base Purchase Price, or $19,500,000 (the "**Break-Up Fee**"), in each case,

> subject and pursuant to the terms and conditions in the Macquarie APA and this Order.

Bidding Procedures Order, ¶ 8.

The FAC alleges that, in contravention of the Bidding Procedures, Lombard and LCI entered into an undisclosed agreement for Lombard to acquire the WAC 9 assets through a credit bid and then subsequently sell the assets to LCI upon the completion of the sale to Lombard. *Id*. at ¶ 20. It further alleges that LCI and Lombard's agreement leveraged Lombard's hold-up power over the Macquarie APA, by virtue of which Lombard could demand additional protections for its potential credit bid. *Id*.

Macquarie was unaware at the time it agreed to the language permitting an unmatched streamlined Lombard credit bid for the WAC 9 assets that Lombard—which is not in the business of helicopter leasing—was talking to a third party to support its credit bid for WAC 9 assets in the full amount of its claim. *Id*. at ¶¶ 20–21. Moreover, as alleged in the FAC, Lombard intended to block the entire sale process absent inclusion of the WAC 9 credit bid language in the Bidding Procedures Order. *Id*. at ¶ 21. Thus, Macquarie would have been unable to consummate the transaction for substantially all of the Debtors assets contemplated by the Macquarie APA without acceding to Lombard's demands regarding a potential full-value credit bid. *Id*. At the time the Bidding Procedures Order was entered, in the absence of a qualifying credit bid, Macquarie still believed that it would—and intended to—acquire the WAC 9 assets under the terms of the Macquarie APA. *Id*. at ¶ 22. As set forth in the FAC, LCI and Lombard's side agreement deprived Macquarie of the opportunity to acquire the WAC 9 assets, or receive a bargained for Break-Up Fee had Macquarie failed to acquire them in a fair auction. *See id*. at ¶ 38.

### D. LCI's Breaches of the NDA and Circumvention of the Court's Bidding Procedures Are Made of Record

Lombard successfully submitted a credit bid under the protections of the Bidding Procedures Order, and the Debtors filed a notice of Lombard's successful bid on January 23, 2019. *Id*. at ¶¶ 23–24. The Court held the hearing on February 12, 2018 to confirm the sale of the WAC 9 assets to Lombard (the "Sale Hearing"). *Id*. at ¶¶ 29–31. The day before the Sale Hearing, Lombard filed an affidavit by its representative, Ms. Jacqueline McDermott, in the Chapter 11 Cases [Docket No. 410] (the "Lombard Affidavit"). Paragraph 6 of the Lombard Affidavit stated:

> ***Lombard is discussing with its servicer [LCI] a subsequent transaction pursuant to which the Designated Transferee and/or the underlying business would be recapitalized and sold to the servicer.*** Neither Lombard, the Designated Transferee, or the servicer have reached an agreement or arrangement with respect to this subsequent sale, but discussions continue and a subsequent sale could occur soon after consummation of Lombard's credit bid if outstanding items are resolved and a binding agreement is reached among the parties.

Lombard Aff., ¶ 6 (emphasis added). The servicer referenced in the Lombard Affidavit was LCI. FAC, ¶ 29. This was the first time that Lombard admitted to improper contact between Lombard and LCI in violation of the NDA and the Bidding Procedures. *Id*. at ¶ 20; Sale Hr'g Tr. 168:11–17.

At the hearing the next day, Ms. McDermott admitted on the record that Lombard and LCI had made improper contact regarding LCI's acquisition of WAC 9 assets, and that Houlihan Lokey at no point authorized such contact. FAC ¶¶ 27, 29.[6] Without the benefit of any discovery, counsel for Macquarie examined Ms. McDermott about the representations made in her affidavit submitted on the eve of the hearing. Although Ms. McDermott acknowledged that

[6] A representative for Houlihan Lokey confirmed that LCI did not receive permission to discuss the WAC 9 assets with Lombard. *Id*. at ¶ 30.

Lombard had indeed spoken with LCI about the potential transfer of the WAC 9 assets to LCI, and what such transaction "might look like," she stated that there was no final documentation yet signed or agreed upon. Sale Hr'g Tr. at 189. Ms. McDermott also acknowledged that she was not involved directly in any of the discussions with LCI regarding the potential transfer of the WAC 9 assets, a fact not lost on the Court. *See id*. at 190:6–12, 197:21–24.

**E. The Court Defers Consideration of LCI's Conduct Until a Later Proceeding**

At the conclusion of testimony on February 12, 2019, the Court acknowledged Macquarie's claim that the testimony indicated an apparent violation of the NDA, but specifically instructed that any claims for alleged willful violations of the NDA should be left "for another day." *Id*. at 251:21–252:6. The Court approved Lombard's credit bid of approximately $98 million for the WAC 9 assets. *See Order (I) (A) Approving Purchase Agreement among Debtors and Successful Credit Bidder, (B) Authorizing Sale of Certain of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (C) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith, and (D) Granting Related Relief, and (II) Authorizing Debtors to Take Certain Actions with Respect to Related Intercompany Claims in Connection Therewith* [Docket No. 525] (the "Lombard Sale Order").

On February 15, 2019, the Court entered the *Order (I) Approving Purchase Agreement Among Debtors and Macquarie, (II) Authorizing Sale of Certain of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (III) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith, and (IV) Granting Related Relief* (the "Macquarie Sale Order") [Docket No. 444], which explicitly preserved in favor and for the benefit of Macquarie a right to pursue claims for all violations of the Bidding Procedures or the Bidding Procedures Order arising from intentional misconduct:

> Notwithstanding any other terms herein or in any other orders of the Court, any damages flowing from any ~~intentional~~ violations of the Bidding Procedures and/or the Bidding Procedures Order **arising from intentional misconduct** are hereby expressly reserved and preserved ~~for the benefit of Macquarie and the Debtors~~ and, upon the occurrence of the Closing, all such rights **held by the Debtors prior to the Closing** shall be assigned to and be held for the benefit of Macquarie pursuant to the terms of the Purchase Agreement.

Macquarie Sale Order, ¶ 42. The reservation of such claims for Macquarie was likewise acknowledged by Debtors' counsel in the course of the Sale Hearing:

> MS. DIBLASI: The releases are broad but not unlimited. There are carveouts specifically for willful misconduct. I would argue if someone intentionally breached an NDA, that may constitute willful misconduct and would not be released.

Sale Hr'g Tr., 228: 14–18.

### F. LCI Completes Its Improper Acquisition of the WAC 9 Assets

The FAC alleges that on March 7, 2019, LCI closed its purchase of the equity in the WAC 9 assets. FAC, ¶ 35. Simultaneously, certain directors of Waypoint Leasing UK 9A Limited resigned and were immediately replaced by employees of LCI and the Libra Group. *Id*. Furthermore, Waypoint Leasing UK 9A changed its registered address to the Libra Group's London location. *Id*. All of these aforementioned changes occurred merely 10 days after the closing of the equity purchase of the WAC 9 entities by Lombard, and only 23 days after the sale hearing where Ms. McDermott testified that no confidential material was shared with LCI and that no sale documentation was being negotiated. *Id*. at ¶ 36.

## III. APPLICABLE LEGAL STANDARDS

### A. The Motion to Dismiss Standard

The standard for reviewing motions brought under Federal Rule of Civil Procedure 12(b)(6) is well known to the Court:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937; *accord Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. The court should assume the veracity of all "well-pleaded factual allegations," and determine whether, together, they plausibly give rise to an entitlement of relief. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

*In re Bernard L. Madoff Inv. Sec. LLC*, 583 B.R. 829, 840 (Bankr. S.D.N.Y. 2018) (Bernstein, J.). When analyzing the pleadings, the Court must take "all well-plead factual allegations as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiffs." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996).

When considering a motion to dismiss, a court may take judicial notice of certain matters, but the scope of such notice is limited. A court may take judicial notice of a document filed in another proceeding in order to establish the "fact of such litigation and related filings." *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc*., 969 F.2d 1384, 1388 (2d Cir. 1992). A court may not accept the truth of the matters asserted in those filings or use them to establish the truth of the matter asserted therein. *Id*. (reversing district court's reliance on orders entered in the bankruptcy court to establish facts asserted in those orders); *see also Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

### B. LCI Pleads Numerous Facts Outside the Pleadings Which Should Be Disregarded by the Court

Both LCI's Motion to Dismiss and Supplemental Brief go far beyond the four corners of Macquarie's FAC and attempt to introduce facts not properly considered at the motion to dismiss stage. Where a motion to dismiss brought under Rule 12 goes beyond the pleadings, a court must disregard those facts, or convert the motion to one for summary judgment under Rule

12(d). *See In re Madoff*, 583 B.R. at 840 (Bernstein, J.) (refusing to consider facts beyond the pleadings after declining to convert a Rule 12 motion introducing such facts). As this Court "does not resolve factual disputes on a motion to dismiss under Rule 12(b)(6)," *id*., it must disregard the numerous contested facts argued by LCI and its broad references to material not included in the FAC, s*ee Sira v. Morton*, 380 F.3d 57, 67–68 (2d Cir. 2004) (holding that "limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint" and rejecting incorporation of additional portions of a transcript beyond those cited by the plaintiff). A few illustrative examples of LCI's inappropriate attempts to argue facts in contravention of the FAC allegations include the following:

| **LCI's Attempt to Argue Facts** | **FAC Allegation as Pled** |
|---|---|
| LCI's claim that discussions between it and Lombard prior to Lombard's acquisition of the WAC 9 assets were no more than "superficial," (Mot. Dismiss, 11), and that those discussions took place in February 2019, after Debtors had accepted Lombard's credit bid. (Supp. Br., 7, 11).[7] | The FAC alleges that: LCI had entered into an undisclosed and impermissible agreement with Lombard to acquire the WAC 9 assets, thereby enabling LCI to avoid a competitive auction with Macquarie for such assets (FAC, ¶ 3); LCI's purchase of the assets from Lombard, along with other simultaneous changes to the relevant board of directors, all occurring just ten days after Lombard's acquisition of the assets from the Debtor, are indicative of improper advance collusion between LCI and Lombard (*id*. at ¶ 36); and, on information and belief, LCI received Confidential Information from Lombard during the Debtors' sale process (*id*. at ¶ 27). |

[7] This latter assertion is particularly egregious inasmuch as it is **not** supported by the McDermott affidavit on which it ostensibly is based. In her affidavit, Ms. McDermott stated that Lombard was then actively discussing a potential transaction with its servicer (LCI), but pointedly did **not** indicate when such discussions first commenced. *See* Lombard Aff., ¶ 6.

| | |
|---|---|
| LCI's attempt to use the findings in the Chapter 11 Cases that Lombard entered into the WAC 9 sale in good faith to prove its own and Lombard's good faith in this proceeding. Mot. Dismiss, 15, 26–27. | The FAC alleges that LCI and Lombard withheld the facts of their collusion from the Court and circumvented the Court-ordered bidding procedures. FAC, ¶¶ 36-38. |
| LCI's assertion that "[t]he Bidding Procedures reflect Macquarie's business decision to agree with Debtors and Lombard not to match Lombard's credit bid for the WAC 9 assets." Mot. Dismiss, 3. | The FAC alleges that Macquarie acceded to Lombard's demands only because Lombard intended to block the entire sale process absent inclusion of the WAC 9 credit bid language in the Bidding Procedures Order (FAC, ¶ 21); that in the absence of a streamlined credit bid from Lombard, Macquarie intended to acquire the WAC 9 assets (*id*. at ¶ 22); and that but for the improper collusion between LCI and Lombard, Macquarie would have proceeded to bid for the assets in a fair auction (*id*. at ¶¶ 38, 51). |

The Court should resist LCI's misguided attempt to push through a summary judgment disposition under the guise of a Rule 12 motion.[8] Disposition of a motion like LCI's, which argues numerous extrinsic and contested facts, "is generally inappropriate . . . when, as here, the parties have not had the opportunity to complete discovery and have not requested conversion." *In re European Rail Pass Antitrust Litig.*, 166 F. Supp. 2d 836, 844 (S.D.N.Y. 2001) (quoting *2 Broadway L.L.C. v. Credit Suisse First Boston Mortgage Capital L.L.C.*, No. 00 Civ. 5773, 2001 WL 410074, at *5 n. 3 (S.D.N.Y. Apr. 23, 2001). Here, of course, Macquarie has had no opportunity to take discovery and develop a fulsome factual record from which the Court may, at the appropriate juncture, consider whether genuine issues of material

[8] To the extent Macquarie is forced to argue on the basis of facts impermissibly introduced by LCI and the Court chooses to accept those facts, Macquarie does not waive its right to seek additional discovery under Rule 56(d) to appropriately and fully respond to the facts improperly introduced by LCI.

fact are indeed disputed. But this is not that time and such arguments have no place in the context of a Rule 12(b)(6) motion.

### C. The FAC Adequately Pleads Allegations on Information and Belief

Equally unavailing is LCI's assertion that Macquarie may not rely upon specific allegations pled upon information and belief. Courts and commentators have long recognized the propriety of pleading on information and belief where, as here, the salient information concerning such allegations is uniquely within the possession of the defendant. *See Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) ("Pleading on the basis of information and belief is generally appropriate" where the relevant "information [is] particularly within [the defendant's] knowledge and control."); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1224 (3d ed. 2004) ("Pleading on information and belief is a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff . . . .").[9] Macquarie should not be penalized for a lack of access to direct information that would further substantiate its allegations, which are presently pled on the available factual record and circumstantial evidence, before it has an opportunity to obtain discovery of such additional evidence.

### D. Rule 9(b) Does Not Apply to Macquarie's Breach of Contract or Tortious Interference Claims

LCI asserts that each of Macquarie's claims is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). LCI is wrong. None of Macquarie's claims sound in fraud or are otherwise subject to Rule 9(b). *Consumer Fin. Prot. Bureau v. RD Legal*

[9] Although inapplicable here, this method of pleading also satisfies the requirements of Rule 9(b). *See IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993) (Rule 9(b) must be read together with Rule 8(a), and thus "[d]espite the generally rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge." (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) (alternations in original))).

*Funding, LLC*, 332 F. Supp. 3d 729, 768 (S.D.N.Y. 2018) ("[T]he United States Supreme Court has consistently cautioned against extending this heightened pleading standard beyond claims for fraud or mistake." (quoting *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1372 (N.D. Ga. 2015))).

With respect to Count I, it is well established that claims of breach of contract, even where the alleged breach is intentional, are not fraud-based and thus are not subject to Rule 9(b)'s heightened pleading standard. *See Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 64 (2d Cir. 2012) ("[B]reach of contract claims fall under Rule 8(a)[.]"); *Patriarch Partners Agency Servs., LLC v. Zohar CDO 2003-I, Ltd.*, No. 16 CIV. 4488 (VM), 2017 WL 1535385, at *3 (S.D.N.Y. Apr. 20, 2017) (allegations that a party "has engaged in a systematic and ongoing breach of its obligations under the [contract] . . . does not constitute fraud and therefore is not subject to Rule 9(b)" (internal citations and quotation marks omitted)).

Likewise, fraud is not an element of a tortious interference claim, and Macquarie's tortious interference claim is not subject to Rule 9(b). Indeed, courts have recognized that tortious interference claims are not subject to a heightened pleading standard even where such claims are based upon the same operative facts as companion fraud-based claims. *See Mayatextil, S.A. v. Liztex U.S.A., Inc.*, No. 92 CIV. 4528 (LJF), 1993 WL 51094, at *6 (S.D.N.Y. Feb. 24, 1993) (holding that although one of the plaintiff's claims that is subject to Rule 9(b) shares factual allegations with its tortious interference claim, the tortious interference claim is not subject to a heightened pleading standard).

Macquarie's section 363(n) is also not subject to Rule 9(b), as it also does not sound in fraud or have fraud as an element of the claim. *See Fulmer v. Fifth Third Equip. Fin. Co. (In re Veg Liquidation, Inc.)*, 2016 Bankr. LEXIS 4160, *44–47 (Bankr. W.D. Ark. Sept. 29, 2016)

(analyzing motion to dismiss 363(n) claim under Rule 8(a) standard); *Brookfield Asset Mgmt., Inc. v. AIG Fin. Prod. Corp.*, No. 09 CIV. 8285 PGG, 2010 WL 3910590, at *6 (S.D.N.Y. Sept. 29, 2010) (holding that Rule 9(b) need not be satisfied where "[n]one of the[] prior events necessarily connote fraud" and where "Plaintiffs need not and have not alleged fraud").

LCI does not argue that Macquarie's claims sound in fraud—as it cannot. Instead, it claims that allegations of collusion are per se subject to the heightened pleading standards of Rule 9(b). No such rule exists, however. *See Hinds Cty., Miss. v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 392 (S.D.N.Y. 2010) (holding in antitrust context that Rule 9(b) not applicable even though "fraudulent acts may inevitably constitute an inherent by-product of defendants' collusive conduct, or else [be] a collateral means they employed to carry out the alleged conspiracy"). The cases LCI relies upon are inapposite and bound strictly to their underlying facts. In *Robinson v. Nat'l R.R. Passenger Corp.*, No. 93 CIV. 8376 (RPP), 1995 WL 444322 (S.D.N.Y. July 26, 1995), the court addressed the circumstances under which a railroad employee subject to a collective bargaining agreement could overturn an arbitration award within the guidelines for doing so set out in the Railway Labor Act ("RLA"). The court recognized that to fit within the RLA's strict limitation on the court's jurisdiction to review minor railway labor disputes, the plaintiff necessarily had to allege that the defendant union engaged in fraudulent conduct in connection with its representation of the plaintiff in the RLA's dispute resolution process. *Id*. at *8. Contrary to LCI's characterization however, the court's holding was limited to the observation that Plaintiff's allegations of collusion had to rise to the level of allegations of fraudulent conduct "amounting to a breach of the duty of fair representation"—and thus satisfy Rule 9(b)—as anything less would not allow the court to review the claims. *Id*.[10]

[10] LCI's other citation likewise is unavailing. The plaintiff in *In re Miner*, 185 B.R. 362, 363 (N.D. Fla. 1995), explicitly pled a fraudulent transfer claim, within which it made an allegation of collusion. Unsurprisingly,

LCI's authority does not support the imposition of any heightened pleading standard on Macquarie's claims, which are pled in conformity with Rule 8(a).[11]

## IV. ARGUMENT

### A. Collateral Estoppel Does Not Foreclose Macquarie's Claims

#### 1. Macquarie's Claims Were Not Actually Decided at the Sale Hearing

LCI's collateral estoppel argument proceeds from the demonstrably false premise that the Court actually resolved the underlying bases for Macquarie's present claims against LCI in the course of the Chapter 11 Cases. To the contrary, the Court very clearly left for another day any determinations as to claims predicated upon intentional or willful misconduct and the aforementioned release provision explicitly preserved Macquarie's right to pursue such claims. Given these undeniable facts (completely ignored by LCI), the estoppel claim is baseless.

Collateral estoppel only applies to issues that are "actually litigated and actually decided" in a prior proceeding. *See N.L.R.B. v. Thalbo Corp*., 171 F.3d 102, 109 (2d Cir. 1999); *see also Jim Beam Brands Co. v. Beamish & Crawford, Ltd.,* 937 F.2d 729, 734 (2d Cir. 1991) ("If an issue was not actually decided in a prior proceeding . . . its litigation in a subsequent proceeding is not barred by collateral estoppel."). Therefore, a party cannot be estopped from pursuing an issue raised in the prior proceeding if the court did not pass judgment on that issue. *See Prime Management Co., Inc. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990).

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the *Miner* court applied Rule 9(b) to the plaintiff's allegations of collusion because it was bound to apply a Rule 9(b)'s heightened pleading standard to the claim of fraudulent transfer within which the collusion allegation arose. *See Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Corp. (In re Verestar, Inc.)*, 343 B.R. 444, 459–60 (Bankr. S.D.N.Y. 2006) ("A claim for actual fraudulent transfer pursuant to § 548(a)(1)(A) or applicable state law must satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure."); *Nisselson v. Drew Indus., Inc. (In re White Metal Rolling and Stamping Corp.)*, 222 B.R. 417, 428 (Bankr. S.D.N.Y. 1998) ("It is well-settled that the Rule 9(b) pleading requirements apply to claims of intentional fraudulent transfer.").

[11] In any event, for the reasons detailed below, the allegations of Macquarie's FAC satisfy the heightened pleading standard of Rule 9(b), should such standard be deemed applicable.

It is clear from the record that the Court never made a final decision as to the merits of any of the issues raised in the FAC. At the February 12 Sale Hearing, the Court acknowledged that Macquarie, as successor to the Debtors, had reserved to it a future right to bring claims related to the intentional misuse of confidential information or other willful misconduct related to the Bidding Procedures. Sale Hr'g Tr., at 252:1-6. Consistent with this broad reservation, and contrary to LCI's assertions, the Court explicitly stated on the record that it would not rule on Macquarie's allegations of intentional misconduct, and informed Macquarie's counsel that its claims of willful misconduct would be set aside "for another day." *Id.* at 252:6. Debtors' counsel expressed its own, identical understanding that the then-forthcoming Macquarie Sale Order would contain "carveouts" for willful misconduct, and stated that parties that intentionally breached their NDAs could still be liable for such intentional conduct. *Id.* at 228:14-24.

Three days later, the Court entered the Macquarie Sale Order, which preserved Macquarie's right to pursue claims "arising from intentional misconduct" related to the Bidding Procedures or the Bidding Procedures Order. Macquarie Sale Order, ¶ 42. Macquarie's three causes of action are all predicated on allegations of LCI's willful misconduct and intentional breaches of the NDA—the exact species of claims preserved to Macquarie. The FAC alleges that LCI willfully violated the NDA and circumvented the Bidding Procedures in an effort to avoid a competitive auction with Macquarie for the WAC 9 assets, and each of the three claims in the FAC is expressly based on allegations of intentional misconduct. *See* FAC, ¶¶ 3, 42–43, 48–51, 55–57. Consistent with the Court's express statements at the conclusion of the February 12 hearing, such claims were **not** adjudicated in the context of the sales hearing and in fact were specifically carved out from the releases contained in the ensuing Orders.[12]

[12] The Court need not tarry long over LCI's reliance on *SECA Leasing Ltd. P'ship v. Nat'l Canada Fin. Corp.*, 159 B.R. 522 (N.D. Ill. 1993), which has no bearing whatsoever on this matter. *SECA* concerned the

### 2. Macquarie Did Not Have a Full and Fair Opportunity to Litigate Its Claims in the Prior Proceeding

During the section 363 sale proceedings, Macquarie was unable to fully and fairly litigate its claims. This is most evident in Macquarie's inability to conduct any discovery or develop anything close to a fulsome factual record in support of its claims. Where parties are not afforded a chance to develop the factual record on an issue, collateral estoppel is inappropriate. *See In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 4480093, at *2 (S.D.N.Y. Aug. 24, 2016) ("The absence of facts litigated through discovery counsels further against preclusion."); *see also Elletson v. Riggle (In re Riggle)*, 389 B.R. 167, 175 (D. Colo. 2007) (collateral estoppel inapplicable "[w]here the parties never complete discovery, and the documents, interrogatories, and answers to interrogatories fail to clarify all the facts"). The Supreme Court has said that collateral estoppel may be "unwarranted" if a party was unable to "engage in full scale discovery or call witnesses." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, n.15 (1979). This holds true even when discovery is precluded by court order. *See Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 361 (3d Cir. 1983) (district court's order foreclosing jurisdictional discovery in a permanent injunction proceeding did not estop the plaintiff from seeking jurisdictional discovery in a subsequent lawsuit).

Macquarie was unable to pursue discovery, identify facts in support of its claims, and fully test evidence presented by other parties during the Sale Hearing. The first indication of

application of res judicata, a related, but wholly different preclusion theory from that put forward by LCI. Res judicata applies only where there is an identity of parties. As a result, it is more punitive in its application—requiring that all claims and issues that could be raised in a proceeding must be raised, lest the party failing to do so be estopped from litigating them in the future. LCI was not a party to the Sale Hearing, and hence it does not rely on the doctrine here. *SECA* addressed only res judicata and nowhere discusses or applies collateral estoppel, which does not preclude a party from raising issues that could have been raised in a prior proceeding, but were not.

improper collusion between LCI and Lombard came from the Lombard Affidavit, which Lombard filed on the literal eve of the Sale Hearing. FAC, ¶ 28. Lombard's timing ensured that Macquarie could not seek discovery or obtain additional facts from either Lombard, LCI, or the Debtors in advance of the hearing. While Ms. McDermott did testify at the Sale Hearing and admitted to the fact of improper discussions between Lombard and LCI, including discussions related to the potential transfer of the WAC 9 assets, she also acknowledged that she was not involved in Lombard's negotiations with LCI and had no personal knowledge of the parties' interactions regarding the contemplated sale of WAC 9 and its assets. Sale Hr'g Tr. at 190:9–18, 197:21–24.

After receiving confirmation of the violations detailed in the Lombard Affidavit, Macquarie's counsel raised the possibility that LCI and Lombard had acted in bad faith and expressed a desire to take discovery consistent with the topics it explored with Ms. McDermott and upon which she lacked direct personal knowledge. *Id.* at 234–36. Such discovery would have given Macquarie the opportunity to discover relevant documents and take relevant testimony of the facts surrounding LCI and Lombard's agreement, and would have provided the most direct evidence of the nature and timing of the information exchanged in aid of that agreement. Rather than grant Macquarie the discovery it sought, and potentially delay the Sale Hearing, the Court charted a middle path. It overruled Macquarie's objection to the extent it implicated any procedural aspects of Lombard's credit bid, with the express reservation that Macquarie's claims of intentional breach of the NDAs and willful misconduct directed at the sale process were saved for another day. *Id*. at 252. This proceeding is entirely consistent with the Court's prior determinations.

### B. Macquarie Adequately Pleads Each Claim of the FAC

Macquarie has adequately pled all three of the claims set forth in its FAC. Each claim is well supported by a short and plain statement explaining Macquarie's entitlement to relief. An analysis appropriately limited to the four corners of the complaint shows that Macquarie's claims are well-pled, and must survive LCI's misguided Motion to Dismiss.

#### 1. Macquarie's Breach of Contract Claim Is Adequately Pled

Count I of the FAC alleges that LCI breached the NDA, the rights of which Macquarie acquired pursuant to the Macquarie APA. The Complaint specifically alleges that LCI breached two material provisions of the NDA—the confidentiality and no-contact clauses. The FAC fairly pleads each and every element of a breach of contract claim: "(1) the existence of a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages suffered as a result of the breach." *In re AlphaStar Ins. Grp. Ltd.*, 383 B.R. 231, 277 (Bankr. S.D.N.Y. 2008) (Bernstein, J.) (citing *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994)). LCI does not dispute that the NDA existed between it and the Debtors, nor that the Debtors performed their obligations thereunder.

LCI's challenge to Count I is not actually directed to the adequacy of the claim as pled, but rather is a misguided attempt to prematurely argue the facts as if it were delivering its closing argument to the fact-finder at the conclusion of the litigation process. Needless to say, such factual contentions have no place in the context of a Rule 12(b)(6) motion, as LCI effectively is asking the Court to ignore or reject well-pled allegations of the complaint.

Examples abound. Principally, LCI argues that it did not in fact breach either the confidentiality provision of the NDA or the no-contact provision. *See* Mot. Dismiss, 19–22. Such argument ignores the contrary allegations of the FAC and invites consideration (and

acceptance) of assumed facts outside of the pleadings, and which were never a part of this Court's findings of fact or conclusions of law.

**a. Macquarie appropriately identifies the Confidential Information that LCI misused**

LCI's only retort to the acknowledged fact of its receipt of information from Lombard—which information is Confidential Information under the terms of the NDA[13]—is that "Macquarie cannot specify what Confidential Information LCI[] allegedly abused[.]" Mot. Dismiss, 21. The FAC appropriately pleads that, on information and belief, such information was exchanged between Lombard and LCI. FAC, ¶ 14. Macquarie should not be held to plead as to details of information peculiarly within the knowledge and control of LCI and Lombard, the particulars of which have been withheld to date from Macquarie. Further, the FAC pleads that the Confidential Information exchanged between Lombard and LCI was subject to the NDA and could only be exchanged with and subject to Houlihan Lokey's advance permission (which was never provided). *Id.* at ¶¶ 25–27. Macquarie also specifically pleads that LCI improperly used that information to impermissibly structure an agreement to acquire the WAC 9 assets before Lombard had closed on those assets. *Id*. at ¶ 14.

LCI's argument that Macquarie needs to specifically identify discrete items of Confidential Information that LCI misused is unsupported by authority. First, Lombard, not Macquarie or the Debtors, provided LCI with Confidential Information. As a result, the nature and types of Confidential Information that LCI received are particularly beyond the knowledge of Macquarie. *Id*. at ¶ 27. The law does not require specific pleading as to information outside of the knowledge of the pleader. *See Boykin*, 521 F.3d at 215 (denying motion to dismiss where

[13] The NDA includes in the definition of Confidential Information all information received from a source "known by [LCI] (after reasonable inquiry) to be bound by a contractual, legal or fiduciary obligation of confidentiality to the Company or any other party with respect to such information." NDA § 1(a).

allegations pled on information and belief related to information that was obviously within the defendant's control); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 (D. Md. 2015) ("The fact that they are pleaded upon information and belief is of no moment because the alleged facts are peculiarly within the possession or control of SU Defendants.").

LCI's cited caselaw is not to the contrary. First, *Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, No. 05 CV 6882 (GBD), 2009 WL 362118, at *4 (S.D.N.Y. Feb. 9, 2009), is entirely inapposite. In that case, the court dismissed the plaintiff's breach claim because "[t]he categories [of information] outlined in paragraph 11 of the complaint [were] broad and potentially encompass[ed] both confidential information and information expressly excluded from the Confidentiality Agreement[.]" *Id.* That is not the case here. *Any* information that LCI received from Lombard is alleged to be de facto Confidential Information under the NDA (NDA at § 1(a)) and could not be used for any purpose other than to evaluate a transaction with the Debtors (*id.* at § 2(a)) or for the limited purpose of servicing the assets (*see* Sale Hr'g Tr. at 227:12).

Moreover, in *Boccardi*, the plaintiff alleged that the defendant misused confidential information to improperly purchase blocks of the plaintiff's stock. 2009 WL 362118, at *4–5. The court held that this did not amount to a claim of misuse of confidential information because the plaintiff specifically pled that it had an agreement in place with the defendant for the purchase of blocks of stock—the very purchase it claimed was improper. *Id.* Here, any discussions by LCI with Lombard regarding the purchase of the WAC 9 assets that occurred before Lombard closed on the WAC 9 assets are per se violative of the NDA and the Bidding Procedures. Accordingly, using Confidential Information in aid of LCI's improper acquisition of the WAC 9 assets is also per se a breach of the NDA. *See U.S. Coachways, Inc. v. Vaccarello*,

2018 WL 3716888 (E.D.N.Y. Aug. 3, 2018) (holding that a pleading sufficiently stated a breach of a confidentiality agreement where retention of a hard drive with confidential information was a per se breach of the agreement).[14]

**b. The Debtors did not disavow a breach of the NDA's no-contact provision**

LCI next argues that the Debtors disavowed any violation of the NDA's no-contact provision that may have occurred (Mot. Dismiss, 21) (LCI is tellingly silent as to whether it actually violated the no-contact provision). This is incorrect, and belied by LCI's own briefing.

As a predicate matter, Macquarie is not using LCI's breach of the NDA's no-contact provision to vindicate its own commercial interests. Macquarie, as successor-in-interest to the Debtors, may articulate claims on its own behalf insofar as breaches remain ongoing and uncured as to the Debtors' prior rights under the NDA. *See* NDA, § 14. In any event, this point is moot insofar as the FAC pleads separate, cognizable harm to the Debtors and Macquarie.

Macquarie also does not attempt to secure any greater rights under the NDA than those held by the Debtors. The Court explicitly stated at the hearing that there was, on the limited facts then introduced, a violation of the Lombard NDA's no-contact provision. Sale Hr'g Tr. at 251:10–11. The Court immediately went on to note that Macquarie's right to further pursue this breach was protected by the reservation to it of the ability to bring all claims related to willful violations of the Bidding Procedures, but that those claims were "for another day." *Id*. at

[14] *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436, 529 N.Y.S.2d 777 (N.Y. App. Div. 1988), also relied upon by LCI, is more of the same. *Gordon* held that the only allegation of exchanged information was information that could not under any circumstances be confidential because it was already in the defendant's possession before it was shared by the plaintiff. *Id.* Further, the plaintiff in *Gordon* alleged conclusorily that it was harmed, with no specificity as to the actual harm that resulted from the alleged improper use of confidential information. As already explained, the FAC plainly alleges that LCI used the improperly-obtained Confidential Information to arrange a surreptitious purchase of the WAC 9 assets in violation of the NDA and the Court's bidding procedures. *See* FAC ¶¶ 43, 51, 57.

251:21–252:6. It is a complete misrepresentation of the status of LCI and Lombard's no-contact violation to claim that such breach was resolved at the Sale Hearing. More importantly, insofar as the Court addressed any such breach, it was Lombard's breach of its own NDA's no-contact obligations, and the impact of that breach on the sale process based on the facts then known. LCI's breaches of the NDA were never before the Court, at the Sale Hearing or otherwise, and so could not have been resolved. Thus, the Debtors rights before, during, and after the hearing vis-à-vis the NDA never changed, and remain now in the same state as they were then, save that Macquarie now holds those rights.

In an attempt to side step the fact that Macquarie has every right to pursue its breach of the NDA, LCI suggests that the Debtors disavowed any breach of the NDA's no-contact provision. Mot. Dismiss, 21. The Debtors did no such thing. LCI relies on statements made at the Sale Hearing by counsel to the Debtors about the structure of a limited information sharing arrangement. This arrangement allowed Lombard to share limited information about the WAC 9 assets with potential "alternative service providers" *for the purpose of servicing the WAC 9 assets*. Sale Hr'g Tr. at 227:12. Counsel for the Debtors made no statements or representations regarding pre-closing discussions between Lombard and LCI about an agreement between them for LCI to acquire the WAC 9 assets from Lombard, which is the conduct and contact explicitly prohibited by the NDA's no-contact provision. LCI attempts to transform the limited-scope grant of permission to share information about **servicing** into a blanket blessing to discuss a future transaction that the NDA otherwise specifically prohibited. Mot. Dismiss, 21. In any event, this is yet another example of LCI's misguided attempt to argue facts and ignore the contrary allegations of the FAC.

Likewise, the Lombard Sale Order makes no representations regarding the NDA's no-contact provision or violations thereof (to the extent it speaks about any non-disclosure agreement it speaks only about Lombard's). The Lombard Sale Order recites that based on the record adduced at the Sale Hearing "[t]he Purchase Price [for the WAC 9 assets] was not controlled by any agreement among potential bidders." Lombard Sale Order, p. 7. This finding is subject to the Court's explicit reservation of all claims regarding intentional bidding misconduct for "another day" and the Court's finding that there was a technical violation of the Lombard NDA's no-contact provision.

Macquarie now stands in the shoes of the Debtors with respect to the Debtors' rights under the NDA, and has every right to explore intentional or willful violations of that agreement. Nothing in the Court's record forecloses that right, and the Debtors at no point agreed to forego the type of claim Macquarie has asserted here.

**c. Macquarie appropriately pleads damages and causation**

Lastly, LCI argues that Macquarie does not plead any damages arising out of its breaches of the NDA. Yet, the FAC specifically alleges that LCI's breaches tainted the bidding process, deprived the Debtors of potential additional value in a competitive auction, and deprived Macquarie of the right to fairly compete for the WAC 9 assets. *See* FAC, ¶¶ 43, 51, 57.

The Bidding Procedures Order recites the Debtors' goal through the section 363 sale process of obtaining the "highest ***or*** best offer" for their assets. Courts have never required that a debtor mechanically accept the bid bearing the highest nominal price figure. *See In re GSC, Inc.*, 453 B.R. 132, 169–170 (S.D.N.Y. 2011); *In re Atlanta Packaging Prod., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988) ("It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price *or* greatest overall benefit possible for the estate.") (emphasis added). Debtors are "encouraged"

to evaluate other factors during the bid and sale process, including "contingencies, conditions, timing or other uncertainties in an offer that may render it less appealing." *In re Family Christian, LLC*, 533 B.R. 600, 621-622 (Bankr. W.D. Mich. 2015). Indeed, it is a "fundamental truism" that the "highest" bid is not necessarily the "highest and best" bid. *In re Bakalis*, 220 B.R. 525, 533 (Bankr. E.D.N.Y. 1998).

Had LCI not entered into a pre-closing agreement with Lombard to subsequently acquire the WAC 9 assets, it is reasonable to infer that Lombard would not have extracted bidding protections for its credit bid, or would have abstained from bidding altogether, and LCI would have been forced to participate directly in the bidding process. A free and fair bidding process could have resulted in an equivalent cash bid, or a higher bid altogether for the WAC 9 assets, either of which the Debtors could have valued as higher ***or*** better than Lombard's credit bid. *See, e.g.*, *Boyer v. Gildea*, 475 B.R. 647, 670 (N.D. Ind. 2012) ("As Comerica Vice President Zarb stated in his deposition, part of the reason Comerica accepted a low bid from Defendant Arlington instead of entering a higher credit bid was that 'Cash is king. Cash has more value than other things.'"). Each of these reasonable inferences supports the damage theories as pled in the FAC and provides sufficient basis to sustain such claim.

In the context of a Rule 12(b)(6) challenge, the damage and causation allegations as pled in the FAC are more than sufficient to satisfy Macquarie's pleading burden. "Under Rule 8(a), [Macquarie] need only allege that it [or the Debtors] w[ere] damaged; it is not required to specify the measure of damages nor to plead proof of causation.'" *LivePerson, Inc. v. 24/7 Customer, Inc.*, 83 F. Supp. 3d 501, 516 (S.D.N.Y. 2015) (quoting *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 272 (S.D.N.Y. 2004)). The extent of harm caused by LCI's breaches of the NDA "is properly evaluated at the summary judgment stage, not the

motion to dismiss stage." *Int'l Council of Shopping Centers, Inc. v. Info Quarter, LLC*, No. 17-CV-5526 (AJN), 2018 WL 4284279, at *7 (S.D.N.Y. Sept. 7, 2018). If nothing else, the Court has already recognized that the contact between Lombard and LCI violated the no-contact provisions of the NDA, giving Macquarie a clear entitlement to at least nominal damages (though at the appropriate time Macquarie expects to provide evidence, including expert testimony, substantiating the full extent of its claimed damages). *See Luitpold Pharm., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 87 (2d Cir. 2015) ("Further, even if Luitpold's allegations of substantial damages were, as Defendants argue, too 'speculative' to support its claims, Luitpold would have plausible claims for nominal damages.").

The FAC plausibly and concisely pleads all requisite elements of a breach of contract claim. LCI's Motion to Dismiss accordingly should be denied.

**2. Macquarie's Tortious Interference Claim Is Adequately Pled**

In support of its tortious interference claim, Macquarie pleads that: "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." *PKG Grp., LLC v. Gamma Croma, S.p.A.*, 446 F. Supp. 2d 249, 251 (S.D.N.Y. 2006) (quoting *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003). Each of the requisite elements is sufficiently pled in the FAC.

First, LCI cannot reasonably contend that the FAC fails to allege that Macquarie had a specific business relationship with which it interfered. Macquarie entered into the Macquarie APA with the Debtors for the acquisition of all of the Debtors' assets, including the WAC 9 assets. *See* FAC, ¶ 15; *Delaurentis v Malley*, No. 114259-2011, 2012 WL 6650163 (N.Y. Sup.

Ct. Dec. 12, 2012) (specific business relationship established by enforceable contract with expectation of receiving the benefits thereof). LCI asserts that Macquarie has no more than a "hope" of acquiring the WAC 9 assets. Mot. Dismiss, 23 (internal citation omitted). Again, LCI simply ignores the contrary allegation of the complaint. The FAC specifically alleges that Macquarie would have acquired the WAC 9 assets but for Lombard's credit bid, and, if Lombard did not credit bid, would have been contractually obligated to purchase the WAC 9 assets, among a number of other assets of the Debtors. *See* FAC, ¶ 15; Macquarie APA.

Second, the FAC adequately alleges that LCI knew of the Macquarie APA and the fact that the Macquarie APA covered the WAC 9 assets. FAC, ¶ 47. The Macquarie APA was publicly filed with the Bidding Procedures Motion on December 10, 2018. *See* Bidding Procedures Mot., Ex. C [Docket No. 64]. "New York courts impute knowledge of the contents of a public record to a party when the party has actual knowledge of facts giving it reason to believe that it has an interest in the contents of the records, and a reasonably prudent person with such an interest would investigate those records if given an opportunity to do so." *St. John's Univ. v. Bolton*, 757 F. Supp. 2d 144, 192 (S.D.N.Y. 2010). LCI's interest in the WAC 9 assets is evinced both by the NDA, which covered those assets, and by LCI's subsequent acquisition of the assets immediately after the Debtors' sale to Lombard closed. As alleged in the FAC, any reasonably prudent person in LCI's position would have been aware of a stalking-horse bid entered for the WAC 9 assets. FAC, ¶ 47.

Third, Macquarie has adequately pled improper conduct on the part of LCI. The FAC alleges that LCI acted intentionally both by breaching the NDA and circumventing the Bidding Procedures Order in an attempt to acquire the WAC 9 assets outside of the section 363 sale process and to deprive Macquarie of the assets. *Id.* at ¶¶ 48–50.

LCI's only argument to the contrary is its unfounded assertion that "a tortious interference claim cannot be based upon allegations of a breach of contract." Mot. Dismiss, 24. Firstly, LCI fails to grasp that Macquarie's claim is **not** solely predicated on LCI's breach of the NDA. Indeed, the FAC makes clear that the tortious interference claim is also based on LCI's wrongful conduct separate and apart from its contractual breaches, including allegations that LCI wrongfully circumvented the Bidding Procedures Order and sought to exert undue economic pressure on Macquarie. FAC, ¶ 48.

Secondly, LCI misstates the operative law. The sole case relied upon by LCI, *Walters v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987), does not support LCI's position, and LCI strategically inserts an ellipsis into its selected quotation from the case, which would otherwise demonstrate the case's lack of support for the rule LCI propounds. In *Walters*, the plaintiff alleged an intentional interference with contract claim, but in doing so "alleged neither [the defendant's] knowledge of [the plaintiff's] other contracts, nor his intentional procurement of any breach." *Id*. at 159. The *Walters* court rightly acknowledged that this did not state a claim for intentional interference with contract.

The *Walters* court then, of its own volition, noted that the plaintiff's allegations would also not amount to tortious interference with prospective economic advantage (as the cause of action was styled by the court). The full holding on this point, which LCI declined to include in its brief was: "No New York case law has been advanced to or discovered by this Court establishing that the breach of a contract, standing alone, is sufficient to create liability ***for subsequent breaches by others of other contracts***." *Id*. (emphasis added). This portion of the holding is critical to the court's opinion because the plaintiff specifically claimed that the defendant, by breaching his contract with the plaintiff, caused the plaintiff's other clients to

breach their own agreements with the plaintiff. *Id*. The plaintiff did not plead that the defendant breached its contract through wrongful means, that the defendant had knowledge of these subsequent contracts, or that the defendant acted specifically with the intent to interfere with those contracts. The plaintiff pled only that the defendant's breach inflicted some unspecified reputational harm on it that led to those breaches. The court made clear that its opinion rested on the plaintiff's failure to plead wrongful conduct and failure to demonstrate a nexus between his wrongful conduct and the harm alleged: "Absent rational allegations that [the defendant] breached the [plaintiff's firms'] agency agreement through wrongful means, specifically to damage plaintiffs' business relations with others, no claim is stated upon which relief can be granted." *Id*. The court in *Walters* said nothing about whether an intentional breach of contract may serve as a wrongful means in establishing a tortious interference claim, because no intentional breach was pled.

In fact, relevant New York authority is directly contrary to LCI's unsupported contention. In *Schisgall v. Fairchild Publications*, the Supreme Court of New York held that where a party intentionally breaches a contract "with intent to inflict injury beyond that contemplated as a result of the mere breach of contract" it gives rise to tortious interference liability. 207 Misc. 224, 232 (N.Y. Sup. Ct. 1955). A number of other jurisdictions have recognized that "[w]here . . . a party breaches a contract with the immediate purpose of injuring or destroying prospective business relationships the means may be considered improper" for purposes of establishing a tortious interference claim. *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984) (collecting cases). This is the exact conduct alleged in the FAC: LCI breached the NDA for the

express purpose of evading a fair auction of the assets where it would need to bid against Macquarie. FAC, ¶ 48.[15]

Moreover, as noted above, LCI simply ignores Macquarie's express allegations that LCI improperly and intentionally circumvented the requirements of the Bidding Procedures Order in procuring its collusive arrangement with Lombard. Using illegal means or otherwise exerting economic pressure in violation of court procedures is the type of improper conduct that gives rise to tortious interference liability. *See In re Gormally*, 550 B.R. 27, 43–45 (Bankr. S.D.N.Y. 2016) (misusing civil process to exert economic pressure was sufficiently wrongful act to sustain tortious interference claim). The Court should rely on the foregoing well-settled authority to deny LCI's request to dismiss Macquarie's tortious interference claim.

Furthermore, application of the relevant factors as identified by the Restatement of Torts likewise demonstrates the adequacy of Macquarie's tortious interference claim. New York has adopted the guidance of the Restatement (Second) of Torts § 767 (1979) (the "Restatement") that:

> [T]he issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation.

[15] LCI argues that "Macquarie's allegation that LCIH was motivated by its own self-interest nonetheless destroys its claim for tortious interference with business relations." Mot. Dismiss, 24 (citation omitted). It does not. The relevant FAC allegation (*see* FAC, ¶ 50) makes no such statements, and LCI's argument conflates two issues. The cited allegation merely describes the subsequent events that followed from LCI's wrongful activity. The mere fact that LCI acquired the assets does not make its conduct less wrongful. It breached the NDA and acted with improper purpose solely to harm Macquarie, as LCI had other avenues to otherwise acquire the WAC 9 assets, yet it elected the avenue that purposefully and surreptitiously deprived Macquarie of the opportunity to compete with it for the assets.

*Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 190, 406 N.E.2d 445 (N.Y. 1980) (quoting Restatement § 767, cmt. b). The Restatement sets forth seven factors for a court to weigh in determining if a defendant's actions amounted to improper interference:

> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

Restatement (Second) of Torts § 767 (1979). These are factors to be weighed by the Court, and "the weight carried by these factors may vary considerably" depending on the facts of the case at hand. *Id*. at cmt. a. Although the prescribed balancing of the relevant factors obviously is premature before a complete factual record is developed and presented to the Court, a cursory review of the FAC demonstrates that the complaint, as pled, properly alleges an actionable tortious interference claim as informed by the Restatement factors.[16]

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[16] *The nature of the LCI's conduct*. The Restatement observes that an actor's conduct is strongly suggestive of impropriety where the actor engages in unlawful conduct, economic pressure, or violations of business ethics and customs in the course of interference. *Id*. at cmt. c. The FAC alleges that LCI utilized Lombard's hold-up power over the Macquarie APA to exert economic pressure over Macquarie to accept the terms of the Lombard's unchallenged credit bid. FAC, ¶¶ 19–20. LCI also violated accepted business ethics and customs by intentionally circumventing the Bidding Procedures established by the Court for the acquisition of the WAC 9 assets. *Id*. at ¶¶ 38, 47–50.

*The actor's motive*. As noted above, the FAC specifically alleges that LCI entered into a collusive side agreement with Lombard, intentionally breached the NDA, and deliberately circumvented the Bidding Procedures. *Id*. at ¶¶ 38, 47–50. LCI's sole motive for employing these improper means was to harm its competitor Macquarie by cutting off Macquarie's ability to fairly bid against LCI for the WAC 9 assets. *Id*.

Lastly, the FAC adequately pleads that LCI's wrongful conduct was the 'but for' cause of Macquarie's injury. In *In re Gormally*, the court held that the but for causation standard was met where the plaintiff would have entered into a transaction with a known buyer who had made offers for the assets in question if the defendant had not interfered with the sale. 550 B.R. at 42. The FAC plainly alleges that Macquarie was "ready, willing, and able" to acquire the WAC 9 assets, but for LCI's side agreement with Lombard. FAC ¶¶ 15, 22, 38, 51; *Sutton & Edwards, Inc. v. Samuels*, 187 A.D.2d 501, 503 (N.Y. App. Div. 1992) (fourth prong of tortious interference claim is met where plaintiff pled that it had a willing and able counterparty to consummate a transaction that was stymied by the defendant's interference).

The FAC states all elements of a tortious interference claim with the necessary detail to meet Macquarie's pleading burden. LCI's arguments for the dismissal of Macquarie's tortious interference claim should be denied.

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*The interests of the other with which the actor's conduct interferes*. Macquarie's interests are undisputed, and set forth fully in the FAC. The FAC pleads that Macquarie had entered into a binding stalking-horse bid with the Debtors for the WAC 9 assets, with every intention of acquiring the assets. *Id*. ¶¶ 15, 22, 46.

*The interests sought to be advanced by the actor*. The FAC alleges that the specific means utilized by LCI to acquire the WAC 9 assets advanced improper interests inasmuch as they were driven by an attempt to deprive Macquarie of the opportunity to fairly compete for the assets. Namely, by acting outside of the construct of the Bidding Procedures and intentionally violating the NDA, LCI sought to harm Macquarie, not advance any legitimate interest. FAC, ¶¶ 46–53.

*The social interests involved*. The collusive conduct giving rise to the FAC implicates not only the rights and interests of Macquarie and the Debtors, but also the public interest in ensuring full compliance with Orders of this Court.

*The proximity or remoteness of the actor's conduct to the interference*. LCI's conduct directly caused the interference, and the FAC sufficiently alleges that this conduct was the but-for cause of Macquarie not acquiring the WAC 9 assets. FAC, ¶¶ 19–22, 46–47.

*The relations between the parties*. Macquarie and LCI are competitors. LCI's conduct was calculated to deprive Macquarie of acquiring industry assets pursuant to a valid and enforceable stalking-horse arrangement or having the opportunity to match any validly placed bid for such assets. *Id.*

### 3. Macquarie Has Standing to Pursue Its Claim Under 11 U.S.C. § 363(n), Which Claim Is Appropriately Pled

#### a. Macquarie has both direct and derivative standing to bring its § 363(n) claim

Macquarie has standing to bring a claim pursuant to 11 U.S.C. § 363(n), both because it acquired the right to bring such claims from the Debtors, and because it has standing in its own right as an aggrieved bidder. First, it is blackletter law that a debtor may bring a section 363(n) claim. *See In re New York Trap Rock Corp.*, 42 F.3d 747, 753 (2d Cir. 1994). Such claims are alienable from the estate, and an assignee may bring section 363(n) claims after acquiring them from the estates. *See JAWHBS, LLC v. Arevalo*, No. 15-24176-CIV, 2016 WL 4142498, at *8 (S.D. Fla. Aug. 4, 2016) (holding that an entity that acquired the estate's claims under section 363(n) had standing to bring such a claim). Macquarie has acquired the Debtors' claims under section 363(n) through the explicit release carveout in the Macquarie Sale Order:

> Notwithstanding any other terms herein or in any other orders of the Court, any damages flowing from any ~~intentional~~ violations of the Bidding Procedures and/or the Bidding Procedures Order **arising from intentional misconduct** are hereby expressly reserved and preserved ~~for the benefit of Macquarie and the Debtors~~ and, upon the occurrence of the Closing, all such rights **held by the Debtors prior to the Closing** shall be assigned to and be held for the benefit of Macquarie pursuant to the terms of the Purchase Agreement.

Macquarie Sale Order, ¶ 42. Having acquired such claims, Macquarie now stands in the shoes of the estates, and may pursue section 363(n) claims on their behalf.

Macquarie may also bring claims under section 363(n) as an aggrieved bidder—a fact acknowledged by LCI. The Second Circuit has held that an aggrieved bidder may challenge the intrinsic fairness of a sale pursuant to section 363(n) where the challenge is to the determination that the sale was made to a good faith purchaser. *See In re Colony Hill Assocs.*, 111 F.3d 269, 273–74 (2d Cir. 1997). "Thus, when an unsuccessful bidder attacks a bankruptcy sale on

equitable grounds related to the intrinsic structure of the sale, he brings himself within the zone of interests which the Bankruptcy Act seeks to protect and to regulate." *In re Harwald Co.*, 497 F.2d 443, 444–45 (7th Cir. 1974) (decided under analogous provision of predecessor act to the Bankruptcy Code). The Second Circuit has acknowledged that in the face of collusion, "the unsuccessful bidder may be the only party with an interest in exposing such inequitable conduct." *Colony Hill*, 111 F.3d at 274. Macquarie was the stalking-horse bidder for the WAC 9 assets, and was deprived of the benefit of its stalking-horse bid, or the ability to further bid for the assets as a result of the collusive activity between Lombard and LCI. It now has standing to challenge that activity and the fairness of the sale of the WAC 9 assets to Lombard under section 363(n).

**b. The Sale Order does not cut off Macquarie's section 363(n) claim**

LCI's argument that the Sale Order cuts off Macquarie's section 363(n) claim is meritless. "Section 363(n) provides a statutory exception to the finality of bankruptcy sale orders for res judicata purposes." *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 917 (9th Cir. 1991). Precluding a section 363(n) claim on the basis of a confirmed sale order "would render meaningless the ability of a bankruptcy trustee to 'avoid a sale' under § 363(n)." *Id*. Thus, such claims may be brought in adversary proceedings filed after the confirmation of an asset sale. *See In re Trap Rock*, 42 F.3d at 749 (reversing orders of bankruptcy court and district court dismissing section 363(n) claims brought by debtor in adversary proceeding filed after entry of order confirming sale in main bankruptcy case).

**c. Macquarie's 363(n) claim is adequately pled**

Macquarie's FAC satisfies the requirements of Rule 9(b) and sets forth each of the elements of a claim under section 363(n). Section 363(n) prohibits (i) agreements (ii) by

potential bidders (iii) that control the sale price of an asset. *See id.* at 752. The FAC alleges that there was an agreement between LCI and Lombard to control sale of the WAC 9 assets. FAC, ¶¶ 20, 55. Ms. McDermott, who testified for Lombard at the Sale Hearing, admitted on the record in the Lombard Affidavit and at the Sale Hearing held the next day that there were pre-Sale Hearing discussions between Lombard and LCI regarding a subsequent sale of the WAC 9 assets to LCI. *Id*. at ¶¶ 28–29. Notwithstanding the open admission of these improper discussions between LCI and Lombard, the Court may also infer an agreement to control a sale through the circumstantial evidence of LCI's conduct. *See In re Trap Rock*, 42 F.3d at 753 (observing that the defendant may have dropped out of bidding for innocent reasons, but that such suspicious conduct was sufficiently consistent with an allegation of collusion to survive a motion to dismiss). Consistent with the inability of a plaintiff to reasonably plead facts outside of its knowledge, it is accepted that plaintiffs in section 363(n) cases typically have to rely on circumstantial evidence of the parties' actions and the timing of those actions when pleading such claims. *See In re Sunnyside Timber, LLC*, 413 B.R. 352, 363 (Bankr. W.D. La. March 31, 2009). That is exactly what Macquarie has done here. FAC, ¶¶ 38, 47–50.

More particularly, the FAC alleges that the extraordinary speed at which Lombard was able to consummate the transfer of the WAC 9 assets to LCI following Lombard's own acquisition of the assets offers compelling circumstantial evidence of an illicit and undisclosed prior agreement. Lombard and LCI were able to complete a complex cross-border transfer of assets to LCI within ten days of Lombard acquiring the assets. *Id*. at ¶ 36. Moreover, LCI acquired the WAC 9 assets a mere 23 day after the credit bid was approved by the Court and ten days after Lombard represented to the Debtors that it had no agreement or other arrangement with any third party to sell the assets. *Id*. The timing of LCI's acquisition of the WAC 9 assets

is strongly indicative that LCI possessed the necessary information to bid on the assets during the auction process if it so desired, but that it refrained because it had an agreement in place with Lombard to acquire the assets shortly after Lombard succeeded at the auction. *Id*. at ¶¶ 36, 55. Certainly these are reasonable inferences to be drawn in Macquarie's favor in the context of a Rule 12(b)(6) challenge. This circumstantial evidence is further bolstered by the fact that if LCI had appropriately bid through the framework of the Bidding Procedures, Macquarie would have received a Break-Up Fee, as defined by the Bidding Procedures Order. *Id*. at ¶ 37. The Bidding Procedures Order set the Break-Up Fee and at three percent of the value of the successful bid, up to a $19,500,000 cap. *Id*. By operating outside of the framework of the Bidding Procedures, LCI avoided paying the Break-Up Fee amount to the Debtors' estates, and deprived Macquarie and the Debtors of additional value to which both were entitled. *Id*. at ¶¶ 38, 49, 51.

Finally, the fact that Lombard leveraged its hold-up power to extract a no-match protection for its credit bid is yet further circumstantial evidence that it was aware that a buyer existed willing to pay more than the value of Lombard's debt. *Id*. at ¶ 20. If Lombard had no such assurance, it would be facially illogical to preclude the opportunity of obtaining full cash satisfaction of its debt position. Put another way: why would Lombard assume the expense of reselling the WAC 9 assets in the hope of obtaining full value for its collateral when it knew Macquarie would bid up to or in excess of the value of its debt? The answer is simple and may be reasonably inferred from the well-pled allegations of the FAC. Lombard already knew that it had a buyer secured.

LCI does not contest whether Macquarie has adequately pled the second or third elements of a section 363(n) claim. The FAC clearly pleads both elements. LCI and Lombard are indisputably "potential bidders." Lombard actually bid in the sale. *Id*. at ¶ 23. LCI executed the

NDA for the purpose of performing diligence for a potential acquisition of the WAC 9 assets through the bidding process. *See id*. at ¶ 12; *Sunnyside Timber*, 413 B.R. at 367 (courts broadly construe "potential bidders" to include all parties who express interest in the sale). Finally, the FAC alleges that the agreement between LCI and Lombard depressed the sale price for the WAC 9 assets because it resulted in a non-competitive bidding structure that did not allow the two parties interested in the ultimate acquisition of the assets, Macquarie and LCI, to bid openly and competitively for them. *Id*. at ¶¶ 21, 38, 51, 57. Instead, it created an artificial market that harmed both the Debtors and Macquarie's economic interests. *Id*. The FAC adequately pleads all elements of section 363(n) claim.

## V. CONCLUSION

For the foregoing reasons, Macquarie respectfully requests that the Court deny LCI's Motion to Dismiss.

Dated: June 7, 2019
New York, New York

Respectfully submitted,
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 7, 2019 I electronically filed the foregoing *Macquarie Rotorcraft Leasing Holdings Limited's Objection to LCI Helicopters (Ireland) Limited's Motion to Dismiss* with the United States Bankruptcy Court for the Southern District of New York using the Court's CM/ECF system, which electronically served a copy on all counsel of record.

Dated: June 7, 2019

*/s/ G. Alexander Bongartz*
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