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*Attorneys for Truist Bank as administrative agent for the WAC7 Lenders and as a WAC 7 Lender*

**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) |
| WILLIAM TRANSIER, as Plan Administrator for Waypoint Leasing Holdings Ltd. and its Affiliated Debtors, | ) | |
| Plaintiff, | ) | Adv. Pro. No. 19-01448 (SMB) |
| v. | ) | |
| SUNTRUST BANK, MUFG UNION BANK, N.A., DEUTSCHE BANK AG, NEW YORK BRANCH, BARCLAYS BANK PLC, and GOLDMAN SACHS BANK USA, | ) | |
| Defendants. | ) | |

**MOTION FOR SUMMARY JUDGMENT**



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Truist Bank, successor by merger to SunTrust Bank, as administrative agent for the WAC7 Lenders[1] (acting in such capacity, "**WAC7 Agent**"), hereby, on behalf of all Defendants, moves for summary judgment as to all counts in the *Complaint* (Doc. 1), as set forth more fully in the Memorandum in Support of the Motion to for Summary Judgment filed contemporaneously herewith, in accordance with Rule 56 of the Federal Rules of Civil Procedure (the "**Federal Rules**"), made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

Dated: March 13, 2020

Respectfully Submitted,

**ALSTON & BIRD LLP**

***By: /s/ David Wender***

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[1] Any capitalized term not otherwise defined herein, shall have the meaning ascribed to such term in the Complaint.

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| | ) | |
| Defendants. | ) | |

**MEMORANDUM OF LAW IN SUPPORT**
**OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

1. On March 14, 2019, in furtherance of a settlement reached with the WAC7 Agent and the WAC7 Lenders that facilitated the sale of substantially all of the Debtors' assets, the Debtors made two distributions[2] to the WAC7 Agent totaling approximately $44,866,683.[3] In the months that followed, the Debtors proposed and obtained confirmation of their Plan. Relevant to this action, the Debtors insisted that the Plan include broad releases to facilitate the efficient wind-down of their businesses. To obtain consent for the broad releases that the Debtors insisted on, the Debtors agreed that the Debtors and the Debtors' estates would grant similar, mutual releases of all Causes of Action against the Debtor Released Parties, as such terms are defined under the Plan. The WAC7 Agent and the Approving Lenders (defined below) are Debtor Released Parties[4] (and, thus, obtained the broad Estate Release (defined below), which bars the instant action). The Plan was confirmed by this Court on July 31, 2019.

2. Notwithstanding the broad releases granted in favor of Defendants, on December 10, 2019, the Plaintiff, the Plan Administrator under the Plan and successor-in-interest of the Debtors, filed the Complaint seeking to claw back amounts that the Debtors distributed to the WAC7 Agent prior to confirmation. The Complaint asserts four substantive causes of action: (1) state-law conversion/misappropriation; (2) state-law unjust enrichment; (3) turnover of estate property under Section 542 of the Bankruptcy Code; and (4) avoidance of an unauthorized post-petition transfer under Section 549 of the Bankruptcy Code; and two remedy causes of action for,

[2] In four (4) wire transfers.

[3] Any capitalized term not otherwise defined herein has the meaning given to it in the Complaint. Certain other defined terms are imported from the Debtors' confirmed Plan of Liquidation and the order confirming that Plan [*see* Bankr. No. 18-13648-smb, Doc. 893] (the "**Plan**") or the Macquarie Sale Order; such terms have the meaning given them in the Plan or Macquarie Sale Order, as identified herein.

[4] All of the Defendants, with the exception of Goldman Sachs Bank USA ("**Goldman**"), voted in favor of the Plan.

(1) recovery of an avoided transfer under Section 550 of the Bankruptcy Code; and (2) declaratory judgment pursuant to Section 105(a) of the Bankruptcy Code. As set forth below, because these claims were released in the Debtors' Plan or are otherwise barred, summary judgment should be granted in the Defendants' favor for each of the six counts asserted.

## II. FACTUAL SUMMARY

3. Each of the causes of action in the Complaint relate to distributions that the WAC7 Agent received contemporaneously with the closing of the Macquarie sale and in connection with a partial distribution of sale proceeds required by the Macquarie Sale Order. Def. Fact ¶ 9.[5] The required distribution under the Macquarie Sale Order implemented the terms of a Plan and Sale Support Agreement, dated January 14, 2019, among the Debtors, "Macquarie Rotorcraft Leasing Holdings Limited" (the purchaser, "**Macquarie**"), and certain WAC 7 Lenders and WAC 8 Lenders (as defined in the Plan) (the "**Plan and Sale Support Agreement**"). Def. Fact ¶ 8.

4. The Plan and Sale Support Agreement resolved outstanding disputes among certain Supporting WAC Lenders (as defined therein), the Debtors, and Macquarie regarding the lenders' credit bid rights and potential objections to the Macquarie sale (particularly, the lenders' right to receive an immediate distribution of collateral proceeds contemporaneous with closing). Def. Fact ¶ 9. At bottom, in exchange for the Supporting WAC Lenders' consent to a sale of their collateral to Macquarie, the Plan and Sale Support Agreement required the Debtors to seek approval of the allocation of Macquarie's purchase price to each of the Supporting WAC Lenders' collateral and required the Debtors to include a provision in the proposed sale order providing an interim distribution to the Supporting WAC Lenders, subject to certain holdbacks. Def. Fact ¶ 9.

[5] Any reference to a "Def. Fact" relates to the Defendants' Statement of Material Facts filed contemporaneously herewith.

After discussions with representatives of certain other WAC Lenders, this treatment was expanded and provided in the proposed sale order to all WAC Lenders whose collateral was to be sold to Macquarie. Def. Fact ¶ 7. Certain aspects of the methodology for calculating the holdbacks were not agreed upon and were determined by the Court prior to the sale closing. Def. Fact ¶ 10. This agreement and the Court's resolution of the unagreed issues were incorporated into the Macquarie Sale Order. Def. Fact ¶ 41.

5. Of note, no provision of, or exhibit to, the Macquarie Sale Order or Plan and Sale Support Agreement contains the amounts of the partial distributions to be made thereunder. Def. Fact ¶ 11. Rather, the amounts of these partial distributions were calculated and distributed outside of the pleadings filed with the Court. Def. Fact ¶ 12. Specifically, the Debtors first circulated a draft illustrative distribution model, apparently drafted by the Debtors' financial advisor, in early February 2019. Def. Fact ¶ 14. The WAC7 Agent (and the WAC 7 Lenders), among others, sought clarifications with regard to the model. In particular, the WAC7 Agent sought clarification with respect to the adjustments necessary to account for the WAC7 Agent's cash collateral and the lack of back-up for the Debtors' various figures. Def. Fact ¶ 35. In response to these comments, *inter alia*, the draft model underwent multiple material revisions during the intervening month prior to the closing of the Macquarie sale on March 14, 2019. Def. Fact ¶ 34. However, issues raised by the WAC7 Agent and Lenders remained unresolved, particularly with respect to the treatment of cash collateral, even on the day of the closing and distribution. Def. Fact ¶ 37.

6. The Debtors' "final" distribution model was circulated on March 13, 2019. Def. Fact ¶ 31.[6] But just as with previous drafts, the Debtors and their advisors refused to commit that the version was accurate or final, specifically providing therein that "THIS ANALYSIS IS AN ESTIMATE ONLY AND IS SUBJECT TO ADJUSTMENT IN ALL RESPECTS. THE DEBTORS RESERVE ALL RIGHTS TO AMEND THESE AMOUNTS." Def. Fact ¶ 32. The "final" model further stated that "the DRAFT numerical data and other information set forth herein have been provided by the Company and are preliminary and subject to material change." Def. Fact ¶ 33.

7. The March 13th (updated) distribution model contained a flow of funds showing two "External" transfers to the WAC7 Agent that together total $44,869,354.30. Def. Fact ¶ 46[7] This is $3,000 more than the $44,866,683 actually received by the WAC7 Agent. This portion of the flow of funds spreadsheet is replicated, with these two rows highlighted, below (Def. Fact ¶ 46):

*E.* **Waypoint Makes True-Up Transfers to Cash Collateral Accounts for Holdback Amount**

| Detail | Sender | Amount | | Beneficiary / Contact | Routing Information | Notes |
|---|---|---|---|---|---|---|
| **Cash Collateral True-Up for Holdback Amount** | | | | | | |
| WAC1 | Waypoint Leasing (Ireland) Limited | 7,838,564.53 | Internal | WAC1 Cash Collateral Account | *See [I] on 'Routing Information' tab* | *See 'Cash & DIP' tab for calculation* |
| WAC3 | Waypoint Leasing (Ireland) Limited | 3,711,073.64 | Internal | WAC3 Cash Collateral Account | *See [I] on 'Routing Information' tab* | *See 'Cash & DIP' tab for calculation* |
| WAC6 | Waypoint Leasing (Ireland) Limited | 1,060,997.07 | Internal | WAC6 Cash Collateral Account | *See [I] on 'Routing Information' tab* | *See 'Cash & DIP' tab for calculation* |
| WAC8 | Waypoint Leasing (Ireland) Limited | 3,427,630.69 | Internal | WAC8 Cash Collateral Account | *See [I] on 'Routing Information' tab* | *See 'Cash & DIP' tab for calculation* |
| | | $16,038,265.93 | | | | *See Note 1 below* |
| **Cash Collateral in Excess of Holdback Amount** | | | | | | |
| WAC7 | WAC7 Cash Collateral Account | 4,138,243.57 | External | SunTrust Bank | *See [J] on 'Routing Information' tab* | *See 'Cash & DIP' tab for calculation* |

*F.* **Waypoint Makes Interim Disbursement to Lenders**

| Detail | Sender | Amount | | Beneficiary / Contact | Routing Information | Notes |
|---|---|---|---|---|---|---|
| WAC1 Lenders | Waypoint Leasing (Ireland) Limited | 105,478,099.49 | External | Macquarie PF Inc. | *See [J] on 'Routing Information' tab* | *See ' APA Waterfall' and 'Distributions by Lender' tabs* |
| WAC3 Lenders | Waypoint Leasing (Ireland) Limited | 53,519,320.62 | External | Glas Trust Company LLC | *See [J] on 'Routing Information' tab* | *See ' APA Waterfall' and 'Distributions by Lender' tabs* |
| WAC6 Lenders | Waypoint Leasing (Ireland) Limited | 11,358,421.03 | External | Bank of Utah | *See [J] on 'Routing Information' tab* | *See ' APA Waterfall' and 'Distributions by Lender' tabs* |
| WAC7 Lenders | Waypoint Leasing (Ireland) Limited | 40,731,110.73 | External | SunTrust Bank | *See [J] on 'Routing Information' tab* | *See ' APA Waterfall' and 'Distributions by Lender' tabs* |
| WAC8 Lenders | Waypoint Leasing (Ireland) Limited | 59,962,022.80 | External | Wells Fargo Bank, National Association | *See [J] on 'Routing Information' tab* | *See ' APA Waterfall' and 'Distributions by Lender' tabs* |
| | | $271,048,974.65 | | | | |

[6] The "final" distribution model is an Excel spreadsheet, file name "Waypoint -- APA Funds Flow (3.13.2019) (updated)," attached as Exhibit 7 to the Wender Declaration.

[7] The final flow of funds is the third tab of the Excel file, titled "Summary Funds Flow" and headered in the spreadsheet as "Macquarie APA Summary Funds Flow."

Heading "F. Waypoint Makes Interim Disbursement to Lenders," shows an "External" transfer (i.e., wire) to "SunTrust Bank" in the amount of $40,731,110.73, and the immediately preceding heading shows an "External" transfer (i.e., wire) to "SunTrust Bank" for $4,138,243.57 (heading "E. Waypoint Makes True-Up Transfers to Cash Collateral Accounts for Holdback Amount," subheading: "Cash Collateral in Excess of Holdback Amount).[8] After receiving this model, on March 14, 2019, the WAC7 Agent received two sets of wires, one set totaling $40,728,439 and another set totaling $4,138,244.

8. Against this backdrop (i.e., the shifting figures), Mr. David Wender, as counsel to the WAC7 Agent, called the Debtors' counsel (Weil Gotshal & Manges LLP), to confirm the wire transfers, particularly the second set of transfers totaling $4,138,244. Def. Fact ¶ 47. Debtors' counsel responded to Mr. Wender's inquiry later that day with the following email: "The additional $4 million is due to the Excess Cash Collateral in WAC 7," referencing the following table in an email forwarded to her from the Debtors' financial advisor:

| | Final | Initial Distribution | | | |
|---|---|---|---|---|---|
| | Funds Flow | A | B | Total | Variance |
| WAC 1 | $105,478,099.49 | $102,233,565.71 | $3,244,533.78 | $105,478,099.49 | $0.00 |
| WAC 3 | $53,519,320.62 | $51,869,814.99 | $1,649,505.63 | $53,519,320.62 | $0.00 |
| WAC 6 | $11,358,421.03 | $7,916,417.59 | $3,442,003.44 | $11,358,421.03 | $0.00 |
| WAC 7 | $40,731,110.73 | $34,160,084.84 | $6,571,025.89 | $40,731,110.73 | $0.00 |
| WAC 8 | $59,962,022.80 | $58,744,424.85 | $1,217,597.95 | $59,962,022.80 | $0.00 |
| | | | | | |
| Excess Cash Collateral | | | | | |
| WAC 7 | $4,135,571.85 | $4,070,053.00 | $65,518.85 | $4,135,571.85 | ($0.00) |

Def. Fact ¶ 48.

9. These responses from the Debtors' professionals were in line with the views expressed by the WAC7 Agent on March 12th and previously that the WAC7 Agent's distribution

[8] Incidentally, the Plan Administrator's allegation in the Complaint, at ¶ 22, that a "$40,731,111 estimated Partial Distribution and funds flow analysis was presented without objection to the WAC7 Lenders and/or the WAC7 Agent prior to distribution" is not supported.

should account for excess cash collateral (Def. Fact ¶ 46) and (as discussed above) were in line with the last-circulated flow of funds.

10. After receiving confirmation from the Debtors' professionals, the WAC7 Agent acted in reliance on the Debtors' March 14th email. On May 7, 2019, the WAC7 Agent filed seven substantially identical proofs of claims against the liable Debtors. Def. Fact ¶ 50. These proofs of claim all stated that:

> Pursuant to the Final DIP Order entered January 9, 2019 (Dkt. No. 231), the Debtors admitted, acknowledged, agreed and stipulated that as of the Petition Date, the WAC7 Borrowers were indebted to the WAC7 Secured Parties (as defined in the Final DIP Order) without defense, counterclaim or offset of any kind, in respect to loans made under the WAC7 Documents in an amount of not less than $103,174,920 (the "WAC7 Prepetition Amount"). . .. .
>
> On March 13, 2019, the Court entered an Order (the "Macquarie Sale Order") (Docket No. 159), wherein, among other things, the WAC7 Lenders would receive a partial distribution . . . .
>
> **On March 14, 2019, the WAC7 Agent received, for the benefit of the WAC7 Lenders, a partial distribution totaling $44,866,682.58 (the "WAC7 Partial Distribution"). . . . Following receipt of the WAC7 Partial Distribution, the remaining amount owing to WAC7 Lenders amounted to not less than $58,308,237.42.**
>
> The WAC7 Agent also presently holds not less than $2,840,569.83 in two segregated accounts (the "WAC7 Segregated Accounts") . . . . Provided . . . the amounts on deposit in the WAC7 Segregated Accounts is applied to reduce the WAC7 Obligations, the total liquidated amount of the WAC7 Lenders' claim as of the Petition Date will be $55,467,667.59.

Def. Fact ¶ 50 (emphasis added).

11. Moreover, when the Debtors requested each WAC7 Lender's claim amounts during the voting process, the WAC7 Agent provided a worksheet allocating the outstanding WAC7 loan amount of $55,467,667.59, as stated in the proofs of claim (i.e., reflecting a reduction to claim of the entire $44,866,682.58 distribution), amongst the WAC7 Lenders. Def. Fact ¶ 51.

The Debtors' counsel and their claims agent used these numbers in preparing and sending out the ballots and in the vote tabulation process. Def. Fact ¶ 52. And so the issue stood, for months - through the voting process, through Plan confirmation, through subsequent distributions, and through the occurrence of the Plan's "Effective Date" on August 9, 2019. Def. Fact ¶ 63.

12. The Court confirmed the Debtors' Plan on July 31, 2019. Def. Fact ¶ 62.

13. Under Article 11.5(a) of the Plan (the "**Estate Releases**"), the Debtors and the Debtors' estates released the "Debtor Released Parties," of all:

> Causes of Action, rights of setoff, other rights, and liabilities whatsoever, whether for tort, contract, . . . avoidance actions, . . . that could possibly have been asserted directly or indirectly, whether . . . known or unknown . . . existing or hereafter arising, in law, equity, or otherwise, and any and all Causes of Action[9] . . . that could possibly have been asserted, based on or in any way relating to, or in any manner arising from, in whole or in part, the Debtors, their Estates or their Affiliates, the conduct of the Debtors' business, the formulation, preparation, solicitation, dissemination, negotiation, or filing of the Forbearance Agreements, the Purchase Agreements, the Disclosure Statement or Plan or any contract, instrument, release, or other agreement or document created or entered into in connection with or pursuant to, the Forbearance Agreements, the Purchase Agreements, the Disclosure Statement, this Plan, the filing and prosecution of the Chapter 11 Cases, the pursuit of consummation of this Plan, the subject matter of, or the transactions or events

[9] "Causes of Action" is defined under Article 1.13 of the Plan to mean:

> any action, claim, cross-claim, third-party claim, cause of action, controversy, demand, right, lien, indemnity, guaranty, suit, obligation, liability, loss, debt, damage, judgment, account, defense, remedies, offset, power, privilege, license and franchise of any kind or character whatsoever, known, unknown, foreseen or unforeseen, existing or hereafter arising, contingent or non-contingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity or pursuant to any other theory of law (including, without limitation, under any state or federal securities laws). Causes of Action also includes: (i) any right of setoff, counterclaim or recoupment and any claim for breach of contract or for breach of duties imposed by law or in equity; (ii) the right to object to Claims or Interests; (iii) any claim pursuant to section 362 or chapter 5 of the Bankruptcy Code; (iv) any claim or defense including fraud, mistake, duress and usury and any other defenses set forth in section 558 of the Bankruptcy Code; and (v) any state law fraudulent transfer claim.

> giving rise to, any Claim or Interest that is treated in this Plan, the business or contractual arrangements between the Debtors, their Estates or their Affiliates, on the one hand, and any Debtor Released Party, on the other hand, or any other act or omission, transaction, agreement, event, or other occurrence taking place before the Confirmation Date; provided that, to the extent that a Claim or Cause of Action is determined by a Final Order to have resulted from fraud, gross negligence or willful misconduct of a Debtor Released Party, such Claim or Cause of Action shall not be so released against such Debtor Released Party and a party alleging fraud, gross negligence or willful misconduct on the part of a Debtor Released Party shall not be prevented from pursuing such an action.

Def. Fact ¶ 58.

14. The "Debtor Released Parties" [Plan, Article 1.24] include the "Released Parties" [Plan, Article 1.81], which include the "WAC Agents (except to the extent the Required Lenders under each applicable WAC Facility vote to reject the Plan)" and "the WAC Lenders that vote to accept the Plan." Def. Fact ¶ 73. The Required Lenders under each applicable WAC Facility voted to accept the Plan. Def. Fact ¶ 73. The WAC7 Agent is a "WAC Agent" [Plan, Article 1.136, 1.182]. Thus, the WAC7 Agent received the extremely broad Estate Release described above.

15. Similarly, all of the Defendants, as parties to the WAC7 Credit Agreement (as defined in the Plan), are WAC7 Lenders [Plan, Article 1.141], and thus WAC Lenders [Plan, Article 1.184]. Def. Fact ¶ 1. Defendants SunTrust Bank, MUFG Union Bank, N.A., Deutsche Bank AG, New York Branch, and Barclays Bank PLC (collectively, the "**Approving Defendants**") voted in favor of the Plan. Def. Fact ¶ 60. None of the Defendants objected to the Plan. Def. Fact ¶ 61.

16. Importantly, at no point leading up to the confirmation of the Plan did the Debtors assert that the Defendants had received more than they should have in the partial distribution. Def. Fact ¶ 68. Indeed, Mr. Transier, in his pre-confirmation role as Independent Director of the Debtors, averred in support of the Plan that "after extensive diligence and analysis, the Debtors

do not believe any valid claims for conduct after June 1, 2018 against the Debtor Released Parties exist" and "I do not believe that any [Debtor] claims or Causes of Action exist." Def. Fact ¶ 59. It was not until October 2019—seven months after the alleged "overpayment," three months after Plan confirmation, and two months after the occurrence of the Plan's Effective Date—that Mr. Transier, in his role as Plan Administrator, contacted the WAC7 Agent and asserted, for the first time, that the WAC7 Agent had received an overpayment of $4 million and demanded its return. Def. Fact ¶ 68.[10]

## III. STANDARD

17. By this Motion, the WAC7 Agent, on behalf of itself and the other Defendants, seeks summary judgment on all causes of action in the Complaint. This Motion relies on two different avenues for obtaining summary judgment under Federal Rule 56. First, the WAC7 Agent and the WAC7 Lenders are entitled to summary judgment based on the defenses of release and *res judicata*. Summary judgment should be granted in respect of these defenses because the WAC7 Agent will show that there is no genuine dispute as to the facts necessary to support them. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). If the WAC7 Agent meets the burden of producing facts that support either defense, the burden shifts to the Plaintiff to set forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

18. The second avenue pursued by this Motion is the more traditional avenue for obtaining summary judgment as a defendant—where the WAC7 Agent demonstrates that the Plaintiff, bearing the burden at trial, has not (and cannot) come forward with sufficient evidence to establish each element of its case. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[10] It is also worth noting that, notwithstanding the fact that the Debtors also waived their right of "setoff" in the Estate Release, the Plan Administrator has unilaterally withheld a $400,000+ post-confirmation distribution to the WAC7 Lenders. Because the Plan Administrator's actions are similarly barred by the Plan, the Plan Administrator should be compelled to distribute these and all other amounts owing to the WAC7 Agent.

19. Although all inferences are drawn in the "light most favorable to the non-moving party," *Mortise v. United States*, 102 F.3d 693, 695 (2d Cir. 1996), "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Facts must be established by citing to "materials in the record, including . . . documents, electronically stored information, affidavits or declarations, . . . or other materials." Fed. R. Civ. P. 56(c)(1)(A). "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden" that would be applicable if the cause of action went to trial. *Anderson*, 477 U.S. at 254.

20. Except where federal bankruptcy law applies, New York state law applies to this dispute.[11]

## IV. ARGUMENT

### A. Plaintiff's Claims Against the Direct Released Defendants are Barred by the Estate Releases in the Plan.

21. All of the Causes of Action asserted in the Complaint against the Approving Defendants and the WAC7 Agent (collectively the "**Direct Released Defendants**") were released

[11] This conclusion is premised on the following considerations: (1) the claims are brought in this Court (which sits in the state of New York), *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 601-02 (2d Cir. 2001) ("Because federal choice of law rules are a type of federal common law, which federal courts have only a narrow power to create, we decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state."); (2) the claims arise from a distribution made during chapter 11 cases pending in this Court and in connection with an order entered by this Court; (3) the Plan provides for a New York choice of law as to state-law issues, Plan, Article 13.8 ("Except to the extent that the Bankruptcy Code or other federal law is applicable, or to the extent an exhibit hereto or a schedule in the Plan Supplement provides otherwise, the rights, duties, and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with, the laws of the State of New York, without giving effect to the principles of conflict of laws thereof."); and (4) the defenses of *res judicata* and release arise under this Court's order confirming the Plan.

pursuant to the Estate Releases.[12] This expressly precludes the Plan Administrator, as successor-in-interest to the Debtors, from recovering on the claims asserted in the Complaint.[13] Accordingly, the Direct Released Defendants are entitled to the entry of summary judgment in their favor.

22. Principles of contract interpretation govern the enforcement of the Estate Releases. *Cf. Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 488 (2d. Cir. 1986). A court may grant summary judgment if the agreement is unambiguous and conveys a definite meaning, or the contract is ambiguous but there is no extrinsic evidence of the parties' intent. *Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co.*, 93 F.3d 1064, 1073 (2d Cir. 1996) (citing *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993)). "When, as here, a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel, the general rule is that, if 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language employed.'" *Locafrance U.S. Corp. v. Intermodal Sys., Inc.*, 558 F.2d 1113, 1115 (2d Cir. 1977) (quoting *German Roman Catholic Orphan Homes v. Liberty National Bank & Trust Co. (In re Schaefer)*, 18 N.Y. 314, 317, 221 N.E.2d 538, 540 (N.Y. 1966)).

23. Only where the language of the contract is ambiguous, i.e., where it is susceptible to more than one reasonable interpretation, "and where there is relevant extrinsic evidence of the parties' actual intent, [does] the meaning of the words become an issue of fact and summary judgment [becomes] inappropriate." *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425,

[12] Per the Plan, the Approving Defendants are Debtor Released Parties because they voted to accept the Plan. Similarly, the WAC7 Agent is a Debtor Released Party because the Required Lenders under the WAC7 Facility voted to accept the Plan.

[13] As discussed in detail in Section III.C below, although Goldman is not a Debtor Released Party, the claims against Goldman fail because, *inter alia*, the WAC7 Agent received the funds and the WAC7 Agent was released.

428 (2d Cir. 1992). Whether the language of a contract is ambiguous is decided by the Court as a matter of law. *Seiden Assoc., Inc.*, 959 F.2d at 429. As stated above, a contract is ambiguous if it is reasonably susceptible to more than one interpretation, *id*. at 428, and the Court makes this determination by reference to the contract alone, without considering any extrinsic evidence. *Burger King v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir. 1990). The Court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would "strain[] the contract language beyond its reasonable and ordinary meaning." *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (citations omitted).

24. As set forth more fully in Section II above, the Direct Released Defendants received the indisputably broad Estate Release directly. The Estate Releases cover each and every cause of action in the Complaint. The substantive causes of action—conversion/misappropriation, unjust enrichment, Section 542 turnover, and Section 549 avoidance—as well as the "remedy" causes of action under Section 550 and declaratory judgment under Section 105(a), "could possibly have been asserted, based on or in any way relating to, or in any manner arising from, in whole or in part . . . any . . . act or omission, transaction, agreement, event, or other occurrence taking place before the Confirmation Date."[14] Indeed, the allegations supporting these claims all hinge on the same core common factual allegations—that, as a result of the Debtors' professionals' purported mistake—the Debtors paid the WAC7 Agent $4,138,244 more than it was entitled to receive. These facts are an "act or omission, transaction, event or other occurrence taking place before the Confirmation Date" (i.e., July 31, 2019). Moreover, pursuant to Article 11.8 of the Plan, each Debtor expressly acknowledged that the Estate Releases covered claims

[14] The Plan Administrator's causes of action under Sections 542, 549, and 550 of the Bankruptcy Code are specifically covered as "Causes of Action," the definition of which (see the previous footnote) specifically includes "any claim pursuant to . . . chapter 5 of the Bankruptcy Code."

that the Debtors "do[] not know or suspect to exist" and "waive[d] any and all rights conferred upon it by any statute or rule of law" to the contrary. Def. Fact ¶ 54. In the face of these facts, there is no genuine dispute that the Direct Release Defendants received a direct and express release of the claims asserted by the Plaintiff in his Complaint.[15]

25. Notwithstanding the breadth and application of the Estate Releases, it appears that the Plaintiff is attempting to abrogate the Estate Releases by alleging that the "WAC7 Lenders have engaged in willful misconduct because, *inter alia,* they: (1) knew of the Partial Distribution Overpayment at or about the time the Partial Distribution Overpayment was made and failed and/or refused to return the Partial Distribution Overpayment to the Estate; and (ii) were timely advised of the Partial Distribution Overpayment by the Plan Administrator and, despite such notice, failed and refused to return the Partial Distribution Overpayment to the Estate." Compl. ¶ 30.

26. It is important to point out the pleading semantics here; "Partial Distribution Overpayment" is loaded terminology. Of course, the WAC7 Agent received the wire transfers and knew that the wire transfers totaled $44,866,683. But the Plaintiff's attempt to escape application of the Estate Releases by alleging "willful misconduct" is unavailing. Neither the WAC7 Agent nor any of the other Defendants had any knowledge of any purported overpayment and are not even alleged to have had any such knowledge. Instead, to the contrary, the amount of the distributions received by the WAC7 Agent comported with the Debtors' professionals' "final" (March 13th) spreadsheet and was specifically confirmed by the Debtors' professionals as being correct. *See* ¶ 8 above, Def. Fact ¶ 48.

[15] As discussed in detail in Section III.C below, although Goldman is not a Debtor Released Party (and, thus, is not included in the defined term Direct Released Defendant), the claims against Goldman fail because, *inter alia*, the WAC7 Agent received the funds and the WAC7 Agent was released.

27. Similarly, the Complaint's allegations that the Defendants were "timely advised" of the alleged overpayment and "failed" or "refused" to return the overpayment upon notice and demand are incorrect. The first time that any party asserted that an overpayment had been made—or made any demand for return of the funds—was months after Plan confirmation, after the Debtors granted the Estate Releases. The Defendants' justifiable reliance on the Estate Release in refusing to return funds cannot constitute willful misconduct sufficient to obviate the application of the Estate Release; that would be absurd. "'Willful misconduct' in this context requires tortious intent, such as fraud, malice, a dishonest purpose or bad faith." *Glob. Crossing Telecomms., Inc. v. CCT Communs., Inc. (In re CCT Communs., Inc.)*, 464 B.R. 97, 106 (Bankr. S.D.N.Y. 2011) (citing *Kalisch-Jarcho, Inc*., 448 N.E.2d 413, 416-17 (N.Y. 1983); *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, Inc*., 192 A.D.2d 83, 600 N.Y.S.2d 212, 216 (N.Y. App. Div. 1993) ("'Willful' is a term of tort, not contract [and] is synonymous with 'wanton' and 'reckless.'"), *aff'd*, 84 N.Y.2d 430, 643 N.E.2d 504, 618 N.Y.S.2d 882 (N.Y. 1994)). The Plaintiff has not alleged facts showing, and certainly cannot support, that any of his claims "result from fraud, gross negligence or willful misconduct" by the Direct Released Defendants. Thus, the Plaintiff's claims against the Direct Released Defendants are barred by plain language of the Estate Releases.

**B. The Claims in the Complaint are Barred by Res Judicata.**

28. The Plan Administrator's claims against all Defendants are similarly barred on account of *res judicata*. It is well established that a bankruptcy court's order confirming a plan of reorganization constitutes a final judgment on the merits and is to be given preclusive effect under the doctrine of *res judicata.* 11 U.S.C § 1141(a); *Sure-Snap Corp. v. State St. Bank and Tr. Co.*, 948 F.2d 869, 873 (2d Cir. 1991); *see also Tracar v. Silverman (In re Amer. Preferred Prescription, Inc.)*, 266 B.R. 273, 277 (E.D.N.Y. 2000); *In re Hooker Invest., Inc.*, 162 B.R. 426, 433 (Bankr. S.D.N.Y. 1993) (collecting cases). *Res judicata* applies to all claims that could have and should have been asserted prior to plan confirmation. *Sure-Snap Corp.*, 948 F.2d at 873 (stating that *res judicata* "bars re-litigation not just of those claims which were brought in a prior proceeding, but of 'any other admissible matter' which could have been brought, but wasn't'") (citations omitted); *see also Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2002). Under *res judicata*, "a debtor is precluded from asserting any claims post-confirmation that are not preserved in its plan." *Futter v. Duffy (In re Futter Lumber Corp.)*, 473 B.R. 20, 29 (E.D.N.Y. 2012); *Katz v. I.A. All. Corp. (In re I. Appel Corp.)*, 300 B.R. 564, 567 (S.D.N.Y. 2003) ("[T]he confirmation of a plan of reorganization prevents the subsequent assertion of any claim not preserved in the plan as required by § 1123(b)(3)."), *aff'd*, 104 F. App'x 199 (2d Cir. 2004).

29. Although courts differ on how specifically a claim must be preserved in a plan to avoid it being barred by *res judicata*, the Second Circuit's standard leads to the conclusion that the Plaintiff's claims are barred. The Second Circuit test inquires whether the requested relief will "impair or destroy rights or interests established by the judgment entered in the first action," here, the Plan and Confirmation Order. *Sure-Snap Corp.*, 948 F.2d at 874 (quoting Second Circuit precedent). A subsequent action is barred by *res judicata* when "[plaintiff's] failure to raise these claims (if valid) when they should have, almost certainly affected that prior judgment." *Id.* at 876.

This is because "had the bankruptcy court found merit in [plaintiff's challenge to an aspect of the proceedings], the bankruptcy court would have structured a different disposition. . . ." *Id*.

30. This case presents the unique and, hopefully, unusual situation of the successor-in-interest to the Debtors seeking to unwind an alleged mistake made by the Debtors' professionals in a pre-plan distribution to creditors, after the Debtors' professionals contemporaneously confirmed that the distribution was not a mistake (Wender Decl. ¶¶ 10-12), after the Debtors sought and obtained confirmation of a Plan based on ballots incorporating that "mistake" (Wender Decl. ¶16), where the Plan fails to identify or correct the "mistake" (Wender Decl. ¶ 17), where the Plan only preserves claims under boilerplate provisions that also provide that they do not preserve claims that are otherwise waived in the Plan (Wender Decl. ¶ 17),[16] and

[16] Two Plan provisions address the preservation of estate claims, Articles 5.9 and 11.9. Article 5.9 states in full:

> Other than Causes of Action against an Entity that are waived, relinquished, exculpated, released, compromised, or settled in the Plan or by a Bankruptcy Court order, the Debtors reserve any and all Causes of Action. On and after the Effective Date, the Plan Administrator may pursue such Causes of Action, in consultation with the WAC Lenders prior to pursuit thereof. No Entity may rely on the absence of a specific reference in the Plan, the Plan Supplement, or the Disclosure Statement to any Cause of Action against them as any indication that the Debtors or the Plan Administrator will not pursue any and all available Causes of Action against them. On and after the Effective Date, the Plan Administrator, shall have, including through its authorized agents or representatives, the exclusive right, and authority to initiate, file, prosecute, enforce, abandon, settle, compromise, release, with-draw, or litigate to judgment any such Causes of Action and to decline to do any of the foregoing without further notice to or action, order, or approval of the Bankruptcy Court.

Article 11.9 states in full:

> Except as otherwise provided in the Plan, nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, Claims, Causes of Action, rights of setoff or recoupment, or other legal or equitable defenses that the Debtor had immediately prior to the Effective Date on behalf of the Estate or itself in accordance with any provision of the Bankruptcy Code or any applicable nonbankruptcy law, including, without limitation, any affirmative Causes of Action against parties with a relationship with the Debtor, other than the Released Parties and the Debtor Released Parties. Following the Effective Date, the Plan Administrator shall have, retain, reserve, and be entitled to assert all such Claims, Causes of Action, rights of setoff or recoupment, and other legal or equitable defenses as fully as if the Chapter 11 Cases had not been commenced, and all of the Debtor's legal and equitable rights in respect of any

where the Plan was confirmed upon the declaration by the Plaintiff (Mr. Transier, albeit serving in a different role) averring a belief that no such claims exist (Wender Decl. ¶ 19).

31. Boilerplate provisions are insufficient to preserve post-petition causes of action that are subject to a binding release even if an alleged "mistake" by the Debtors' professionals occurred in calculating a pre-plan distribution—a "mistake" that they were fully aware of, ratified, and incorporated into the voting under the Plan—particularly where the Plaintiff, as the Debtors' Independent Director pre-confirmation, averred that no such causes of action existed. *See, e.g.*, *In re Porter*, 382 B.R. 29, 40 (Bankr. Vt. 2008) ("[A] blanket reservation allowing for an objection to any claim is insufficient.") (quoting *Tracar, S.A. v. Silverman (In re Am. Preferred Prescription, Inc.)*, 266 B.R. 273, 277-78 (E.D.N.Y. 2000)); *Browning v. Levy*, 283 F.3d 761, 774 (6th Cir. 2002) ("[A] general reservation of rights does not suffice to avoid *res judicata."); Kelley v. South Bay Bank (In re Kelley)*, 199 B.R. 698, 704 (B.A.P. 9th Cir. 1996) ("[A] blanket reservation by the debtor reserving 'all causes of action which the debtor may choose to institute' has been held insufficient to prevent the application of *res judicata* to a specific action.") (quotations omitted). It is undeniable that if the Debtors had brought, or otherwise sought to expressly preserve, these claims prior to confirmation of the Plan, the parties would have approached the Plan confirmation process differently. Indeed, Mr. Transier's stated belief that there were no such causes of action was specifically cited as a reason the Court should confirm the Plan.[17] Confirmation Order at 4. Accordingly, the Debtors' failure to raise these issues when

> Unimpaired Claim may be asserted after the Confirmation Date and Effective Date to the same extent as if the Chapter 11 Cases had not been commenced.

[17] And, had these purported claims been identified by the Debtors pre-confirmation, all of the Defendants (including Goldman) would have insisted on clarifying that the causes of action asserted in the Complaint were fully and finally resolved at confirmation, whether through the Estate Releases or otherwise. If the Debtors had refused, the Defendants would likely have objected to the Plan and the proposed release of the Debtors. The Defendants certainly would have demanded a thorough scrubbing of all of the Debtors' professionals' calculations (particularly the use of

they should have affected the terms and relief given in the Plan and the ultimate disposition of every parties' rights in this action and the claims in the Complaint are thus barred under the standard established by the Second Circuit.

**C. The Claims in the Complaint Otherwise Fail.**

32. There are several additional grounds that warrant dismissal, or in the alternative, summary judgment as to each of the claims in the Complaint. These are applicable to all of the Defendants generally.

*1. The Section 549/550 Claims against all Defendants are Barred by the Release of the WAC7 Agent.*

33. As to all Defendants, the Section 549 and Section 550 claims in the Complaint fail on their face because the challenged transfer was from the Debtors to the WAC7 Agent. All Defendant-transferees of the WAC7 Agent may raise the WAC7 Agent's defenses, including the Estate Releases under Section 550(s). *See* 11 U.S.C. § 550(a) (limiting recovery against transferees "*to the extent that a transfer is avoided*"); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 501 B.R. 26, 29 (S.D.N.Y. 2013) (interpreting Section 550(a) to mean that while the transfer need not be actually avoided against the initial transferee, it must be proven to be actually avoidable, and thus a "subsequent transferee in possession of that transfer may raise any defenses to avoidance available to the initial transferee"). As demonstrated above, the Plaintiff's claims against the WAC7 Agent (including the Section 549 and Section 550 claims), are barred

cash collateral) during the case (if the WAC7 Lenders have received $4 million too much due to a miscalculation, what other miscalculations are out there not in the WAC7 Lenders' favor and what other amounts have the Debtors distributed to other creditors in error?).

by the Estate Releases and, therefore, the WAC7 Agent's subsequent transfer to each of the other Defendants cannot be avoided under Section 550.

*2. Section 542 Claims are Unavailable Post-Confirmation.*

34. The Plaintiff's Section 542 claims cannot go forward here because Section 542 is limited, as relevant here, "to [recovery of] property that the trustee may use, sell, or lease under section 363 of this title" and is temporally limited to claims brought "during the case." *See* 11 U.S.C. § 542(a). Thus, a "complaint for turnover cannot exist once the bankruptcy court confirms the debtor's plan because the estate ceases to exist upon plan confirmation. All estate property not otherwise transferred under the plan reverts back to the ***debtor***." *Diagnostics Int'l, Inc. v. Aerobic Life Prods. Co. (In re Diagnostics Int'l, Inc.),* 257 B.R. 511, 515 (Bankr. Ariz. 2000) (emphasis added). "[T]urnover . . . applies 'during the case' – the bankruptcy case – and requires return of the property to the ***trustee***." *Id.* (emphasis added). This makes turnover unavailable post-confirmation. A court in this district has similarly stated that:

> Confirmation vests the property of the estate in the debtor, unless the plan or confirmation order provide otherwise. 11 U.S.C. § 1141(b). As a consequence, the bankruptcy estate ceases to exist, and the debtor in possession disappears. *In re Jamesway Corp.*, 202 B.R. 697, 701 (Bankr. S.D.N.Y. 1996). Under § 542, the sole recipient of the turnover is the trustee, the representative of the estate. *See* 11 U.S.C. § 323(a). Since there is no estate and no trustee after confirmation, there can be no turnover. *See, e.g., Poplar Run Five Ltd. Partnership v. Virginia Elec. & Power Co. (In re Poplar Run Five Ltd. Ptnr.),* 192 B.R. 848, 856 (Bankr. E.D. Va. 1995)(after confirmation, the estate ceased to exist, and there was no estate to receive "estate property" pursuant to §§ 542 and 543); *Venn v. Kinjite Motors, Inc. (In re WMR Enters., Inc.),* 163 B.R. 887, 889 (Bankr. N.D. Fla. 1994) (turnover under § 542 is not available following confirmation because there is no longer an estate).

*Rickel & Assocs. Inc. v. Smith (In re Rickel & Assocs.),* 272 B.R. 74, 97-98 (Bankr. S.D.N.Y. 2002).

Just as is in *Rickel*, here "all of the property of the estate . . . vested in the debtor upon confirmation." 272 B.R. at 98. Also like in *Rickel*, the Plan and Confirmation Order "state[] that all of the property of the estate vests in the debtor." *Id.*[18] "Accordingly, the estate and the debtor in possession, its representative, ceased to exist upon confirmation, and the plaintiff[] cannot maintain the turnover action." *Id.* Thus, summary judgment, or in the alternative, dismissal with prejudice, is appropriate as to the Section 542 action against all Defendants.

*3. The Section 542 Claim and Conversion/Misappropriation Claims Cannot be Sustained Because the Funds in Dispute Ceased to be Property of the Estate (and Became the Defendants' Property) Upon Payment.*

35. As relevant here, Section 542 turnover actions are limited to "property that the trustee may use, sell, or lease under section 363," i.e., property of the estate. 11 U.S.C. § 542(a); *see also* 11 U.S.C. § 363(b), (c) (structuring when and how the "trustee . . . may use, sell, or lease, . . . property of the estate"). Similarly, under New York law, an action for conversion may only be maintained by the party with the right to possess the property. *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713, 717 (N.Y. 2006) ("A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession . . . . Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights.).

[18] Here, Article 11.1 of the Plan provides:

> On the Effective Date, pursuant to section 1141(b) of the Bankruptcy Code, all property of the Estates, including the Debtors' rights under the Purchase Agreements and the Transition Services Agreement, shall vest in the Debtors.

Paragraph 11 of the Confirmation Order similarly states:

> On the Effective Date, pursuant to sections 1141(b) and (c) of the Bankruptcy Code, all property of the Estates shall vest in the Debtors free and clear of all Claims, liens, encumbrances, charges and other interests, except as provided pursuant to the Plan and this Confirmation Order.

36. It is hornbook law that once a debtor has made a payment to a creditor on account of a valid preexisting debt, title to the funds passes to the creditor. *See* 53A Am. Jur. 2d Money § 22 ("Since possession of money vests title in the holder, the title to money passes with delivery to a person who acquires it in good faith and for valuable consideration.") (citing *Land Oberoesterreich v. Gude*, 86 F.2d 621 (2d Cir. 1936), applying this rule where party received payment on a pre-existing debt without notice of another party's interest in the funds)).

37. As demonstrated above, the WAC7 Agent, and subsequently the other Defendants, received the now-disputed funds in payment of their claims under the WAC7 Credit Agreement and as provided for in the Plan and Sale Support Agreement and in good faith reliance on the Debtors' professionals' calculations and representations. The application of these funds to the WAC7 Lenders' claims was provided for in the Plan and Sale Support Agreement and was clearly described in the WAC7 Lender's proofs of claim (Def. Fact ¶ 50) and the Debtors' professionals used that reduced claim amount in soliciting and tabulating votes on the Plan (Def. Fact ¶ 51). Accordingly, upon payment, title to the funds passed to the WAC7 Agent and the property ceased to be part of the Debtors' estate.[19] Thus, no turnover action may be sustained. *Cf. In re Block 1524 Constr. Corp.*, 75 B.R. 276, 278 (Bankr. E.D.N.Y. 1987) (denying motion for turnover because debtor no longer had ownership of property). Similarly, because the Defendants, not the Plaintiff, absolutely own the funds, no action for conversion may be maintained.

[19] It is now axiomatic that the Debtors' property rights are defined by state law. *See Butner v. United States*, 440 U.S. 48, 59 (1979).

*4. No Unjust Enrichment Claim May be Pursued Because the Payments are Governed by a Written Contract and Equity and Good Conscience Do Not Require Repayment.*

38. "To prevail on a claim for unjust enrichment in New York, a plaintiff must establish 1) that the defendant benefitted; 2) at the plaintiff's expense; and 3) that 'equity and good conscience' require restitution." *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000) (applying New York law). "[Q]uasi-contractual claims such as unjust enrichment are barred if a written contract between the parties governs the subject matter of their dispute." *Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 958 (2d Cir. 1993) (applying New York law). Here, there are at least two written contracts governing the funds that are the subject to this dispute. First, the funds were paid to reduce the claims under the WAC7 Credit Agreement, which governs the payment and receipt of the funds at issue pre-confirmation. But, even ignoring the WAC7 Credit Agreement, the funds are the subject of the partial distribution contemplated by the Plan and Sale Support Agreement, which was incorporated into the Macquarie Sale Order. Def. Fact ¶ 41. It was in the course of performance of that agreement that the Debtors rendered a calculation of the distribution, paid that distribution, and ratified the amount of that distribution as being correct. Def. Fact ¶ 47-48. Accordingly, the disputed payment is the subject of a written contract and no unjust enrichment claim may be maintained.

39. Further, setting the existence of a written contract aside for the moment, the Plaintiff cannot show that "equity and good conscience" require repayment. As noted above, the Plaintiff alleges that the Debtors' professionals made a mistake in calculating the distribution to the WAC7 Agent. However, it is undisputed that the Debtors' professionals expressly reaffirmed that calculation and the resulting distribution, allowed that alleged mistake to be incorporated into the Plan voting process, and failed to raise the alleged mistake prior to the confirmation of the Plan (at which time the parties' substantive rights were fixed). The Plaintiff, in his role as the

Debtors' Independent Director, averred a belief that no such claims existed. The Plaintiff cannot show—based on this record—that equity and good conscience require repayment.

*5. Declaratory Judgment under Section 105(a) is Unwarranted.*

40. The Plaintiff seeks a declaratory judgment under Section 105(a) of the Bankruptcy Code as an "order, process, or judgment that is necessary or appropriate to carry out . . . Sections 542, 549, and 550 of the Bankruptcy Code." Compl. ¶ 56-57. As demonstrated above, the Plaintiff has no viable claim under these Sections of the Bankruptcy Code; thus, this relief should be denied.[20]

## V. CONCLUSION

WHEREFORE, as the WAC7 Agent, for and on behalf of itself and the other Defendants, respectfully requests:

- The Court grant summary judgment against all claims against the Direct Released Defendants because they have established beyond genuine dispute that the claims in the Complaint were released under the Plan.
- The Court grant summary judgment against all claims against all of the Defendants because they have established beyond genuine dispute that the claims in the Complaint are barred by *res judicata*.
- The Court grant summary judgment against all claims against the Defendants because the Plaintiff cannot provide admissible evidence supporting each element of the claims in the Complaint, as demonstrated above.[21]
- The Court dismiss all claims in the Complaint against each Defendant with prejudice.

[20] To the extent that the Court does not grant summary judgment on the Chapter 5 claims, the Court should still dismiss the Section 105(a) count because the declaratory relief is duplicative of direct action causes of action under the Bankruptcy Code and accordingly serves no useful purpose. *Cf. Rickel & Assocs. Inc. v. Smith (In re Rickel & Assocs.)*, 272 B.R. 74, 99 (Bankr. S.D.N.Y. 2002) (dismissing count requesting declaratory relief because it involved the same issues and decided issues raised in the direct action). Moreover, the propriety of obtaining declaratory relief under Section 105(a) as opposed to meeting the standards set forth in 28 U.S.C. § 2201 is dubious. *See Law v. Siegel*, 571 U.S. 415, 421 (2014) ("[A] statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere.").

[21] In the alterative, dismissal of certain claims may be appropriate as noted above.

Dated: March 13, 2020

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, David Wender, hereby certify that on March 13, 2020, I caused a copy of the foregoing *MOTION FOR SUMMARY JUDGMENT* to be served on all parties who are scheduled to receive notice through the Court's ECF system.

***By: /s/ David Wender***

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