IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
	§	Civil Action No. 4:24-cv-02001
CONVERGEONE HOLDINGS, INC., et al.,[1]	§	
	§	Bankruptcy Case No. 24-90194
	§	
Debtors.	§	
	§	
Ad Hoc Group of Excluded Lenders,	§	
	§	
Appellant.	§	
	§	

BRIEF FOR APPELLANT
THE AD HOC GROUP OF EXCLUDED LENDERS

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: AAA Network Solutions, Inc. (7602); ConvergeOne Dedicated Services, LLC (3323); ConvergeOne Government Solutions, LLC (7538); ConvergeOne Holdings, Inc. (9427); ConvergeOne Managed Services, LLC (6277); ConvergeOne Systems Integration, Inc. (9098); ConvergeOne Technology Utilities, Inc. (6466); ConvergeOne Texas, LLC (5063); ConvergeOne Unified Technology Solutions, Inc. (2412); ConvergeOne, Inc. (3228); Integration Partners Corporation (7289); NetSource Communications Inc. (6228); NuAge Experts LLC (8150); Providea Conferencing, LLC (7448); PVKG Intermediate Holdings Inc. (4875); Silent IT, LLC (7730); and WrightCore, Inc. (3654). The Debtors' mailing address is 10900 Nesbitt Avenue South, Bloomington, Minnesota 55437.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Bankruptcy Procedure 8012(a), Appellant the Ad Hoc Group of Excluded Lenders hereby states that:

- Cerberus Capital Management, L.P. does not have a parent corporation. Craig Court GP, LLC owns 10% or more of Cerberus Capital Management, L.P. Craig Court GP, LLC is owned by Craig Court, Inc., a New York corporation. Craig Court, Inc. does not have a parent corporation and is wholly owned by an individual.

- Blue Owl Liquid Credit Advisors LLC's parent corporation is Blue Owl Capital Inc, a public company. No publicly held corporation owns 10% or more of Blue Owl Liquid Credit Advisors LLC's stock.

- Ellington CLO Management LLC is wholly owned by EMG Holdings, L.P. That holding company does not have any parent, as it is a partnership made up of individual partners. No public company owns 10% of any of these entities.

- Livello Capital Management does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

- Palmer Square Capital Management does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

- Steele Creek Investment Management does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

A fundamental policy of bankruptcy is to ensure that similarly situated creditors are treated equally. The reorganization plan (the "Plan") of ConvergeOne Holdings, Inc. and its affiliates (collectively, the "Debtors") flouts that principle by giving preferred creditors investment opportunities that were not extended to other creditors holding identical claims. Specifically, the Plan offered only certain first-lien lenders in class 3 (the "Majority Lenders"), including an affiliate of the Debtors' private-equity sponsor (the "Insider"), an exclusive opportunity to purchase steeply discounted equity in the reorganized company. This resulted in those favored parties receiving millions of dollars in enhanced recovery under the Plan. Appellant the Ad Hoc Group of Excluded Lenders (the "Excluded Lenders") requested the same opportunity to purchase discounted equity but was rebuffed.[2] Consequently, the Majority Lenders' and Insider's recoveries exceeded the Excluded Lenders' recovery by more than 30%—even though they were all members of the same class.

The Bankruptcy Code forbids a reorganization plan from discriminating among members of the same class in this manner. *See* 11 U.S.C. § 1123(a)(4)

---

[2] The Excluded Lenders are: (*i*) Blue Owl Liquid Credit Advisors LLC; (*ii*) Cerberus Capital Management, L.P.; (*iii*) Ellington CLO Management LLC; (*iv*) Livello Capital Management; (*v*) Palmer Square Capital Management; and (*vi*) Steele Creek Investment Management. *See* Bankr. Dkt. No. 233.

("[A] plan shall . . . provide the same treatment for each claim or interest of a particular class[.]"). The Debtors effectively bought the votes they needed for confirmation by siphoning value from the Excluded Lenders to the Majority Lenders and Insider using an exclusive investment opportunity. If the Plan had expressly provided for the Majority Lenders and Insider to receive a 30% greater recovery on their claims than the Excluded Lenders, it clearly would not have been confirmable. The result should be no different where the Debtors accomplished the same result by providing the Majority Lenders and Insider with an exclusive investment opportunity that enhanced their recoveries. Critically, the Debtors did not market the exclusive investment opportunity to the investing community generally (*i.e.*, they did not conduct a market test) and instead bound themselves contractually to provide it only to the Majority Lenders and Insider.

Under the Supreme Court's decision in *Bank of America National Trust & Savings Association v. 203 N. LaSalle St. Partnership*, 526 U.S. 434 (1999), an investment opportunity provided by a plan and not subject to a market test is part of the treatment of a creditor's claim. The Plan was thus required to offer the opportunity to purchase discounted equity either to all class 3 members or to none of them. The Debtors were not permitted to pick winners and losers within class 3, however, which is precisely what they did.

The question presented in this appeal is a purely legal one: Was the Plan's grant of an exclusive *opportunity* to buy equity "treatment for" the Majority Lenders' and Insider's claims within the meaning of 11 U.S.C. § 1123(a)(4), or was it consideration for a separate commitment? *LaSalle* provides the answer. There (like here), the Supreme Court considered whether a plan's grant of an exclusive opportunity to buy reorganized equity was treatment for a stakeholder's pre-existing equity interest or separate consideration for the stakeholder's commitment to purchase the equity. There (like here), the debtor argued that the stakeholder received the opportunity to buy discounted equity on account of its commitment to infuse capital into the reorganized entity and not on account of its pre-existing equity interest. The Supreme Court disagreed, however, holding that when a plan provides a stakeholder with an *opportunity* to purchase a reorganized debtor's equity, the opportunity itself is "property" that constitutes a distribution on account of a pre-existing claim or interest (unless the investment opportunity had been market-tested). *LaSalle* controls here. Its holding means that the investment opportunity offered exclusively to the Majority Lenders and Insider was treatment for their claims, not separate consideration for their commitment to backstop a new equity offering.

The bankruptcy court tried to distinguish *LaSalle* by noting that the Supreme Court was interpreting 11 U.S.C. § 1129(b)(2)(B)(ii), whereas this case concerns

11 U.S.C. § 1123(a)(4). But that is a distinction without a difference because the operative language and the underlying rationale of the two provisions are substantively the same. Section 1129(b)(2)(B)(ii) permits confirmation over a senior creditor's objection as long as a junior stakeholder does not receive a distribution "on account of" its claim or interest. The question under § 1123(a)(4) here is whether the Plan favored the Majority Lenders and Insider by giving them better treatment "for" their claims. If an exclusive investment opportunity is treatment "on account of" a claim under § 1129(b)(2)(B)(ii), it is also treatment "for" a claim under § 1123(a)(4).

Under § 1123(a)(4), the Debtors had a choice: Either give all class 3 members the same opportunity to buy discounted equity in the reorganized entity or expose the investment opportunity to a market test. They did neither. Accordingly, the Plan violates § 1123(a)(4), and confirmation was improper.

JURISDICTIONAL STATEMENT

The bankruptcy court had jurisdiction over the Debtors' chapter 11 cases under 28 U.S.C. § 1334 and this Court's automatic referral under 28 U.S.C. § 157(a). *See In re Order of Reference to Bankr. Judges*, General Order 2012-6 (S.D. Tex. May 24, 2012).

This Court has jurisdiction over the Excluded Lenders' appeal from the bankruptcy court's final order confirming the Plan (the "Confirmation Order")

under 28 U.S.C. § 158(a)(1). The bankruptcy court entered the Confirmation Order on May 23, 2024. App.845–909. The following day, the Excluded Lenders filed their notice of appeal, as amended on May 25. App.910–85.

QUESTION PRESENTED AND STANDARD OF REVIEW

Does a plan of reorganization violate 11 U.S.C. § 1123(a)(4) when it offers an investment opportunity to some class members but not others without a debtor first conducting a market test?

The question presented is a pure question of law, which this Court reviews *de novo*. *See United Refin. Co. v. Dorrion*, 688 F. Supp. 3d 558, 562 (S.D. Tex. 2023) ("A district court functions as an appellate court when reviewing the decision of a bankruptcy court as to a core proceeding, and so applies the same standard of review as would a federal appellate court. Findings of fact are thus reviewed for clear error, while conclusions of law and mixed questions of fact and law are reviewed de novo." (citation omitted)); *see also Ovation Servs., LLC v. Morgan*, 689 F. Supp. 3d 417, 419 (S.D. Tex. 2023) (applying same standard when reviewing an order confirming a plan of reorganization).

STATEMENT OF THE CASE

A. The Debtors

ConvergeOne is a global information technology services company. App.37–38. Along with certain affiliates, it sought bankruptcy protection earlier

this year after facing liquidity challenges due to a highly leveraged capital structure that became unsustainable. App.38–39.

Before filing their chapter 11 cases, the Debtors privately negotiated the terms of a proposed restructuring with the Majority Lenders, a select group of creditors that collectively held approximately 81% of the Debtors' first-lien claims. App.751–53; App.1186. One of the entities participating in the negotiations was a lender owned and controlled by the Debtors' controlling shareholder – *i.e.*, the Insider. App.51. The Excluded Lenders—who together hold approximately $164 million of first-lien claims—sought to participate but were shut out of the negotiations. App.1124–27; App.731–47. The terms of the restructuring negotiated between the Debtors and the Majority Lenders and Insider were memorialized in a Restructuring Support Agreement (the "RSA"), which, in turn, was incorporated into the Plan. *See* App.357–97; App.213–14 (discussing the RSA and its terms); App.524 (noting that the Plan may be modified only "in accordance with the [RSA]"). The negotiated Plan was presented to the bankruptcy court as a *fait accompli*. *See* App.213–15.

The transactions at the heart of the RSA and Plan were offered only to the Majority Lenders and Insider. *See* App.473–74; App.39; App.64. The Debtors made no effort to market those investment opportunities to anyone else at any time.

B. The Plan

The RSA (and, thus, the Plan) provided for the Debtors to raise $245 million to fund Plan distributions and provide working capital for the reorganized business. App.518; App.528; App.473–74. The Plan contemplated that the Debtors would raise the $245 million by selling equity in the reorganized entity at a 35% discount to its assumed value. App.524.

The Plan classified all holders of first-lien claims against the Debtors—including the Majority Lenders, the Insider, and the Excluded Lenders—as members of class 3. App.538–39. The Plan did not treat all class 3 members alike, however.

Although the Plan offered all class 3 members the opportunity to purchase $159 million in discounted equity on a *pro rata* basis (the "Open Equity Allocation"), the remaining $86 million of discounted equity was reserved exclusively for purchase by the Majority Lenders and Insider (the "Exclusive Equity Allocation").[3] App.528–29; App.539; *see also* App.518. The Plan further provided the Majority Lenders and Insider with the opportunity to purchase any discounted equity not sold in the Open Equity Allocation (the "Backstop Investment Opportunity") and paid them a fee worth $37.7 million. *See* App.515;

[3] This is sometimes referred to as the "Direct Allocation" or "Stated Holdback."

App.526; App.473–77.[4] In exchange for the Exclusive Equity Allocation, the Backstop Investment Opportunity, and the $37.7 million fee, the Majority Lenders and Insider committed to voting for the Plan and purchasing any unsold equity from the Open Equity Allocation. *See* App.374–75. The Excluded Lenders were willing to make the same commitments in exchange for the same investment opportunities, but the Debtors refused to extend to them the terms offered to the Majority Lenders and Insider.

C. The Impact of the Plan's Discriminatory Terms

The Exclusive Equity Allocation, the Backstop Investment Opportunity, and the $37.7 million fee (collectively, "Exclusive Investment Opportunities") resulted in the Majority Lenders and Insider recovering approximately 31% more for their first-lien claims than the Excluded Lenders did. *See* App.753.

After the Plan was filed and they learned of the Exclusive Investment Opportunities, the Excluded Lenders offered the Debtors an alternative restructuring proposal that treated all class 3 members alike. App.754–55, App.762–73. The Debtors rejected the proposal, however, contending that it was

[4] The Majority Lenders and Insider held approximately 81% of first-lien claims and were thus only at risk of backstopping about $31 million—or 19%—of the $159 million Open Equity Allocation. App.753–54. Yet they received a backstopping fee valued at nearly $38 million (in addition to the opportunity to participate in the Exclusive Equity Allocation). *Id.*

not executable in part because the Majority Lenders and Insider would not vote to confirm a plan that treated all class 3 claims equally. App.1085; App.840–44.

D. Plan Confirmation

The Excluded Lenders objected to the Plan, arguing that the unequal treatment of class 3 members violated 11 U.S.C. § 1123(a)(4). The Excluded Lenders argued that because the Plan offered the Exclusive Investment Opportunities to only the Majority Lenders and Insider, those creditors received preferential treatment relative to other class 3 members. In support, the Excluded Lenders cited *LaSalle*, where the Supreme Court held that an investment opportunity that is not market tested constitutes property offered to a stakeholder on account of its claim or interest.

At a hearing on May 23, 2024, the bankruptcy court orally overruled the Excluded Lenders' objections. App.1172–97. The court confirmed the Plan the next day. App.845–909.

SUMMARY OF ARGUMENT

Section 1123(a)(4) of the Bankruptcy Code provides that "a plan shall provide the same treatment for each claim . . . of a particular class." 11 U.S.C. § 1123(a)(4). The Plan provided the Majority Lenders and Insider with a substantially higher recovery for their claims than the Excluded Lenders even

though they are all members of the same class. The Plan thus violates § 1123(a)(4).

The bankruptcy court justified that discrimination by holding that the Majority Lenders and Insider received preferential treatment not for their claims but for agreeing to purchase any unsold shares in the Open Equity Allocation. But the Plan provided only the Majority Lenders and Insiders (and not the Excluded Lenders) with the Exclusive Investment Opportunities in exchange for backstopping the Open Equity Allocation, and the Debtors did not offer those opportunities to the market. Under *LaSalle*, the Exclusive Investment Opportunities were part of the treatment of the Majority Lenders' and Insider's claims. And because that same treatment was not given to the Excluded Lenders' claims, the Plan did not treat all class 3 members equally. The bankruptcy court thus erred by confirming the Plan.

ARGUMENT

THE PLAN DISCRIMINATES AMONG CLASS 3 MEMBERS AND THEREFORE SHOULD NOT HAVE BEEN CONFIRMED.

The bankruptcy court should not have confirmed the Plan because it did not treat all members of class 3 alike. The Bankruptcy Code authorizes confirmation of a reorganization plan only if the plan satisfies 11 U.S.C. § 1123(a)(4). *See* 11 U.S.C. § 1129(a)(1). Section 1123(a)(4) requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a

particular claim or interest agrees to a less favorable treatment of such particular claim or interest." *Id.* § 1123(a)(4).[5]

The Plan violated § 1123(a)(4) because it provided certain rights to purchase discounted equity in the reorganized Debtors to some class 3 members but not others. As a result, the Majority Lenders and Insider received a substantially higher recovery than the Excluded Lenders even though they all held the same claims and are all members of the same class.

The bankruptcy court confirmed the Plan because it mistakenly believed that the Debtors gave the Majority Lenders and Insider the exclusive right to purchase discounted equity as consideration for their agreement to backstop the Open Equity Allocation, not as treatment for their claims. App.1191. But that misses the key point: The Excluded Lenders wanted the same opportunity that the Plan gave the Majority Lenders and Insider—namely, the opportunity to participate in the Exclusive Investment Opportunities on the same terms that the Plan offered to the Majority Lenders and Insider. But that opportunity was given only to the Majority Lenders and Insider, not to the Excluded Lenders. Because the Plan provided the opportunity to only some class 3 members but not others, it did not treat all class 3 members equally. As the Supreme Court explained in *LaSalle*, an exclusive

[5] The Excluded Lenders did not agree to a less favorable treatment.

opportunity that is not market-tested constitutes treatment of a claim or interest under a plan of reorganization.

A. The Plan Violates § 1123(a)(4).

Equality of distribution among similarly situated creditors is "a central policy of the Bankruptcy Code." *Begier v. IRS*, 496 U.S. 53, 58 (1990); *see also Am. Nat'l Bank v. MortgageAmerica Corp.* (*In re MortgageAmerica Corp.*), 714 F.2d 1266, 1274 (5th Cir. 1983) (noting that the policy of "equality of distribution among creditors" permeates the Code). This policy is designed to prevent the possibility that "a few insiders, whether representatives of management or major creditors, [will] use the reorganization process to gain an unfair advantage." *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1425 (2024) (citing *LaSalle*, 526 U.S. at 444). Section 1123(a)(4) of the Bankruptcy Code codifies that policy by requiring that a plan "provide the same treatment for each claim . . . of a particular class[.]" 11 U.S.C. § 1123(a)(4). The "same treatment" requirement means that all claimants within a given class must have "the same opportunity for recovery." *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) (quotation marks omitted).

The Plan violated the statute and the fundamental policy of equal treatment because it provided the Majority Lenders and Insider with valuable investment opportunities that were withheld from the Excluded Lenders even though they all

held the same claims and are all members of the same class. As a result of the Plan's unequal treatment of class 3 members, the Majority Lenders and Insider recovered over 30% more for their first-lien claims than the Excluded Lenders received for the same first-lien claims. *Cf. In re AOV Indus. Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986) ("[T]he most conspicuous inequality" that § 1123(a)(4)'s equal-treatment rule "prohibits is payment of different percentage settlements to co-class members.").

To be sure, the Debtors disguised the Plan's discrimination by jerry-rigging an arrangement whereby the Majority Lenders and Insider were given the exclusive opportunity to backstop the Open Equity Allocation in exchange for significant additional compensation. But offering a sweetheart deal to the Majority Lenders and Insider and not to other class 3 members is precisely the type of unequal treatment that the Bankruptcy Code forbids. *See* Stephen J. Lubben, *Holdout Panic*, 96 Am. Bankr. L.J. 1, 23 (2022) ("Overpaying for a backstop that will never likely be used is one obvious way of bypassing the intra-class equity requirement of section 1123(a)(4)."). It would elevate form over substance to allow a plan to transfer additional value to a subset of class members using an exclusive investment opportunity when it could not provide that same subset of

creditors with additional value by paying them a greater recovery on their claims.[6] This is especially so where, as here, the exclusive benefits were never offered to the market.

The Supreme Court recognized as much when it held that an exclusive opportunity to purchase equity provided by a plan to a stakeholder is given on account of the stakeholder's claim or interest unless that opportunity is market tested. *See LaSalle*, 526 U.S. at 454–58. The issue in *LaSalle* was nearly identical to the one presented here—namely, whether a chapter 11 plan's grant to the debtor's stakeholders of an exclusive opportunity to buy reorganized equity was (*i*) given "on account of" the stakeholders' pre-existing interests or (*ii*) part of a separate transaction under which the stakeholders agreed to infuse the debtor with new capital in exchange for the new equity. *Id.* at 453–58.[7]

---

[6] *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2085–86 (2024) ("[Plan proponents] ask us to look the other way. Whatever limits the code imposes on debtors and discharges mean nothing, they say, because the Sacklers seek a 'release,' not a 'discharge.' But word games cannot obscure the underlying reality." (citation omitted)); *In re Nat'l Energy & Gas Transmission, Inc.*, 492 F.3d 297, 303–04 (4th Cir. 2007) (Wilson, J., concurring) ("[T]he overarching issue in this appeal is reduced to this: does [the creditor's] contractual right with [guarantor] . . . to call payments from that guarantor what it wants to call them, preclude the Bankruptcy Court from calling those payments what they are vis-à-vis the bankrupt debtor. . . . In my view, to do so is simply to call a rose by another name.").

[7] The favored stakeholders in *LaSalle* were equityholders, not creditors, but the rationale applies equally to favored creditors and insiders.

The Supreme Court held that the answer turns on whether the opportunity to purchase equity was on the best obtainable terms for the debtor. *Id.* at 456. If it was, then no favoritism is involved, and the investment opportunity is merely a separate transaction unrelated to the stakeholders' pre-existing interest. But if not, then the investment opportunity is being offered as a favor to the stakeholders on account of their pre-existing interests. *Id.*

The Court then explained that the *only* way to ensure that an investment opportunity offered to a stakeholder contains the best possible terms for the debtor is to see what others would be willing to pay for it on the open market. *Id.* Because the investment opportunity in *LaSalle* had not been subject to any such market test, the Court held that it was provided to the favored stakeholders on account of their pre-existing interests. *Id.* at 456–58.

LaSalle's analysis and holding apply foursquare here. As in *LaSalle*, the Plan offered a select group of stakeholders an exclusive opportunity—here, the opportunity to backstop the Open Equity Allocation in exchange for the Exclusive Investment Opportunities. *See* App.524. As in *LaSalle*, the exclusive opportunity was not market-tested. Accordingly, the only "apparent reason" for giving the Majority Lenders and Insider the exclusive opportunity was "at least in part, to do [them] a favor," *LaSalle*, 526 U.S. at 456—*not* to provide them with legitimate consideration for the new funding they provided. If the opportunity had been

market-tested, there would have been no reason to restrict the opportunity solely to the Majority Lenders and Insider, who would not have needed "the protection of exclusiveness." *Id.*

Under *LaSalle*, then, the Exclusive Investment Opportunities are property that was offered to the Majority Lenders and Insider on account of their first-lien claims. This is a textbook case of favored creditors and an insider "us[ing] the reorganization process to gain an unfair advantage" over others. *Id.* at 444.

In denying the earlier stay motion, this Court suggested that *LaSalle* is inapposite because it discusses 11 U.S.C. § 1129(b)(2), not § 1123(a)(4). *See* Dkt. No. 28 at 7. Respectfully, that is beside the point. The central issue in *LaSalle* was whether an exclusive investment opportunity provided under a plan was "on account of" a stakeholder's pre-existing claim or interest or resulted from a separate agreement. 526 U.S. at 449–54. *LaSalle* thus concerned the causal link between an exclusive investment opportunity provided under a plan and a favored stakeholder's claim or interest. *Id.* at 451 ("[T]he better reading of subsection [1129](b)(2)(B)(ii) recognizes that a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates [§ 1129(b)(2)]."); *see also id.* at 460 (Thomas, J., concurring in the judgment) (explaining that "the phrase 'on account of' . . . obviously denotes some type of causal relationship between the junior interest and the property received or

retained"). That is the same question presented here. Just as the absolute priority rule of § 1129(b)(2) prohibits junior stakeholders from receiving property ahead of senior stakeholders "on account of" their claims or interests, the equal treatment rule of § 1123(a)(4) prohibits a plan from providing certain class members preferential treatment on account of their claims or interests. *Cf. Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455 (2017) (explaining that both §§ 1123 and 1129 "set[] out the framework" for "distribution of valuable assets" under a plan). In other words, the causation issues under § 1129(b) and § 1123(a)(4) are identical. *See also* pages 20–21, *infra* (further explaining why the analysis under § 1129(b) and § 1123(a)(4) should be the same).

This Court also suggested that other courts have permitted the type of discrimination contained in the Plan, citing the Eighth Circuit's decision in *Ad Hoc Committee of Non-Consenting Creditors v. Peabody Energy Corp.* (*In re Peabody Energy Corp.*), 933 F.3d 918 (8th Cir. 2019). Dkt. No. 28 at 7–8. But the investment opportunity in *Peabody* was not offered exclusively to only certain creditors. 933 F.3d at 926. To the contrary, the objecting creditors there had the same opportunity for recovery as other creditors in their class. *Id.* So *Peabody* does not speak to the issue in this appeal. If anything, *Peabody* supports the Excluded Lenders' position because the Eighth Circuit did not accept the argument

raised in the briefing that *LaSalle* applies only to § 1129(b)(2).[8] Instead, the court carefully distinguished *LaSalle* on its facts, which suggests that it believed *LaSalle* applies to § 1123(a)(4). 933 F.3d at 926–27.

Other courts, without deciding the issue, have expressed concerns about the legality of arrangements in which opportunities are offered exclusively to certain creditors as part of a backstopping agreement:

> The problem with special allocations in rights offerings, or with private placements that are limited to the bigger creditors who sat at the negotiating table, or big backstop fees that are paid to the bigger creditors who sat at the negotiating table but that are not even open to other creditors (and in particular to other creditors in the same class), is that it is far too easy for the people who sit at the negotiating table to use those tools primarily to take for themselves a bigger recovery than smaller creditors in the same classes will get.

In re Pac. Drilling S.A., No. 17-bk-13193, 2018 WL 11435661, at *2 (Bankr. S.D.N.Y. Oct. 1, 2018) (reproduced at Add.1–5); *see also In re TPC Grp. Inc.*, No. 22-bk-10493, Dkt. No. 565 at 188–89 (Bankr. D. Del. July 29, 2022) (reproduced at Add.6–11) (expressing concerns about a similar exclusive

[8] *See* Brief for Appellee Official Committee of Unsecured Creditors of Peabody Energy Corp., et al. at 17–22, *In re Peabody Energy Corp.*, 933 F.3d 918 (8th Cir. 2018) (No. 18-1302), 2018 WL 3304222, at *17–22.

backstopping and rights-offering scheme and noting that "*LaSalle* is highly relevant" to deciding its legality).[9]

This Court should reject the practice of using backstopping arrangements to transfer value to favored creditors, which is merely discrimination by another name. Endorsing the Plan's scheme would render § 1123(a)(4) toothless and undermine the equal-treatment principle that is fundamental to the reorganization process. *See, e.g.*, David A. Skeel, Jr., *Bankruptcy's Identity Crisis*, 171 U. Pa. L. Rev. 2097, 2101–02 (2023) (criticizing restructuring support agreements "negotiated by insiders" that "benefit the insiders by compensating them in a variety of ways, such as paying them to 'backstop' the sale of new stock when a company emerges from Chapter 11" because such arrangements raise "concerns that Chapter 11 no longer works as intended" and "exacerbate both the perception and the reality of insider control"); Lubben, *supra* page 13, at 24 (stating that backstop agreements "hide unequal treatment in a plan").

[9] To the extent that a handful of bankruptcy courts have confirmed plans with similar arrangements, those courts did not address the *LaSalle* argument raised by Appellants here.

B. The Bankruptcy Court's Attempt to Distinguish *LaSalle* Is Unavailing.

In confirming the Plan and concluding that it complies with § 1123(a)(4), the bankruptcy court held that *LaSalle* does not apply for five reasons, none of which withstands scrutiny.

First, the court tried to distinguish *LaSalle* on the basis that it addressed § 1129, not § 1123(a)(4). App.1190. That is irrelevant for the reasons discussed above. *See* pages 16–17, *supra*.

The bankruptcy court thought it was significant that § 1129 uses the phrase "on account of [a] claim or interest," whereas § 1123(a)(4) requires "the same treatment *for* each claim or interest." 11 U.S.C. § 1123(a)(4) (emphasis added); App.1190. But that is a distinction without a difference because "on account of" and "for" both aim at determining whether a causal relationship exists between something given and something received. It is thus unsurprising that the Supreme Court construed "on account of" to mean "because of." *LaSalle*, 526 U.S. at 450. The meaning of "for" is also "because of." *See For*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/for (last visited Aug. 1, 2024). The definitional and functional similarities of "for" and "on account of" undercut the bankruptcy court's reliance on a minor wording difference between the provisions.

Indeed, the Debtors recognized the interchangeability of the terms "on account of" (in § 1129) and "for" (in § 1123(a)(4)) in their brief supporting Plan

confirmation: "[T]he law is clear that creditors can receive value *on account of* new-money commitments that is not provided to all creditors in a class. The only requirement is that this value be provided *in exchange for* the new-money commitment." Bankr. Dkt. No. 324 at ¶ 7 (emphasis added). There was simply no basis for the bankruptcy court to treat the word "for" in § 1123(a)(4) differently from how the Supreme Court construed "on account of" in § 1129.

Second, the bankruptcy court incorrectly held that *LaSalle* is limited to "cram down" cases under § 1129(b)(2). App.1190–91. Nothing about the reasoning of *LaSalle* suggests such a limitation. And the Eleventh Circuit rejected the notion of such a limitation when it applied *LaSalle*'s reasoning in the context of determining whether a class of shareholders was deemed to have rejected a plan under 11 U.S.C. § 1126(g). *See Braun v. Am.-CV Station Grp., Inc.* (*In re Am.-CV Station Grp., Inc.*), 56 F.4th 1302, 1309–11 (11th Cir. 2023).

The plan in *America-CV Station Group* provided four shareholders with the exclusive right to buy new equity. *Id.* at 1306. The plan was then modified to provide that exclusive right to only one of those shareholders. *Id.* at 1306–07. The three excluded shareholders, who were stripped of their right to buy equity, objected to confirmation, arguing that the plan had been modified, which required a new disclosure statement and a re-solicitation of votes. *Id.* at 1305, 1307–08, 1311.

The bankruptcy court determined that the objecting shareholders were deemed to have voted to reject the plan under 11 U.S.C. § 1126(g) and were therefore not entitled to additional disclosure or another opportunity to vote. *Id.* at 1307. In the bankruptcy court's view, the objectors were not going to receive any property under the original plan and therefore were deemed to have rejected the plan under § 1126(g).

The Eleventh Circuit disagreed, holding that the opportunity to purchase equity was property that the objectors would have received under the original plan. *Id.* 1310–11. Section 1126(g) therefore did not apply. The Eleventh Circuit noted that the central question in the case was causation, and *LaSalle* provided the answer:

> [I]f the unmodified plans did entitle the Class 3 interest holders to receive property on account of their pre-petition equity interests, then § 1126(g) does not apply—meaning the bankruptcy court could not deem the [excluded shareholders] to have rejected the plans. So the question is whether the [excluded shareholders] were entitled to receive or retain property under the unmodified plans on account of their interests.
>
> Answering that question, it turns out, is straightforward because of Supreme Court precedent. In *[LaSalle]*, the Court analyzed a similar Chapter 11 plan in which the former partners of the debtor received ownership in a reorganized partnership in exchange for capital contributions. . . . [T]he question was whether the former partners . . . had received or retained property on account of their interests—the same question at issue here. The

> Court said yes; it characterized the former partners as having received an exclusive opportunity to obtain equity in the reorganized entity. And that opportunity qualified as a property interest received on account of their partnership interest in the pre-petition entity.

Id. at 1309–10 (citing *LaSalle*, 526 U.S. at 437, 442, 455–56).

Notably, the Eleventh Circuit further found that the modified plan had "serious problems" under § 1123(a)(4). *Id.* at 1312. By stripping the right to purchase equity from three of the four shareholders in the class, "one member received property under the plan and the others received nothing. That was improper. All modifications, including this one, must comply with § 1123." *Id.* at 1312. "Had the bankruptcy court recognized that the class 3 interest holders received property under the plans, it could not have granted the modification or confirmed the modified plans because the [favored shareholder group] was treated more favorably than the rest of class 3. *See* 11 U.S.C. §§ 1129(a)(1), 1123(a)(4)." *Id.* The Eleventh Circuit's decision in *America-CV Station Group* thus establishes three critical points: (*i*) *LaSalle* is not limited to cramdown cases; (*ii*) *LaSalle* is not limited to 11 U.S.C. § 1129; and (*iii*) a plan that provides some class members but not others with an opportunity to purchase equity violates § 1123(a)(4).

Third, the bankruptcy court conflated the reorganized equity offered under the Plan and the exclusive opportunity to purchase that equity. The bankruptcy court stated, "[e]quity is not being offered . . . for nothing. Here, the participating

parties are putting new money and backstopping a deal. We don't have a *LaSalle* problem here." App.1191. That fundamentally misses the point. The Plan provided the Majority Lenders and Insider with the *exclusive opportunity* to backstop the Open Equity Allocation in exchange for additional value. Under *LaSalle*, that investment opportunity is a separate property interest that is part of the treatment given on account of the Majority Lenders' and Insider's claims. 526 U.S. at 455 ("At the moment of the plan's approval the Debtor's partners necessarily enjoyed an exclusive opportunity . . . . This opportunity should, first of all, be treated as an item of property in its own right."). By focusing on the *quid pro quo* of the backstopping agreement, the bankruptcy court failed to recognize that the opportunity to enter into the backstopping agreement in the first place was preferential treatment provided only to the Majority Lenders and Insider but not other class 3 members.

Fourth, the bankruptcy court incorrectly thought that the financing proposal offered by the Excluded Lenders shortly before the confirmation hearing, which was swiftly rejected by the Debtors, constituted a "market test" for purposes of *LaSalle*. App.1193. But a market test requires a test of *the market—i.e.*, an open competition to determine whether market participants would be willing to buy discounted equity on terms more favorable to the debtor than those offered to the exclusive group. *See LaSalle*, 526 U.S. at 457 ("Under a plan granting an

exclusive right, making no provision for competing bids or competing plans, any determination that the price was top dollar would necessarily be made by a judge in bankruptcy court, whereas the best way to determine value is exposure to a market."); *see also In re Castleton Plaza, LP*, 707 F.3d 821, 821 (7th Cir. 2013) ("[C]ompetition is the way to tell whether a new investment makes the senior creditors (and the estate as a whole) better off."). The alternate financing proposal did not do that.

The Excluded Lenders' proposal was not a response to an offer to the market. Rather, it was made after the cake was already baked: An RSA for a pre-packaged Plan had already been agreed to, the RSA had a speedy timeline for the conclusion of the chapter 11 case, votes for the pre-packaged Plan had already been solicited, and DIP financing was already in place. To satisfy *LaSalle*'s market test, a debtor cannot merely passively wait for a counterproposal; instead, it must "open[] the bankruptcy process to competing plan proposals," *In re Acis Cap. Mgmt., L.P.*, 604 B.R. 484, 538 (N.D. Tex. 2019), *aff'd sub nom. Matter of Acis Cap. Mgmt., L.P.*, 850 F. App'x 302 (5th Cir. 2021), engage in "a systematic effort designed to 'market test' the deal," *In re NNN Parkway 400 26, LLC*, 505 B.R. 277, 283 (Bankr. C.D. Cal. 2014), and affirmatively "extend[] an opportunity to anyone else either to compete for [reorganized] equity or propose a competing reorganization plan," *LaSalle*, 526 U.S. at 454. The Debtors did none of that.

What's more, a special committee of the Debtors' board did not reject the Excluded Lenders' proposal based on its economic terms but because the Majority Lenders and Insider would not support it. App.1085; App.840–44. According to the special committee, if the Debtors were to adopt the Excluded Lenders' proposal, the Plan would not have the votes to be confirmed, the Debtors' stay in chapter 11 would be extended, and they would incur expenses for which they had not budgeted. App.1085. All of that speaks only to whether the Excluded Lenders' proposal was feasible, not whether the exclusive opportunity was offered to the Majority Lenders and Insider on the best obtainable terms for the Debtors. The only way to answer that question would have been for the Debtors to offer the investment opportunity to the market, which they did not do. *Cf. In re Union Fin. Servs. Grp., Inc.*, 303 B.R. 390, 423–26 (Bankr. E.D. Mo. 2003) (confirming "new money" plan where opportunity to invest was sufficiently marketed, including two separate solicitations for debtors' equity, broad search for competing bids, full marketing process, and flexible timing for offer submissions); *Castleton Plaza*, 707 F.3d at 824 (ordering debtor to "open the proposed plan of reorganization to competitive bidding" to meet *LaSalle*'s market-test requirement because the stakeholder receiving the debtor's equity under the challenged plan was an insider).

If anything, the special committee's decision to reject the Excluded Lenders' alternative proposal confirms that the opportunity to backstop the Open Equity Allocation in exchange for the Exclusive Investment Opportunities was offered on account of the Majority Lenders' and Insider's claims. According to the committee, the alternative proposal lacked sufficient votes because the Majority Lenders and Insider would have deprived themselves of the Exclusive Investment Opportunities by voting for it. In other words, to receive the Exclusive Investment Opportunities, the Majority Lenders and Insider had to vote for the Plan (and not any other proposal). And they could vote for the Plan only because they held claims. *See* 11 U.S.C. § 1126(a) ("The holder of a claim . . . may accept or reject a plan."). There is thus a direct line of causation between the Majority Lenders' and Insider's claims and the Exclusive Investment Opportunities.

Fifth, the bankruptcy court incorrectly believed that the Fifth Circuit had addressed the question presented in *Mabey v. Southwestern Electric Power Co.* (*In re Cajun Electric Power Co-op., Inc.*), 150 F.3d 503 (5th Cir. 1998). App.1194. But *Cajun Electric* (which did not involve an exclusive investment opportunity) did not address *LaSalle* because it was decided a year before *LaSalle*.

Cajun Electric is also readily distinguishable. Cajun was an electric utility cooperative, with twelve members who were also power purchasers. The plan at issue was the product of a robust auction that led to the submission of three

competing chapter 11 plans. *Cajun Electric*, 150 F.3d at 507–08. Each plan provided for the reimbursement of legal expenses of a committee of certain members ("CCM"). *Id.* at 507, 518–19. The district court concluded that the plan's payment of legal fees for the CCM's members constituted discriminatory treatment relative to stakeholders in the same class in violation of § 1123(a)(4). *Id.* at 512.

The Fifth Circuit disagreed and found no § 1123(a)(4) violation because (*i*) a third party (not the debtor) was reimbursing the CCM's members' legal fees, and (*ii*) "as the bankruptcy court found, the payments were not made in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case." 150 F.3d at 518–19. *Cajun Electric* thus did not involve a plan's grant of an exclusive investment opportunity (unlike here); involved payments from a third party, not the debtor (unlike here); and did not consider *LaSalle*, which had not yet been decided. Not only does *Cajun Electric* not control the outcome here, but it has nothing to say on the question presented.

CONCLUSION

For the foregoing reasons, the Excluded Lenders request that the Court reverse the Confirmation Order and remand for proceedings consistent with the Court's decision.

Dated: August 2, 2024

Respectfully submitted,

GRAY REED
By: */s/ Jason S. Brookner*
Jason S. Brookner (Bar# 24033684)
William N. Drabble (Bar# 24074154)
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
Telephone: (713) 986-7000
Facsimile: (713) 986-7100
Email: jbrookner@grayreed.com
wdrabble@grayreed.com

PROSKAUER ROSE LLP
David M. Hillman (*pro hac vice*)
Michael T. Mervis (*pro hac vice*)
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3000
Facsimile: (212) 969-2900
Email: dhillman@proskauer.com
mmervis@proskauer.com

PROSKAUER ROSE LLP
John E. Roberts (*pro hac vice*)
One International Place
Boston, MA 02110-2600
Telephone: (617) 526-9600
Facsimile: (617) 526-9899
Email: jroberts@proskauer.com

PROSKAUER ROSE LLP
Steve Y. Ma (*pro hac vice*)
2029 Century Park East, Suite 2400
Los Angeles, California 90067-3010
Telephone: (310) 284-4542
Facsimile: (310) 557-2193
Email: sma@proskauer.com

Counsel to Appellant the Ad Hoc Group of Excluded Lenders

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing document complies with the type-volume limit of Fed. R. Bankr. P. 8015(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g), this document contains 6,484 words.

The undersigned further certifies that the foregoing brief complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirement of Fed. R. Bankr. P. 8015(a)(5)(A) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Jason S. Brookner
Jason S. Brookner
Counsel to Appellant the Ad Hoc Group of Excluded Lenders

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 2, 2024, he caused a true and correct copy of the foregoing document to be served via the Court's CM/ECF Electronic Notification System on all parties to this proceeding who have subscribed for notice, and on counsel to Appellees via electronic mail as reflected below.

/s/ Jason S. Brookner
Jason S. Brookner
Counsel to Appellant the Ad Hoc Group of Excluded Lenders

Charles R. Koster
WHITE & CASE LLP
609 Main Street, Suite 2900
Houston, TX 77002
Telephone: (713) 496-9700
Facsimile: (713) 496-9701
Email: charles.koster@whitecase.com

Bojan Guzina
Jason N. Zakia
Andrew F. O'Neill
Erin R. Rosenberg
Blair M. Warner
Adam T. Swingle
WHITE & CASE LLP
111 South Wacker Drive, Suite 5100
Chicago, IL 60606
Telephone: (312) 881-5400
Email: bojan.guzina@whitecase.com
jzakia@whitecase.com
aoneill@whitecase.com
erin.rosenberg@whitecase.com
blair.warner@whitecase.com
adam.swingle@whitecase.com

Counsel to the Debtors

John F. Higgins
Eric M. English
James A. Keefe
PORTER HEDGES LLP
1000 Main Street, 36th Floor
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 226-6248
E-mail: jhiggins@porterhedges.com
eenglish@porterhedges.com
jkeefe@porterhedges.com

GIBSON, DUNN & CRUTCHER LLP
Scott J. Greenberg
Keith R. Martorana
C. Lee Wilson
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
Email: sgreenberg@gibsondunn.com
kmartorana@gibsondunn.com
clwilson@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP
Michelle Choi
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
Email: mchoi@gibsondunn.com

Counsel to the First Lien Ad Hoc Group

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
	§	Civil Action No. 4:24-cv-02001
CONVERGEONE HOLDINGS, INC., et al., [1]	§	
	§	Bankruptcy Case No. 24-90194
Debtors.	§	
	§	
Ad Hoc Group of Excluded Lenders,	§	
	§	
Appellant.	§	
	§	

ADDENDUM TO
BRIEF FOR APPELLANT THE AD HOC GROUP OF EXCLUDED LENDERS

Tab	Addendum Page No.	Document
1.	Add. 001-005	*In re Pacific Drilling S.A.*, Not Reported in B.R. Rptr. (2018)
2.	Add. 006-011	*In re TPC Group Inc., et al.,* Case No. 22-10493 - Transcript of Hearing [taken on July 29, 2022]

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: AAA Network Solutions, Inc. (7602); ConvergeOne Dedicated Services, LLC (3323); ConvergeOne Government Solutions, LLC (7538); ConvergeOne Holdings, Inc. (9427); ConvergeOne Managed Services, LLC (6277); ConvergeOne Systems Integration, Inc. (9098); ConvergeOne Technology Utilities, Inc. (6466); ConvergeOne Texas, LLC (5063); ConvergeOne Unified Technology Solutions, Inc. (2412); ConvergeOne, Inc. (3228); Integration Partners Corporation (7289); NetSource Communications Inc. (6228); NuAge Experts LLC (8150); Providea Conferencing, LLC (7448); PVKG Intermediate Holdings Inc. (4875); Silent IT, LLC (7730); and WrightCore, Inc. (3654). The Debtors' mailing address is 10900 Nesbitt Avenue South, Bloomington, Minnesota 55437.

Respectfully submitted this 2nd day of August, 2024.

GRAY REED

By: */s/ Jason S. Brookner*
Jason S. Brookner
Texas Bar No. 24033684
William N. Drabble
Texas Bar No. 24074154
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
Telephone: (713) 986-7000
Facsimile: (713) 986-7100
Email: jbrookner@grayreed.com
wdrabble@grayreed.com

- and -

PROSKAUER ROSE LLP
David M. Hillman (*pro hac vice*)
Michael T. Mervis (*pro hac vice*)
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3000
Facsimile: (212) 969-2900
Email: dhillman@proskauer.com
mmervis@proskauer.com

- and -

PROSKAUER ROSE LLP
John E. Roberts (*pro hac vice* pending)
One International Place
Boston, MA 02110-2600
Telephone: (617) 526-9600
Facsimile: (617) 526-9899
Email: jroberts@proskauer.com

-and-

PROSKAUER ROSE LLP
Steve Y. Ma (*pro hac vice*)
2029 Century Park East, Suite 2400
Los Angeles, California 90067-3010
Telephone: (310) 284-4542
Facsimile: (310) 557-2193
Email: sma@proskauer.com

COUNSEL TO THE AD HOC GROUP OF EXCLUDED LENDERS

Certificate of Service

The undersigned hereby certifies that on the 2nd day of August, 2024, he caused a true and correct copy of the foregoing document to be served via the Court's CM/ECF system. In addition, a copy of the foregoing was served via electronic mail on the other parties to this appeal, as set forth below.

/s/ Jason S. Brookner
Jason S. Brookner

Charles R. Koster
WHITE & CASE LLP
609 Main Street, Suite 2900
Houston, TX 77002
Telephone: (713) 496-9700
Facsimile: (713) 496-9701
Email: charles.koster@whitecase.com

Bojan Guzina
Jason N. Zakia
Andrew F. O'Neill
Erin R. Rosenberg
Blair M. Warner
Adam T. Swingle
WHITE & CASE LLP
111 South Wacker Drive, Suite 5100
Chicago, IL 60606
Telephone: (312) 881-5400
Email: bojan.guzina@whitecase.com
jzakia@whitecase.com
aoneill@whitecase.com
erin.rosenberg@whitecase.com
blair.warner@whitecase.com
adam.swingle@whitecase.com

COUNSEL TO THE DEBTORS

John F. Higgins
Eric M. English
James A. Keefe
PORTER HEDGES LLP
1000 Main Street, 36th Floor
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 226-6248
E-mail: jhiggins@porterhedges.com
eenglish@porterhedges.com
jkeefe@porterhedges.com

Scott J. Greenberg
Keith R. Martorana
C. Lee Wilson
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
Email: sgreenberg@gibsondunn.com
kmartorana@gibsondunn.com
clwilson@gibsondunn.com

Michelle Choi
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
Email: mchoi@gibsondunn.com

COUNSEL TO THE
FIRST LIEN AD HOC GROUP

2018 WL 11435661
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. New York.

IN RE: PACIFIC DRILLING S.A., et al., Debtors.

Case No. 17-13193 (MEW) (Jointly Administered)
|
Signed October 1, 2018

Attorneys and Law Firms

For the Debtors: TOGUT, SEGAL & SEGAL LLP, One Penn Plaza, New York, NY 10119, BY: ALBERT TOGUT, KYLE J. ORTIZ.

For Quantum Pacific: SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Four Times Square, New York, NY 10036, BY: JAY M. GOFFMAN, GEORGE R. HOWARD.

For the Ad Hoc Group of Bondholders: PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, 1285 Avenue of the Americas, New York, NY 10019, BY: ANDREW N. ROSENBERG.

For the RCF Group: WHITE & CASE LLP, 1221 Avenue of the Americas, New York, NY 10020, BY: CHARLES R. KOSTER.

For Citibank as RCF Agent: SHEARMAN & STERLING LLP, 599 Lexington Avenue, New York, NY 10022, BY: NED SCHODEK.

For Samsung Heavy Industries Co. Ltd.: DLA PIPER LLP, 120 North Market Street, Suite 2100, Wilmington, DE 19801, BY: R. CRAIG MARTIN.

For the Office of the United States Trustee: UNITED STATES DEPARTMENT OF JUSTICE, 201 Varick Street, Room 1006, New York, NY 10014, BY: BENJAMIN J. HIGGINS.

For the SSCF Agent: MILBANK, TWEED, HADLEY & MCCLOY LLP, 28 Liberty Street, New York, NY 10005, BY: MATTHEW BROD.

For Credit Suisse: CRAVATH, SWAINE & MOORE LLP, Worldwide Plaza, 625 Eighth Avenue, New York, NY 10019, BY: PAUL H. ZUMBRO.

Proposed Counsel for the Official Committee of Unsecured Creditors: BRINKMAN PORTILLO RONK APC, 4333 Park Terrace Drive, #205, Westlake Village, CA 91361, BY: DAREN BRINKMAN, LAURA PORTILLO.

BENCH DECISION REGARDING MOTION FOR APPROVAL OF TERMS OF EQUITY RIGHTS OFFERING AND EQUITY COMMITMENT AGREEMENT

MICHAEL E. WILES, UNITED STATES BANKRUPTCY JUDGE

***1** This is the final version of a bench decision that the Court announced in open court on September 25, 2018.

Before me is the Debtors' motion for approval of the terms under which additional equity capital will be raised in connection with the proposed plan of reorganization. I will not keep everybody in suspense: I am going to approve the arrangements, but not without a great deal of misgivings, which I am going to explain.

The proposed arrangements were negotiated during the course of a mediation supervised by former Judge Peck. The participants in the mediation included certain holders of fully secured obligations, a separate ad hoc group of holders of three classes of secured debts that apparently are undersecured, and Quantum Pacific, the majority equity owner, which I shall refer to as "QP."

As originally proposed in early August, the structure was similar to one that has become increasingly common in Chapter 11 cases. More particularly, the proposal called for $400 million to be raised through a rights offering. The opportunity to participate in the rights offering would be provided only to holders of the three classes of undersecured debts. Those holders would be given the opportunity to buy common stock at a 46.9 percent discount to the stipulated and expected value of that equity under the plan.

In addition, the proposal called for a private placement of $100 million pursuant to which the so-called Ad Hoc Group would have the exclusive right to buy additional stock, which would be sold for $100 million but at the same 46.9 percent discount to expected plan value.

The Ad Hoc Group also proposed to provide a backstop under which the Ad Hoc Group guaranteed its own purchases of stock and under which the Ad Hoc Group would have the exclusive right to buy any shares that other eligible holders did not subscribe to purchase pursuant to the rights offering. The backstop would ensure that the full $500 million would be raised under the various equity sales, and in exchange the proposal called for a backstop fee equal to 8 percent of the amount of stock to be issued pursuant to the offering, payable in common stock. Eight percent of $500 million is $40 million but since the eight percent fee was to be payable in the form of a percentage of the steeply discounted stock to be issued, the fee actually had an expected value of much greater than $40 million.

When this proposed structure was first before the Court early August, it was met with strong opposition from QP, which had its own proposal that it wanted to make. The QP proposal also contemplated a $500 million equity raise but it differed from the Ad Hoc Group proposal in at least three ways. First, the proposed backstop fee would be 7 percent rather than 8 percent. Second, the backstop premium would be available to any creditor participating in the rights offering who committed to make a purchase on or before an early election deadline that was to be established, but that was not described any further in the papers that I received. Third, QP proposed a $100 million private placement in which it, not the Ad Hoc Group, would be the buyer, but it proposed a slightly higher buy-in price than was proposed in the Ad Hoc Group proposal.

***2** I raised questions about the proposals on August 9 and expressed some skepticism about the structure and the fees. I asked if the Debtors had explored the option of raising equity in the markets and whether the Debtors had done their homework, so to speak, as to whether better terms might be available in the market. The answer at that time in so many words was that the Debtors had not done so. The Debtors have offered different explanations since then as to why they agreed to this structure, but at least on August 9th the answer essentially was that this was being proposed because it raised the amount of money the Debtors wanted and it was the structure that the Ad Hoc Group wanted.

I also asked why the private placements were being set aside either for the Ad Hoc Group (under its proposal) or for QP (under its proposal); why there was a need for a backstop at all, since the parties in front of me seem to be fighting for the chance to buy the equity at the proposed discounted price; and why such a large backstop fee of eight percent was needed in light of the fact that equity was to be sold at a very large 46.9 percent discount to expected value.

I did not get answers at that time that were very specific or very satisfactory, though in fairness to the parties, the structure had just been agreed to and was not actually before me for approval on that date. I noted on August 9th that rights offering structures like this can be a proper and useful way of raising financing, and that backstop fees can be appropriate when real risks are taken and when the fees are proportionate to those risks, but that like every other tool that has been invented they can be misused.

The theory of the Bankruptcy Code is that when the big creditors sit in a room and negotiate a deal, the little creditors who are in the same boat get the same deal. The Bankruptcy Code does not permit the unequal treatment of creditors in the same class; it also does not permit the payment of extra compensation to large creditors in exchange for their commitment to vote for a plan. The problem with special allocations in rights offerings, or with private placements that are limited to the bigger creditors who sat at the negotiating table, or big backstop fees that are paid to the bigger creditors who sat at the negotiating table but that are not even open to other creditors (and in particular to other creditors in the same class), is that it is far too easy for the people who sit at the negotiating table to use those tools primarily to take for themselves a bigger recovery than smaller creditors in the same classes will get. The Code allows for reasonable financing terms but they must be reasonable, and they cannot just be a disguised means of giving bigger creditors a preferential recovery. I therefore made clear that to the extent that these terms were being presented to me as reasonable financing terms, the parties would need to convince me that the terms were reasonable as a financing matter and were better than other options.

After the August 9th hearing, the parties returned to mediation, and since that time they have resolved their differences. The size of the proposed rights offering was changed to $350 million. In addition to the proposed $100 million private placement for the Ad Hoc Group, the parties proposed a separate $50 million private placement to QP on the same terms. The proposed backstop arrangement remained the same: the Ad Hoc Group would be paid an eight percent fee, payable on stock, with respect to the entire $500 million offering. The parties also entered into a Plan Support Agreement, which as I have noted previously, has not been

Add. 002

presented for my approval and which contains some terms that I have previously said I would not approve.

***3** Last week, on September 18th, the parties appeared before me with their request for approval of the backstop fees and rights offering procedures. I heard evidence in the form of the testimony of Mr. Celentano of Evercore, the Debtor's investment banker. At the conclusion of the hearing, I made a few rulings.

First, I ruled that no legitimate justification had been offered for the proposed separate private placement to the Ad Hoc Group. I noted that the terms were to be the same as the proposed terms under the rights offering, and that in substance, if not in form, the proposed private placement was just a way of giving the Ad Hoc Group a disproportionate share of the rights offering. Counsel to the Ad Hoc Group agreed that the private placement would be eliminated and that the shares that would have been covered by the private placement to the Ad Hoc Group would instead be part of the rights offering for which all holders would be eligible.

Second, I ruled last week that the Debtors had failed to show the reasonableness of the proposed backstop fee, or the need for it in certain instances. During the hearing, the Debtors pointed to other bankruptcy cases in which large backstop fees have been paid. But Mr. Celentano readily acknowledged that he could think of no out-of-bankruptcy market context in which people who are being given the exclusive opportunity to buy stock at an expected 46.9 percent discount were nevertheless also paid an eight percent fee in exchange for their willingness to take advantage of that golden opportunity. In addition, Mr. Celentano acknowledged that even in prior bankruptcy cases there were few instances, if any, in which equity was offered at so steep a discount and in which parties nevertheless were paid such a high fee as the eight percent fee that was being proposed.

Some prior decisions have justified backstop fees by reference to put options since the backstop includes a commitment to buy at a fixed price no matter what the real value turns out to be. But there are several flaws in that analogy.

First, in most of the cases where these structures have been proposed the equity is offered at a steep discount to expected value. In this case, for example, the proposed discount is 46.9 percent. That means that the put option is very much out of the money. The more out of the money a put option is, the less the premium that it ought to command.

Second, there are features to the typical backstop arrangement that are far different from a typical put option. In a straight put option, the seller of the option takes the risk that it will have to buy the security if prices fall below the exercise price. But if prices stay above the exercise price, then the option will not be exercised. In that case, the seller of the put option gets nothing except the right to retain the option premium, and the option premium is paid in exchange for the risk that the price might fall.

In this case, though, and in other bankruptcy cases where similar structures have been proposed, the party who provides the backstop also is being given an exclusive right to buy at a discount. In other words, the backstop provider does not merely take the risk of a lower price. Instead, the backstop party also gets the benefit of the expected discount. That is more akin to being given a call option. It is a right that has additional value that ought to be valued and taken into account in determining, as a reasonable financing matter, whether a backstop fee is needed at all, or what a reasonable backstop fee should be.

***4** Here, the evidence that I received last week did not suggest that a backstop fee was needed or proper. I ruled after considering the evidence that the eight percent fee could be paid with respect to shares for which no commitments were yet in place, but that the fee had not been justified as a financing matter as to other portions of the proposed offering, including those to which QP and other creditors had committed and to which the Ad Hoc Group itself had committed. However, I also scheduled this further hearing today in case the parties wished to present additional evidence.

In advance of this hearing the parties have submitted a revised proposal that eliminates the proposed private placement to the Ad Hoc Group and that provides that $460 million of equity will be raised to a rights offering in which all members of the three impaired secured classes will be entitled to participate. They have also proposed that the Ad Hoc Group be paid a backstop fee equal to 8 percent of the uncommitted portions of the equity offering and 5 percent as to the rest. Again, that fee would be payable in stock. The parties have submitted an additional brief and an additional declaration that emphasizes the benefits to the Debtors of having obtained committed equity financing, and that repeats arguments that

Add. 003

were previously made regarding the risks that allegedly are involved in providing the backstop. Mr. Celentano has also provided additional evidence as to not only fees approved in other bankruptcy cases but regarding committed underwriting fees that have been paid in a number of out-of-bankruptcy financings.

I have considered the additional evidence that has been provided and the revised terms of the proposed arrangements. As I said at the outset of my remarks here, I have misgivings. I have misgivings mainly because I am not completely satisfied with the evidence that I have as to the reasonableness of the proposed fee. There are tools that investment bankers and securities professionals use to calculate option values. There are option formulas that take account of how the exercise price compares to the current value (which in this case would be the expected plan value) and that take account of potential market volatility. As a general matter, the higher the market volatility, the higher the option value. In this case, the parties have made many submissions in which they have trumpeted the risks that oil prices might decline, but nobody has made any effort to calculate the actual degree of risk involved here, or to calculate the actual value of the put option portion of the backstop fee, or to calculate just how volatile the markets would have to be in order to justify an option fee of the size that has been proposed, given how out-of-the-money the put option would be.

I have been provided with evidence of committed underwriting fees that have been charged in cases outside bankruptcy. It is true, as the Debtors suggest, that in those cases the commitments usually were made only a few days before the sales of the relevant securities, and that significantly reduced the risks to the parties providing the commitments. But it is also the case that the prices to which the parties committed themselves in those instances were much closer to the expected values, as opposed to the steep 46.9 percent discounts that are being offered here.

I have also been given evidence of backstop fees that courts have approved in some other bankruptcy cases, but many of those were uncontested, and nobody has pointed me to any prior decision in which a court has approved these fees with any actual discussion of the evidence as to the economic reasonableness of a particular backstop fee, or as to how the reasonableness of such a fee should properly be evaluated.

***5** The parties have also urged me to approve the eight percent fee in reliance on the Debtors' business judgment. But in considering such arguments courts should not lose sight of the fact that these fees are typically payable in stock. As a result, they have no practical effect on the Debtors themselves. The real effect is on other creditors, because the issue of the added shares dilutes the value of the shares that those other creditors will receive.

Furthermore, the principle to be guarded here is one that requires equal treatment of similarly situated creditors, which is more a matter of bankruptcy philosophy than it is a matter of business judgment. As I said last week, as a business matter the Debtors just want to get out of bankruptcy. They can agree to reasonable fees as part of a financing, but it is for the courts to decide whether fees are reasonable or not and to decide whether, in effect, some larger creditors are really being given an unequal and preferential treatment that is disguised as a financing term.

I cannot help but continue to be skeptical based on the evidence I have as to the proposed backstop fee and the alleged need for it in this case. That is particularly true as to the Ad Hoc Group's own commitments to exercise their rights in the rights offering. They have ample economic incentive to exercise those rights and, in fact, participated in structuring those rights to make them attractive to themselves. They have already committed to exercise their rights as part of a Plan Support Agreement with other parties. I am concerned that nobody else was given a similar opportunity, which raises the possibility again that the backstop fee is really just an extra payment and an extra recovery rather than a reasonable, stand-alone financing term.

But, on the other hand, while I have expressed my own concerns many times over the past several weeks in the hearings on this matter, not one of the relevant indenture trustees and not a single holder of any of the relative debts has come forward to complain about the proposed terms. Instead, the Debtors and all of the other parties have in unison asked me to approve these revised arrangements.

I may be skeptical about what the evidence would show if objections were filed. I hope that in the future when these structures are presented, the parties will explore in more detail the issues and concerns that I have raised. But this is the wrong case in which to make rulings, particularly based only on skepticism. I have to rule on the evidence that is actually before me. While I have strong doubts, those doubts are not enough, without more and without any objections, for me to reject the terms that the parties have negotiated and for which

Add. 004

they have sought approval today. So I will approve the revised arrangements that have been presented.

All Citations

Not Reported in B.R. Rptr., 2018 WL 11435661

Add. 005

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
TPC GROUP INC., *et al.*,	Case No. 22-10493 (CTG)
	Jointly Administered
	Courtroom No. 7 824 Market Street Wilmington, Delaware 19801
Debtors.	Friday, July 29, 2022 10:00 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	Scott Bowling, Esquire BAKER BOTTS LLP 30 Rockefeller Plaza New York, New York 10112
	James Prince, Esquire BAKER BOTTS LLP 2001 Ross Avenue, Suite 900 Dallas, Texas 75201
Audio Operator:	Sean Moran
Transcription Company:	Reliable The Nemours Building 1007 N. Orange Street, Suite 110 Wilmington, Delaware 19801 Telephone: (302)654-8080 Email: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES (CONTINUED):

For the Debtors:	Kevin Jacobs, Esquire BAKER BOTTS LLP 910 Louisiana Street Houston, Texas 77002
For the Ad Hoc Noteholder Group:	Kristopher Hansen, Esquire Erez Gilad, Esquire PAUL HASTINGS LLP 200 Park Avenue New York, New York 10166
For the Ad Hoc Group of Non-Consenting Noteholders:	David Hillman, Esquire Michael Mervis, Esquire PROSKAUER ROSE LLP Eleven Times Square Eighth Avenue & 41st Street New York, New York 10036
For Mockingbird Credit Opportunities:	Charles Persons, Esquire SIDLEY AUSTIN LLP 2021 McKinney Avenue, Suite 2000 Dallas, Texas 75201
For MDL Plaintiffs:	Sander Esserman, Esquire STUTZMAN BROMBERG ESSERMAN & PLIFKA 2323 Bryan Street, Suite 2200 Dallas, Texas 75201
For the Committee:	Naomi Moss, Esquire AKIN GUMP STRAUSS HAUER & FELD LLP One Bryant Park Bank of America Tower New York, New York 10036

(Proceedings commence at 10:00 a.m.)

THE COURT: Good morning, everyone. This is Judge Goldblatt. We are on the record in In Re TPC Group, Inc., which is Case Number 22-10493.

We are proceeding this morning by Zoom. As a result, I ask that folks leave your microphones muted, unless you're addressing the Court; that, when you do address the Court, you introduce yourselves for the record each time; and as I see folks already are, to have folks leave their cameras off, unless you're either addressing the Court or wish to be recognized.

So, with that, why don't I pass the baton to Mr. Prince to take us through the agenda.

MR. PRINCE: Good morning, Your Honor. Jim Prince of Baker Botts here on behalf of the debtors. With me are my partners Scott Bowling and Kevin Jacobs. Mr. Bowling is going to handle Item Number 1, which is the DIP motion. And of course, Mr. Jacobs, he handles our evidence and he will be doing that function again today. We also have our co-counsel Morris Nichols on the line, our -- as part of the hearing.

Turning to the agenda, Your Honor, we have the DIP motion. That's the big game or the big show. We have some miscellaneous sealing motions, which are Items 2 through 6. I'm pleased to report that those are all either resolved or moot. So, really, we just have one item, which is the --

anything to harm the company, but the only request that I would make is, can that language exist or do you need us to report back to you by 5 o'clock?

THE COURT: So this language has been in this draft order since the beginning of the case and, if you had an objection to it, you could have raised it and haven't. And I think, by giving you a half an hour, I'm giving you a half an hour longer than I needed to.

MR. HILLMAN: Thank you, Your Honor.

THE COURT: Okay. So I do have a few additional points that I want to add. Before that anyone here feels as if the wind is now at their sails, I thought I should say a word about a lingering concern that I have.

So, as discussed, this DIP loan incorporates the RSA milestones and, as a result, the failure to meet those milestones becomes an event of default. So, to the extent there are concerns about the plan, they are at least a relevant consideration of the approval of the DIP loan. And there's a concern that I have, without prejudging any issue, that I thought it appropriate to highlight in view of the evidence that I heard today.

During the cross-examination of Mr. Jamal, there was evidence that the members of the ad hoc group would under the plan receive substantial value that is not described as a payment on account of their prepetition secured claim or

payment under the DIP, but is instead essentially described as fees for backstopping the rights offering and the exit facility. And on hearing that testimony, it really jumped out and underscored that this question of whether that value is on account of the prepetition debt or on account of those plan transactions will be important to whether the plan comports with the requirement of the Bankruptcy Code that similarly-situated creditors be treated alike.

And at some level it does seem as if, for example, the Supreme Court's decision in 203 North LaSalle is highly relevant to that question and that, when you're asked is the reason a party, a creditor or interest holder receiving certain treatment on account of their claim or interest, on the one hand, or on account of a plan transaction on the other, that the way that's answered is by market testing. And I've got some concerns that these transactions here aren't market tested, which, if right, would counsel in favor of the view that it's actually consideration being given on account of the claims, which would give rise to claims of discriminatory treatment.

Now, I say that not to answer any of these questions today, but because I had concerns about approving the DIP that, if that turns out to be a problem, the case could be in trouble, I ended up satisfying myself that no one can exercise default remedies without approval from the Court

and that, with the quality of the parties here, there may be an opportunity to work through those issues between here and there. But I did want -- and, again, nothing I've said, you know, is intended to prejudge anything and everything I said on this topic could well be entirely mistaken. And so no one should take this as I've decided anything, it's just that, as I heard the evidence, I became concerned about it and thought it only appropriate to share the concern, so that the parties can all proceed appropriately.

So, with that, let me ask this question. Are there any questions about what I just said that I can help address?

(No verbal response)

THE COURT: Okay. If not, what I would propose then is that the objectors reach out to the debtor -- well, let me ask the question this way. Can we -- I just want to puzzle through the question of timing of the entry of this order and how -- we are obviously happy to enter an appropriate order, you know, in the evening, over the weekend, whenever it's -- whenever we're in a position to enter it, but I would be interested in hearing from the parties about how much time sensitivity there is from an operational business perspective as to when the order is entered.

(Pause)