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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., <i>et</i>)	Case No. 18-13648 (SMB)
<i>al.</i> ,)	
)	(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.)	
)	
_____)	

**DEFENDANTS' ANSWER AND
AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT**



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Truist Bank, successor by merger to SunTrust Bank, as administrative agent for the WAC7 Lenders (acting in such capacity, “**WAC7 Agent**”), hereby, on behalf of all Defendants, files its answer and affirmative defenses to Plaintiff’s Complaint (Doc. 1) in the above-captioned adversary proceeding.

ANSWER

Defendants deny each and every allegation contained in the Complaint, except as specifically admitted herein, and any factual averment admitted herein is admitted only as to the specific facts and not as to any conclusions, characterizations, implications, innuendoes, or speculations. The headings in the Complaint are not allegations and therefore do not require a response. These general comments and objections are incorporated, to the extent appropriate, into each numbered paragraph of this Answer. Except as otherwise indicated, the capitalized terms used in this Answer refer to the capitalized terms used in the Complaint. The use of such capitalized terms is solely for convenience and is not an admission of any allegation of fact or law.

Nature of the Case.¹ Through this adversary proceeding, Plan Administrator seeks to recover, on behalf of the Debtors’ estate (the “Estate”), \$4,138,244 that was inadvertently overpaid to, and unlawfully retained by, the WAC7 Lenders in connection with the partial distribution paid by Waypoint pursuant to the Court’s February 14, 2019 Order (I) Approving Purchase Agreement among Debtors and Macquarie, (II) Authorizing Sale of Certain of Debtors’ Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (III) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith, and (IV) Granting Related Relief (the “Macquarie Sale Order”) [Bankr. Case, Doc. 444]. Despite due demand by Plan Administrator for repayment of the clearly erroneous and undisputed overpayment, the WAC7 Lenders have unlawfully retained those funds and refused to return them to the Estate.

¹ Defendants are not required to answer the prefatory statement (“Nature of the Case”), because it does not comply with Rule 10(b) of the Federal Rules of Civil Procedure, incorporated into this proceeding by Federal Rule of Bankruptcy Procedure 7010. Fed. R. Civ. P. 10(b) (“A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading.”); *see also Schoenberg v. Decorative Cabinet Corp.*, 27 F. Supp. 802, 803 (E.D.N.Y. 1939).

ANSWER: Defendants deny the allegations set forth in this paragraph, except Defendants admit that the Plan Administrator brings this action seeking to recover amounts paid to the WAC7 Agent for the benefit of the WAC7 Lenders based on a purported mistake of the Debtors' professionals.

Complaint Paragraph 1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, Section 12.1 of the Plan, Paragraph 59 of the Macquarie Sale Order, and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.).

ANSWER: Defendants admit that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, Section 12.1 of the Plan, and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); the allegations in Paragraph 1 are otherwise denied.

Complaint Paragraph 2. Venue in this Court is proper pursuant to 28 U.S.C. § 1409 as this adversary proceeding arises under and in connection with a case under the Bankruptcy Code that is pending in this District.

ANSWER: Admitted

Complaint Paragraph 3. This is a "core proceeding" as defined by, inter alia, 28 U.S.C. § 157(b)(2)(A) and (E).

ANSWER: Defendants admit that this is core proceeding as defined by, inter alia, 28 U.S.C. § 157(b)(2)(A); the allegations in Paragraph 3 are otherwise denied.

Complaint Paragraph 4. Plan Administrator consents to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

ANSWER: Defendants consent to the entry of final orders or judgment by the Court in this adversary proceeding.

Complaint Paragraph 5. Plan Administrator has a business address of 12128 Madeleine Circle, Dallas, Texas 75230, and is the Plan Administrator for the Debtors. Pursuant to Sections 5.4(b)(vi) and 5.9 of the Plan, Plan Administrator has the authority and right on behalf of the Debtors to prosecute, among other things, all Causes of Action (as defined in the Plan) on behalf of the Debtors, including the Causes of Action set forth herein.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth as to Plaintiff's business address and on that basis deny the allegation. Defendants deny the allegations in Paragraph 5, except Defendants admit that Plan Administrator has the authority and right on behalf of the Debtors to prosecute certain Causes of Action (as defined in the Plan), but only to the extent such Causes of Action are preserved by the Plan.

Complaint Paragraph 6. Upon information and belief, SunTrust Bank has a business address of 3333 Peachtree Street N.E., Atlanta, Georgia 30326, and is both the administrative agent for the WAC7 Lenders and a WAC7 secured lender that improperly received and is now unlawfully retaining a portion of the partial distribution overpayment, as described herein.

ANSWER: SunTrust Bank n/k/a Truist Bank denies that its business address is set forth in Paragraph 6. SunTrust Bank n/k/a Truist Bank admits that it is both the administrative agent for the WAC7 Lenders and a WAC7 secured lender and that it received several wires including two that totaled \$4,138,244 which the Plan Administrator asserts was an overpayment (the "**Separate Collateral Distribution**"). The allegations of Paragraph 6 are otherwise denied.

Complaint Paragraph 7. Upon information and belief, MUFG has a business address of 445 S. Figueroa Street, Los Angeles, California 90071, and is a WAC7 secured lender that improperly received and is now unlawfully retaining a portion of the partial distribution overpayment, as described herein.

ANSWER: MUFG denies the allegations in Paragraph 7, except MUFG admits MUFG has a business address as given, is a WAC7 secured lender, and received, in a subsequent distribution, a portion of the Separate Collateral Distribution.

Complaint Paragraph 8. Upon information and belief, Deutsche Bank has a business address of 60 Wall Street, New York, New York 10005, and is a WAC7 secured lender that improperly received and is now unlawfully retaining a portion of the partial distribution overpayment, as described herein.

ANSWER: Deutsche Bank denies the allegations in Paragraph 8, except Deutsche Bank admits Deutsche Bank has a business address as given, is a WAC7 secured lender, and received, in a subsequent distribution, a portion of the Separate Collateral Distribution.

Complaint Paragraph 9. Upon information and belief, Barclays has a business address of 1 Churchill Place, Canary Wharf, London E14 5HP, United Kingdom, and is a WAC7 secured lender that improperly received and is now unlawfully retaining a portion of the partial distribution overpayment, as described herein.

ANSWER: Barclays denies the allegations in Paragraph 9, except Barclays admits Barclays Bank PLC has a business address as given, is a WAC7 secured lender, and received, in a subsequent distribution, a portion of the Separate Collateral Distribution.

Complaint Paragraph 10. Upon information and belief, Goldman Sachs has a business address of 30 Hudson Street, Jersey City, New Jersey 07302, and is a WAC7 secured lender that improperly received and is now unlawfully retaining a portion of the partial distribution overpayment, as described herein.

ANSWER: Goldman Sachs denies the allegations in Paragraph 10 except Goldman Sachs admits Goldman Sachs has a business address as given, is a WAC7 secured lender, and received, in a subsequent distribution, a portion of the Separate Collateral Distribution.

Complaint Paragraph 11. Waypoint was an independent helicopter leasing company focused on acquiring and leasing rotary wing aircraft to helicopter operators throughout the world.

ANSWER: Admitted.

Complaint Paragraph 12. Waypoint had a capital structure involving nine (9) separate debt facilities (each a “WAC Facility”) with a total of approximately twenty-four (24) lenders (each a “WAC Lender”). Each of the WAC Facilities was secured by different collateral housed in separate corporate entity silos and, thus, each group of WAC Lenders has different interests.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 and, as such, deny them.

Complaint Paragraph 13. As of November 25, 2018, Waypoint had outstanding funded debt obligations in the aggregate principal amount of approximately \$1.1 billion, approximately \$100 million of which was attributable to unpaid principal, plus accrued and unpaid interest, fees, and other expenses associated with the WAC7 Facility.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 relative to the Debtors' total outstanding funded debt, but Defendants admit that this was an amount asserted by the Debtors in various statements to the Court and that the amount outstanding in respect of the WAC7 Facility was more than \$103 million.

Complaint Paragraph 14. On November 25, 2018, Waypoint filed a voluntary petition for relief under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code"), which was docketed as Case No. 18-13648 (SMB).

ANSWER: Admitted.

Complaint Paragraph 15. On February 14, 2019, the Court entered the Macquarie Sale Order, authorizing and approving the sale of substantially all of Waypoint's assets, including certain executory contracts and unexpired leases, to Macquarie Rotorcraft Leasing Holdings Limited ("Macquarie") pursuant to the terms of a Stock and Asset Purchase Agreement, dated December 7, 2018 (as amended, supplemented or otherwise modified), and the additional terms set forth in the Macquarie Sale Order (the "Sale Transaction").

ANSWER: Defendants admit that the Court entered the Macquarie Sale Order on February 14, 2019. Defendants deny Plan Administrator's characterization and description of the Macquarie Sale Order.

Complaint Paragraph 16. As provided in the Macquarie Sale Order, the Debtors were required to make a partial distribution of the net proceeds of the Sale Transaction, less certain withholdings and holdback amounts (collectively, the "Partial Distributions"), to each of the WAC Lenders (or to their respective agents on the lenders' behalf) pursuant to a formula set forth in the Macquarie Sale Order.

ANSWER: Defendants admit that the Debtors were required to make a partial distribution of proceeds from the Sale Transaction. Defendants deny that the term Partial Distribution was defined in the Macquarie Sale Order, deny that the Sale Order provided the sole authority for the Debtors to distribute monies, and otherwise deny Paragraph 16's allegations characterizing or describing the Macquarie Sale Order or related documents.

Complaint Paragraph 17. Paragraph 43 of the Macquarie Sale Order provides:

Partial Distribution to Affected Participating Lenders. Upon Closing and, with respect to the Supporting WAC Lenders, subject to the terms and conditions of the Plan & Asset Sale Support Agreement, the Debtors shall make a partial distribution to the Affected Participating Lenders, in full and final satisfaction and release of that portion of such Affected Participating Lenders' claims in an amount equal to such Affected Participating Lenders' allocable share of net proceeds (as set forth in paragraphs 38 and 39 herein), less (i) such lenders' allocable share of the Winddown Account (as set forth in paragraph 32 herein), (ii) such lenders' allocable share of the Fee Reserve Account (as set forth in paragraph 35 herein), and (iii) such lenders' allocable share of a holdback in the aggregate amount of \$22,857,000, as set forth on Schedule 1 hereto (the "Holdback Amounts"), which Holdback Amounts shall be deposited in such lenders' respective Cash Collateral accounts (which shall constitute cash collateral of such lenders and shall be subject to such lenders' rights under the DIP Order and section 363(c) of the Bankruptcy Code) and held for the benefit of such lenders, subject to limited rights of the Debtors to draw upon if the funds in the Winddown Account are insufficient to fund the Affected Participating Lenders' allocable share of the winddown and administrative costs of the Debtors' estates, and the amount to be withdrawn is reasonable, as determined by agreement by the relevant Affected Participating Lenders or an order of the Court. The balance of any Holdback Amounts that remain in the respective Cash Collateral accounts shall be distributed on the effective date of the chapter 11 plan. The Debtors' rights to use the Affected Participating Lenders' Cash Collateral terminates upon Closing.

ANSWER: Defendants admit that the text contained in Complaint Paragraph 17 of the Complaint is copied from the Macquarie Sale Order.

Complaint Paragraph 18. Leading up to the Closing of the Sale Transaction, detailed calculations of the Partial Distribution amounts for each WAC Facility were performed by the Debtors' advisors. Such calculations were distributed to (or made available via a dataroom accessible to) each of the WAC Lenders, including the WAC7 Lenders, without objection. Such calculations included estimations of certain amounts and, as such, were subject to express disclaimers.

ANSWER: Defendants admit that the Debtors distributed or made available certain calculations to the WAC7 Lenders in connection with the proposed partial distribution to

be made in connection with the closing of the Sale Transaction. Defendants admit that the calculations purported to include estimations of certain amounts and that the calculations were generally accompanied by express disclaimers. Defendants deny that such calculations were “detailed” in that, notwithstanding repeated requests, certain versions were provided in PDF, while others did not include all requested supporting documentation (including, for example, underlying formulas or source data). To the extent the allegations in Paragraph 18 further characterize or describe documents delivered to the WAC7 Lenders, Defendants deny that description as being inconsistent with those documents. Defendants deny that the calculations were received by the WAC Lenders “without objection.” To the extent any further response is required, Defendants deny the remaining allegations of Paragraph 18.

Complaint Paragraph 19. As summarized in the below table prepared by the Debtors’ advisors, the WAC7 Lenders’ allocable share of net proceeds from the Sale Transaction less the WAC7 Lenders’ allocable share of the Winddown and Account Fee Reserve Accounts equaled \$36,592,867:

Confidential

Analysis of Overpayment in Actual Interim Distribution on 3/14/19

Actual Interim Distribution Made to WAC 7 Agent on 3/14/19

Initial Distribution A	\$34,160,085
Initial Distribution B	\$6,571,026
Total APA Proceeds & Estimated Excess Cash Distribution [1]	\$40,731,111

Excess Cash A	\$4,070,053
Excess Cash B	\$65,519
Total Excess Cash Collateral Distribution ^(B) [2]	\$4,135,572

Total Interim Distribution Made to WAC7 Agent on 3/14/19 [1+2]	\$44,866,683
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Note: Letters "A" and "B" above relate to the two different wires that were distributed as noted in the detailed APA Excel schedule shared with lenders in advance of closing.

Actual vs Correct Distribution Amounts

Total Received by WAC 7 Agent [1]	\$44,866,683
WAC 7 Net Sale Proceeds	36,592,867
Actual Excess Cash	\$4,135,572
Correct Amount Due to WAC 7 Agent [2]	\$40,728,439

Amount Overpaid and to be Returned [1 - 2]	\$4,138,244
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- 1 Amount confirmed by WAC 7 Agent counsel on 3/14/19; This amount includes (i) WAC 7's allocated share of net APA proceeds and (ii) the \$4,138,244 estimated cash balance in WAC 7 cash collateral account (see below) in excess of the court ordered holdback
- 2 Actual cash balance of \$4,135,572 that was remaining in WAC 7 cash collateral account(s), in excess of the holdback amount, was also distributed resulting in duplicate distributions on account of excess cash

ANSWER: Defendants deny the allegations in Paragraph 19.

Complaint Paragraph 20. The cash balance in the WAC7 Lenders' cash collateral account at the Closing of the Sale Transaction was estimated to be \$6,382,587. As set forth in Schedule 1 of the Macquarie Sale Order, the WAC7 Lenders' allocable share of the \$22,857,000 aggregate holdback amount was \$2,244,343, resulting in an estimated excess cash balance to be distributed to the WAC7 Lenders of \$4,138,244 (i.e. $\$6,382,587 - \$2,244,343 = \$4,138,244$). The estimated excess cash balance in the WAC7's cash collateral account was subject to adjustment at the Closing based on the actual excess cash collateral balance.

ANSWER: Schedule 1 of the Macquarie Sale Order reflects that the WAC7 Lenders' allocable share of the \$22,857,000 aggregate holdback amount was \$2,244,000. The Defendants further maintain that the allegations of Paragraph 20 cannot be answered because (i) the use of the term "estimated," without reference to any document, is vague; (ii) the Debtors' advisors provided multiple estimates that varied widely over time; and (iii) there is no information about who purportedly made this estimate, when it was made, and whether it was transmitted to the WAC7 Lenders. To the extent that Paragraph 20 purports to describe distribution models or related documents delivered to Defendants, Defendants deny Plan Administrator's characterization, description, or interpretation thereof as being inconsistent with those documents. To the extent the allegations in Paragraph 20 characterize, describe, or interpret documents (including written calculations or support thereof) not shared with Defendants, Defendants lack knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, deny them. To the extent any further response is required, the remaining allegations of Paragraph 20 are denied.

Complaint Paragraph 21. Based on the foregoing formula, the WAC7 Lenders were estimated to receive a Partial Distribution in the total amount of \$40,731,111.

ANSWER: The Defendants maintain that the allegations of Paragraph 21 cannot be answered because (i) the use of the term "estimated," without reference to any document, is vague; (ii) the Debtors' advisors provided multiple estimates that varied widely over

time; and (iii) there is no information about who purportedly made this estimate, when it was made, and whether it was transmitted to the WAC7 Lenders. To the extent that Paragraph 21 purports to describe distribution models or related documents delivered to Defendants, Defendants deny Plan Administrator's characterization, description, or interpretation thereof as being inconsistent with those documents. To the extent the allegations in Paragraph 21 characterize, describe, or interpret documents (including written calculations or support thereof) not shared with Defendants, Defendants lack knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, deny them. To the extent any further response is required, the remaining allegations of Paragraph 21 are denied.

Complaint Paragraph 22. The \$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. The funds flow analysis included a "Statement of Limiting Conditions" expressly stating, inter alia, that "[t]he DRAFT numerical data and other information set forth herein ... are preliminary and subject to material change."

ANSWER: The Defendants maintain that the allegations in the first sentence of Paragraph 22 cannot be answered because (i) the use of the term "estimated Partial Distribution and funds flow analysis," is vague; (ii) the Debtors' advisors provided multiple estimates that varied widely over time; and (iii) there is no information about who purportedly made this particular estimate, when it was made, and when it was transmitted to the WAC7 Lenders. To the extent that Paragraph 22 purports to describe distribution models or related documents delivered to Defendants, with the exception of the second sentence of Paragraph 22, Defendants deny Plan Administrator's characterization, description, or interpretation thereof as being inconsistent with those documents. Defendants deny receiving any such analysis "without objection." To the extent the allegations in Paragraph 22 characterize, describe, or interpret documents (including written

calculations or support thereof) not shared with Defendants, Defendants lack knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, deny them. To the extent any further response is required, the remaining allegations of Paragraph 22 are denied.

Complaint Paragraph 23. Upon the Closing of the Sale Transaction, the Partial Distribution amount due to the WAC7 Lenders was revised to account for the actual excess cash balance in the WAC7's Lenders cash collateral account. The revised amount was \$40,728,439.

ANSWER: To the extent that Paragraph 23 purports to describe distribution models or related documents delivered to Defendants, Defendants deny Plan Administrator's characterization, description, or interpretation thereof as being inconsistent with those documents. To the extent the allegations in Paragraph 23 characterize, describe, or interpret documents (including written calculations or support thereof) not shared with Defendants or the actions of third parties not communicated to Defendants, Defendants lack knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, deny them. To the extent any further response is required, the remaining allegations of Paragraph 23 are denied.

Complaint Paragraph 24. Based on an accounting error by the Debtors' advisors, on March 14, 2019, the Debtors erroneously distributed \$44,866,683 (instead of the authorized \$40,728,439) to the WAC7 Lenders (through the WAC7 Agent), resulting in an overpayment of \$4,138,244 (the "Partial Distribution Overpayment"). The Partial Distribution Overpayment was the result of the Debtors' advisors erroneously including in their calculation both: (i) the estimated excess cash balance in the WAC7 Lenders' cash collateral account (i.e. \$4,138,244); and (ii) the actual excess cash balance in the WAC7 Lenders' cash collateral account (i.e. \$4,135,572), causing a "double counting" of those funds. As a result of this error, the WAC7 Lenders received funds that should have been distributed pro rata among all the WAC Lenders.

ANSWER: Defendants admit that on March 14, 2019, Debtors wired \$44,866,683 to the WAC7 Agent and further admit that the Plan Administrator now claims that Debtors' advisors made a mistake with respect to their calculations and distribution. The allegations in Paragraph 24 are otherwise denied.

Complaint Paragraph 25. Shortly after discovering the Partial Distribution Overpayment, Plan Administrator asked the Debtors’ advisors to conduct a thorough analysis of the Partial Distribution that was paid to the WAC7 Lenders. As a result of its analysis, these advisors prepared a detailed memorandum (the “Overpayment Memo”) confirming the Partial Distribution Overpayment and explaining how such Overpayment was a result of “double counting” the excess cash balance in the WAC7 Lenders’ cash collateral account.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, deny them.

Complaint Paragraph 26. The Debtors’ advisors further calculated each of the WAC7 Lenders’ estimated allocable share of the Partial Distribution Overpayment as follows:

Waypoint Leasing
WAC7 Lender Allocations
\$ in thousands

Lender	Holdings Based on Scheduled Claims		Implied Allocation of Overpayment	
	\$	%	\$	%
MUFG Union Bank	\$ 23,449	23%	\$ 941	23%
Deutsche Bank	18,759	18%	753	18%
Sun Trust	28,139	27%	1,129	27%
Barclays	18,759	18%	753	18%
Goldman Sachs	14,069	14%	565	14%
Total	\$ 103,175	100%	\$ 4,141	100%

Note:
Total overpayment of \$4,141k differs from the presentation amount of \$4,138k due to rounding.

ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, deny them. Answering further, Defendants deny the accuracy of the calculations described in Paragraph 26.

Complaint Paragraph 27. Via letter dated November 6, 2019, Plan Administrator advised each of the WAC7 Lenders of the Partial Distribution Overpayment and demanded that each of the WAC7 Lenders immediately return their respective share of the Partial Distribution Overpayment. Plan Administrator further provided the WAC7 Lenders with a copy of the Overpayment Memo.

ANSWER: Defendants admit that on November 7, 2019, Plan Administrator delivered to certain of their respective representatives a letter dated November 6, 2019, that included conclusory statements alleging that the Separate Collateral Distribution was an

overpayment and included the Overpayment Memo. Defendants otherwise deny the allegations in Paragraph 27.

Complaint Paragraph 28. Receiving no response to his November 6, 2019 letter, on November 19, 2019, Plan Administrator sent a second correspondence to the WAC7 Lenders reiterating his request that the WAC7 Lenders immediately return their respective share of the Partial Distribution Overpayment.

ANSWER: Defendants admit that Plan Administrator sent a second correspondence to the WAC7 Lenders reiterating his allegations with respect to the Separate Collateral Distribution. Defendants otherwise deny the allegations in Paragraph 28.

Complaint Paragraph 29. Although never actually denying the Partial Distribution Overpayment, and despite having previously been provided with, and not objecting to, the actual Partial Distribution amount due to the WAC7 Lenders, on November 20, 2019, counsel for the WAC7 Agent responded on behalf of the WAC7 Lenders, flatly rejecting Plan Administrator's request and refusing to return the Partial Distribution Overpayment.

ANSWER: Defendants admit that counsel for the WAC7 Agent on behalf of the WAC7 Lenders sent a letter dated November 20, 2019. Defendants otherwise deny the allegations in Paragraph 29.

Complaint Paragraph 30. 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.

ANSWER: Denied.

Complaint Paragraph 31. Plan Administrator repeats, realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint as though set forth at length herein.

ANSWER: Defendants incorporate their responses to the foregoing paragraphs as if fully set forth herein.

Complaint Paragraph 32. As set forth above, the WAC7 Lenders are currently intentionally exercising unauthorized dominion and control over funds (i.e. the Partial

Distribution Overpayment) belonging to the Estate to the exclusion and in derogation of the Estate's rights to those funds.

ANSWER: The allegations in Paragraph 32 are denied.

Complaint Paragraph 33. As a direct and proximate result of the WAC7 Lenders' wrongful conduct, as aforesaid, the Estate and its creditors have suffered, and continue to suffer, substantial damages.

ANSWER: The allegations in Paragraph 33 are denied.

Complaint Paragraph 34. Plan Administrator repeats, realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint as though set forth at length herein.

ANSWER: Defendants incorporate their responses to the foregoing paragraphs as if fully set forth herein.

Complaint Paragraph 35. The Macquarie Sale Order required Waypoint to make a Partial Distribution of \$40,728,439 to the WAC7 Lenders. By mistake, Waypoint distributed \$44,866,683 to the WAC7 Lenders, resulting in a Partial Distribution Overpayment of \$4,138,244 to which the WAC7 Lenders are not entitled.

ANSWER: Defendants admit that on March 14, 2019, Debtors wired \$44,866,683 to the WAC7 Agent. The allegations in Paragraph 35 are otherwise denied.

Complaint Paragraph 36. It would offend principals of equity and good conscience to permit the WAC7 Lenders to retain the amounts by which they have been unjustly enriched at the Estate's expense.

ANSWER: The allegations in Paragraph 36 are denied.

Complaint Paragraph 37. Plan Administrator is entitled to recover, on behalf of the Estate, the amount by which the WAC7 Lenders have been unjustly enriched as a result of the Partial Distribution Overpayment.

ANSWER: The allegations in Paragraph 37 are denied.

Complaint Paragraph 38. Plan Administrator repeats, realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint as though set forth at length herein.

ANSWER: Defendants incorporate their responses to the foregoing paragraphs as if fully set forth herein.

Complaint Paragraph 39. Section 541 of the Bankruptcy Code provides that, with certain exceptions, a debtor's "estate is comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case" and "[p]roceeds, product, ... or profits of or from property of the estate" 11 U.S.C. § 541(a)(1), (a)(6).

ANSWER: Paragraph 39 accurately quotes several portions of Section 541 of the Bankruptcy Code. Defendants deny Plan Administrator's characterization, description, and interpretation thereof.

Complaint Paragraph 40. Section 542(a) of the Bankruptcy Code provides that "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a).

ANSWER: Paragraph 40 accurately quotes several portions of Section 542 of the Bankruptcy Code. Defendants deny Plan Administrator's characterization, description, and interpretation thereof.

Complaint Paragraph 41. By virtue of the Partial Distribution Overpayment, the WAC7 Lenders are in custody, possession or control of valuable property of the Estate.

ANSWER: The allegations in Paragraph 41 are denied.

Complaint Paragraph 42. The Partial Distribution Overpayment constitutes property that can be used in accordance with Section 363 of the Bankruptcy Code.

ANSWER: The allegations in Paragraph 42 are denied.

Complaint Paragraph 43. The Partial Distribution Overpayment has more than inconsequential value or benefit to the Estate.

ANSWER: The allegations in Paragraph 43 are denied.

Complaint Paragraph 44. Accordingly, pursuant to Bankruptcy Code section 542(a), Plan Administrator is entitled to an order compelling and directing the WAC7 Lenders to turn over such property to Plan Administrator.

ANSWER: The allegations in Paragraph 44 are denied.

Complaint Paragraph 45. Plan Administrator repeats, realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint as though set forth at length herein.

ANSWER: Defendants incorporate their responses to the foregoing paragraphs as if fully set forth herein.

Complaint Paragraph 46. Section 549(a) of the Bankruptcy Code renders avoidable any “transfer of property of the estate - (1) that occurs after the commencement of the case; and (2) ... (B) that is not authorized under this title or by the court.” 11 U.S.C. § 549(a).

ANSWER: Paragraph 46 accurately quotes several portions of Section 549 of the Bankruptcy Code. Defendants deny Plan Administrator’s characterization, description, and interpretation thereof.

Complaint Paragraph 47. The Macquarie Sale Order authorized the Debtors to make a Partial Distribution of \$40,728,439 to the WAC7 Lenders. By mistake, Waypoint distributed \$44,866,683 to the WAC7 Lenders, resulting in a Partial Distribution Overpayment of \$4,138,244 to which the WAC7 Lenders are not entitled.

ANSWER: Defendants admit that on March 14, 2019, Debtors wired \$44,866,683 to the WAC7 Agent. The allegations in Paragraph 47 are otherwise denied.

Complaint Paragraph 48. Except as otherwise provided by the Court under the Macquarie Sale Order, the proceeds of the Sale Transaction are property of the Estate.

ANSWER: The allegations in Paragraph 48 are denied.

Complaint Paragraph 49. The Partial Distribution Overpayment occurred after the commencement of the case and was not authorized by the Court or any provision of the Bankruptcy Code.

ANSWER: The allegations in Paragraph 49 are denied.

Complaint Paragraph 50. As a result, the Partial Distribution Overpayment is an unauthorized post-petition transfer that is avoidable by Plan Administrator pursuant to Bankruptcy Code section 549(a).

ANSWER: The allegations in Paragraph 50 are denied.

Complaint Paragraph 51. Plan Administrator repeats, realleges, and incorporates by reference the allegations contained in all preceding paragraphs of this complaint as though set forth at length herein.

ANSWER: Defendants incorporate their responses to the foregoing paragraphs as if fully set forth herein.

Complaint Paragraph 52. Pursuant to Section 549 of the Bankruptcy Code, Plan Administrator is entitled to avoid the Partial Distribution Overpayment as an unauthorized post-petition transfer.

ANSWER: The allegations in Paragraph 52 are denied.

Complaint Paragraph 53. The WAC7 Lenders were the initial transferee, or the immediate or mediate transferee of the initial transferee, for whose benefit the Partial Distribution Overpayment was made.

ANSWER: The allegations in Paragraph 53 are denied.

Complaint Paragraph 54. Pursuant to Section 550(a) of the Bankruptcy Code, Plan Administrator is entitled to recover the Partial Distribution Overpayment as an avoided transfer, plus interest thereon to the date of payment and the costs of this action.

ANSWER: The allegations in Paragraph 54 are denied.

Complaint Paragraph 55. Plan Administrator repeats, realleges and incorporates by reference the allegations contained in all preceding paragraphs of this complaint as though set forth at length herein.

ANSWER: Defendants incorporate their responses to the foregoing paragraphs as if fully set forth herein.

Complaint Paragraph 56. Section 105 of the Bankruptcy Code authorizes the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]” where, as here, such relief is warranted and derived from another provision of the Bankruptcy Code. 11 U.S.C. § 105(a).

ANSWER: Defendants admit that Paragraph 56 accurately quotes a portion of Section 105(a) of the Bankruptcy Code. Defendants deny the allegations with respect the application of 11 U.S.C. § 105(a).

Complaint Paragraph 57. As set forth above, relief is warranted and derived from, inter alia, Sections 542, 549, and 550 of the Bankruptcy Code.

ANSWER: The allegations in Paragraph 57 are denied.

Complaint Paragraph 58. The Macquarie Sale Order authorized the Debtors to make a Partial Distribution of \$40,728,439 to the WAC7 Lenders. By mistake, the Debtors distributed \$44,866,683 to the WAC7 Lenders, resulting in a Partial Distribution Overpayment of \$4,138,244 to which the WAC7 Lenders are not entitled.

ANSWER: The allegations in Paragraph 58 purport to state legal conclusions, to which no response is required. To the extent a response is required, the allegations in Paragraph 58 are denied.

Complaint Paragraph 59. The Partial Distribution Overpayment was not authorized by the Court nor otherwise intended to be transferred to the WAC7 Lenders.

ANSWER: The allegations in Paragraph 59 are denied.

Complaint Paragraph 60. Pursuant to Sections 105(a), 542, 549, and 550 of the Bankruptcy Code, Plan Administrator is entitled to the entry of a judgment declaring that the Estate is the sole legal and equitable owner of the Partial Distribution Overpayment, and an order compelling and directing the WAC7 Lenders to turn over such property to Plan Administrator.

ANSWER: The allegations in Paragraph 60 are denied.

AFFIRMATIVE DEFENSES

Defendants assert the following defenses without admitting any of the allegations of the Complaint, without assuming the burden of any such defense that it would not otherwise have, and with reservation of their right to amend or supplement this Answer for any reason, including based upon evidence developed in discovery or otherwise. Defendants incorporate their Answer above and the *Statements of Uncontested Fact in Respect of Motion for Summary Judgment* (Doc. 23) and the related *Declaration of David Wender in Respect of Motion for Summary Judgment* (Doc. 24).

I. Release under the Plan

1. The claims in the Complaint were released pursuant to Article 11.5(a) (the “**Estate Releases**”) of the Debtors’ confirmed Plan [*see* Bankr. No. 18-13648-smb, Doc. 893].

II. Exculpation under the Plan

2. The claims are barred by the exculpation provision of the Debtors’ confirmed Plan, Article 11.6.

III. Res Judicata

3. With respect to all Defendants, all claims in the Complaint are barred by the *res judicata* effect of the order confirming the Plan.

IV. Lack of Standing

4. The claims brought in the Complaint were not preserved under the Plan, because they were released and subject to exculpation; thus, Plan Administrator has no standing to bring such claims.

V. Laches

5. With respect to all Defendants, all claims in the Complaint are barred by the doctrine of laches due to Debtors’ failure to bring such claims prior to the confirmation of the Plan.

VI. Unclean Hands

6. With respect to all Defendants, all claims in the Complaint are barred by the doctrine of unclean hands. The Debtors and their advisors engaged in inequitable conduct by expressly confirming the propriety of the Separate Collateral Distribution prior to Plan confirmation and then asserting a different position after Plan confirmation. Moreover, pursuant to the Complaint, the alleged overpayment occurred due to the mistake(s) of unspecified “Debtors’ advisors,” of whom the Plan Administrator—in his role as Chief Restructuring

Officer—was one. Such a mistake, if it occurred, constituted or was a result of a breach of Debtors’ advisors’ fiduciary duties, which Plan Administrator is now expending estate resources to try to correct instead of pursuing the parties responsible for the alleged mistake.

VII. Waiver and Estoppel

7. With respect to all Defendants, all claims in the Complaint are barred by waiver and estoppel. The Debtors waived any claim to the Separate Collateral Distribution by confirming the propriety of the Separate Collateral Distribution and are estopped from pursuing any claim to recover the Separate Collateral Distribution by their conduct in seeking confirmation of the Plan and making distributions under the Plan upon the basis that the Separate Collateral Distribution was properly paid to Defendants.

VIII. Voluntary Payment Doctrine

8. With respect to all Defendants, all claims in the Complaint are barred by the voluntary payment doctrine under New York Law. The voluntary payment doctrine bars recovery of payments made with full knowledge of the facts. Because the Debtors (and only the Debtors) were in full possession of the facts when they made the Separate Collateral Distribution, the voluntary payment doctrine bars recovery.

IX. Failure to Join Indispensable Party

9. With respect to all Defendants, all claims in the Complaint are barred by the Plan Administrator’s failure to join indispensable parties. Specifically, assuming the correctness of the Plan Administrator’s allegations, the Separate Collateral Distribution was made as a result of mistakes made by the Debtors’ advisors, whose exculpation and release has concurrent breadth with the exculpation and release afforded the Defendants. Accordingly, the basic rule with respect to contracts—that all parties to the contract impacted by the contractual interpretation must be joined—applies.

Dated: September 10, 2020

Respectfully Submitted,

ALSTON & BIRD LLP

By: /s/ David Wender _____

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CERTIFICATE OF SERVICE

I, David Wender, hereby certify that on September 10, 2020, I caused a copy of the foregoing *DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT* 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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