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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
	)	
WAYPOINT LEASING HOLDINGS LTD., *et al.*,	)	Case No. 18-13648 (SMB)
	)	
	)	(Jointly Administered)
Debtors.	)	
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.	)	

REPLY IN SUPPORT
OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

1. It is undisputed that leading up to Plan[1] confirmation, certain pre-confirmation payments were made to the WAC7 Agent for and on behalf of the WAC7 Lenders in return for their support of the Plan. The negotiations around how much cash should be distributed were hard-fought. Plan confirmation was intended to put an end to these disputes. Any claims relating to those payments, and indeed the underlying claims in the Debtors' cases, were settled and released pursuant to the Plan. As the Plan Disclosure Statement states:

> [T]he estate releases in the Plan are justified due to . . . the benefits to the Debtors' efforts to wind down under non-bankruptcy law afforded by ***the elimination of*** . . . ***claims of creditors who vote in favor of the Plan*** (and thus provide a consensual release of the Debtors, their Affiliates, and certain of their other related parties).[2]

2. The Plan Administrator relies on a mischaracterization of several phrases from the Estate Releases, that he defines together under the moniker "Carveout Language,"[3] to avoid application of their actual terms.

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[1] All capitalized otherwise-undefined terms have the meaning ascribed to them in the Defendants' opening brief.

[2] *See Disclosure Statement for Second Amended Modified Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors*, ¶ V.M.5, Case No. 18-13648, ECF Doc. 819 (emphasis added); *In re AMR Corp*., 562 B.R. 20, 28 (Bankr. S.D.N.Y. 2016) ("a debtor's plan and disclosure statement 'should be read together to ascertain the meaning of [p]lan provisions.'").

[3] The "Carveout Language" is comprised of three different phrases / clauses / sentences from the Estate Releases:

> . . . except as otherwise expressly provided in this Plan, the Macquarie Sale Order, or the Confirmation Order . . .

> . . . 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;

—and—

> Notwithstanding anything to the contrary in the foregoing, the releases above do not release the Debtors' Claims, obligations, suits, judgments, damages, demands, debts, remedies, Causes of Action, rights of setoff, other rights, and liabilities under any of the Purchase Agreements, the Transition Services

- Although the Plan Administrator argues that the Estate Releases "were made expressly ***subject to*** the Macquarie Sale Order," the Estate Releases actually state that all claims are released "except as otherwise ***expressly provided*** in [] the Macquarie Sale Order." Because the Macquarie Sale Order does not expressly provide the Debtors with a right to claw back any distribution payments, this argument fails.
- Although the Plan Administrator further argues that the Estate Releases "exclude any claims ***arising from*** post-petition agreements, including the Macquarie Purchase Agreement and the Plan and Asset Sale Support Agreement," the Estate Releases actually exclude only claims "***under***" those agreements. The Complaint does not assert claims "***under***" these agreements. Instead, the causes of action asserted are grounded in tort claims and claims under the Bankruptcy Code and the Complaint does not identify or otherwise specifically rely on any rights granted in these agreements. Thus, this argument also fails.
- Lastly, although the Plan Administrator intimates that the Estate Releases were not intended to be "broad" with respect to post-petition claims, the Estate Releases expressly apply to any claims relating to "transactions, agreements, events or other occurrences taking place ***before the Confirmation Date***."

3. Similarly, the Plan Administrator cannot rely on the "willful misconduct" exception to avoid application of the Estate Releases. It is undisputed that the Debtors' professionals contemporaneously confirmed that the alleged excess distribution was properly calculated and properly made to the Defendants on account of their cash collateral. This eliminates any genuine dispute that the Defendants' receipt and pre-confirmation "non-return" of the distribution was "misconduct" done with tortious intent, the standard for willful misconduct. Putting this aside, the Complaint fails to survive even the motion to dismiss standard because the well-pled facts fail to support any reasonable inference that any of the Defendants took any actions constituting willful misconduct.

Agreement or any other agreements entered into by the Debtors after the Petition Date.

II. ARGUMENT

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

1. The Claims in the Complaint Are Not Expressly Excepted from Release by the Macquarie Sale Order and Are Not Brought Under the Plan and Asset Sale Support Agreement or Macquarie Purchase Agreement.

4. The Estate Releases are clear. "[E]xcept as otherwise expressly provided in this Plan, the Macquarie Sale Order, or the Confirmation Order, and to the fullest extent authorized by applicable law," the Debtors released all Claims and Causes of Action against the Debtor Released Parties, specifically including those relating to "transactions, agreements, events or other occurrences taking place before the Confirmation Date." Plan, Art. 11.5(a).

5. The Plan Administrator argues in Section II.A. of his response that the claims in the Complaint were not released because: (1) "the calculations and payment of the partial distribution were made under and in accordance with" Paragraph 43 of the Macquarie Sale Order; (2) the claims in the Complaint seek to recover a "distribution of sale proceeds that was not authorized by the Macquarie Sale Order or related agreements;" (3) the claims in the Complaint thus "relat[e] to the Partial Distributions under the Macquarie Sale Order and Plan and Asset Sale Support Agreement;" and (4) the "Carveout Language" carves out all post-petition Debtor-claims "relating to the Partial Distributions under the Macquarie Sale Order and Plan and Asset Sale Support Agreement." As shown below, the Plan Administrator's arguments are unsupported by the actual language of the Estate Releases.[4]

[4] The Plan Administrator's amalgamation of various phrases into the defined term "Carveout Language" leaves the Defendants to guess at what actual language, if any, is being referenced, making it very difficult to reply. To the degree the Court believes the Defendants have guessed wrongly and thus failed to address the substance of any argument, the Defendants request leave to file a further reply once the Court has required the Plan Administrator to clarify what language the Plan Administrator is relying on with respect to each argument.

a. Neither the Macquarie Sale Order nor the Plan expressly provide an exception to the release for claims to recover pre-Plan distributions.

6. The first clause in the "Carveout Language"—"*except as otherwise expressly provided in this Plan, the Macquarie Sale Order, or the Confirmation Order*"—is prefatory to the Estate Releases. The natural and ordinary meaning of "expressly" provided is "[c]learly and unmistakably communicated" or "stated with directness and clarity," *Express*, Black's Law Dictionary (11th ed. 2019), or "directly, firmly, and explicitly stated" or specifically "designed for or adapted to its purpose." *Express*, Merriam-Webster (online dictionary). Something is not express if it is implicit. *Express*, Merriam-Webster (online thesaurus). Something is provided "otherwise" if it is different or contrary. *Otherwise*, Black's Law Dictionary (11th ed. 2019); *see also Otherwise*, Merriam-Webster (online dictionary) ("something or anything else: something to the contrary"). Putting these terms together with respect to the Macquarie Sale Order and the claims in the Complaint, the plain language would require the Macquarie Sale Order to directly, clearly, and unmistakably preserve claims to recover the property distributed in connection with the distributions made under that order. The Macquarie Sale Order simply does not do this.

7. The Court should thus reject the Plan Administrator's argument that the Estate Releases preserve all "***post-petition Debtor-claims, relating to the Partial Distributions under the Macquarie Sale Order*** and the Plan and Asset Sale Support Agreement" (emphasis added), and each of its variant formulations,[5] because these arguments are patently inconsistent with the unambiguous plain language of the Estate Releases. *Doniger v. Rye Psychiatric Hosp. Ctr., Inc.*,

[5] This is reworded elsewhere by the Plan Administrator as all "post-petition rights, claims, and obligations under any post-petition agreements, particularly relative to the Macquarie Sale Order."

505 N.Y.S.2d 920, 923 (N.Y. App. Div. 2nd Dept. 1986).[6] Similarly, the Plan Administrator's argument that Paragraph 43 of the Macquarie Sale Order somehow expressly preserves the claims in the Complaint because it provided for the calculation of the partial distribution to the Defendants (Opp. Br. at page 15)[7] fails because the Macquarie Sale Order does not provide an express right to recover payments in excess of the payments required by Paragraph 43 or prohibit payments in excess of those payments.[8] The Plan Administrator's other related arguments fail for similar reasons.[9]

8. In sum, the claims in the Complaint are comprehended by the release of claims related to any "act or omission, transaction, agreement, event, or other occurrence taking place before the Confirmation Date" and nothing in Paragraph 43 of the Macquarie Sale Order or the Plan "expressly provide[s] otherwise."

[6] Though the Plan Administrator notes (in footnote 8) that the Court should deny the Defendants' motion if the Court finds the language to be ambiguous, the Plan Administrator does not contend that the language is ambiguous or explain where the ambiguity would lie. Because the language of the Estate Releases is not ambiguous, this argument should be rejected.

[7] In his own words, the Plan Administrator argues: "the Macquarie Sale Order specifically provides for the manner in which the partial distribution to Affected Participating Lenders would be calculated" and "the calculations and payment of the partial distribution were made under and in accordance with the above language."

[8] Indeed, the "net proceeds" of the Sale Transaction referenced in Paragraph 43 the Macquarie Sale Order did not include the Defendants' excess cash collateral (Def. Fact ¶¶ 41, 42, 43), yet the Debtors' professionals' email to counsel to the WAC7 Agent expressly stated an intent to distribute an "additional $4 million [] due to the Excess Cash Collateral in WAC 7" (Def. Fact ¶ 48).

[9] The Plan Administrator further points to the Macquarie Sale Order's statement that in the event of a conflict between any later-confirmed chapter 11 plan and the "Transaction Documents" (i.e., the Macquarie Purchase Agreement and its exhibits, schedules, etc.), the Transaction Documents will control; raises Article 5.9 (Preservation of Rights of Action) and 11.9 of the Plan (Retention of Causes of Action/Reservation of Rights); and raises arguments based on the distribution model's disclaimer. These arguments fail on their face because no provisions of the Transaction Documents are even cited as preserving the claims in the Complaint, the preservation of claims in the Plan is made expressly subject to the releases, and the distribution model is not mentioned in the "Carveout Language" and does not purport to reserve a right to claw back any payments.

b. The Plan Administrator's claims are not made "***under***" the Plan and Asset Sale Support Agreement or Macquarie Purchase Agreement.

9. The Plan Administrator further relies on the full sentence at the end of the Estate Releases—"*Notwithstanding anything to the contrary in the foregoing, the releases above do not release the Debtors' Claims, obligations, suits, judgments, damages, demands, debts, remedies, Causes of Action, rights of setoff, other rights, and liabilities under any of the Purchase Agreements, the Transition Services Agreement or any other agreements entered into by the Debtors after the Petition Date*." This provision preserves only those claims that arise "under" these agreements, not every claim that relates to them. It is well-recognized that claims brought *under* an agreement are brought pursuant to the terms of the agreement itself; in contrast, claims *related to* an agreement are merely connected to the agreement.[10]

10. If there were any doubt as to the narrow scope of the term *under* in this context, it is resolved by comparing this limited term with the broad terms of the release itself—"based on or in any way relating to, or in any manner arising from." Plan, Art. 11.5(a). Moreover, the Plan elsewhere distinguishes between claims and rights "arising under" and claims and rights that are merely "related to."[11] Accordingly, the Plan Administrator's conflation of claims

[10] *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 226 (2d Cir. 2001) (in the arbitration context, agreeing with a prior court that while there is "no substantive difference . . . between the phrases 'relating to,' 'in connection with' or 'arising from,'" a "distinction exists between . . . 'arising from' and . . . 'arising under,'" that "is more than just a semantic one, and only the latter phrase limits arbitration to a literal interpretation or performance of the contract." (emphasis added)); *Dantas v. Citibank, N.A.*, 17-Cv-1257 (SHS), 2018 U.S. Dist. LEXIS 101504, *15 (S.D.N.Y. June 18, 2018) (recognizing that "relate to" required only a loose connection and was broader than "arise from" and "based on").

[11] *See* Plan, Art. 1.87. In full, the provision states:

> ***Settled WAC10 Claims*** means all rights, Claims, and interests of the Debtors, the WAC10 Administrative Agent, the WAC10 Security Trustee, and the WAC10 Lender, ***arising under out of or related to*** (a) WAC10 continued possession and use of WAC10 Collateral, any alleged diminution of WAC10 Collateral value while in the possession of WAC10, and any alleged lack of direct benefit to WAC10 Lender from the WAC10 chapter 11 case, and (b) the

related to a distribution pursuant to the Plan and Asset Sale Support Agreement or Macquarie Purchase Agreement with claims made *under* these agreements goes against the common understanding of these terms and renders meaningless the Plan's prior use of *under* in disjunction with broader terminology such as *related to*. *See In re Gawker Media LLC*, 588 B.R. 337, 345 (Bankr. S.D.N.Y. 2018) ("[A] court should not adopt a 'construction which would render a contractual provision meaningless or without force or effect.'" (quoting *Valle v. Rosen*, 138 A.D.3d 1107 (N.Y. App. Div. 2016))).

11. The Plan Administrator's claims are plainly not brought *under* the Plan and Asset Sale Support Agreement or the Macquarie Purchase Agreement. The Plan Administrator's substantive claims are not contract-based claims; they are tort claims (conversion and unjust enrichment) and claims under the Bankruptcy Code. Moreover, the Complaint does not rely on any rights or provisions in the Plan and Asset Sale Support Agreement or Macquarie Purchase Agreement. The Plan and Asset Sale Support Agreement is not even mentioned in the Complaint, and the Macquarie Purchase Agreement is mentioned only by way of background.

12. The Plan Administrator cites only one provision of the Plan and Asset Sale Support Agreement: the provision requiring the Debtors to incorporate a partial distribution into the Macquarie Sale Order; however, that provision was fully satisfied once the partial distribution requirement was actually incorporated into the Macquarie Sale Order.[12] The Plan

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> Final DIP Order, including any and all claims of the Debtors against the WAC10 Lender and WAC10 Agent with respect to the purported surcharge of their collateral pursuant to section 506(c) of the Bankruptcy Code or otherwise.

Plan, Art. 1.87 (emphasis added).

[12] The Plan Administrator implicitly acknowledges this in arguing that "the Plan and Asset Sale Support Agreement requires that the parties include language in the Macquarie Sale Order specifically addressing the

Administrator cannot point to any provision in that agreement giving him a basis to bring these claims. As to the Macquarie Purchase Agreement, the Defendants were not parties to that agreement. So, it is not surprising that the Plan Administrator fails to cite a single provision of the Macquarie Purchase Agreement in support of his claims. In any event, neither of those agreements provides any claw back rights. Thus, the Plan Administrator fails to show that his claims are *under* the Plan and Asset Sale Support Agreement or Macquarie Purchase Agreement.

13. Finally, the Plan Administrator's position—that this limited exception to the Estate Releases allows the Debtors to recalculate and pursue pre-confirmation distributions made in connection with the sale orders related to the purchase agreements—would lead to absurd and unintended results. If the Plan Administrator's position was accepted, the Defendants (and all other similarly situated creditors) could challenge each and every distribution in the Debtors' bankruptcy cases. This ability to "unscramble the egg" contravenes the broad language in the Estate Releases covering "any other act or omission, transaction, agreement, event, or other occurrence taking place before the Confirmation Date," and does not comport with Debtors' stated goal for the releases—to "enhance[e] the likelihood of the quickest and most cost-effective winddown of the Debtors and their non-Debtor affiliates." *See Disclosure Statement*, ¶ V.M.5.

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interim distribution to the Supporting WAC Lenders of their respective share of the Macquarie sale proceeds received by the Debtors pursuant to the Macquarie Purchase Agreement." The Plan Administrator makes much of Defendants' statement, made with respect to the Plan Administrator's unjust enrichment claim—that "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." Two points of clarification are required here: (1) the "agreement" under which funds were distributed is the agreed partial distribution language in the Macquarie Sale Order, and (2) even though neither the Macquarie Sale Order nor Plan and Asset Sale Support Agreement expressly provided for a distribution of excess cash collateral, the Debtors considered it incumbent during the course of their performance under this provision to calculate and distribute excess cash collateral.

2. The Plan Administrator Has Failed to Meet the Standard to Avoid Summary Judgment, and, in the Alternative, Has Not Pled Facts Showing Willful Misconduct.

14. The Plan Administrator's unsubstantiated claim based on the "willful misconduct" exception to the Estate Releases fails to survive either the summary judgment standard or the motion to dismiss standard. As an initial matter, summary judgment is plainly warranted. This Court invited a motion for summary judgment as to the applicability of the Estate Releases (which is allowed at this stage of the case, s*ee* Fed. R. Civ. P. 12(d)), and the Defendants' Motion met the initial factual showing required by Federal Rule 56 to demonstrate the absence of willful misconduct.

15. As the Defendants have shown, the flow of funds in the March 13th (updated) distribution model provided by the Debtors' professionals to Defendants shows two "External" transfers (i.e., wires) to "SunTrust Bank" in the amounts of $40,731,110.73[13] and $4,138,243.57,[14] which corresponded roughly to the two sets of wires, totaling $40,728,439 and $4,138,244 made by the Debtors to the Defendants the following day. Def. Fact ¶ 46. After receiving these amounts, the Defendants reached out to Debtors' counsel to verify the amounts, Def. Fact ¶ 47, and the Debtors' counsel and financial advisor confirmed by email the amounts were correct, Def. Fact ¶ 48. It was only months after Plan confirmation that the Plan Administrator asserted that the distribution was incorrect. The Plan Administrator does not contest these facts[15] and had (and has) access to all the information necessary to verify them.[16]

[13] Heading "F. Waypoint Makes Interim Disbursement to Lenders."

[14] Heading "E. Waypoint Makes True-Up Transfers to Cash Collateral Accounts for Holdback Amount."

[15] The Plan Administrator contests one point immaterial to the above recitation regarding the role of the Debtors' financial advisor. As to the other assertions, he takes a *the-documents-speak-for-themselves* / *no-knowledge-or-information* approach. But that does not meet the "specifically controverted" requirement under Local Bankruptcy Rule 7056-1(c). *See Burberry Ltd. v. Horowitz (In re Horowitz)*, Nos. 14-36884 (CGM), 15-09002 (CGM), 2016 Bankr. LEXIS 805, at *3 n.2 (Bankr. S.D.N.Y. Mar. 14, 2016) (holding that a defendant's response that "neither

Thus, the Plan Administrator has failed to meet his burden to demonstrate willful misconduct by the Defendants. *See* Fed. R. Civ. P. 56(c).

16. While the Plan Administrator asserts a need for discovery to rebut the facts raised by the Defendants, he failed to comply with Federal Rule 56(d), which requires the nonmovant to "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d).[17] Even if the Plan Administrator had filed such an affidavit or declaration, it would not have been sufficient to avoid summary judgment. *See* 11 *Moore's Federal Practice - Civil* § 56.102 (2020) ("[T]he facts specified in the Rule 56(d) affidavit must be . . . such that, in the circumstances of the case, their existence could preclude summary judgment."). No fact reasonably alleged to exist outside the Plan Administrator's control[18] could turn the Defendants' receipt of the distribution into willful misconduct. *Cf. Peterson v. Wells Fargo Bank, N.A. (In re Peterson)*, Case Nos. 10-23429 (AMN), 15-2008 (AMN), 2018 LEXIS 589, *19-20 (Bankr. D. Conn. Mar. 2, 2018) ("Even if the Chapter 13 Standing Trustee's disbursement was an error that violated the terms of the confirmed plan, the fault and any damages arising from such an error do not fall on the creditor. . . . If an error is made in the disbursement of funds to creditors, the burden falls on the Chapter 13 Standing Trustee, not on the creditor . . . ."). Thus, summary judgment is appropriate.

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denies or admits the allegations contained in" the plaintiff's statement of facts "as the documents speak for themselves" was an admission).

[16] The Plan Administrator stands in the shoes of the Debtors and has had full access to their records (including the email exchanges related to the Complaint) and advisors since his appointment over half a year ago.

[17] Failure to comply with Federal Rule 56(d) is fatal in the Second Circuit. 11 *Moore's Federal Practice - Civil* § 56.101 (2020) ("Courts are free to ignore a request for additional discovery that is not supported by an affidavit or declaration." (citing, *inter alia*, *FTC v. Moses*, 913 F.3d 297, 306 (2d Cir. 2019))).

[18] A Federal Rule 56(d) affidavit must "identify the facts that the nonmovant seeks to discover and that are essential to its opposition to the summary judgment motion. Specific facts sought must be identified. Mere speculation that there is some relevant evidence not yet discovered will never suffice." 11 *Moore's Federal Practice - Civil* § 56.102 (2020) (citing, *inter alia*, *Alphonse Hotel Corp. v. Tran*, 828 F.3d 146, 151-152 (2d Cir. 2016)").

17. While the summary judgment standard is applicable here, dismissal is also appropriate because the Plan Administrator did not adequately plead willful misconduct. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—"that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). As this Court has stated:

> The [plaintiff's] factual allegations must nevertheless be plausible, *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007); *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), and "raise a right to relief above the speculative level." *Bell Atlantic*, 127 S. Ct. at 1965; *accord ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). "[L]abels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 127 S. Ct. at 1965; *accord Paycom Billing Servs. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 289 (2d Cir.2006)("we do not 'permit conclusory statements to substitute for minimally sufficient factual allegations.'") (*quoting Furlong, M.D. v. Long Island College Hosp.*, 710 F.2d 922, 927 (2d Cir.1983)); *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 344 (2d Cir. 2006) ("bald assertions and conclusions of law will not suffice" to defeat motion to dismiss (internal quotation marks omitted)).

O'Connell v. Arthur Andersen, LLP (In re AlphaStar Ins. Grp., Ltd.), 383 B.R. 231, 256 (Bankr. S.D.N.Y. 2008). "'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) (quoting *Kalisch-Jarcho, Inc., v. City of N.Y.*, 448 N.E.2d 413, 416-17 (N.Y. 1983)).

18. In his response, the Plan Administrator directs the Court to the Complaint's allegations of "willful misconduct" as follows:

> The WAC7 Lenders have engaged in willful misconduct because, *inter alia*, they: (i) 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 Plan Administrator and,

> despite such notice, failed and refused to return the Partial Distribution Overpayment to the Estate.

19. This paragraph does not sufficiently allege "willful misconduct." The allegation in part (i) that the WAC7 Lenders knew they were receiving an overpayment when they received the distribution[19] is insufficient because a bare allegation that the Defendants knew they were receiving an overpayment is not plausible in the context of the Complaint's allegations. The Complaint acknowledges that the Debtors' advisors rendered the calculations and that every one of their distribution models "included estimations of certain amounts and, as such, were subject to express disclaimers" that indicated the "preliminary" nature of the calculations and the fact they were "subject to material change." Complaint, ¶¶ 18, 22. Taking the facts alleged as true,[20] then: (1) the Debtors' advisors, not the Defendants, performed the calculations; (2) the various calculation models presented by the Debtors' advisors included estimated amounts and were never presented as final numbers; (3) the Debtors' advisors made a mistake in the calculations; and (4) the Plan Administrator first asserted that an overpayment occurred post-confirmation. The Complaint does not allege that the Debtors notified the Defendants of any overpayment or requested repayment prior to Plan confirmation nor does it allege any affirmative act or misrepresentation by the Defendants prior to Plan confirmation. Thus, the Complaint simply does not support any inference that the Defendants knew they were

[19] As noted in the Defendants' initial brief, there is vagueness around the defined term "Partial Distribution Overpayment"; as noted therein, the term could mean either: (1) "an overpayment of $4,138,244" or (2) simply "$4,138,244." The Plan Administrator failed to directly clarify his meaning on this point; however, at one place in his brief (Opp. Br. at page 25), he asserts: "Plan Administrator has alleged that Defendants knew that they were being overpaid at the time of the distribution."

[20] To be clear, notwithstanding the Plan Administrator's arguments to the contrary, at no time have the Defendants acknowledged that they received an overpayment. The Plan Administrator's contention that "The transfer was a mistake due to a clear accounting error, which amounted to a double payment. Critically, there is no material dispute regarding this core allegation" is bordering on violating Bankruptcy Rule 9011.

receiving an overpayment or refused, in the face of such knowledge, to return such an overpayment pre-confirmation.

20. The second component of the Plan Administrator's willful misconduct allegation (*i.e.*, part (ii)) is that the WAC 7 Lenders refused to return the money when the Plan Administrator asked for it (for the first time) after Plan confirmation in October 2019. But this allegation is simply a tautology: if the Estate Releases barred the claw back request, then the WAC7 Lenders did nothing wrong by keeping the money. In other words, the releases cannot be retroactively undone: to state a claim, the willful misconduct must be alleged to have occurred before the releases took effect, not after.

21. Accordingly, the Complaint fails to allege facts that would "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"—i.e., that the Defendants' receipt and pre-confirmation "non-return" of the payment was done with fraud, malice, a dishonest purpose, or in bad faith. *Cf. Ashcroft*, 556 U.S. at 678. In the absence of pre-confirmation willful misconduct, the claims are barred by the release.

22. Thus, regardless of whether the Court applies a motion to dismiss standard or a summary judgment standard on the issue, the Plan Administrator is not saved by the willful misconduct exception and the claims in the Complaint are barred by the Estate Releases.

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

1. The Res Judicata *Arguments Are Procedurally Proper.*

23. The Plan Administrator complains that *res judicata* is outside of the Court's summary judgment directive. This argument is misplaced. As made obvious by the numerous stipulations between the parties in this case, the Defendants were under an obligation to serve an unspecified responsive pleading pursuant to Federal Rule 7012, including any motion for summary judgment allowed by the Court pursuant to Federal Rule 12(d). The Court's invitation

to file a motion for summary judgment as to the Estate Releases did not preclude the Defendants from moving to dismiss or otherwise seeking summary judgment on other points pursuant to Federal Rule 12(d).

24. In any event, however, the *res judicata* arguments (and the supporting documents) on which the Defendants here rely are appropriately considered on a motion to dismiss. *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) ("Generally *res judicata* is an affirmative defense to be pleaded in the defendant's answer. . . . However, when all relevant facts are shown by the court's own records, of which the court takes notice, the defense may be upheld on a Rule 12(b)(6) motion without requiring an answer."); *Baeshen v. Arcapita Bank B.S.C.(c) (In re Arcapita Bank B.S.C.(c))*, 520 B.R. 15, 22 (Bankr. S.D.N.Y. 2014) (dismissing claims on a motion to dismiss based on the *res judicata* effect of a confirmed chapter 11 plan).

2. The Res Judicata *Arguments Are Meritorious.*

25. While the Plan Administrator tries to drag the Court down into the mire of the specific versus non-specific reservation of claims dispute (as this Court knows, some courts require that claims be specifically listed,[21] whereas other courts allow for a more categorical or general approach[22]), that is not the point. The fundamental considerations undergirding *res*

[21] "The majority of courts that have examined this issue have held that for this exception to apply, the plan must expressly reserve the right to pursue ***that particular claim*** post-confirmation and that a blanket reservation allowing for an objection to ***any claim*** is insufficient." *See, e.g., Am. Preferred Prescription*, 266 B.R. 273, 277 (E.D. N.Y. 2000) (emphasis in original); *citing In re Kelley*, 199 B.R. 698, 704 (9th Cir. B.A.P. 1996); *D & K Props. Crystal Lake v. Mutual Life Ins. Co. of N.Y.*, 112 F.3d 257, 261 (7th Cir. 1997) ("A blanket reservation that seeks to reserve all causes of action reserves nothing."); *Rosenshein v. Kleban*, 918 F. Supp. 98, 103 n. 4 (S.D.N.Y. 1996) (stating that the debtor could not "rely on a general retention clause to preserve undisclosed causes of action known to him when he filed for bankruptcy"); *In re Hooker Invs., Inc. v. Jewelmasters, Inc.*, 162 B.R. 426, 433-34 (Bankr. S.D. 1993) ("Each of these decisions either expressly or impliedly recognizes that whereas a blanket reservation would not be enough to escape the *res judicata* bar, an express reservation would.").

[22] The minority rule holds that a general reservation of claims can avoid the *res judicata* bar, *see, e.g., Cohen v. Tic Fin. Sys. (In re Ampace Corp.)*, 279 B.R. 145, 156-62 (Bankr. D. Del. 2002); *Fox v. Bank Mandiri (In re Perry H. Koplik & Sons, Inc.)*, 357 B.R. 231, 246-47 (Bankr. S.D.N.Y. 2006), many of the ***courts*** employing the minority approach ***require,*** at the very least, a categorical ***reservation of the type of claims*** being pursued in the complaint or ***language sufficient to provide adequate notice*** to creditors that the debtor had outstanding claims against third

judicata as set forth in *Sure-Snap* center on whether: (i) these are the types of claims that could have and should have been asserted prior to Plan confirmation; (ii) the parties' rights under the Plan would look different if the Debtors had raised these claims prior to Plan confirmation; and (iii) allowing the Debtors to bring these claims would work an injustice. *See Sure-Snap Corp. v. State St. Bank and Tr. Co.*, 948 F.2d 869, 874 (2d Cir. 1991).

26. The issue is not what would have happened if the Debtors had paid the Defendants a different amount pre-confirmation,[23] the question under *Sure-Snap* is whether the Debtors' failure to raise these claims prior to Plan confirmation almost certainly affected that prior judgment. *Sure-Snap Corp.*, 948 F.2d at 874. The Debtors' own brief in support of Plan confirmation confirms that the Estate Releases helped strike a delicate balance that claims such as the ones asserted in the Complaint would surely have disrupted:

> [T]he Estate Releases helped to induce the WAC Agents and the WAC Lenders that were voting in favor of the Plan to consent to releasing claims and Causes of Action against the Debtors, their affiliates, and related parties. **It is unlikely that the WAC Lenders, the WAC Agents, and the other releasing holders of**

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parties. *See, e.g.*, *Rifken v. CapitalSource Fin., LLC (In re Felt Mfg. Co., Inc.)*, 402 B.R. 502, 517 (Bankr. D. N.H. 2009) (holding that "categorical reservations are sufficient, so long as the language used identifies the categories with enough detail to put creditors on notice."); *Katz v. I.A. Alliance Corp. (In re I. Appel Corp.)*, 300 B.R. 564, 570 (Bankr. S.D.N.Y. 2003) ("The combination of the blanket reservation of claims in the Plan and the reference to potential claims against the Katzes in the Disclosure Statement was sufficient to provide adequate notice to the creditors, the Katzes, the trustee, and the bankruptcy court that the Debtor had potential outstanding claims against the Katzes."), *aff'd Katz v. I.A. Alliance Corp. (In re I. Appel Corp.)*, 104 F. App'x 199 (2d Cir. 2004); *In re Ampace Corp.*, 279 B.R. at 160 (stating, "a general reservation in a plan of reorganization ***indicating the type or category of claims to be preserved*** should be sufficiently specific to provide creditors with notice that their claims may be challenged post-confirmation." (emphasis added) (citations omitted)); *Fleet Nat'l Bank v. Gray* (*In re Bankvest Capital Corp.)*, 375 F.3d 51, 60 (1st Cir. 2004) (holding plan of reorganization's express reservation of right to pursue avoidance actions sufficiently preserved particular avoidance action) (collecting cases); *Guttman v. Martin (In re Railworks Corp.)*, 325 B.R. 709, 717 (Bankr. D. Md. 2005) ("A reservation is sufficient ***if it reserves a category or type of claim,*** and it is not required that individual claims and specific defendants be specified." (emphasis added)).

[23] Plan Administrator argues (Opp. Br. at page 19) that "any notion that Defendants would have voted differently with respect to the Plan (or objected to the Plan) had they not been overpaid (by about $4 million on their approximately $45 million partial distribution), but instead received the correct amount, would not only be disingenuous, but raises factual issues that cannot be determined at this early, pre-discovery stage of the proceeding."

> **Claims would have agreed to provide such reciprocal releases if the Debtors did not provide the Estate Releases to the Debtor Released Parties.**

Debtors' Memorandum of Law in Support of Confirmation of the Third Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors, Case No. 18-13648, Doc 876, ¶ 61 (emphasis added).

27. While the Plan Administrator asserts that "the claims at issue in this proceeding had not yet arisen at [the time of Plan confirmation] as the overpayment to the WAC7 Lenders had not yet been discovered," the undisputed facts show that (i) the Debtors' professionals (a) calculated the distribution, (b) made the distribution, and (c) confirmed the accuracy of the distribution, (ii) the amount of the distribution was included in Defendants' proof of claim and (iii) the amount of the distribution was incorporated into the Plan voting process. The Plan Administrator's reliance on the discovery rule to contend that his alleged claims did not exist at the time of Plan Confirmation is unsupported by the actual facts known to the Debtor.

28. Accordingly, because the Debtors admittedly obtained substantial benefits in confirming the Plan, were in 100% possession of the facts around the pre-Plan distributions, and requested and received a reciprocal release of post-petition claims against them and a host of related parties, they could and should have brought any claim asserting the pre-Plan distributions were wrong prior to Plan confirmation.

C. The Defendants' Motion is Otherwise Proper.

29. As noted above, with respect to *res judicata*, the Court's invitation to file a motion for summary judgment as to the release did not preclude the Defendants from filing a motion to dismiss or otherwise seeking summary judgment under Federal Rule 12(d) as to the merits of the claims.

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

30. The Plan Administrator does not challenge the force of the argument that all Defendant-transferees of the WAC7 Agent may raise the WAC7 Agent's defenses, including the Estate Releases, under Section 550. Thus, if the Court concludes that the Plan Administrator's claims against the WAC7 Agent are barred by the Estate Releases, the Plan Administrator does not contest that his Section 550 arguments fail as to all Defendants.

2. Section 542 Claims are Unavailable Post-Confirmation.

31. The Plan Administrator cites authority that a plan can preserve Section 542 claims just like any other Chapter 5 claim. Section 542 claims are different from other Chapter 5 causes of action because Section 542(a) requires that the claims be brought "during the case." None of the authority cited by the Plan Administrator is binding on this Court or adequately deals with this language.

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.

32. The Defendants' opening brief asserted that no turnover or conversion action was available here because title to the funds passed to the WAC7 Agent and the property ceased to be part of the Debtors' estate. The Plan Administrator responds only by arguing that the Complaint challenges the Defendants' good faith and the adequacy of consideration, making this issue improper for a motion to dismiss.

33. The Plan Administrator's challenge to good faith fails on the motion to dismiss standard because, as shown with respect to the lack of well-pled allegations of willful misconduct, the Complaint does not raise a reasonable inference that the Defendants accepted the funds in less than good faith. On the motion for summary judgment standard, which is

appropriate here for the same reasons given above with respect to willful misconduct, the Plan Administrator simply cannot raise a genuine issue of fact on the good faith issue in the face of, *inter alia*, the Debtors' email confirming the accuracy of the distribution.

34. The Complaint does not contain any allegations challenging the amount or validity of the Defendants' claims in the bankruptcy cases. Similarly, the Plan Administrator's response fails to raise any legitimate question on these issues and the Plan Administrator does not challenge the Defendants' statement of fact (Def. Fact ¶ 41) that the Defendants filed proofs of claim (entitled to *prima facie* validity) after receiving the distribution. Thus, there is no genuine dispute as to the adequacy of the consideration.

4. No Unjust Enrichment Claim May be Pursued Because Equity and Good Conscience Do Not Require Repayment.

35. Taking the Complaint's allegations as true, the Debtors' professionals made a mistake in calculating the distribution to the WAC7 Agent as part of a partial distribution on the Defendants' claims and failed to raise it even through Plan confirmation. Contrary to the Plan Administrator's assertion, New York courts do dismiss claims if the equity and good conscience element cannot be proven. *See, e.g.*, *Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403, 405 (N.Y. App. Div. 1st Dept.) ("It is not against equity and good conscience to permit Phoenix to retain the money that plaintiffs invested [in a corporation with a shareholder agreement that did not prohibit share dilution] . . . To the extent that plaintiffs' unjust enrichment claim is based on the alleged dilution of their shares, it fails to state a cause of action"). The Plan Administrator's unjust enrichment claim should therefore be dismissed.

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

36. The Plan Administrator asks the Court to utilize Section 105(a) of the Bankruptcy Code to do what cannot be done under the express provisions of the Bankruptcy

Code and the Federal Rules. The Plan Administrator purports to seek this relief as an interpretation and enforcement of the Macquarie Sale Order and "Transaction Documents," but utterly fails to point to anything in these documents that gives him the right to assert these claims. What the Plan Administrator is really seeking, without satisfying the appropriate standards, is relief under Bankruptcy Rule 9024 and Federal Rule 60 to broaden the Macquarie Sale Order and edit the Estate Releases out of the Plan. The Supreme Court put an end to this freewheeling use of Section 105(a) in *Law v. Siegal* and there is no need to retread this ground.

III. CONCLUSION

WHEREFORE, 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 the challenged elements of the claims in the Complaint, as demonstrated above.
- The Court dismiss all claims in the Complaint against each Defendant with prejudice.

Dated: May 8, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David Wender, hereby certify that on May 8, 2020, I caused a copy of the foregoing *REPLY IN SUPPORT OF DEFENDANTS' 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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