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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re WAYPOINT LEASING HOLDINGS LTD. *et al.*, Debtors.	Chapter 11 Case No. 18-13648 (SMB) Jointly Administered
MACQUARIE ROTORCRAFT LEASING HOLDINGS LIMITED, Plaintiff, v. LCI HELICOPTERS (IRELAND) LIMITED, Defendant.	Adversary Proceeding No. 19-01107 (SMB) **RETURN DATE AND TIME**: JUNE 20, 2019, 10:00 AM/EST **OPPOSITION DEADLINE**: JUNE 7, 2019 **REPLY DEADLINE**: JUNE 14, 2019

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF LCI HELICOPTERS (IRELAND) LIMITED'S
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

After a robust search for bidders for Debtors' assets, extensive negotiations regarding the Bidding Procedures for the purchase of Debtors' assets, a comprehensive set of Bidding Procedures, a lengthy and detailed court Order approving the Bidding Procedures, written objections to Lombard's 100% credit bid for the WAC 9 assets and a request for a break up fee, an evidentiary hearing extending well into the evening to adjudicate those objections and the request for a break up fee, a lengthy court Order approving Lombard's 100% credit bid, an adversary complaint, an amended adversary complaint and 39 pages of briefing, Macquarie can neither articulate a plausible basis for nor identify any specific facts to support its claim that Lombard and LCIH colluded to taint the sales process supervised and approved by this Court.[1]

Faced with LCIH's motion to dismiss, Macquarie amended its pleading in search of a viable claim to assert against its smaller competitor. Macquarie's amended pleading attempts a new timeline to allege that LCIH and Lombard's alleged collusion started in November 2018. The new timeline is meant to address Macquarie's agreement in the Bidding Procedures to not match Lombard's 100% credit bid, a fact that destroys Macquarie's claims against LCIH. By moving the timeline, Macquarie now argues that LCIH indirectly coerced Macquarie to agree to not match Lombard's 100% credit bid by leveraging the bargaining strength of LCIH's alleged co-conspirator, Lombard. Macquarie argues that but for this alleged coercion—which is allegedly attributable to LCIH by dint of a secret and collusive agreement with Lombard—it would have purchased the WAC 9 assets.

The First Amended Adversary Complaint ("FAC") alleges no facts to support this

[1] Defined terms have the same meanings ascribed to them in the Memorandum of Law in Support of LCI Helicopters (Ireland) Limited's Motion to Dismiss ("Opening Mem.") (Docket No. 6-1) and the Reply Memorandum of Law in Further Support of LCI Helicopters (Ireland) Limited's Motion to Dismiss ("Reply Mem.") (Docket No. 9).

fantastical scenario. In addition, Macquarie's theory ignores the testimony of Lombard's representative who stated, under oath, that Lombard told Macquarie in December 2018 that it would take par plus interest for the WAC 9 assets and Macquarie declined. In addition to these fatal defects, Macquarie's own conduct undermines its claim that it would have purchased the WAC 9 assets in a robust auction process but for the alleged collusion of LCIH and Lombard. As set forth in Debtors' Disclosure Statement for Second Amended Modified Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. And Its Affiliated Debtors approved by the Court on June 4, 2019 ("Disclosure Statement"), Macquarie refused to match the 100% credit bid made for the assets of WAC 12 (which owned 17 working aircraft, a number identical to WAC 9 (*see* Morrison Decl. Ex. B at Ex. 1 at p. 3) even though the WAC 12 lender had not negotiated a "no match bid" agreement like that obtained by Lombard. *See In re Waypoint Leasing Holdings LTD., et al.*, No. 18-13648 (SMB) (Docket No. 819 at 29). Clearly, Macquarie sought to purchase Debtors' assets at a discount and (i) agreed not to match (WAC 9); and (ii) elected not to match (WAC 12) the respective lenders' 100% credit bids (Macquarie also did not match the credit bid for WAC 2). Given Macquarie's refusal to match any of the three credit bids made in Debtors' bankruptcy proceeding, Macquarie's claim that LCIH's alleged collusion with Lombard prevented Macquarie from making and Debtors from obtaining an offer for the WAC 9 assets higher and better than Lombard's 100% credit bid is not only unsupported by facts, but also is not remotely plausible.

Macquarie's opposition fails to overcome the myriad fatal pleading defects in the FAC. Macquarie acknowledges that it needs discovery to find support for its conclusory allegations, which is the very definition of a fishing expedition that courts will not permit. Macquarie acknowledges that it cannot allege that LCIH's alleged conduct damaged Debtors and instead

argues either that nominal damages will do (notwithstanding its request for punitive damages), that damages are really a summary judgment issue or it embarks on a speculative journey into whether a higher or better bid for the WAC 9 assets lurked out there in the absence of Lombard's 100% credit bid (notwithstanding the Disclosure Statement's recitation of a prepetition sales process which involved solicitations to 180 strategic and financial buyers which yielded five bids for substantially all of Debtors' assets and a term sheet for one bidder who was then outbid by Macquarie at the last minute). *In re Waypoint Leasing Holdings LTD., et al.*, No. 18-13648 (SMB) (Docket No. 819 at 25-26).

The rest of Macquarie's opposition is similarly deficient. As set forth below, the opposition relies upon inapposite case law, inapplicable legal standards and unreasonable inferences to support the conclusory claims in the FAC.

Despite Macquarie's arguments to the contrary, the Court never validated Macquarie's claims of collusion or intimated that Macquarie could proceed directly to discovery when it left "for another day" Macquarie's "argument" that alleged breaches of non-disclosure agreements could be viewed as "willful misconduct." That "another day" is today. Enough is enough.

ARGUMENT

POINT I

MACQUARIE FAILS TO STATE A CLAIM AGAINST LCIH

A. This Court Did Not Previously Validate Macquarie's Collusion Claims

Macquarie seeks an end run around the prior proceedings, hearings, rulings and Orders in the Debtors' bankruptcy proceeding by arguing that this Court has, by its comments made during the February 12, 2019 evidentiary hearing, "carved out," "set aside" and "saved" Macquarie's claims for "intentional breach of the NDAs and willful misconduct."[2] (Macquarie Rotorcraft Leasing Holdings Limited's Objection to LCI Helicopters (Ireland) Limited's Motion to Dismiss ("Pl. Br.") (Docket No. 10) at 18, 20) In fact, Macquarie argues that LCIH's motion to dismiss "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." (*Id*. at 2)

According to Macquarie, the Court has ruled that the claims asserted against LCIH are impervious to the Court's prior rulings and Orders which, among other things, (i) rejected Macquarie's assertion that Lombard and LCIH colluded to obtain the WAC 9 assets for LCIH. (Morrison Reply Decl. Ex. C at 250:13-16: "The evidence is, through Ms. McDermott, that it was Lombard that made the bid. It didn't make the bid on behalf of itself and anybody else. It wasn't in a business combination with anybody else. It made the bid."); (ii) found Macquarie adduced "absolutely no evidence about what information was given to LCI[H]" (*Id*. at 250:24-251:2); (iii) found that Lombard had permission from the Debtors to share information with

[2] Notwithstanding Macquarie's contention that this Court preserved such claims, Macquarie has not sued Lombard, the alleged co-conspirator, electing only to sue LCIH, Macquarie's smaller competitor.

LCIH relating to LCIH's role as the asset servicer (*Id*. at 251:2-7); and (iv) found that LCIH's alleged co-conspirator, Lombard, acted in good faith (*Id*. at 251:12-19: "And I don't know how you can say they acted in bad faith based on contacting somebody about the possibility that once they get these assets they want to sell them because they don't want to hold onto them . . . .")[3]

Macquarie's purported silver bullet is the following comment made by the Court: "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." (*Id*. at 252:2-6) (emphasis supplied) Clearly, the Court did not find that Macquarie's objections to the sale amounted to valid claims against LCIH that would be immune from the Court's prior rulings and would be invulnerable to a motion to dismiss. The Court, understandably, told Macquarie's counsel that it could *argue* that it had claims for willful misconduct given the carve out in the releases. (*See id*.) The Court did not say that such claims were intrinsically valid. In fact, the Court doubted the viability of such claims, telling Lombard's counsel that Macquarie would be "hard pressed" to establish damages if Macquarie elected to pursue such claims. (*Id*. at 247:13-14)

Accordingly, Macquarie cannot avoid the prior proceedings—which destroy its claims against LCIH—based upon the Court's acknowledgment that the releases gave Macquarie's counsel an opportunity to argue that Macquarie has claims for willful misconduct. The Court's comments especially do not give Macquarie a free pass to discovery where Macquarie alleges no additional or new facts in this action and where LCIH was not a party to the February 12, 2019 evidentiary hearing. It is too heavy a lift for Macquarie to employ the Court's comments

[3] Those rulings are supplemented by the Court's February 14th Final Order which found that Lombard's 100% credit bid was the highest and best value for the WAC 9 assets (Morrison Decl. Ex. E at p. 6), that Lombard complied with its NDAs and the Bidding Procedures in all material respects (*Id*. at p. 7), that Lombard's 100% credit bid was not the product of any collusion (*Id*.) and which overruled Macquarie's objections to the sale with prejudice (*Id*. at p. 11).

regarding "another day" to be used to allow Macquarie to sail its meritless claims through a motion to dismiss.

B. The Court May Properly Consider Its Prior Proceedings

Desperate to avoid the prior proceedings in Debtors' bankruptcy proceeding, Macquarie argues that the Court cannot consider them on a motion to dismiss due to a limited role of judicial notice of court proceedings. (Pl. Br. at 11) Relying upon *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.,* 969 F.2d 1384, 1388 (2d Cir. 1992), Macquarie argues that the Court can only take judicial notice of its prior proceedings "in order to establish the 'fact of such litigation and related filings'" and not for the truth of their contents. (Pl. Br. at 11)

Macquarie cannot so easily avoid the prior proceedings. The *Rotches* decision involves "a document filed in *another* court" that was not related to the proceeding *sub judice*. *Rotches*, 969 F.2d at 1388 (emphasis supplied). Here, the prior proceedings were in this Court and they absolutely relate to this adversary proceeding. In this context, the Court may consider its prior proceedings on a motion to dismiss. *See Zappin v. Cooper*, No. 16 CIV. 5985 (KPF), 2018 WL 708369, at *7 (S.D.N.Y. Feb. 2, 2018), *reconsideration denied,* No. 16 CIV. 5985 (KPF), 2018 WL 2305562 (S.D.N.Y. May 18, 2018), and *aff'd,* No. 18-1545, 2019 WL 2142528 (2d Cir. May 15, 2019) ("[i]n the Rule 12(b)(6) context, a court may take judicial notice of prior pleadings, orders, judgments, and other related documents that appear in the court records of prior litigation and that relate to the case *sub judice*.") (quoting *Jianjun Lou v. Trutex, Inc.*, 872 F.Supp.2d 344, 349-50 n.6 (S.D.N.Y. 2012) (taking judicial notice of prior order denying motion to extend temporary restraining order)).

C. Macquarie Has Confirmed That This Case Is A Fishing Expedition

Macquarie's opposition repeatedly seeks to excuse the FAC's failure to plead facts to

support its conclusions by claiming that it needs discovery to substantiate its pleading. (*See* Pl. Br. at 2 ("[discovery] will allow Macquarie to gather relevant evidence peculiarly within LCI[H]'s control that is supportive of its contentions.")); at 13 ("Macquarie has had no opportunity to take discovery and develop a fulsome factual record"); and at 14 ("Macquarie should not be penalized for a lack of access to direct information that would further substantiate its allegations . . . before it has an opportunity to obtain discovery of such additional evidence.")

However, Macquarie cannot justify its request to proceed to discovery with meritless claims. Macquarie has failed to allege any facts to support its conclusion that Lombard and LCIH colluded to taint the bidding process for WAC 9 assets and/or to harm Macquarie or that LCIH misused confidential information to obtain the WAC 9 assets. Nor has Macquarie alleged any facts that could form a basis for its information and belief allegations. Macquarie has simply invented a timeline for alleged collusion between Lombard and LCIH that is incongruous with the timing of the preliminary discussions between LCIH and Lombard disclosed by Jacqueline McDermott in her affidavit (*see* Morrison Decl. Ex. F) and at the February 12, 2019 evidentiary hearing (*see* Morrison Reply Decl. Ex. C at 188:22-189:18).

Moreover, Plaintiff has not demonstrated that information relating to the allegedly tainted bidding process which involved Macquarie, Lombard and the Debtors—and not LCIH—is somehow in the exclusive possession of LCIH. For instance, Debtors had control over the data room including the information that was shared with LCIH, with Debtors' permission. (*Id*. at 226:18-227:3) Macquarie and Lombard have information regarding the negotiations whereby Macquarie agreed to not match Lombard's bid. Lombard would also have information regarding its alleged collusion with LCIH.

Accordingly, Macquarie's amended pleading is manifestly inadequate to justify advancing to expensive discovery from a competitor. *See Bald Hill Builders, LLC v. 2138 Scuttle Hole Rd. Realty, LLC*, No. 2:17-cv-107 (ADS)(GRB), 2017 WL 3668769, at *4 (E.D.N.Y. Aug. 23, 2017) (citation omitted) (granting 12(b)(6) motion and denying plaintiff's request to engage in discovery to discern whether collusion existed and finding "[s]uch a course of action would constitute 'aimless trawling' and is not permitted under *Iqbal* or *Twombly*."); *Janus et Cie v. Kahnke*, No. 12 CIV. 7201 WHP, 2013 WL 5405543, at *4 (S.D.N.Y. Aug. 29, 2013) (dismissing where "[d]iscovery . . . would be a fishing expedition through a competitor's files."); *CVC Claims Litig. LLC v. Citicorp Venture Capital Ltd.*, No. 03 CIV. 7936 (DAB), 2007 WL 2915181, at *4 (S.D.N.Y. Oct. 4, 2007) (dismissing and quoting *Nebenzahl v. Miller*, No. CIV. A. 13206, 1996 WL 494913, at *3 (Del. Ch. Aug. 26, 1996) ("Conclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them")).

Courts consistently reject a plaintiff's request for discovery based upon deficient pleadings as a response to a motion to dismiss. In *Viania v. Zimmer, Inc.*, No. 217-cv-1641 (ADS)(AYS), 2017 WL 5714725, at *5 (E.D.N.Y. Nov. 27, 2017) the court held: "The Plaintiff asks the Court to deny the Defendants' motion [to dismiss] based on a hope that the Plaintiff will discover [a claim] during discovery. . . . This is improper. '[D]iscovery is not a fishing expedition for Plaintiffs to obtain information to try and create claims that do not already exist. In order to properly state a claim, Plaintiffs need to have adequate information in their possession at the time they file their complaint . . . .'" *Id*. (citations omitted); *Utts v. Bristol-Myers Squibb Co.*, 251 F. Supp. 3d 644, 673 (S.D.N.Y. 2017) ("The motion to dismiss mechanism exists to prevent plaintiffs from conducting fishing expeditions to see if they can cobble together

meritorious claims. Discovery is burdensome and expensive, and the Federal Rules of Civil Procedure do not provide for it unless the pleading can survive a Rule 12(b)(6) motion.").

D. Macquarie's Collateral Estoppel Arguments Are Meritless

Macquarie argues that the claims asserted in this adversary proceeding were not adjudicated during the February 12, 2019 evidentiary hearing because they were specifically carved out from the releases and therefore LCIH's collateral estoppel argument is based upon a "demonstrably false premise." (Pl. Br. at 17-18) Macquarie's straw man response confuses *res judicata* and collateral estoppel. LCIH's motion is not predicated upon an argument that LCIH's alleged breach of the LCIH NDA, LCIH's alleged tortious interference with business relations and LCIH's alleged violation of 11 U.S.C. §363(n) were previously adjudicated. However, it cannot be disputed that issues integral to these claims were previously adjudicated and the Court's rulings on such issues compel dismissal of the claims asserted in this adversary proceeding.

Accordingly, the Court has previously ruled, after an evidentiary hearing, *inter alia*, (i) that Macquarie failed to establish collusion between Lombard and LCIH (Morrison Decl. Ex. E at p. 7); (ii) that Debtors received the highest and best value for the WAC 9 assets (*Id*. at p. 6); (iii) that Lombard acted in good faith and complied with the Bidding Procedures and its NDAs in all material respects (*Id*. at p. 7); and (iv) that Macquarie failed to demonstrate that LCIH abused any confidential information (Morrison Reply Decl. Ex. C at 250:24-251:9). As set forth in LCIH's memoranda of law (Opening Mem. at 25-29 and Reply Mem. at 4-8), the issues resolved by the Court compel dismissal of the claims asserted against LCIH because they make up necessary elements of Macquarie's claims, *e.g*. damages, malicious conduct and breach.

It is self-evident that the Court's finding with respect to Lombard's lack of collusion,

good faith and compliance with the Bidding Procedures and NDAs (*see* Morrison Decl. Ex. E at p. 7 of 28) destroys any claim against LCIH arising out of the same alleged collusive scheme. In *International 800 Telecom Corp. v. Kramer, Levin, Nessen, Kamin & Frankel*, 155 Misc. 2d 975, 980, 591 N.Y.S.2d 313 (Sup. Ct. N.Y. Cnty. 1992), the Court found that collateral estoppel precluded a claim against an accounting firm (Peat Marwick) based upon an alleged conspiracy among that accounting firm, a law firm (Kramer Levin) and a financial printer (Bowne) to overbill the plaintiff client when the Court previously found that neither the law firm nor the financial printer engaged in overcharging:

> [Plaintiff] has failed [to show a meritorious cause of action] since its claim of a conspiracy to overcharge between Bowne, Kramer, Levin and Peat Marwick cannot be sustained. The court's prior determinations in two trials have established that neither Bowne nor Kramer engaged in overcharging. Since Peat Marwick cannot have engaged in a conspiracy that this court has determined did not exist, collateral estoppel compels the conclusion that [plaintiff] lacks a meritorious claim against Peat Marwick.

Id.

Macquarie next argues that collateral estoppel does not apply because Macquarie did not have a full and fair opportunity to litigate its objections at the February 12, 2019 evidentiary hearing due to its "inability to conduct any discovery or develop anything close to a fulsome factual record." (Pl. Br. at 19-20) This argument ignores controlling Second Circuit law and would inject instability into the bankruptcy process. It is well settled that "some orders of bankruptcy courts, entered in the course of Chapter 11 proceedings prior to confirmation, are final judgments, which, if not timely appealed (or timely challenged under Fed. R. Civ. P. 60(b)), are entitled to *res judicata* effect." *In re American Preferred Prescription Inc.,* 255 F.3d 87, 92 (2d Cir. 2001) (citations omitted). Among those pre-confirmation orders recognized by the Second Circuit as being entitled to preclusive effect are orders involving a sale of assets. *Id.*; *see*

also SECA Leasing L.P. v. Nat'l Can. Fin. Corp., 159 B.R. 522, 524 (N.D. Ill. 1993).

Macquarie offers no legal support to overturn Second Circuit jurisprudence with respect to the finality of sales orders. (*See* Pl. Br. at 19) *In re General Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 4480093, at *2 (S.D.N.Y. Aug. 24, 2016) involved an unripe attempt to apply collateral estoppel to conclusions made by an appellate court regarding a fact issue. *In re Riggle*, 389 B.R. 167, 173-79 (D. Colo. 2007), *as amended* (Aug. 15, 2007) involved an attempt to apply collateral estoppel to a summary judgment motion granted on default. Macquarie's cite to *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979) refers to a discussion of when it would be unfair to use *offensive* collateral estoppel (a plaintiff seeks to estop a defendant from relitigating issues which defendant previously lost against another plaintiff), which is not an issue on this motion to dismiss. Finally, *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 361 (3d Cir. 1983) was explicitly narrowed to "under the circumstances of this case" and involved an issue of personal jurisdiction.

E. Macquarie Cannot Save Its Breach Of Contract Claim

In its opening memorandum of law, LCIH demonstrated that Debtors had no actionable claim for breach of the LCIH NDA when Macquarie allegedly succeeded to Debtor's rights under that agreement on March 13, 2019. (Opening Mem. at 18-22) Moreover, Macquarie acquired no rights greater than Debtors under the LCIH NDA and cannot pursue its own commercial interests under that agreement. (*Id.*) Neither Macquarie's amended pleading nor its opposition meaningfully address these fatal defects.

Macquarie argues that its conclusory allegations are enough and that the details of LCIH's alleged breach are peculiarly known to LCIH. (Pl. Br. at 22) Accordingly, Macquarie

argues that the allegations in FAC ¶ 14 and ¶¶ 25-27 "specifically pleads" a breach of contract claim. (Pl. Br. at 22-23) However, FAC ¶ 14 merely alleges, in the most conclusory fashion and upon information and belief, that with respect to confidential information, "LCI has continuously possessed, and still possesses, Confidential Information, and used such Confidential Information to evaluate proposed acquisitions of certain of the Debtors' assets outside of the Court-ordered sale process, in violation of the NDA, and to consummate such acquisitions." (Morrison Reply Decl. Ex. A ¶ 14) There are no specific facts in that allegation (FAC ¶ 27 is nearly identical (*see id*. ¶ 27)). The dearth of specific facts renders inapposite the case of *U.S. Coachways, Inc. v. Vaccarello*, No. 17-cv-5983 (SJ)(SMG), 2018 WL 3716888 (E.D.N.Y. Aug. 3, 2018), relied upon by Macquarie. (Pl. Br. at 23-24) In that case, plaintiffs alleged the specific fact that defendant failed to return hard drives containing confidential information that belonged to plaintiff and were the exclusive property of plaintiff. *U.S. Coachways*, 2018 WL 3716888, at *3.

Macquarie argues that it need not plead more detail because "the particulars . . . have been withheld to date from Macquarie." (Pl. Br. at 22) However, Macquarie is suing purportedly to vindicate Debtors' interests in the LCIH NDA. (*See*, *e.g.*, *id*. at 24) The gravamen of the breach of contract claim is that LCIH allegedly misused *Debtors'* confidential information to *Debtors*' detriment. Yet Debtors' December 27, 2018 letter to LCIH, which is attached to the FAC, could only state that Lombard "*may have*" provided LCIH with Confidential Information in violation of *Lombard's* NDA. (Morrison Reply Decl. Ex. A at Ex. B at p. 2) Subsequent to December 27, 2018, Debtors did not pursue any claim against either Lombard or LCIH for breach of any NDA and, in fact, represented to the Court at the February 12, 2019 evidentiary hearing, that Debtors' were aware of no breach by Lombard with respect to information given to LCIH. (*See* Morrison Reply Decl. Ex. C at 227:8-23) Debtors controlled

their data room (which they permitted LCIH access to (*see id*. at 226:18-227:3)) and Debtors decided whether or not to follow up on their December 27, 2018 letter to LCIH. Macquarie's argument that "the nature and types of Confidential Information that LCI[H] received are particularly beyond the knowledge of Macquarie" (Pl. Br. at 22) is less an excuse for its failure to plead facts and more an acknowledgment that it did not satisfy its Rule 11 obligation to investigate with Debtors before asserting this claim against LCIH on behalf of Debtors.[4]

Macquarie attempts to argue that it has alleged damages for the alleged breach of the LCIH NDA by relying upon its conclusions that the alleged misconduct tainted the bidding process and deprived Macquarie of the right to bid for the WAC 9 assets. (Pl. Br. at 26) The Court has previously rejected these theories (they are not facts) as speculative. (*See* Opening Mem. at 12 and n.7)

Macquarie then substitutes pure conjecture for facts in an effort to ameliorate its inability to allege the damages element of its breach of contract claim:

> Had LCI[H] 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[H] *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. Each of these reasonable inferences support the damage theories as pled in the FAC and provides sufficient basis to sustain such claim.

(Pl. Br. at 27 (citation omitted) (bold in original; italics supplied))

Putting aside that these highly speculative theories formed the basis for Macquarie's objection to Lombard's credit bid were contradicted by the evidence adduced at the February 12,

[4] Macquarie's opposition ignores Jacqueline McDermott's prior testimony that Lombard did not share with LCIH any information beyond what was permitted by Debtors which the Court found to be credible. (*See* Reply Mem. at 6-8)

2019 evidentiary hearing and were rejected by the Court, it is clear that the FAC alleges no facts from which the Court can reasonably infer that Macquarie's speculative scenario would have occurred. *See Camprubi-Soms v. Aranda*, No. 00-cv-9626 (DLC)(DF), 2001 U.S. Dist. LEXIS 11291, at *26-27 (S.D.N.Y. June 12, 2001) ("Courts need not strain to find inferences that are favorable to the plaintiff, which are not apparent on the face of the complaint."); *Zeising v. Kelly*, 152 F. Supp. 2d 335, 342 (S.D.N.Y. 2001).

Macquarie argues that it has sufficiently alleged damages because (i) Fed. R. Civ. P. 8(a) requires nothing further; (ii) evaluating damages is a summary judgment issue; and (iii) the Court has previously found a technical breach of an NDA by Lombard which should result in at least nominal damages against LCIH. (Pl. Br. at 27-28).[5] Obviously, none of these meritless arguments should distract the Court from requiring Macquarie to satisfy all of the elements of pleading a claim for breach of contract which, of course, includes the element of damages. *See, e.g., House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, No. 13 CIV. 519 RJS, 2014 WL 1383703, at *10 (S.D.N.Y. Mar. 31, 2014) (dismissing breach of contract claim and holding "[f]actual allegations showing damages are essential" and recognizing that under New York law, "'[w]here a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order.'") (citation omitted)); *Jinno Int'l Co. v. Premier Fabrics, Inc.*, No. 12 CIV. 07820 LGS, 2013 WL 4780049, at *3 (S.D.N.Y. May 24, 2013) (dismissing breach of contract counterclaim because the "pleading fails to support an inference that it has actually suffered damages a result of Jinno's breach of any agreement.").

[5] In its original adversary complaint, Macquarie alleged "LCI[H]'s breaches of the NDA have caused damage to Plaintiff in an amount to be proven at trial." (Morrison Decl. Ex. A ¶ 34) The FAC alleges "LCI[H]'s breaches of the NDA have caused damage to Plaintiff, as successor to Debtors, by depriving the Debtors of obtaining potential competing cash bids for the WAC 9 assets and the additional value that such bids may have realized." (Morrison Reply Decl. Ex. A ¶ 43)

F. Macquarie Cannot Save Its Tortious Interference Claim

LCIH has demonstrated that Macquarie has failed to plead the elements of its tortious interference with business relations claim which requires, *inter alia*, Macquarie to allege that LCIH acted with malice and solely to harm Macquarie. (Opening Mem. at 22-25) Moreover, to the extent that Macquarie relies upon LCIH's alleged collusion with Lombard to support its claim, the allegations are subject to Rule 9(b)'s heightened pleading standard. (Reply. Mem. at 8-9) Neither the FAC nor Macquarie's opposition saves this claim.

Macquarie argues that its tortious interference claim is not subject to Rule 9(b), even if it is based upon a theory of collusion, citing to *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). (Pl. Br. at 15) However, *Mayatextil* involved a claim for tortious interference with contract and not tortious interference with business relations. *See Mayatextil*, 1993 WL 51094, at *6. The latter tort requires an element of "more culpable conduct" that is not required for tortious interference with contract. (*See* Opening Mem. at 23-24)

Macquarie also seeks to distinguish *Walters v. Fullwood*, 675 F. Supp. 155, 159 (S.D.N.Y. 1987), which holds that a tortious interference with business relations claim cannot be predicated upon an alleged breach of contract by arguing that, in this case, Macquarie alleges an intentional breach of contract. (Pl. Br. at 30) However, it is well-settled that a plaintiff cannot bootstrap a breach of contract into an independent tort by claiming that the breach was intentional. *See Axa Mediterranean Holdings S.P. v. ING Insur. Intern., B.V.*, 106 A.D.3d 457, 458, 965 N.Y.S.2d 89 (1st Dep't 2013) ("The mere allegation that the alleged breach of contract was 'maliciously intended' or constituted 'willful misconduct' does not render the breach of contract claim a separate and independent tort claim."); *OFSI Fund II, LLC v. Canadian Imperial*

Bank of Commerce, 82 A.D.3d 537, 539, 920 N.Y.S.2d 8 (1st Dep't 2011) (same).

Macquarie's cases are not helpful. *Schisgall v. Fairchild Publications*, 207 Misc. 224, 230, 137 N.Y.S.2d 312 (Sup. Ct. N.Y. Cnty. 1955) involved a claim for *prima facie* tort and arose in a factual scenario where the defendant book publisher could not have been motivated by self-interest when it refused to publish plaintiff's book. *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799-800 (Iowa 1984) involved an appeal after trial and, consistent with LCIH's arguments, held that the "tort basis of liability should not have been submitted to the jury[,]" recognizing that [d]eliberate breach of contract is generally not considered to be improper means, as the law remedies such breaches with damages calculated to give the injured party the benefit of the bargain; generally no need thus exists for additional tort remedies." *In re Gormally*, 550 B.R. 27, 41-46 (Bankr. S.D.N.Y. 2016), another decision rendered after trial, involved defendant's abuse of process by wrongfully filing a lis pendens.

Macquarie fails to meaningfully address its failure to allege that LCIH acted solely for the purpose of harming Macquarie, a fatal defect for a claim of tortious interference with business relations. (*See* Opening Mem. at 22-25) Macquarie feebly argues, in a footnote, that "[t]he relevant FAC allegation" (FAC ¶ 50 which alleges that LCIH's alleged misconduct enabled Lombard to purchase the WAC 9 assets with the intention of reselling them to LCIH) describes "subsequent events." (Pl. Br. at 32 n.15) However, the FAC is full of allegations that LCIH and Lombard concocted a scheme to allow LCIH to circumvent the bidding process to obtain the WAC 9 assets. For example, FAC ¶ 1 alleges "Defendant engaged in discussions with third parties, contrary to its contractual promises, to purchase assets belonging to [Debtors]." (Morrison Reply Decl. Ex. A ¶ 1) This is clearly an allegation of an alleged purpose other than to harm Macquarie.

Finally, Macquarie's assertion that it was "ready, willing and able" to acquire the WAC 9 assets (Pl. Br. at 34) does not satisfy its failure to allege "but for" causation necessary for its claim. Macquarie cannot allege "but for" causation given its agreement to not match Lombard's 100% credit bid (*see* Morrison Decl. Ex. D at p. 2 n.3). There are no allegations of fact to support Macquarie's conclusion that LCIH caused Macquarie to make that agreement. Macquarie's undisputed refusal to match the 100% credit bid for WAC 12 (and the credit bid for WAC 2) (*see id*. at p. 2 ¶ 6) belie its allegations of "but for" causation, and certainly destroy any basis for Macquarie's "information and belief." Macquarie's reliance on *Sutton & Edwards, Inc. v. Samuels*, 187 A.D.2d 501, 502, 589 N.Y.S.2d 609 (2nd Dep't 1992) is meritless, as that case involved a claim for tortious interference with contract.

G. Macquarie Cannot Save Its §363(n) Claim

LCIH has demonstrated that Macquarie lacks standing to assert a claim under 11 U.S.C. §363(n) because, under the law of the Second Circuit, "[u]nsuccessful bidders usually lack standing to challenge a bankruptcy court's approval of a sale." (Reply Mem. at 9 (quoting *In re Gucci*, 126 F.3d 380, 388 (2d Cir. 1997)) In addition, LCIH demonstrated that LCIH does not fall within the limited exception to the standing rule and, in any event, its claim is meritless. (*Id.* at 10-11)

Macquarie argues that it has standing because it is not suing as a frustrated bidder but as Debtors' assignee. (Pl. Br. at 35-36) This argument is directly contradicted by the FAC, which clearly asserts a §363(n) claim as a frustrated bidder. (Morrison Reply Decl. Ex. A ¶¶ 54-59) In any event, as set forth above and in LCIH's prior submissions, Macquarie cannot demonstrate that the Debtors were damaged by the bidding process supervised and approved by the Court. (*See, e.g.*, *supra* at 13-14) Although LCIH was not a party to these proceedings, it is doubtful

that Debtors contemplated that the releases given in the February 14th Final Order allow Macquarie to hijack Debtors' bankruptcy proceeding on the eve of confirming a plan with a claim, brought on behalf of the Debtors, asserting that Debtors' bidding process was corrupt.

Macquarie also argues that it has standing as an aggrieved bidder because it was deprived of the benefit of its stalking horse bid or the ability to bid for the WAC 9 assets. (Pl. Br. at 35-36) However, Macquarie's unsupported and conclusory allegations of collusion do not bring it within the narrow standing exception. It is undisputed that Lombard was the sole creditor for WAC 9 (*see* Morrison Decl. Ex. E at Ex A) and that Macquarie was not a creditor (*see* Morrison Decl. Ex. H at p. 3 ¶ 5). Macquarie has neither explained nor demonstrated how its allegations of collusion against Lombard would help maximize Lombard's recovery as the creditor for WAC 9, and, accordingly, Macquarie lacks standing. *See In re New Energy Corp.*, Nos. 3:13–CV–205, 12–33866, 2013 WL 1192664, at *4 (N.D. Ind. Mar. 22, 2013) (finding that unsuccessful bidder lacked standing to challenge a sale where its allegations of collusion "are harming the creditors, not helping maximize their recovery.").

Finally, Macquarie asks the Court to draw inferences similar to those sought from the Court to save its other claims with respect to its attempt to allege a collusive scheme in the absence of any specific factual allegations. (*See* Pl. Br. at 36-39) As set forth above, the Court need not strain to find favorable inferences where they are not apparent from the face of the pleading. (*See supra* at 14)

POINT II

DISMISSAL WITH PREJUDICE IS WARRANTED

As set forth in LCIH's prior submissions, the FAC should be dismissed with prejudice because Macquarie cannot cure the FAC's defects. (*See* Reply Mem. at 12) After two attempts to plead a claim, Macquarie does not even request leave to further amend. Accordingly, dismissal with prejudice is appropriate. *See Kranser v. Rahco Funds LP*, No. 11 CV 4092(VB), 2012 WL 4053805, at *3 (S.D.N.Y. Aug. 9, 2012) (dismissing with prejudice and holding that "Plaintiffs have had two chances to assert their various claims" and "[t]he Court will not permit them a third by granting leave to replead"); *Campagnello v. Ponte*, 16 Civ. 7432 (PAE) (JCF), 2017 WL 4124337, at *1 (S.D.N.Y. Sep. 13, 2017) ("As Campanello has already had the opportunity to amend his Complaint, and indeed has done so, the Court agrees with Judge Francis that this dismissal shall be with prejudice to Campanello's ability to file any further amendments.").

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in LCIH's prior submissions on this motion, defendant LCIH respectfully requests the Court to grant its motion and dismiss the FAC in its entirety and with prejudice and to award LCIH such further relief as the Court deems appropriate.

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Respectfully submitted,

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