

# FOR PUBLICATION

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MAR 11 2019

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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8 **UNITED STATES BANKRUPTCY COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **SAN FERNANDO VALLEY DIVISION**

11 In re:

12 ICPW LIQUIDATION CORPORATION,  
13 a California corporation,<sup>1</sup> and

14 ICPW LIQUIDATION CORPORATION,  
15 a Nevada corporation,<sup>2</sup>

16 Former Debtors.

17 MATTHEW PLISKIN, AS TRUSTEE OF THE  
18 TRUST CREATED UNDER THE JOINT PLAN  
19 OF LIQUIDATION DATED FEBRUARY 9,  
20 2018,

21 Plaintiff,

22 vs.

23 RADIANS WAREHAM HOLDING, INC.,  
24 RADIANS, INC., and SAFETY SUPPLY  
25 CORPORATION,

26 Defendants.

Lead Case No. 1:17-bk-12408-MB

Jointly administered with 1:17-bk-12409-MB

Chapter 11

Adv. Proc. No. 1:17-ap-01101-MB

**MEMORANDUM OF DECISION RE:  
DEFENDANTS' MOTION TO DISMISS  
ADVERSARY COMPLAINT**

27 <sup>1</sup> Formerly known as Ironclad Performance Wear Corporation, a California corporation.

28 <sup>2</sup> Formerly known as Ironclad Performance Wear Corporation, a Nevada corporation.

1 **I. INTRODUCTION**

2 This adversary proceeding arises out of the prepetition acquisition of a secured loan by  
3 defendant Radians Wareham Holding, Inc. ("RWHI") and the prepetition exercise of remedies  
4 under that loan agreement against the chapter 11 debtors herein, Ironclad Performance Wear  
5 Corporation, a California corporation ("ICPW CA"), and Ironclad Performance Wear Corporation,  
6 a Nevada corporation ("ICPW NV") (collectively, the "Debtors").<sup>3</sup> The plaintiff herein, Matthew  
7 Pliskin ("Plaintiff"), is trustee under a trust created pursuant to a joint plan of liquidation ("Plan")  
8 confirmed in the above-referenced chapter 11 cases. Plaintiff is successor in interest to the official  
9 committee of equity holders for ICPW NV ("Equity Committee"), which commenced this  
10 adversary proceeding prior to confirmation of the Plan by filing the complaint herein  
11 ("Complaint"). Adv. Dkt. 1.<sup>4</sup>

12 The Complaint alleges that RWHI acquired the loan and exercised remedies thereunder in  
13 an effort to acquire the Debtors' business and in a manner that caused injury to the Debtors and the  
14 value of their business. Based on this premise, the Complaint asserts: (i) a cause of action for  
15 economic duress, (ii) a cause of action for breach of the covenant of good faith and fair dealing,  
16 (iii) a cause of action for unjust enrichment, (iv) a cause of action for recovery, as an unauthorized  
17 transfer, of all funds paid to RWHI on its claims in the Debtors' cases, and (v) disallowance of the  
18 proof of claim filed by RWHI on account of the acquired loan. The Complaint also names as  
19 defendants RWHI's affiliates, Safety Supply Corporation ("Safety Supply"), and Radians, Inc.  
20 ("Radians") (together with Safety Supply and RWHI, "Defendants").

21 Defendants have filed their motion to dismiss the Complaint (the "Motion to Dismiss" or  
22 "MTD"). Adv. Dkt. 5. Defendants argue that Safety Supply and Radians should be dismissed from

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23 <sup>3</sup> At the time of filing, the Debtors' corporate name was "Ironclad Performance Wear Corporation,"  
24 which the Court subsequently authorized the Debtors to change to "ICPW Liquidation  
25 Corporation." See Case Dkt. 218.

26 <sup>4</sup> Unless otherwise noted, all references to "Adv. Dkt." refer to entries on the docket of the instant  
27 proceeding, Adversary Proceeding No. 1:17-ap-01101-MB, *Official Committee of Equity Holders*  
28 *of ICPW Liquidation Corporation v. Radians Wareham Holding, Inc. et al.*, and all references to  
"Case Dkt." refer to entries on the docket of Bankruptcy Case No. 1:17-bk-12408-MB, *In re ICPW*  
*Liquidation Corporation, a California Corporation.*

1 this lawsuit because the Complaint does not allege enough facts to support a claim against these  
2 affiliates of RWHI. Defendants further argue that all claims against them should be dismissed  
3 because: (i) the claims were released pursuant to the terms of a prepetition release executed by the  
4 Debtors, (ii) the claims were released pursuant to the terms of the agreed order approving the  
5 Debtor's postpetition financing, and (iii) the Complaint fails to adequately plead causes of action on  
6 which relief can be granted.

7 The Court has reviewed and considered all the pleadings filed in support of and in  
8 opposition to the Motion to Dismiss, the oral arguments of counsel, and the documents identified in  
9 Section IV below. For the reasons set forth below, the Motion to Dismiss will be granted in part  
10 and denied in part, as specified below.

## 11 II. BACKGROUND

12 On September 8, 2017 ("Petition Date"), the Debtors each filed a voluntary petition for  
13 relief under chapter 11 of the Bankruptcy Code. ICPW CA developed and manufactured high-  
14 performance task-specific gloves and apparel in a variety of end markets. *See* Omnibus  
15 Declaration of L. Geoff Greulich in Support of Debtors' Emergency "First Day" Motions  
16 ("Greulich Decl."), ¶ 3.<sup>5</sup> ICPW NV was a publicly-traded company whose only business was  
17 owning all shares in ICPW CA. *See* Greulich Decl., Case Dkt. 6, ¶ 2. The Debtors' business was  
18 headquartered in Farmers Branch, Texas. *Id.*

19 In connection with commencement of these cases, the United States Trustee ("UST")  
20 appointed (1) the Equity Committee, *see* Case Dkt. 59; and (2) an official committee of unsecured  
21 creditors ("Creditors' Committee"). *See* Case Dkt. 62.

22 In late 2014, the Debtors obtained a revolving credit facility from Capital One, N.A.  
23 ("Capital One"), secured by substantially all of the Debtors' assets. Greulich Decl., Case Dkt. 6,  
24 ¶ 12. On July 25, 2017, Capital One assigned the loan to RWHI. *Id.*, ¶ 14. As of the Petition Date,  
25 RWHI was the Debtors' only secured creditor. *Id.*, ¶ 23. RWHI filed identical proofs of claim in  
26 \_\_\_\_\_

27 <sup>5</sup> The Greulich Declaration was resubmitted for purposes of this adversary proceeding as an Exhibit  
28 to the Declaration of E. Franklin Childress, Jr. in Support of Defendants' Motion to Dismiss  
("Childress Decl."), Adv. Dkt. 6 & 6-1.

1 each of the Debtors' cases. *See* Claim No. 20-1 in Case No. 1:17-bk-12408-MB; Claim No. 7-1 in  
2 Case No. 1:17-bk-12409-MB). Both proofs of claim asserted a claim amount of \$3,464,093.28,  
3 owing as of the Petition Date (collectively, the "Claim").

4         Shortly before the Petition Date, the Debtors and RWHI entered into an asset purchase  
5 agreement ("APA") pursuant to which RWHI agreed to serve as a stalking horse, i.e., purchase the  
6 Debtors' assets subject to overbid and court approval. Greulich Decl., Case Dkt. 6, ¶ 27. The APA  
7 provided for certain bidding procedures applicable to the process, and a breakup fee of \$500,000  
8 ("Breakup Fee") if RWHI was not the winning bidder in an auction for the Debtors' assets, or if the  
9 Debtors proceeded with a plan of reorganization. *See* Greulich Decl. at 271-72..

10         On September 28, 2017, the Court entered an order approving the form of the APA and the  
11 bidding procedures to which the Debtors and RWHI agreed, including the Breakup Fee. *See* Case  
12 Dkt. 71 ("Bidding Procedures Order"). On October 30, 2017, the Court conducted an auction and  
13 thereafter approved the sale of substantially all the Debtors' assets to a purchaser *other than* RWHI.  
14 *See* Sale Order, Case Dkt. 177. The winning bidder agreed to purchase substantially all of the  
15 Debtors' assets for \$25,500,000. *Id.* That sale closed on November 14, 2017. *See* Case Dkt. 237.

16         Also before the Petition Date, the Debtors and RWHI entered into the DIP Agreement,  
17 pursuant which RWHI agreed to provide postpetition financing while the Debtors marketed the  
18 opportunity to overbid for the assets. Greulich Decl., Case Dkt. 6, ¶ 23. On October 6, 2017, the  
19 Court entered its final order approving the DIP Agreement, the form of which was agreed to by the  
20 parties. *See* Case Dkt. 87 ("Final DIP Order"). Among other things, the Final DIP Order contained  
21 language (i) granting standing to the Equity Committee to pursue certain claims of the Debtors'  
22 estates (the "Estates") against RWHI, provided an action on such claims was commenced within a  
23 specified time period, and (ii) subject to such rights, waiving certain claims against RWHI:

24                 kk. On or before the date that is sixty (60) days from the date of the entry of  
25 this Final Financing Order (the "Lookback Period"), the Official Committee of  
26 Unsecured Creditors and the Official Committee of Equity Holders shall have  
27 standing individually and on behalf of Debtors' Estates to object to, challenge, or  
28 seek to avoid the amount, validity, or enforceability of the Pre-Bankruptcy Secured  
Debt (or any portion thereof) or any of the liens and security interests created under  
the Pre-Bankruptcy Secured Debt and to bring any other claim that they have  
against Radians, individually or on behalf of the Debtors' Estates (separately and  
collectively, a "Challenge"). If no such action, objection or other Challenge is

1 commenced by either the Official Committee of Unsecured Creditors or the  
2 Official Committee of Equity Holders within the Lookback Period, the Pre-  
3 Bankruptcy Secured Debt will be deemed and adjudicated finally and indefeasibly  
4 as valid and enforceable, the liens and security interests created under the Pre-  
5 Bankruptcy Secured Debt in the Collateral securing the Pre-Bankruptcy Secured  
6 Debt will be deemed and adjudicated finally and indefeasibly as valid, enforceable  
7 and perfected liens and security interests in that Collateral, and any affirmative  
8 claim(s) or cause(s) of action of any kind against Radians with respect to the Pre-  
9 Bankruptcy Secured Debt, or otherwise, and the liens and security interests securing  
10 the Pre-Bankruptcy Secured Debt, or any payment received by Radians will be  
11 forever barred. As provided in this Final Financing Order, the Debtors have waived  
12 and released, and shall be forever barred from asserting, any right to object to,  
13 challenge or seek to avoid, the amount, validity, or enforceability of the Pre-  
14 Bankruptcy Secured Debt or the liens and security interests in the Collateral  
15 securing the Pre-Bankruptcy Secured Debt. Except as otherwise may have been  
16 determined by the Court in the proceedings referenced above, and subject to further  
17 Order of the Court, in the event any payment made to, or other amount or value  
18 received by Radians from or for the account of any of the Debtors is avoided,  
19 rescinded, set aside or must otherwise be returned or repaid by Radians, whether in  
20 the Cases or any other proceedings, the indebtedness repaid shall be allowed as a  
21 claim in accordance with existing law. Any of Radians' claims, liens, rights, and  
22 remedies under the Loan Documents which survive such action shall be reinstated  
23 and fully preserved.

24 Case Dkt. 87 at 19 (Final DIP Order).

25 On December 5, 2017, the Equity Committee filed the Complaint and initiated the  
26 instant adversary proceeding. The Court subsequently confirmed the Plan, which dissolved  
27 the Equity Committee, created a trust solely for the benefit of the shareholders of ICPW  
28 NV, and transferred to the trust the rights of the Equity Committee to prosecute this action.  
*See* Case Dkt. 438, 442. Thereafter, the parties entered into a stipulation substituting  
Matthew Pliskin, as trustee under the trust created by the Plan, as Plaintiff. *See* Adv.  
Dkt. 42.

### 29 III. THE ALLEGATIONS OF THE COMPLAINT

30 What follows are the relevant allegations from the Complaint. Safety Supply is the parent  
31 company of RWHI and Radians. Complaint, ¶¶ 4-6. Defendants acted under the same  
32 management and share responsibility for each other's actions. *Id.*, ¶ 13. RWHI was paid  
33 \$5,343,988.19 upon the closing of the sale of the Debtors' assets. *Id.*, ¶ 7.

34 Defendants manufacture safety equipment and apparel. *Id.*, ¶ 12. In 2007 or 2008, the  
35 representatives of the Debtors and RWHI met to discuss if the two businesses might benefit from a

1 strategic transaction. *Id.*, ¶ 14. The Debtors decided not to pursue such a transaction, but over the  
2 next several years RWHI communicated its interest in acquiring the Debtors' brands or assets. *Id.*

3       Between November 2016 and April 2017, Capital One agreed to waive defaults when the  
4 Debtors breached the debt service coverage ratio ("DSCR") covenant of the Loan Agreement. *Id.*,  
5 ¶ 19. On April 11, 2017, Capital One agreed to replace the DSCR covenant with a 12-month  
6 trailing adjusted EBITDA covenant. *Id.* In May 2017, Capital One demonstrated it was willing to  
7 work with the Debtors through financial difficulties when it extended the loan's maturity date to  
8 July 2018. *Id.*

9       In May 2017, RWHI prepared to go public with an offer to purchase ICPW NV's shares for  
10 27.5 cents per share. *Id.*, ¶ 15. Around the time RWHI was preparing its stock purchase offer, the  
11 Debtors' board of directors received anonymous reports of accounting irregularities that resulted in  
12 inflated revenue figures on the Debtors' financial statements. *Id.*, ¶ 16. Upon investigating the  
13 reports, the Debtors filed a Form 8-K Report with the Securities and Exchange Commission on or  
14 about July 6, 2017, dated June 29, 2017, disclosing the financial irregularities, the termination of  
15 the employment of the Debtors' chief executive officer and chief financial officer, and the  
16 appointment of new individuals to those positions. *Id.*

17       Days later, on July 10, 2017, RWHI's CEO wrote the Debtors' chairman to say RWHI did  
18 not want to wait for the financial reports to be restated, and RWHI was willing to consider  
19 increasing its 27.5 cents per share purchase offer. *Id.*, ¶ 17. Meanwhile, RWHI contacted Capital  
20 One to express its interest in purchasing the Debtors' loan. *Id.*, ¶ 18. RWHI and Capital One  
21 quickly reached an agreement whereby RWHI would purchase the loan and waive any recourse  
22 against Capital One related to the uncertainties presented by the misstatements in the Debtors'  
23 financial statements. *Id.*, ¶ 20. RWHI purchased the loan from Capital One on July 25, 2017, and  
24 Radians wired to Capital One an amount of money equivalent to the outstanding balance on the  
25 loan. *Id.*, ¶ 21. Neither Defendants nor their managers had ever before acted as a commercial  
26 lender. *Id.*

27       The next day, on July 26, 2017, counsel for RWHI sent the Debtors a letter declaring the  
28 Debtors in default under the loan due to the previously disclosed misstated financial reports,

1 accelerating the loan, and demanding immediate payment of the \$3,688,195.22 outstanding balance  
2 in full. *Id.*, ¶ 22. RWHI knew the Debtors had no means by which to pay the loan since the  
3 Debtors' last financial statements showed a cash balance of less than \$300,000. *Id.* Over the next  
4 four weeks, the Debtors negotiated with several prospective lenders to either replace or supplement  
5 the existing debt, but RWHI did not allow that to happen. *Id.*, ¶ 23. Instead, RWHI agreed only to  
6 two one-week forbearances—one signed August 1, the other signed August 14—even though the  
7 Debtors told RWHI they needed two to three weeks to arrange financing. *Id.* Meanwhile, RWHI  
8 continued to make offers to purchase the Debtors. *Id.*

9 RWHI began sweeping cash from the Debtors' bank accounts on August 24, 2017. *Id.*,  
10 ¶ 24. RWHI knew the Debtors could not operate without cash, but it refused to stop sweeping the  
11 cash because it intended to force the Debtors to shut down or turn over their assets to RWHI. *Id.*  
12 RWHI's actions—in accelerating the loan, agreeing only to unworkable one-week forbearances,  
13 and sweeping the Debtors' bank accounts—were strictly for RWHI's own commercial advantage  
14 and were unjust, oppressive, and in bad faith. *Id.*, ¶ 25. Left with no funds and no other  
15 alternative, the Debtors informed RWHI that they intended to file for bankruptcy protection, and  
16 the parties negotiated an agreement whereby RWHI would be the stalking horse bidder in a  
17 bankruptcy sale. *Id.*, ¶ 26. Had RWHI not forced the Debtors into bankruptcy, the Debtors would  
18 have been able to negotiate refinancing of the loan or a sale of the Debtors' assets on terms more  
19 favorable than those realized in the bankruptcy auction. *Id.*, ¶ 28.

20 RWHI improperly used the acceleration and cash sweeping provisions of the Loan  
21 Agreement to further RWHI's own economic interests because RWHI was only interested in  
22 acquiring the Debtors' assets. *See id.*, ¶¶ 30-34. RWHI's actions forced the Debtors into  
23 bankruptcy. *Id.* In bankruptcy, the Debtors' assets were sold for a price that was less than the value  
24 of the assets before RWHI exercised these remedies. *Id.*

#### 25 IV. LEGAL STANDARDS

##### 26 A. Federal Rule of Civil Procedure Rule 8

27 Under Federal Rule of Civil Procedure 8, made applicable here by Federal Rule of  
28 Bankruptcy Procedure 7008, a complaint must include "a short and plain statement of the claim

1 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must "give the  
2 defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v.*  
3 *Twombly*, 550 U.S. 544, 545 (2007); *see also Eclectic Properties E., LLC v. Marcus & Millichap*  
4 *Co.*, 751 F.3d 990, 996 (9th Cir. 2014).

5 **B. Federal Rule of Civil Procedure Rule 12(b)(6)**

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), applicable here under  
7 Federal Rule of Bankruptcy Procedure 7012(b), challenges the sufficiency of the allegations set  
8 forth in the complaint. "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable  
9 legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v.*  
10 *Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica*  
11 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

12 In resolving a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in the  
13 light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. *Johnson*,  
14 534 F.3d at 1122; *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001). On the other hand, the court  
15 is not bound by conclusory statements, statements of law, and unwarranted inferences cast as  
16 factual allegations. *Twombly*, 550 U.S. at 555-57; *Clegg v. Cult Awareness Network*, 18 F.3d 752,  
17 754-55 (9th Cir. 1994).

18 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed  
19 factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'  
20 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
21 action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). "In practice, a complaint . . .  
22 must contain either direct or inferential allegations respecting all the material elements necessary to  
23 sustain recovery under some viable legal theory." *Id.* at 562 (emphasis added) (quoting *Car*  
24 *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

25 In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court elaborated on the *Twombly*  
26 standard as follows:

27 To survive a motion to dismiss, a complaint must contain sufficient factual  
28 matter, accepted as true, to state a claim to relief that is plausible on its  
face. A claim has facial plausibility when the plaintiff pleads factual



1 content that allows the court to draw the reasonable inference that the  
2 defendant is liable for the misconduct alleged. . . . Threadbare recitals of  
the elements of a cause of action, supported by mere conclusory  
statements, do not suffice.

3 *Id.* at 678 (citations and internal quotation marks omitted).

4 If dismissal is granted under Rule 12(b)(6), leave to amend should be allowed unless the  
5 pleading may not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122,  
6 1130 (9th Cir. 2000). If amendment would be futile, dismissal may be ordered with prejudice.  
7 *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

8 A complaint may be dismissed under Rule 12(b)(6) based on an affirmative defense "only if  
9 the defendant shows some obvious bar to securing relief on the face of the complaint." *ASARCO,*  
10 *LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014). "If, from the allegations of the  
11 complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues  
12 of fact, dismissal under Rule 12(b)(6) is improper." *Id.* (citing *Scott v. Kuhlmann*, 746 F.2d 1377,  
13 1378 (9th Cir.1984)).

## 14 V. DISCUSSION

### 15 A. Scope of Materials Considered

16 In considering a Rule 12(b)(6) motion, "courts must consider the complaint in its entirety,  
17 as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to  
18 dismiss, in particular, documents incorporated into the complaint by reference, and matters of  
19 which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,  
20 322 (2007) (citations omitted). "Certain written instruments attached to pleadings may be  
21 considered part of the pleading." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).  
22 "Even if a document is not attached to a complaint, it may be incorporated by reference into a  
23 complaint if the plaintiff refers extensively to the document or the document forms the basis of the  
24 plaintiff's claim." *Id.* The Court may consider such a document on which the complaint  
25 "necessarily relies" if: "(1) the complaint refers to the document; (2) the document is central to the  
26 plaintiff's claim; and (3) no party questions the authenticity of the document." *United States v.*  
27 *Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). "The defendant may offer such a  
28 document, and the district court may treat such a document as part of the complaint, and thus may

1 assume that its contents are true for purposes of a motion to dismiss under 12(b)(6)." *United States*  
2 *v. Ritchie*, 342 F.3d at 908.

3 Here, the Complaint refers extensively to the loan documents and revisions between the  
4 Debtors and Capital One, and the forbearance agreements between the Debtors and RWHI. Those  
5 documents are central to Plaintiff's claims. The Complaint defines "Loan Agreement" as the  
6 "Revolving Loan and Security Agreement, first entered as of November 28, 2014 (as later  
7 amended, the 'Loan Agreement')." Complaint, ¶ 11. The Complaint repeatedly references the  
8 "Loan Agreement" then makes the following allegations: (1) under the First Cause of Action:  
9 "Radians' actions as a lender to [Debtors] constituted improper use of the Loan Agreement's  
10 acceleration and sweeping provisions for Radians' own commercial advantage over the [Debtors],"  
11 *id.*, ¶ 31; (2) under the Second Cause of Action: "The Loan Agreement sold by Capital One to  
12 Radians Wareham Holding, Inc. included an implied covenant of good faith and fair dealing," *id.*,  
13 ¶ 36, and "Radians' actions deprived [Debtors] of the benefits of the Loan Agreement, improperly  
14 invoking the acceleration and sweeping provisions, and contrary to the standards of conduct  
15 established while Capital One held the loan, for Radians' own commercial advantage over  
16 [Debtors]," *id.*, ¶ 38; and (3) under the Third Cause of Action: Radians' wrongful actions include  
17 using the acceleration and sweeping provisions of the Loan Agreement to coerce unreasonable  
18 terms and other consideration from [Debtors]," *id.*, ¶ 43. The Complaint also alleges that RWHI  
19 would only agree to two "unworkable one-week forbearances," "one signed August 1st, the other  
20 signed August 14th." *Id.*, ¶¶ 23, 25. Plaintiff seeks to void the forbearance agreements based on  
21 duress, *see Opp.* at 18-19, and describes them as containing "unreasonable terms." Complaint,  
22 ¶ 43. Throughout briefing and extensive oral argument, no party has questioned the authenticity of  
23 the loan documents, revisions, or forbearance agreements. To the contrary, Plaintiff implicitly  
24 admits the authenticity of the documents by arguing that certain provisions were misused and  
25 others should be voided.

1 Thus, the Court has considered the following documents in ruling on the Motion to  
2 Dismiss:<sup>6</sup>

- 3 (a) Revolving Loan and Security Agreement made as of November 28, 2014, by and  
4 among Debtors and Capital One, N.A.<sup>7</sup>
- 5 (b) Second Amended and Restated Revolving Line of Credit Note in favor of Capital  
6 One, N.A. dated April 11, 2017, in the principal amount of \$8,000,000.00.<sup>8</sup>
- 7 (c) First Modification Agreement dated as of June 15, 2015, by and among Debtors and  
8 Capital One, N.A.<sup>9</sup>
- 9 (d) Second Modification Agreement dated as of March 16, 2016, by and among Debtors  
10 and Capital One, N.A.<sup>10</sup>
- 11 (e) Waiver and Third Modification Agreement dated as of November 28, 2016, by and  
12 among Debtors and Capital One, N.A.<sup>11</sup>
- 13 (f) Waiver and Fourth Modification Agreement dated as of February 23, 2017, by and  
14 among Debtors and Capital One, N.A.<sup>12</sup>
- 15 (g) Limited Waiver and Fifth Modification Agreement dated as of April 11, 2017, by  
16 and among Debtors and Capital One, N.A.<sup>13</sup>
- 17 (h) Sixth Modification Agreement dated as of May 10, 2017, by and among Debtors  
18 and Capital One, N.A.<sup>14</sup>

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17 <sup>6</sup> Each appears on the record in at least three places: (1) the Childress Decl., Adv. Dkt. 6 & 6-1;  
18 (2) the Greulich Decl., Case Dkt. 6; and (3) the RWHI Proof of Claim.

19 <sup>7</sup> (as later amended and modified, the "Loan Agreement"), Childress Decl., Adv. Dkt. 6 at 24;  
20 Greulich Decl., Case Dkt. 6 at 18; POC at 7.

21 <sup>8</sup> Childress Decl. at 74; Greulich Decl. at 68; POC at 56.

22 <sup>9</sup> Childress Decl. at 84; Greulich Decl. at 78; POC at 78.

23 <sup>10</sup> Childress Decl. at 89; Greulich Decl. at 83; POC at 83.

24 <sup>11</sup> Childress Decl. at 94; Greulich Decl. at 88; POC at 88.

25 <sup>12</sup> Childress Decl. at 102; Greulich Decl. at 96; POC at 96.

26 <sup>13</sup> Childress Decl. at 107; Greulich Decl. at 101; POC at 101.

27 <sup>14</sup> Childress Decl. at 127; Greulich Decl. at 121; POC at 112.

28 (Continued...)

- 1 (i) General Assignment and Assumption of Loan Documents made as of July 25, 2017,  
by Capital One, N.A., to and accepted by RWHI.<sup>15</sup>
- 2 (j) Forbearance and Modification Agreement dated August 1, 2017, by and among  
3 RWHI and Debtors.<sup>16</sup>
- 4 (k) Forbearance Agreement dated August 14, 2017, by and among RWHI and  
Debtors.<sup>17</sup>

5 **B. Governing Law**

6 The parties agree that the substantive law of Texas applies to the three state-law causes of  
7 action by virtue of a choice of law provision in the Loan Agreement. *See* Adv. Dkt. 6 at 57,  
8 Section 13.5. The Complaint alleges that the "Loan Agreement provided it was to be governed by  
9 the laws of the State of Texas (Section 13.[5])." Complaint, ¶ 1. Similarly, Defendants admit that  
10 "[t]he tort claims are governed by Texas law." MTD at 3 (citing Section 13.5 of the Loan  
11 Agreement). As for Plaintiff's objection to claim, bankruptcy law applies in the first instance,  
12 although determination of the objection may require the examination of state law. As for Plaintiff's  
13 claim for the recovery of an unauthorized postpetition transfer, bankruptcy law provides the rule of  
14 decision.

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18 <sup>15</sup> Childress Decl. at 134; Greulich Decl. at 128; POC at 118.

19 <sup>16</sup> This document is hereinafter referred to as the "August 1 Forbearance Agreement." *See* Childress  
20 Decl. at 142; Greulich Decl. at 136; POC at 125.

21 <sup>17</sup> This document is hereinafter referred to as the "August 14 Forbearance Agreement" and together  
22 with the August 1 Forbearance Agreement, the "Forbearance Agreements"). *See* Childress Decl. at  
23 153; Greulich Decl. at 147; POC at 147. There is confusion among the parties as to whether RWHI  
24 and the Debtors executed a third forbearance agreement. The Complaint alleges that "[t]wo one-  
25 week forbearances—one signed August 1st, the other signed August 14th—were all that [RWHI]  
26 was willing to accept," Complaint ¶ 23, but the Opposition states "the last of the relevant releases  
27 was executed on August 25, 2017." Opp. at 25. The Motion to Dismiss discusses a forbearance  
28 agreement dated August 30, 2017. Attached to the Childress Decl. at 164 and the Greulich Decl. at  
158 is a "Second Forbearance Agreement" dated August 25, 2017 but attached to the POC at 159 is  
a "Second Forbearance Agreement" dated August 30, 2017. The existence or effective date of a  
third forbearance agreement has no dispositive effect on the Court's ruling on the Motion to  
Dismiss.

(Continued...)

1           **C.       Dismissal of Safety Supply and Radians**

2           As a preliminary matter, Defendants argue that the Complaint should be dismissed as to  
3 Safety Supply and Radians because "RWHI undertook all of the allegedly improper actions," MTD  
4 at 14, and these two affiliates "did not participate in the purchase of the Subject Loan and are not  
5 parties to any agreement as to the Subject Loan," *id.* at 3.<sup>18</sup> In response, Plaintiff argues that all  
6 three Defendants "acted together, for the benefit of common ownership and under the orders of  
7 common management," and they should either be jointly and severally liable under a theory of  
8 civil conspiracy, or assigned proportionate liability based on each defendant's percentage of  
9 responsibility.<sup>19</sup> *Opp.* at 8.

10                       **1.       Civil Conspiracy**

11           As a threshold matter, the Court observes that Plaintiff's civil conspiracy theory of liability  
12 with respect to Safety Supply and Radians was raised for the first time in Plaintiff's opposition to  
13 the Motion to Dismiss (the "Opposition"). The Complaint itself does not use the term civil  
14 conspiracy, identify the elements of a civil conspiracy, or assert facts adequate to satisfy the  
15 elements of a civil conspiracy. Thus, the civil conspiracy theory asserted in Plaintiff's opposition  
16 derives from outside the Complaint and is not a proper defense to the inadequacy of the Complaint.  
17 *See Broam v. Bogan*, 320 F.3d 1023, 1026 n. 2. (9th Cir. 2003) ("In determining the propriety of a  
18 Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers,  
19 such as a memorandum in opposition to a defendant's motion to dismiss.") (quoting *Schneider v.*  
20 *Cal. Dep't. of Corr.*, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998)). Moreover, even if the Court  
21 assumes that Plaintiff attempted in some measure to plead a civil conspiracy, its allegations are  
22 woefully inadequate to the task.

23 \_\_\_\_\_  
24  
25 <sup>18</sup> Although Defendants raise this argument in the context of the claim for duress, the Complaint  
26 alleges all claims against all three Defendants, and the pleading deficiencies identified by  
27 Defendants apply to the entire Complaint.

28 <sup>19</sup> Plaintiff cites "Tex. Civ. Prac. & Rem. Code Ann. § 33.0139(a)-(b)" as the authority for  
assigning proportionate liability. Since there is no such section of the Texas Civil Practice and  
Remedies Code, the Court has considered the entire Chapter 33 of Title 2 of that Code.

1 Under Texas law, the elements of a civil conspiracy are: "(1) two or more persons; (2) an  
2 object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or  
3 more unlawful, overt acts; and (5) damages as a proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552,  
4 556 (Tex. 2005). Civil conspiracy is a derivative tort. *Tilton v. Marshall*, 925 S.W.2d 672, 681  
5 (Tex. 1996). "That is, a defendant's liability for conspiracy depends on participation in some  
6 underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable."  
7 *Hotze v. Miller*, 361 S.W.3d 707, 718 (Tex. App. 2012, pet. denied).<sup>20</sup> "There must be some act  
8 committed by one or more of the parties *to advance or pursue or to implement the agreement.*"  
9 *Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788, 796 (Tex. App. 1988, writ denied)  
10 (original emphasis), *disapproved of on other grounds, Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d  
11 716 (Tex. 1995).<sup>21</sup> The meeting of the minds must involve a specific intent "to accomplish an  
12 unlawful purpose or to accomplish a lawful purpose by unlawful means." *Juhl v. Airington*, 936  
13 S.W.2d 640, 644 (Tex. 1996) (quoting *Triplex Commc'ns, Inc.*, 900 S.W.2d at 719). "Merely  
14 proving a joint 'intent to engage in the conduct that resulted in the injury' is not sufficient to  
15 establish a cause of action for civil conspiracy." *Id.*; *see also Angel v. La Joya Indep. Sch. Dist.*,  
16 717 F. App'x 372, 380 (5th Cir. 2017) (under Texas law, "Plaintiffs could have stated a claim for  
17 civil conspiracy if they alleged a 'meeting of the minds' with respect to the reason for the adverse  
18 actions").

19 The Complaint alleges that Safety Supply is the parent company of RWHI and Radians,  
20 Complaint, ¶¶ 4-6, and "[a]s corporate members of the same privately-owned organization,  
21 [RWHI], Radians and Safety Supply Corporation acted under the same management and share  
22 \_\_\_\_\_

23 <sup>20</sup> "Civil conspiracy" came to be used to extend liability in tort beyond the active wrongdoer to  
24 those who have merely planned, assisted, or encouraged his acts." *Carroll v. Timmers Chevrolet,*  
25 *Inc.*, 592 S.W.2d 922, 925 (Tex.1979) (quoting W. PROSSER, HANDBOOK OF THE LAW OF  
26 TORTS § 46, at 293 (1971)).

27 <sup>21</sup> *See also* Comm. on Pattern Jury Charges, State Bar of Texas, *Texas Pattern Jury Charges: Civil*  
28 *Conspiracy*, PJC 109.1 (2014) ("One or more persons involved in the conspiracy must have  
performed some act or acts to further the conspiracy."); 15A C.J.S. Conspiracy § 6, *Overt Act*  
("civil conspiracy requires at least one overt act, committed by at least one conspirator, in  
furtherance of the conspiracy").

1 responsibility for each related entity's actions regarding the [Debtors]," *id.*, ¶ 13. The Complaint  
2 alleges that "[RWHI], through [Safety Supply], prepared to go public with the offer [to purchase  
3 the shares of ICPW NV]," *id.*, ¶ 15, and that Radians wired money to Capital One when RWHI  
4 purchased the Debtors' loan from Capital One, *id.*, ¶ 21.

5         These factual allegations do not satisfy the elements for a civil conspiracy under Texas law.  
6 First, the allegation that Safety Supply and Radians acted under the same management does not  
7 satisfy any element of a civil conspiracy. At best it suggests that RWHI may have directed its  
8 wholly owned subsidiaries to undertake certain actions for the benefit of RWHI, which actions  
9 were not themselves tortious. Second, the allegation that the three Defendants "share  
10 responsibility" for each other's actions is not a factual allegation. It is a legal conclusion, which  
11 the Court is not bound to accept as true on a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S.  
12 662, 678-79 (2009). Third, the Complaint does not allege any meeting of the minds between the  
13 three Defendants regarding a common objective or course of action, the substance of their  
14 agreement, or that it was made by each participant with a specific intent "to accomplish an  
15 unlawful purpose or to accomplish a lawful purpose by unlawful means."

16         The alleged fact that Safety Supply sought to purchase shares of ICPW NV arguably  
17 demonstrates that RWHI sought to use its wholly owned subsidiary to acquire the Debtors'  
18 business. It does not establish an agreement between the two entities to achieve any unlawful  
19 purpose or any lawful purpose by unlawful means. Likewise, the alleged fact that Radians wired  
20 the money used by RWHI to acquire the Debtors' loan from Capital One, demonstrates little more  
21 than that Radians facilitated the purchase of that loan on behalf of its wholly owned parent. It does  
22 not establish a meeting of the minds regarding either an unlawful purpose or a lawful purpose by  
23 unlawful means. As such, the Complaint fails to provide Defendants with "fair notice" of the civil  
24 conspiracy theory that was subsequently asserted in the Opposition or the "grounds upon which  
25 [that theory] rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

26         Notably, it is not clear under Texas law whether a parent can even conspire with its wholly  
27 owned subsidiary. *See Grizzle v. Texas Commerce Bank*, 38 S.W.3d 265, 284 (Tex. App. 2001),  
28 *rev'd in part on other grounds*, 96 S.W.3d 240 (Tex. 2002) (noting disagreement among Texas

1 courts). Some Texas courts have adopted a *per se* prohibition on civil conspiracy between a  
2 corporate parent and its subsidiaries, relying on *Copperweld Corporation v. Independence Tube*  
3 *Company*, 467 U.S. 752 (1984), a United States Supreme Court case interpreting a federal antitrust  
4 statute (the Sherman Act). *See, e.g., Atl. Richfield Co. v. Misty Prod., Inc.*, 820 S.W.2d 414, 420  
5 (Tex. App. 1991, writ denied); *Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 430 (Tex. App.  
6 1998, pet. denied) (citing *Atl. Richfield Co. v. Misty Prod., Inc.*, 820 S.W.2d at 420). Other courts  
7 have held that such a *per se* prohibition is "restricted to the antitrust context and [is] not applicable  
8 to common law conspiracies." *See, e.g., Atl. Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 447  
9 (Tex. App. 1993, writ denied); *Metro. Life Ins. Co. v. La Mansion Hotels & Resorts, Ltd.*, 762  
10 S.W.2d 646, 652 (Tex. App. 1988, writ dismissed) ("We are here concerned with an alleged  
11 conspiracy under common law theories. Under the common law, a parent corporation and its  
12 subsidiary are separate legal entities."). The Texas Supreme Court has yet to weigh in on the issue,  
13 and the two Texas federal courts to do so have reached contrary conclusions. *Compare ASARCO*  
14 *v. Ams. Mining Corp.*, 382 B.R. 49, 78-79 (S.D. Tex. 2007) (holding that Texas Supreme Court is  
15 likely to find that a parent and subsidiary *can* conspire with each other), *with Block v. Alpharma,*  
16 *Inc.*, Civil Action No. 3:02-CV-1077-N, 2004 U.S. Dist. LEXIS 31174 (N.D. Tex. Mar. 17, 2004)  
17 (opposite conclusion).

18 But the Court does not need to adjudicate this issue at this juncture. Because the Complaint  
19 does not identify civil conspiracy as a basis for liability against Safety Supply and Radians, and the  
20 Complaint does not plead facts that would put Defendants on notice that a civil conspiracy has  
21 been alleged, the Court need only rule that the civil conspiracy argument asserted in the  
22 Opposition is inadequate to remedy the Complaint.

## 23 **2. Proportionate Liability**

24 Chapter 33 of the Texas Civil Practices and Remedies Code provides a proportionate  
25 responsibility scheme that generally applies to all common law torts and certain statutory torts.  
26 Tex. Civ. Prac. & Rem. Code § 33.002; *see PEMEX Exploracion y Produccion v. Murphy Energy*  
27 *Corp.*, 923 F. Supp. 2d 961, 980 (S.D. Tex. 2013), *aff'd*, 595 Fed. App'x 445 (5th Cir. 2015).  
28 "[T]he statute requires the trier of fact to determine the percentage of responsibility of each



1 claimant, defendant, settling person, and responsible third party who has been designated in  
2 accordance with the statute." *Arceneaux v. Pinnacle Entm't, Inc.*, 523 S.W.3d 746, 748 (Ct. App.  
3 2017). The purpose of the statute is to "hold each party responsible only for the party's own  
4 conduct causing injury." *Id.* (internal quotations omitted). Although the Complaint alleges that  
5 Radians wired money to Capital One to acquire the loan, and Safety Supply prepared a share  
6 purchase offer, neither of these actions is itself tortious and therefore does not support apportioning  
7 liability to Safety Supply or Radians.

8 \* \* \*

9 Based on the foregoing, the Court will grant the Motion to Dismiss with respect to Safety  
10 Supply and Radians, but will grant Plaintiff leave to amend his complaint to allege facts that, if  
11 established, would show either (i) the existence of a civil conspiracy justifying the imposition of  
12 liability on Safety Supply and/or Radians for wrongful acts committed by RWHI, or (ii) tortious  
13 acts by Safety Supply and/or Radians that would substantiate an apportionment of liability to either  
14 or both of those entities.

15 **D. Defendants' Arguments That the Entire Action is Barred**

16 Defendants argue that Plaintiff is barred from bringing the Complaint in its entirety for two  
17 separate reasons. First, Defendants argue that the equity holders of ICPW-NV (a) have not  
18 suffered any direct injury that would confer standing on them to pursue any claim, and (b) under  
19 Texas law, they do not have standing to pursue a claim for injuries to either of the Debtors.  
20 Second, Defendants argue that the Debtors voluntarily released their claims against Defendants,  
21 both prepetition and postpetition. For this reason, Defendants argue, none of the claims asserted in  
22 the Complaint is an enforceable claim of the Estates. Each of these arguments is addressed in turn.

23 **1. Standing**

24 As noted, Plaintiff is the successor in interest to the Equity Committee. The beneficiaries of  
25 the trust for which Plaintiff serves as trustee are the former holders of the equity in ICPW-NV.  
26 Defendants rely on these facts to argue that Plaintiff does not have standing to pursue the claims  
27 asserted in the Complaint. Defendants argue that Plaintiff cannot have standing because the equity  
28 holders have not been directly injured by Defendants and do not otherwise have standing as equity

1 holders, under Texas law, to sue for damages to the corporation. But these arguments assume  
2 incorrectly that Plaintiff is asserting causes of action that originated with the equity holders  
3 themselves. To the contrary, the claims that Plaintiff is pursuing on behalf of the plan trust are  
4 claims of the Estates. *In re Spaulding Composites Co.*, 207 B.R. 899, 903 (B.A.P. 9th Cir. 1997).  
5 The Equity Committee was granted the right to pursue claims of the Estates under the Final DIP  
6 Order, and that right was transferred to Plaintiff pursuant to the Plan. That the ultimate beneficiary  
7 of any recoveries realized by Plaintiff are former equity holders of ICPW-NV is of no moment.

## 8 **2. Releases**

9 A release is an affirmative defense that must be raised in the answer or a responsive  
10 pleading. Fed. R. Civ. P. 8(b), (c); *see* Tex. R. Civ. P. 94. A complaint may be dismissed under  
11 Rule 12(b)(6) based on an affirmative defense "only if the defendant shows some obvious bar to  
12 securing relief on the face of the complaint." *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999,  
13 1004 (9th Cir. 2014). "If, from the allegations of the complaint as well as any judicially noticeable  
14 materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is  
15 improper." *Id.* (citing *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.1984)).

### 16 **a. Prepetition Releases**

17 Property of the bankruptcy estate includes "all legal or equitable interests of the debtor in  
18 property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The scope of section 541 is  
19 "broadly defined and includes causes of action." *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378,  
20 (B.A.P. 9th Cir. 1997) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9 (1983)).  
21 The nature of the property rights that become assets of an estate are defined by state law. *Id.* (citing  
22 *Butner v. United States*, 440 U.S. 48, 54 (1979)). Thus, if a cause of action is released by the  
23 debtor prepetition, it will not be a "legal or equitable interest of the debtor in property as of the  
24 commencement of the case." *See* 11 U.S.C. § 541(a)(1).

25 In Texas, a "release, valid on its face, until set aside, is a complete bar to any later action  
26 based on matters covered by the release." *Deer Creek Ltd. v. North Am. Mortgage Co.*, 792 S.W.  
27 2d 198, 203 (Tex. App. 1990, no writ) (citing *Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex. App.  
28

1 1978, writ ref'd n.r.e.<sup>22</sup>). To release a claim, a release provision must "mention" the claim. *D.R.*  
2 *Horton-Texas, Ltd. v. Savannah Props. Assocs., L.P.*, 416 S.W.3d 217, 226 (Tex. App. 2013, no  
3 pet.). "Although releases include claims existing at the time of execution, they may also include  
4 unknown claims and damages that develop in the future." *Id.* (citing *Keck, Mahin & Cate v. Nat'l*  
5 *Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 698 (Tex. 2000)).

6 Defendants contend that the claims asserted in the Complaint were released by the Debtors  
7 prior to the commencement of these cases and therefore never became assets of the Debtors'  
8 estates. Specifically, Defendants point to language in the prepetition Forbearance Agreements  
9 executed by the Debtors and RWHI, in which the Debtors (i) acknowledge that they have no  
10 defenses to the payment obligations under their prepetition loan, and (ii) release any claims they  
11 had against RWHI at the time they executed such agreements. The relevant language in the  
12 forbearance agreements reads as follows:

13 **6. Acknowledgement of Lack of Defenses.** [Debtors] acknowledge that  
14 as of the Effective Date each has no defense, counterclaim, offset, cross  
15 complaint, claim or demand of any kind or nature whatsoever  
16 (collectively, the "Borrower Claims") that can be asserted to reduce or  
17 eliminate all or any part of its liability to repay any of the Obligations to  
18 [RWHI] or seek affirmative relief for damages of any kind or nature from  
19 [RWHI], which Borrower Claims arise out of or are related to the Loan  
20 Documents or, more generally, [Debtors]' relationship with [RWHI]. To  
21 the extent that any such Borrower Claims exist as of the Effective Date,  
22 [Debtors] acknowledge and agree that they have been fully, forever and  
23 irrevocably released pursuant to Paragraph 14 hereto.

24 . . .

---

25 <sup>22</sup> Typically, a notation of "writ refused" indicates that the Texas Supreme Court has adopted the  
26 opinion as its own. *See* Tex. R. App. P. 56.1(c) ("If the Supreme Court determines—after a  
27 response has been filed or requested—that the court of appeals' judgment is correct and that the  
28 legal principles announced in the opinion are likewise correct, the Court will refuse the petition  
with the notation 'Refused.' The court of appeals' opinion in the case has the same precedential  
value as an opinion of the Supreme Court."). However, the "n.r.e." notation indicates the Supreme  
Court's dissatisfaction with some aspect of the appellate court's declaration of the law but not the  
result. *See* Tex. R. App. P. 483 (repealed Sept. 1, 1986) ("In all cases where the Supreme Court is  
not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the  
law, but is of the opinion that the application presents no error which requires reversal, the Court  
will deny the application with the notation 'Refused. No Reversible Error.'"). Former Texas  
Supreme Court Justice Ted Z. Robertson and Professor James W. Paulsen concluded that the "writ  
ref'd n.r.e." notation was "in every sense a decision on the merits of the appeal." Hon. Ted Z.  
Robertson & James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 Tex. Tech L. Rev.  
1, 26 (1986).

14. **Release of Lender.**

(a) Except with respect to [RWHI's] obligations set forth in this Agreement, in consideration of the agreements of [RWHI] contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, [Debtors], and each of their respective successors, assigns, and other legal representatives, hereby absolutely, unconditionally and irrevocably releases, remises and forever discharges [RWHI], and its successors and assigns, and its present and former shareholders, affiliates, subsidiaries, divisions, predecessors, directors, officers, attorneys, employees, agents and other representatives ([RWHI] and all such other Persons being hereinafter referred to collectively as the "Releasees" and individually as a "Releasee"), of and from all demands, actions, causes of action, suits, covenants, contracts, controversies, agreements, promises, sums of money, accounts, bills, reckonings, damages and any and all other claims, counterclaims, defenses, rights of set off, demands and liabilities whatsoever (individually, a "Claim" and collectively, "Claims") of every name and nature, known or unknown, suspected or unsuspected, both at law and in equity, which such [Debtors] or any of their respective heirs, successors, assigns, or other legal representatives may now or hereafter own, hold, have or claim to have against the Releasees or any of them for, upon, or by reason of any circumstance, action, cause or thing whatsoever which arises at any time on or prior to the day and date of this Agreement, including, without limitation, for or on account of, or in relation to, or in any way in connection with any of the Loan Documents or transactions thereunder or related thereto.

August 1 Forbearance Agreement at ¶¶ 6, 14; August 14 Forbearance Agreement at ¶¶ 6, 12 (the "Prepetition Releases").

Although the releases are broad and would appear to cover the claims presented in the Complaint, Plaintiff argues that the Prepetition Releases do not bar this action because (i) the Prepetition Releases are not binding on Plaintiff as a matter of bankruptcy policy and/or because Plaintiff was not a party to the releases; (ii) Plaintiff's claims post-date the Prepetition Releases; and (iii) the Prepetition Releases are voidable based on coercion and duress.<sup>23</sup>

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<sup>23</sup> In his Opposition, Plaintiff alleges for the first time that the Prepetition Releases should be avoided as fraudulent transfers pursuant to Bankruptcy Code section 548. Opp. at 19. The Complaint does not allege fraudulent transfers or make any reference to avoidance of a prepetition transfer under the Bankruptcy Code. Therefore, the Complaint does not "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Accordingly, the fraudulent transfer theory cannot be used to overcome Defendants' Motion to Dismiss.

1                                   **i.           Bankruptcy Policy**

2           First, Plaintiff argues that the Prepetition Releases do not apply to the claims asserted in the  
3 Complaint as a matter of bankruptcy policy. Opp. at 17. The Court disagrees. Plaintiff mistakenly  
4 relies on several cases applying the general principle that because the Bankruptcy Code seeks to  
5 provide a "fresh start" to "the honest but unfortunate debtor," *Grogan v. Garner*, 498 U.S. 279,  
6 286-287 (1991), "[i]t is against public policy for a debtor to waive the prepetition protection of the  
7 Bankruptcy Code." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002);  
8 *see Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011,  
9 1026 (9th Cir. 2012) (reaffirming *Huang*); *In re Cole*, 226 B.R. 647, 651-654 & nn. 6-7 (B.A.P. 9th  
10 Cir. 1998) (citing sixteen cases for the proposition that "prepetition waivers of the bankruptcy  
11 discharge . . . [and] other bankruptcy benefits . . . are . . . unenforceable").<sup>24</sup>

12           In *Huang*, the debtor entered into a detailed prepetition settlement agreement in which he  
13 agreed he would not file for bankruptcy protection and that, if he did, the debt evidenced by the  
14 settlement agreement would not be dischargeable under Bankruptcy Code section 523(a)(2)(A).  
15 275 F.3d at 1176-77. The debtor nonetheless sought bankruptcy protection. The Ninth Circuit  
16 refused to enforce the terms of the agreement because "[i]t is against public policy for a debtor to  
17 waive the prepetition protection of the Bankruptcy Code." *Id.* at 1177. The court explained that  
18 the "prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely  
19 require their debtors to waive [bankruptcy protection]." *Id.*; *see also In re Pease*, 195 B.R. 431,  
20 434-35 (Bankr. D. Neb. 1996) ("Any attempt by a creditor in a private pre-bankruptcy agreement  
21 to opt out of the collective consequences of a debtor's future bankruptcy filing is generally  
22 unenforceable. The Bankruptcy Code preempts the private right to contract around its essential  
23 provisions.").

24 \_\_\_\_\_  
25 <sup>24</sup> Similarly, the Bankruptcy Code renders unenforceable restrictions on a debtor's assignment of  
26 property interests or conditions that would result in forfeiture of a debtor's prepetition rights. *See*  
27 11 U.S.C. § 541(c)(1) ("an interest of the debtor in property becomes property of the estate . . .  
28 notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy  
law . . . (A) that restricts or conditions transfer of such interest by the debtor; or (B) that is  
conditioned on the . . . financial condition of the debtor . . . and that effects . . . a forfeiture . . . of  
the debtor's interest in property.").

1           The Ninth Circuit reiterated this policy statement in *Thorpe*, in which the court of appeals  
2 held that the debtor's transfer of claims to a plan trust pursuant to Bankruptcy Code section 524(g)  
3 did not give rise to a claim for damages based on a prepetition agreement promising not to assign  
4 those claims. 671 F.3d at 1026 (citing *In re Huang*, 275 F.3d at 1177). This is because  
5 enforcement of the prepetition agreement in this manner—although the agreement did not mention  
6 specific rights in bankruptcy—would effectively waive the rights of a debtor to use the trust and  
7 injunction mechanism under Bankruptcy Code section 524(g). It also would violate the provisions  
8 of Bankruptcy Code section 541(c) which abrogate prepetition anti-assignment restrictions that  
9 would limit a debtor's right to transfer its interests in bankruptcy. *See* 671 F.3d at 1026-27.

10           But these cases are distinguishable—as are the other cases cited by Plaintiff. These courts  
11 declined to enforce either (i) a prepetition waiver by the debtor of specifically-identified rights or  
12 protections under the Bankruptcy Code, or (ii) a prepetition waiver by the debtor of non-  
13 bankruptcy rights which, if enforced, would effectively deny the debtor rights or protections  
14 created by the Bankruptcy Code. None of these cases involve a debtor, its successor, or a third  
15 party being permitted to pursue nonbankruptcy claims that were released prepetition by the debtor  
16 in accordance with state law.<sup>25</sup>

17           Here, the Prepetition Releases do not purport to affect the Debtors' rights under the  
18 Bankruptcy Code (e.g., preempting the automatic stay, granting a blocking right, precluding a  
19 bankruptcy trustee's avoidance powers, etc.), but instead release prepetition state law causes of

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20  
21 <sup>25</sup>*See* Opposition citing *In re Jeff Benfield Nursery, Inc.*, 565 B.R. 603, 608-09 (Bankr. W.D. N.C.  
22 2017) (prepetition waiver of protection of the automatic stay under 11 U.S.C. § 362 was per se  
23 unenforceable); *In re Intervention Energy Holdings*, 553 B.R. 258, 263 (Bankr. D. Del. 2015)  
24 (creditor holding one common unit in debtor limited liability company that issued a total of  
25 22,000,001 common units could not enforce its blocking right because "prepetition agreements  
26 purporting to interfere with a debtor's rights under the Bankruptcy Code are not enforceable"); *In re*  
27 *South East Financial Assocs., Inc.*, 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997) (where debtor  
28 entered into prepetition stipulation providing that any breach of the stipulation would constitute  
"bad faith" as to warrant dismissal under 11 U.S.C. § 1112(b), the provision was not enforceable  
against unsecured creditors who were not bound by the stipulation and would be detrimentally  
impacted by dismissal); *In re Atrium High Point Ltd. Partnership*, 189 B.R. 599, 607-08 (Bankr.  
M.D.N.C. 1995) (prepetition waiver of protection of the automatic stay under 11 U.S.C. § 362  
could not bind third parties who were not parties to the agreement); *In re Tru Block Concrete*  
*Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1982) (debtor's prepetition agreement to waive  
protections of bankruptcy was "wholly void as against public policy").

1 action, such as the claims asserted in the Complaint for duress, breach of the covenant of good faith  
2 and fair dealing, and unjust enrichment claims. The prepetition release of these state-law claims  
3 may have had an economic impact on the Debtors and ultimately the Estates (when they later came  
4 into existence). But the prepetition release of those claims is not equivalent to the *express* waiver  
5 of statutory rights and protections under the Bankruptcy Code or even the *effective* waiver of such  
6 rights and protections. Instead, the releases resulted in certain assets (i.e., state law causes of  
7 action) not becoming part of the Estates. These facts do not raise the same policy concerns at issue  
8 in *In re Huang* and *In re Thorpe Insulation, Inc.*

9         The case on which Plaintiff most heavily relies actually *supports* the Court's analysis. *See*  
10 *Minnesota Corn Processors, Inc. v. American Sweeteners, Inc. (In re American Sweeteners, Inc.)*,  
11 248 B.R. 271 (Bankr. E.D. Pa. 2000). The debtor and a creditor executed a prepetition release  
12 pursuant to which the debtor released all claims against the creditor for any conduct occurring  
13 before the date of the settlement agreement. *Id.* at 275. In the context of a dispute over discovery,  
14 the court held that the prepetition release was a "complete defense to any action on the claims  
15 released," but that the release was not effective to preclude a claim of equitable subordination under  
16 Bankruptcy Code section 510(c). *Id.* at 275-78.<sup>26</sup> In other words, the court gave effect to the case  
17 law that prohibits a prepetition waiver of rights and protections conferred by the Bankruptcy Code,  
18 but otherwise enforced the prepetition waiver of claims. Here, enforcement of the Prepetition  
19 Waivers effectuates only a prepetition waiver of state law claims and does not deprive any party of  
20 any rights or protections conferred by the Bankruptcy Code.

21         Finally, irrespective of whether the Prepetition Releases are enforceable, Plaintiff contends  
22 that he should not be bound by those releases because he was not a party to them. The Court finds  
23 this argument unpersuasive. Having made clear that Plaintiff is only pursuing claims that were  
24 property of the Estates, see Opp. at 20, Plaintiff cannot now argue that these claims are free of any  
25 defenses to which they were subject when they were still in the hands of the Debtors or the Estates.

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26  
27 <sup>26</sup> This is contrary to Plaintiff's representation in his Opposition that the *American Sweeteners* court  
28 held that a "mutual release binds [the] debtor, but not objecting third parties or non-parties." *See*  
Opp. at 16.

1 Plaintiff effectively has stepped into the shoes of the Debtors and the Estates and takes these claims  
2 how he finds them. *See* 11 U.S.C. § 541(a)(1) (estate includes only those "legal and equitable  
3 interests of the debtor in property as of the commencement of the case."). In this instance, it  
4 appears the claims were waived and released before they ever became property of the Estates.  
5 Plaintiff cannot avoid this reality.

6 **ii. Time at Which the Claims Accrued**

7 Second, Plaintiff argues that the Prepetition Releases do not bar his claims because the  
8 Debtors' injuries "occurred upon the closing of the sale of [the Debtors'] assets, but no earlier than  
9 upon execution and effectiveness of the [asset purchase agreement among the Debtors and RWHI],  
10 on or about the Petition Date." *Opp.* at 19. In other words, Plaintiff argues that the Debtors'  
11 injuries manifested themselves *after* the Prepetition Releases were executed. Defendants argue that  
12 Plaintiff's claims fall within the coverage of the Prepetition Releases because the allegedly  
13 wrongful acts giving rise to Plaintiff's claims occurred before the Prepetition Releases were  
14 executed. The Court agrees with the Defendants.

15 In Texas, "a cause of action generally accrues at the time when facts come into existence  
16 authorizing a claimant to seek a judicial remedy." *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d  
17 826, 828 (Tex. 1990). A plaintiff's cause of action accrues "when a wrongful act causes some legal  
18 injury, even if the fact of injury is not discovered until later, and even if all resulting damages have  
19 not yet occurred." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). "The fact that damage may continue  
20 to occur for an extended period after denial does not prevent limitations from starting to run."  
21 *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828.<sup>27</sup>

22 Here, the Complaint alleges that RWHI's wrongful actions included "accelerating the loan,  
23 agreeing only to unworkable one-week forbearances and sweeping [the Debtors'] bank accounts,"  
24 Complaint, ¶ 25. According to the Complaint, these actions first occurred *before* the Prepetition

25 \_\_\_\_\_  
26 <sup>27</sup> Under Texas law, a statute of limitations may be tolled when the plaintiff is under continuing  
27 duress that prevents it from timely asserting its claim. *See Pierce v. Haverlah's Estate*, 428 S.W.2d  
28 422, 426 (Tex. App. 1968, writ ref'd n.r.e.). But even then, "the action [still] *accrues* when the  
wrongful act occurs. . . ." *Whatley v. Nat'l Bank of Commerce*, 555 S.W.2d 500, 506 (Tex. App.  
1977, no writ) (emphasis added).



1 Releases were executed. The Complaint alleges that these actions injured the Debtors by  
2 "depriv[ing the Debtors] of the benefits of the Loan Agreement," *id.*, ¶ 38; by "coerc[ing]  
3 unreasonable terms and other consideration from [the Debtors], including a pre-payment fee and  
4 the Break-Up Fee," ¶ 43; and by providing RWHI with a commercial advantage over the Debtors.  
5 *Id.*, ¶¶ 31, 38. Under Texas law, regardless of whether additional injuries manifested themselves  
6 later, the claims based on RWHI's pre-release conduct accrued before the Prepetition Releases were  
7 executed.

8 Even if this were not the case, Texas law permits a release to be valid against unknown  
9 claims and damages that develop in the future. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of*  
10 *Pittsburgh, Pa.*, 20 S.W.3d 692, 698 (Tex. 2000) ("Although releases often consider claims existing  
11 at the time of execution, a valid release may encompass unknown claims and damages that develop  
12 in the future."). Here, the Debtors released Defendants

13 from all . . . claims . . . of every name and nature, known or unknown, suspected or  
14 unsuspected, which [the Debtors] . . . may now or hereafter own, hold, have or claim  
15 to have against the [Defendants] . . . by reason of any circumstance [or] action, . . .  
including, without limitation, . . . in any way in connection with any of the Loan  
Documents or transactions thereunder or related thereto.

16 *See* August 1 Forbearance Agreement at ¶ 14; August 14 Forbearance Agreement at ¶ 12. This  
17 language is broad enough to cover any unknown claims and injuries caused by RWHI that were not  
18 yet known.

19 Plaintiff attempts to support its argument with an unreported Texas appellate decision  
20 relating to a claim to recover illegal or invalid fees or taxes. *See Texas Valla Real Estate I, Inc. v.*  
21 *City of Houston*, No. 14-10-00496-CV, Tex App. LEXIS 7722, \*1 (Tex. App. Sept. 27, 2011). In  
22 that case, the City of Houston refused to release a utility lien on real property after Texas Valla  
23 purchased the property at a foreclosure sale. *Id.* Texas Valla brought several claims, including  
24 recovery of payment of a lien paid under duress. *Id.* at \*3. The court determined that Texas Valla's  
25 claim was time-barred because it accrued "at the time the payment of the fee or tax [was] made  
26 'because that is when the injury occur[red].'" *Id.* at \*14 (quoting *Lowenberg v. City of Dallas*, 168  
27 S.W.3d 800, 801 (Tex. 2005)).

1 The case, however, is not persuasive on the point for which it is cited. The holding applies  
2 narrowly to "a claim to recover illegal or invalid fees or taxes." This limitation is all the more  
3 apparent when the case is read in conjunction with the case on which it relies, *Lowenberg v. City of*  
4 *Dallas*, 168 S.W.3d 800. In *Lowenberg*, the Texas Supreme Court began its decision as follows:  
5 "The question presented is *when a claim accrues for refund of an illegal fee*. The court of appeals  
6 held it accrues when the fee is enacted rather than when it is paid, distinguishing a recent opinion  
7 by this Court to the contrary. We disagree, and thus reverse." *Id.* (emphasis added). Neither *Texas*  
8 *Valla Real Estate I* or *Lowenberg* deals with the time at which a tort claim arises. Texas law is  
9 clear that it arises when the wrongful conduct occurs and the injury first results, regardless of  
10 whether additional injuries arise from that conduct.

11 **iii. Duress as a Defense to the Prepetition Releases**

12 Finally, Plaintiff argues that the Prepetition Releases are voidable because they were  
13 obtained as a result of Defendants' duress upon the Debtors. Defendants contend that there was no  
14 duress and the Prepetition Releases are valid.

15 A release obtained by duress is voidable. *Jeanes v. Hamby*, 685 S.W.2d 695, 702 (Tex.  
16 App. 1985, writ ref'd n.r.e.) (citing *Mitchell v. C.C. Sanitation Co.*, 430 S.W.2d 933, 936 (Tex.  
17 App. 1968, writ ref'd n.r.e.); *Deer Creek Ltd. v. North Am. Mortgage Co.*, 792 S.W. 2d 198, 203  
18 (Tex. App. 1990, no writ); *see also Wright v. Sydow*, 173 S.W.3d 534, 543-44 (Tex. App. 2004,  
19 pet. denied) ("Generally, when one coerces another to execute a contract by taking undue or unjust  
20 advantage of the person's economic necessity or distress, the contract may be invalid or  
21 unenforceable. This legal theory is called economic duress."). "The elements of duress are the  
22 same for both contract and tort." 49 Tex. Prac., Contract Law § 2.35, *Duress, coercion, and undue*  
23 *influence—Elements of duress*.

24 As described in Section E below, Plaintiff has not adequately pled the tort of economic  
25 duress under Texas law. But even if the Court assumes for the sake of argument that Plaintiff had  
26 done so, and that the Prepetition Releases were a result of such duress, the Court would not be able  
27 rule on the enforceability of the Prepetition Releases at this stage of the litigation. To succeed in  
28 demonstrating that a release (or any other defense) entitles Defendants to immediate dismissal,

1 Defendants would have to show from the face of the Complaint that there is an "*obvious* bar to  
2 securing relief." *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014)  
3 (emphasis added).

4 The allegations in the Complaint show that there is a *potential* bar to relief but not an  
5 obvious one. The Complaint raises substantial factual questions. The Prepetition Releases suggest  
6 that Plaintiff's claims might be barred, but that will not be the case if Plaintiff adequately pleads—  
7 and ultimately proves—that the Prepetition Releases were obtained by duress. Because the Court  
8 is limited on a motion to dismiss to evaluating the pleadings and any documents referenced or  
9 incorporated therein, and because the duress issue cannot be determined until there is an adequate  
10 factual record, the Court cannot conclude at this time whether the Prepetition Releases bar  
11 Plaintiff's claims. The Motion to Dismiss on this basis will be denied.

### 12 **3. The Postpetition Release**

13 Defendants assert that this entire action is barred by the release (the "DIP Release")  
14 contained in section 11.13 of the Debtor in Possession Credit Agreement between the Debtors and  
15 RWHI (the "DIP Agreement"), Case Dkt. 6 at 229, as approved by the Final DIP Order, Case  
16 Dkt. 87. Plaintiff asserts that the DIP Release could not serve as a bar to the Estates' claims until  
17 expiration of the 60-day "Lookback Period" provided for in the Final DIP Order (the "Lookback  
18 Provision"), Case Dkt. 87, ¶¶ kk. The DIP Release provides in relevant part as follows:

19 Release. [The Debtors] hereby acknowledge and agree that, as of the date  
20 hereof: (a) [the Debtors] have no claim except as may be provided under  
21 this Agreement or the Stalking Horse Agreement or cause of action  
22 against [RWHI] . . . ; (b) [the Debtors have] no offset rights, counterclaims  
23 or defenses of any kind against any of their obligations, indebtedness or  
24 liabilities to [RWHI]; and (c) [RWHI] has heretofore properly performed  
25 and satisfied in a timely manner all of their obligations to the [the  
26 Debtors]. [RWHI] wishes (and [the Debtors] agree) to eliminate any  
27 possibility that any past conditions, acts, omissions, events, circumstances  
28 or matters would impair or otherwise adversely affect any of the rights,  
interests, contracts, collateral security or remedies of [RWHI]. Therefore,  
[the Debtors] on each of its own behalf and on behalf of each of its  
respective successors and assigns, hereby waives, releases and discharges  
[RWHI] . . . from any and all claims, demands, actions or causes of action  
on or before the date hereof and arising out of or in any way relating to  
this Agreement, the Loan Documents and any other documents,  
instruments, agreements, dealings or other matters connected with this  
Agreement, including, without limitation, all known and unknown matters,  
claims, transactions or things occurring on or prior to the date hereof

1 relating to this Agreement. The waivers, releases, and discharges  
2 contained in this paragraph shall be effective regardless of any other event  
3 that may occur or not occur prior to, or on or after the date hereof.

4 Case Dkt. 6 at 229. This broad release, if approved by the Court, would seem to preclude the  
5 Debtors, their successors, and their assigns from pursuing virtually any action against Defendants.

6 Accordingly, both the Equity Committee and the Creditors' Committee objected on multiple  
7 grounds to the motion to approve the DIP Agreement, Case Dkt. 7. The Equity Committee  
8 requested that "any final [DIP] order incorporate additional language to clarify that the Equity  
9 Committee and creditors may pursue claims and causes of action in their individual capacity and on  
10 behalf of the estate to challenge the validity, perfection or enforceability of Radians' prepetition  
11 liens." Case Dkt. 86 at 6. The Equity Committee also requested that "any waiver by the estates  
12 should not be effective until the Equity Committee and the Creditors' Committee have [had]  
13 sufficient time to investigate and challenge Radians' liens, if necessary." *Id.* at 10. The Creditors'  
14 Committee also objected to the DIP Release contained in section 11.13 of the DIP Agreement. *See*  
15 Case Dkt. 85 at 9-10. The Final DIP Order, of which all parties approved as to form, states that the  
16 parties resolved both Committees' objections, and the objections were withdrawn. Case Dkt. 87  
17 at 4.

18 The Lookback Provision at the end of the Final DIP Order provides for a 60-day lookback  
19 period in which the Committees would be permitted to pursue an action against RWHI regarding  
20 the amount, validity, or enforceability of the prepetition loan, or to bring any other claim that they  
21 have, individually or on behalf of the Estates. The language is tailored to address the Equity  
22 Committee's objection:

23 kk. On or before the date that is sixty (60) days from the date of the  
24 entry of this Final Financing Order (the "Lookback Period"), the Official  
25 Committee of Unsecured Creditors and the Official Committee of Equity  
26 Holders *shall have standing individually and on behalf of Debtors' Estates*  
27 to object to, challenge, or seek to avoid the amount, validity, or  
28 enforceability of the Pre-Bankruptcy Secured Debt (or any portion  
thereof) or any of the liens and security interests created under the Pre-  
Bankruptcy Secured Debt and *to bring any other claim that they have*  
*against Radians, individually or on behalf of the Debtors' Estates*  
(separately and collectively, a "Challenge"). If no such action, objection  
or other Challenge is commenced by either the Official Committee of  
Unsecured Creditors or the Official Committee of Equity Holders within  
the Lookback Period, the Pre-Bankruptcy Secured Debt will be deemed

1 and adjudicated finally and indefeasibly as valid and enforceable, the liens  
2 and security interests created under the Pre-Bankruptcy Secured Debt in  
3 the Collateral securing the Pre-Bankruptcy Secured Debt will be deemed  
4 and adjudicated finally and indefeasibly as valid, enforceable and  
5 perfected liens and security interests in that Collateral, and any affirmative  
6 claim(s) or cause(s) of action of any kind against Radians with respect to  
7 the Pre-Bankruptcy Secured Debt, or otherwise, and the liens and security  
8 interests securing the Pre-Bankruptcy Secured Debt, or any payment  
9 received by Radians will be forever barred.

10 *Id.* at 19 (emphasis added). The DIP Release also bars the Debtors' right to pursue an action  
11 against RWHI regarding the amount, validity, or enforceability of the prepetition loan:

12 As provided in this Final Financing Order, the Debtors have waived and  
13 released, and shall be forever barred from asserting, any right to object to,  
14 challenge or seek to avoid, the amount, validity, or enforceability of the  
15 Pre-Bankruptcy Secured Debt or the liens and security interests in the  
16 Collateral securing the Pre-Bankruptcy Secured Debt.

17 *Id.* Defendants now argue that the DIP Release bars this entire action, notwithstanding the  
18 Lookback Provision in the Final DIP Order.

19 Defendants are wrong. First, the provisions of the Final DIP Order take precedence over  
20 the DIP Agreement, which contains the DIP Release. *See* Final DIP Order at 8 ("In the event of a  
21 conflict between the Loan Documents and this Final Financing Order, this Final Financing Order  
22 shall control."). Second, the Final DIP Order makes clear that, although the *Debtors* were waiving  
23 their rights against RWHI, the ability to bring a claim against RWHI on behalf of the *Estates* was  
24 preserved for a period of 60 days from the date of entry of the Final DIP Order. *Id.* In other words,  
25 the DIP Release is subject to the Lookback Provision. This is what the Court understood and  
26 intended when it approved the Final DIP Order, as revised to address and resolve the objections of  
27 the Committee.<sup>28</sup> The Final DIP Order was entered on October 6, 2017, and the Equity Committee  
28 timely filed the Complaint 60 days later, on December 5, 2017.

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29 <sup>28</sup> There is an inherent contradiction with Defendants' interpretation of the DIP Release and the  
30 Lookback Provision. If, as Defendants contend, the DIP Release was intended to immediately and  
31 unconditionally release both the Debtors' and the Estates' claims and causes of action against  
32 RWHI, and the Lookback Provision further released both the Debtors' and the Estates' ability to  
33 challenge the amount, validity, or enforceability of the prepetition loan, then there would be  
34 nothing remaining to assign to the Committees. In other words, the Court would be granting the  
35 Committees standing on behalf of the Estates to pursue certain actions against RWHI, while  
36 simultaneously ruling that any such action is barred by the DIP Release.

1           Moreover, Courts routinely approve provisions like the Lookback Provision where the  
2 claims released by a debtor are preserved for another entity to pursue on behalf of the debtor's  
3 estate. *See In re Adelpia Commc'ns Corp.*, 330 B.R. 364, 383-84 (Bankr. S.D.N.Y. 2005) ("It was  
4 necessary (and typical) for the Debtors to accede to such a provision, and for the Court to approve  
5 it. Provisions of that character are common in DIP financing orders in chapter 11 cases (at least  
6 where prepetition lenders are asked to make concessions to permit the postpetition financing), but  
7 bankruptcy courts normally approve them only where some entity—typically a creditors'  
8 committee—has the ability to assert those claims.").<sup>29</sup>

9           Accordingly, the Court rejects the argument that the DIP Release bars this action. The  
10 Motion to Dismiss based on the Postpetition Release will be denied.

11           **E.       First Cause of Action: Duress**

12           Duress can arise as a defense to a contract claim, *see e.g., Wright v. Sydow*, 173 S.W.3d at  
13 543-44, or a tort. *See Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App. 1985)  
14 (citing *Housing Authority of City of Dallas v. Hubbell*, 325 S.W.2d 880, 902 (Tex. App. 1959, writ  
15 *ref'd n.r.e.*)). Duress of property is also referred to as "economic duress." *See id.* Under Texas  
16 law, economic duress consists of the following elements: (1) the defendant threatened to do some  
17 act that it had no legal right to do; (2) the threat was of such a nature as to destroy the free agency

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18  
19           <sup>29</sup> The *Adelpia* court went on to say, "If the Court were then to deprive the Creditors' Committee  
20 of standing, that would undercut one of the critical premises upon which those limitations were  
21 approved in these chapter 11 cases. It would deprive the estates of the opportunity to pursue claims  
22 that, whether or not they ultimately will be meritorious, plainly deserve to be pursued." *Id.* at 384.  
The court also cited the S.D.N.Y. Gen. Order No. M-274, "Guidelines for Financing Requests,"  
"Extraordinary Provisions," ¶ 3, which provides as follows:

23           The Court will not consider as extraordinary the debtor's stipulation as to validity,  
24 perfection, enforceability, priority and non-avoidability of a prepetition lender's claim and  
liens, and the lack of any defense thereto, provided that:

25           (a) the Official Committee of Unsecured Creditors (the "Committee"), appointed under  
26 section 1102 of the Bankruptcy Code, has a minimum of 60 days (or such longer period  
27 as the Committee may obtain for cause shown before the expiration of such period)  
from the date of the order approving the appointment of counsel for the Committee to  
28 investigate the facts and bring any appropriate proceedings as representative of the  
estate . . . .

1 of the threatened party; (3) the threat overcame the threatened party's free will and caused it to do  
2 what it otherwise would not have done and was not legally bound to do; (4) the restraint caused by  
3 such threat was imminent; and (5) the threatened party had no present means of protection. *In re*  
4 *Frank Motor Co.*, 361 S.W.3d 628, 632 (Tex. 2012) (citing *Flameout Design & Fabrication, Inc. v.*  
5 *Pennzoil Caspian Corp.*, 994 S.W.2d 830, 837 (Tex. App. 1999, no pet.)); *see also Dale v. Simon*,  
6 267 S.W. 467, 470 (Tex. Comm'n App. 1924, judgment adopted).

7 Duress "may be evidenced by forcing a victim to choose between distasteful and costly  
8 situations, i.e., bow to duress or face bankruptcy, loss of credit rating, or loss of profits from a  
9 venture." *Trinh v. Lang Van Bui*, No. 14-11-00442-CV, 2012 WL 5378112, at \*7 n.7 (Tex. App.  
10 Nov. 1, 2012) (quoting *State Nat. Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d 661, 686 (Tex.  
11 App. 1984, writ granted (Mar. 6, 1985), judgment set aside and cause dismissed (Mar. 6, 1985)).

12 "Duress must be shown from the acts or conduct of the party accused of duress, not the emotions of  
13 the purported victim." *McCord v. Goode*, 308 S.W.3d 409, 413 (Tex. App. 2010, no pet.).

14 Generally, what constitutes duress is a question of law, but whether duress exists under a particular  
15 set of circumstances is a fact question. *Wright v. Sydow*, 173 S.W.3d at 544. A plaintiff that  
16 prevails on a duress claim is entitled to actual pecuniary damages proximately caused by the  
17 defendant. *See, e.g., Housing Authority of City of Dallas v. Hubbell*, 325 S.W.2d at 905-909.

18 The gravamen of the Complaint is that Defendants improperly used the acceleration and  
19 cash sweeping provisions of the Loan Agreement to further Defendants' own economic interests  
20 because Defendants were interested only in acquiring the Debtors' assets. *See* Complaint, ¶¶ 30-34.  
21 The Complaint alleges that Defendants' actions "forced" the Debtors into bankruptcy, which led to  
22 a sale of the Debtors' assets for a price that was less than the value of the assets before the sequence  
23 of events was set into motion by the acceleration.

24 Defendants argue that Plaintiff has not stated a claim for duress because: (1) the Complaint  
25 does not allege that RWHI *threatened* to perform an act it had no legal right to perform and instead  
26 simply *exercised* its rights under the Loan Agreement; (2) RWHI was not responsible for the  
27 Debtors' underlying financial distress because that distress was caused by the Debtors and their  
28 former officers; and (3) the commencement of a bankruptcy case and the administration of that

1 case—which the Debtors took advantage of—is a statutory *protection* from the sort of duress  
2 alleged by Plaintiff, not a form of damage.

3  
4 **1. No Threat Alleged To Act Without A Legal  
Right To Do So**

5 Defendants argue that the Complaint is inadequate because it fails to allege that (a) RWHI  
6 made a threat against the Debtors, (b) to do something that RWHI did not have a legal right to do.  
7 Reply at 13. The Court agrees that these and other elements of the cause of action have not been  
8 adequately pled. For the reasons set forth below, however, the Court will permit Plaintiff to  
9 replead this cause of action.

10 The Complaint alleges that (i) RWHI's counsel sent a letter to the Debtors declaring a  
11 default, accelerating the loan and demanding immediate payment of the entire balance loan balance  
12 the day after acquiring the loan, even though RWHI knew the Debtors would be unable to pay the  
13 loan, Complaint, ¶ 22, (ii) RWHI thereafter entered into two one-week forbearance agreements  
14 while simultaneously making offers to purchase the Debtors' assets, *id.*, ¶ 23, and (iii) RWHI  
15 thereafter began sweeping the Debtors' bank accounts with the intention of "forcing ICPW to shut  
16 down [sic], and turn over its assets to Radians." *Id.*, ¶ 24. Plaintiff alleges that the acceleration of  
17 the debt, the brevity of the forbearances, and the subsequent cash sweep "were strictly for Radians'  
18 own commercial advantage" and "unjust, oppressive and in bad faith." *Id.*, ¶ 25.

19 Although the Complaint describes a series of actions undertaken by RWHI purportedly in  
20 the exercise of its rights under the Loan Agreement, and ascribes a bad faith intent to those actions,  
21 the Complaint does not specifically identify a *threat* by RWHI to do *anything*. Black's Law  
22 Dictionary defines "threat" in relevant part as "a declaration, express or implied, of an intent to  
23 inflict loss or pain on another." Black's Law Dictionary (10th ed. 2014). The Complaint describes  
24 the transmittal of a letter by RWHI one day after its acquisition of the loan, declaring a default and  
25 accelerating the loan balance. The Complaint also describes the subsequent exercise of RWHI's  
26 cash sweep remedy under the Loan Agreement. None of these actions is alleged to have contained  
27 or constituted a threat by RWHI to exercise a remedy or take some other action. Each of these  
28 actions was itself the exercise of a remedy of the Loan Agreement. *See, e.g., Nance v. Resolution*



1 *Trust Corp.*, 803 S.W.2d 323, 333 (Tex. App. 1990), writ denied per curiam, 813 S.W.2d 154 (Tex.  
2 1991) ("There is no evidence that Nance's will was overcome by any threat made by Alamo.  
3 Indeed, there is no evidence of any threat at all, and the only action of which Nance complains . . .  
4 was specifically authorized by the terms of the contract.").

5 Even if a threat were alleged, the Complaint fails to identify the action that was threatened  
6 or demonstrate that RWHI did not have a legal right to undertake the threatened action. There are  
7 no allegations that the Debtors were *not* in default or that the Loan Agreement did *not* provide the  
8 remedies exercised by RWHI. Instead, Plaintiff argues that the acceleration and cash sweep were  
9 not proper because they were not undertaken in good faith. To support this argument, Plaintiff  
10 relies on the Ninth Circuit's decision in *Brown v. AVE MCO Investment Corp.*, 603 F.2d 1367 (9th  
11 Cir. 1979) (construing Texas law), which applied the predecessor to Texas Business and  
12 Commercial Code section 1.309. Section 1.309 provides in relevant part:

13 A term providing that one party or that party's successor in interest may  
14 accelerate payment or performance or require collateral or additional  
15 collateral "at will" or when the party "deems itself insecure," or words of  
16 similar import, means that the party has power to do so only if that party in  
good faith believes that the prospect of payment or performance is  
impaired. The burden of establishing lack of good faith is on the party  
against which the power has been exercised.

17 Tex. Bus. & Com. Code § 1.309 (2017); see also Tex. Bus. & Comm. Code § 1.208 (West 1984)  
18 (repealed 2003).<sup>30</sup> In *Brown*, the Ninth Circuit held that when a security agreement permits a  
19 lender to accelerate a loan if the borrower leases the collateral to a third party, and the lender

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20 <sup>30</sup> The Loan Agreement provides that the Texas version of the Uniform Commercial Code governs  
21 the security interests thereunder. See Loan Agreement at 16, § 3.2. That statute is contained in title  
22 1 of the Texas Business and Commerce Code. The predecessor to section 1.309 applicable in  
*Brown* was section 1.208, which provided as follows:

23 A term providing that one party or his successor in interest may accelerate payment  
24 or performance or require collateral or additional collateral "at will" or "when he  
25 deems himself insecure" or in words of similar import shall be construed to mean  
26 that he believes that the prospect of payment or performance is impaired. The  
burden of establishing lack of good faith is on the party against whom the power has  
been exercised.

27 Tex. Bus. & Comm. Code section 1.208 (West 1984) (repealed 2003).

28 (Continued...)

1 accelerates for that reason, the propriety of the acceleration nevertheless depends on the good faith  
2 of the lender, as articulated in the statute. *Brown*, 603 F.2d at 1368-1380 (reversing jury verdict  
3 based on instructions that did not incorporate the predecessor to § 1.309 and related equitable  
4 principles).

5 Defendants also rely on *State Nat. Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d 661,  
6 683-88 (Tex. App. 1984, writ granted (Mar. 6, 1985), judgment set aside and cause dismissed (Mar.  
7 6, 1985)) ("*Farah*").<sup>31</sup> In *Farah*, the Texas Court of Appeals upheld a jury verdict finding, *inter*  
8 *alia*, a lender liable for duress because it threatened to declare a default and accelerate the debt if  
9 the borrower reappointed a prior chief executive officer of the borrower to that position. The court  
10 observed that even though the lender had a contractual right to declare a default and accelerate  
11 under a change in control provision in the loan documents, the lender was entitled to do so only if  
12 the lender had a good faith belief that its security was about to be impaired. *See Id.* at 684-85  
13 (citing *Brown* and former Tex. Bus. & Com. Code § 1.208). The lender was not entitled to use its  
14 acceleration right offensively and for its own commercial advantage.

15 These cases, however, do not remedy Plaintiff's duress claim. Even if the Court assumes  
16 for the sake of argument that RWHI's default declaration and debt acceleration were undertaken in  
17 bad faith, the Complaint does not allege that RWHI ever *threatened* to exercise these remedies.  
18 RWHI just exercised them. The present circumstances are materially different than those presented  
19 in *Farah*, where the lender threatened to declare a default and accelerate the note if the borrower  
20 did not accede to the lender's demands. And they are even farther afield of *Brown*, in which the  
21 Ninth Circuit held that the acceleration clause at issue was subject to the good faith requirement  
22

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23  
24 <sup>31</sup> After *Farah* was appealed to the Texas Supreme Court, the judgment was vacated pursuant to the  
25 parties' "joint motion to dismiss the entire case as settled." *See* William E. Hartsfield,  
26 *1 Investigating Employee Conduct* § 4:41 n.2 "Economic Duress" (2018); Michael T. Madison,  
27 Jeffrey R. Dwyer, Steven W. Bender, *2 Law of Real Estate Financing* § 14:15 "Duress" (2017).  
28 Although both sides cite to this case, neither side addresses its precedential value, if any, given that  
the matter was settled, and the judgment vacated. Because the Court's decision does not depend on  
*Farah*, it is not necessary to adjudicate this issue. In any future proceedings, however, the parties  
should be cognizant of the issue and be prepared with legal authority demonstrating the extent of  
*Farah's* precedential value, if any.

1 under the Texas Uniform Commercial Code but was not asked to address the requirements of a  
2 claim for duress under Texas law.

3           Notwithstanding the foregoing analysis, the Court is not persuaded that repleading the  
4 duress claim is futile and will grant Plaintiff leave to do so. Based on the facts alleged in the  
5 Complaint, it is at least plausible that RWHI's letter declaring a default and accelerating the debt  
6 under the Loan Agreement was an implicit threat by RWHI to exercise other remedies or take other  
7 actions against the Debtors. Plaintiff may be able to state a claim for duress under Texas law, if  
8 Plaintiff can allege that (1) the letter constituted a threat by RWHI to take action that it did not have  
9 a legal right to take; (2) the threat was of such a nature as to destroy the free agency of the Debtors;  
10 (3) the threat overcame the threatened party's free will and caused it to do what it otherwise would  
11 not have done and was not legally bound to do; (4) the restraint caused by such threat was  
12 imminent; and (5) the threatened party had no present means of protection.

13           To be clear, the Court is not prejudging these issues. The Court does not know if facts and  
14 law exist to substantiate such allegations. For instance, if RWHI made an implicit threat to  
15 exercise remedies other than acceleration under the Loan Agreement, it is not clear whether the  
16 exercise of such a remedy is subject to the same good faith requirement as acceleration. If Plaintiff  
17 determines to file an amended Complaint alleging the "threat" for purposes of the duress analysis  
18 was a threat to exercise the cash sweep or any other remedy, Plaintiff should be prepared to  
19 demonstrate why RWHI did not have a legal right to exercise that remedy under section 1.309  
20 and/or otherwise applicable Texas law.

21           Further, Plaintiff will need to allege facts that specifically address and satisfy *all* of the  
22 elements of a claim for duress under Texas law. The Complaint largely elides over those elements.  
23 For instance, the Complaint describes facts suggesting that RWHI acted in bad faith and for  
24 motives unrelated to enforcing the Loan Agreement as a creditor. The Complaint further alleges  
25 that the Debtors were harmed by RWHI's conduct. But the Complaint does not adequately allege  
26 that RWHI "destroy[ed] the free agency "of the Debtors, or "overcame the [Debtors'] free will and  
27 caused [them] to do what [they] otherwise would not have done and was not legally bound to do."  
28

1 The closest Plaintiff comes is to allege that RWHI's conduct "forced" the Debtors to file  
2 bankruptcy. But the term "forced" does not necessarily mean to destroy the free agency or  
3 overcome the free will of another party—a very specific standard articulated in the Texas case law.  
4 The term "forced" may mean merely "done or produced with effort, exertion, or pressure."  
5 Merriam Webster's Collegiate Dictionary (10th ed. 1996) at 455. It is not clear from the allegations  
6 in the Complaint that RWHI destroyed the Debtors' free agency and overcame their free will—  
7 rather than simply adding to the existing pressures facing the Debtors and/or hastening the filing of  
8 their bankruptcy cases. If Plaintiff intends to replead the duress cause of action, Plaintiff should  
9 consider and address the applicable standard under Texas law and plead facts sufficient to satisfy  
10 that standard, if they exist.

## 11 2. Responsibility for Financial Distress

12 Defendants argue that Plaintiff cannot state a claim for duress because Defendants were not  
13 responsible for the Debtors' underlying financial distress.<sup>32</sup> They argue that the Debtors' financial  
14 distress was a result of the Debtors' and their former officers' conduct, which they allegedly  
15 concealed by inflating revenue figures, *see* Complaint, ¶¶ 16, 19. Defendants argue further that the  
16 existence of a different adversary proceeding establishes that Defendants could not have caused the  
17 Debtors' financial distress or the bankruptcy filing. *See* Reply at 21 n.12.

18 Some Texas courts have held that a party cannot be liable for a duress claim unless the  
19 party "was responsible for [the] claimant's financial distress." *See First Texas Sav. Ass'n of Dallas*  
20 *v. Dicker Ctr., Inc.*, 631 S.W.2d 179, 185-86 (Tex. App. 1982, no writ); *Simpson v. MBank Dallas,*  
21 *N.A.*, 724 S.W.2d 102, 109 (Tex. App. 1987, writ ref'd n.r.e.) (relying on *First Texas Sav. Ass'n of*  
22 *Dallas v. Dicker Ctr., Inc.*, 631 S.W.2d at 185-86); *Deer Creek Ltd. v. North Am. Mortgage Co.*,

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23  
24 <sup>32</sup> Although Defendants refer to this as the "causation" element of duress, *see* MTD at 13, 18-19,  
25 causation for purposes of duress asks whether the defendant's actions contributed substantially to  
26 the plaintiff doing what it otherwise would not have done and was not legally bound to do. *See*  
27 *Sudan v. Sudan*, 145 S.W.3d 280, 287 (Tex. App. 2004), *rev'd on other grounds*, 199 S.W.3d 291  
28 (Tex. 2006) ("The test for causation, i.e., whether the duress contributes substantially to the  
claimant's decision to assent, is subjective, considering all surrounding circumstances, such as the  
background and relationship of the parties and the emotional condition of the party claiming  
duress.") (citing Restatement (Second) of Contracts § 175 cmt. c (Am. Law Inst. 1981)).

1 792 S.W. 2d 198, 203 (Tex. App. 1990, no writ) (relying on *Simpson v. MBank Dallas, N.A.*, 724  
2 S.W.2d at 109). Other courts have narrowed the principle to apply only when a party alleges that  
3 its preexisting financial condition was the reason it submitted to duress. See *State Nat. Bank of El*  
4 *Paso v. Farah Mfg. Co.*, 678 S.W.2d at 687 ("The *First Texas* case [631 S.W.2d at 185] and those  
5 like it are clearly distinguishable. FMC's claim of duress does not rest upon its pre-existing  
6 financial condition as the basis for Farah and other board members having submitted to the lenders'  
7 threats. It rests primarily upon the acts and conduct of the lenders and the ramifications carried by  
8 their threats. Since FMC's pre-existing financial condition is not relevant to its cause of action for  
9 duress, [the lenders' contention] is without merit."). Still other courts have simply declined to treat  
10 this as a required element of duress. See *Sudan v. Sudan*, 145 S.W.3d 280, 286 n. 9 (Tex. App.  
11 2004), *rev'd on other grounds*, 199 S.W.3d 291 (Tex. 2006). The *Sudan* court could "find no Texas  
12 Supreme Court opinion recognizing [responsibility for a duress claimant's financial distress] as a  
13 separate element [of duress]." *Id.* After quoting the portion of *First Texas* from which this rule  
14 was derived, the *Sudan* court concluded that "because the Texas Supreme Court has never adopted  
15 any such requirement, and because we do not agree that it even follows from the quoted sentence of  
16 [17] C.J.S. [Contracts, § 177 (1963)], we decline to treat it as a required element of the defense of  
17 duress." *Id.*

18         The Motion to Dismiss cannot be granted on this basis under any of the standards by which  
19 Texas courts assess financial distress in the context of duress. Under the *Farah* application of the  
20 rule, Defendants need only be responsible for the Debtors' preexisting financial distress if Plaintiff  
21 has alleged that the Debtors' preexisting financial condition was the reason they submitted to  
22 duress. This is not the case. The Complaint alleges that the Debtors were forced to file for  
23 bankruptcy and surrender their assets as a result of RWHI's acceleration of the loan and sweeping  
24 of the Debtors' bank accounts. Complaint, ¶¶ 22-28. The Complaint does not rely on the Debtors'  
25 preexisting financial condition as a basis for the duress claim; it relies strictly on RWHI's actions  
26 that allegedly forced the Debtors into bankruptcy.

27         But even if financial distress is a required element of duress, as *First Texas* treated it, the  
28 Complaint sufficiently alleges RWHI's responsibility for the Debtors' financial distress. The

1 Complaint alleges that (i) RWHI accelerated the loan and demanded payment of approximately  
2 \$3.7 million even though RWHI knew the Debtors had a cash balance of less than \$300,000,  
3 Complaint, ¶ 22; (ii) the Debtors were negotiating with a number of other prospective lenders, but  
4 RWHI refused to allow the Debtors the time to arrange refinancing, *id.*, ¶ 23; (iii) RWHI began  
5 sweeping the Debtors' bank accounts even though RWHI knew the Debtors could not operate  
6 without such cash, *id.*, ¶ 24; and (iv) this forced the Debtors to file for bankruptcy and surrender  
7 their assets, *id.*, ¶¶ 26-28. These allegations, accepted as true, plausibly establish that RWHI's  
8 actions resulted in financial distress to the Debtors. The Defendants argue that the Debtors were  
9 already under financial distress, and, implicitly, that RWHI's actions did not worsen the Debtors'  
10 situation or accelerate its need for bankruptcy protection. But this is a Motion to Dismiss and the  
11 Defendants' argument is essentially a factual one. The Defendants' version of the facts cannot be  
12 determined on the pleadings.

### 13 3. Protection Through the Bankruptcy Court

14 Defendants argue that Plaintiff cannot state a claim for duress because the Debtors always  
15 had the option to seek the protections of bankruptcy:

16 Throughout the period from July 26, 2017 until September 1, 2017 and  
17 beyond, the [the Debtors] had experienced counsel representing the  
18 corporations. As is clear from the filing of the Bankruptcy Cases, the [the  
Debtors] had the ability to seek the protection of the United States  
Bankruptcy Court at any time

19 MTD at 19. There are two flaws with Defendants' argument. First, the Debtors' bankruptcy forms  
20 the basis of Plaintiff's claim for duress. The Complaint alleges that RWHI improperly used the  
21 acceleration and cash sweeping provisions to force the Debtors into bankruptcy, ¶¶ 31-32, and in so  
22 doing, prevented the Debtors from obtaining out-of-court financing or otherwise engaging in  
23 strategic transactions on terms more favorable than those achieved in bankruptcy, *id.*, ¶ 33. *See id.*,  
24 ¶ 28. Thus, even if Debtors' bankruptcy filing provided the Debtors some form of protection, the  
25 Complaint alleges that the Debtors nevertheless were harmed by the bankruptcy process. In other  
26 words, Plaintiff is alleging that the Debtors were worse off because the Defendants' alleged duress  
27 caused the Debtors to go through a bankruptcy process that they otherwise would not have had to  
28 go through. Texas law clearly contemplates that compelling an entity to resort to bankruptcy may

1 itself be compensable injury. *See State Nat. Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d at 686  
2 ("Economic duress . . . may be evidenced by forcing a victim to choose between distasteful and  
3 costly situations, i.e., bow to duress or face bankruptcy, loss of credit rating, or loss of profits from  
4 a venture.").

5 Second, to the extent Defendants are arguing that the Debtors could have and should have  
6 sought bankruptcy protection sooner, that issue simply cannot be determined on the pleadings. The  
7 Complaint alleges that the parties negotiated from the time RWHI declared a default to the time it  
8 began sweeping the Debtors' bank accounts—during which time RWHI continued to make  
9 purchase offers to the Debtors. Complaint, ¶¶ 23-24. Without considering the facts and  
10 circumstances surrounding the parties' behavior prepetition, it would be impossible to determine  
11 whether the Debtors could have sought bankruptcy protection sooner than they did. This argument  
12 is simply not supported by the facts pled in the Complaint.

13 \* \* \*

14 For the reasons set forth in Section E.1 above, the Court will grant the Motion to Dismiss  
15 with respect to the First Cause of Action: Duress, with leave to amend.

16 **F. Second Cause of Action: Breach of Covenant of Good Faith and Fair Dealing**

17 The Complaint alleges that the Loan Agreement "included an implied covenant of good  
18 faith and fair dealing" that prohibited each party from acting in a way that would destroy or injure  
19 the other party's right to receive the benefits of the contract, Complaint, ¶¶ 36-37, and that RWHI  
20 breached that duty by enforcing the acceleration and cash sweep provisions of the Loan Agreement  
21 in a manner that was unjust, oppressive, and designed to further RWHI's own economic interests at  
22 the expense of the Debtors, *id.*, ¶ 38. Defendants contend that these allegations do not amount to a  
23 standalone cause of action.

24 Texas common law does not recognize an implied duty of good faith and fair dealing—  
25 breach of which constitutes a tort—in every contract or business transaction. *Formosa Plastics*  
26 *Corp. v. Predidio Eng'rs & Contrs.*, 960 S.W. 2d 41, 52 (Tex. 1998); *English v. Fischer*, 660 S.W.  
27 2d 521, 522 (Tex. 1983). "Texas courts have carved out exceptions for certain 'special  
28 relationships' such as between insurers and insured, principal and agent, joint venturers and

1 partners. *Cockrell v. Republic Mortg. Ins. Co.*, 817 S.W.2d 106, 116 (Tex. App. 1991) at 11 (citing  
2 *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W. 2d 165, 167 (Tex. 1987) and other authority).  
3 These "special relationships" do *not* include the relationship between a lender and a borrower.  
4 *Cockrell v. Republic Mortg. Inc. Co.*, 817 S.W.2d at 116; *Nance v. Resolution Trust Corp.*, 803  
5 S.W.2d at 333; *Georgetown Assoc. Ltd. V. Home Fed. Sav. And Loan Ass'n*, 795 S.W. 2d 252, 255  
6 (Tex. App. 1990), *writ dismissed w.o.j.*; *Victoria Bank & Trust Co.* 779 S.W. 2d 893, 902 (Tex.  
7 App. 1989), *rev'd on other grounds* 811 S.W. 2d 931 (1991).

8 "Absent an *Arnold* 'special relationship,' the duty to act in good faith is contractual in nature  
9 and its breach does not amount to an independent tort." *Adolph Coors Co. v. Rodriguez*, 780  
10 S.W.2d 477, 481 (Tex. App. 1989), *no writ*, (no duty of good faith and fair dealing in supplier-  
11 distributor relationship) [hereinafter "*Coors*"]; *Lumpkin v. H & C Comms., Inc.*, 755 S.W. 2d 538,  
12 540 (Tex. App. 1988), *writ denied*, (no duty of good faith and fair dealing in an employer-  
13 employee relationship).

14 The contractual duty of good faith in a commercial setting has been codified at Texas  
15 Business and Commerce Code section 1.304. Tex. Bus. & Comm. Code § 1.304 (2017). This  
16 statute provides: "Every contract or duty within this title imposes an obligation of good faith in its  
17 performance and enforcement." *Id.* Applying the nearly identical predecessor to section 1.304,<sup>33</sup>  
18 the Texas Court of Appeals explained as follows:

19 The duty of good faith and fair dealing is aimed at making effective the  
20 agreement's promises. It defines other duties which grow out of specific contract  
21 terms and obligations. Therefore, in order to be actionable as a breach of contract  
under [former section 1.304], bad faith conduct must relate to some aspect of  
performance under the terms of the contract.

22 *Coors*, 780 S.W. 2d at 481 (citations omitted). Further, "The agreement made by the parties and  
23 embodied in the contract itself cannot be varied by an implied covenant of good faith and fair  
24 dealing." *Id.* at 482 (citing *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.E. 2d 944, 947 (Tex.  
25

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26 <sup>33</sup> See Tex. Bus. & Comm. Code § 1.203 (West 1984) (repealed 2003) ("Every contract or duty  
27 within this title imposes an obligation of good faith in its performance or enforcement.") The only  
28 textual difference apparent to the Court is the change from "performance *or* enforcement" in the  
repealed statute to "performance *and* enforcement" in the current statute.



1 1984)). At most, it gives rise to claim for breach of contract. *See Central Sav. And Loan Ass'n v.*  
2 *Stemmons Northwest Bank, N.A.*, 848 S.W.2d at 239 (citing *Adolph Coors Co. v. Rodriguez*, 780  
3 S.W.2d at 481-82) ("A breach of this implied duty under the code gives rise only to a cause of  
4 action for breach of contract.")).<sup>34</sup> Thus, the enforcement of a contractual provision in accordance  
5 with its terms, but otherwise in bad faith, is not itself a tort.

6 Here, the Plaintiff alleges that RWHI enforced the acceleration and cash sweep provisions  
7 of the Loan Agreement in bad faith, i.e., for the purpose of leveraging the Debtors to sell RWHI its  
8 business. Plaintiff argues that this violates the specific duty in section 1.309 of the Texas Business  
9 and Commerce Code not to exercise an acceleration clause or certain other enforcement provisions  
10 unless the RWHI believed in good faith that the prospect of payment or performance was impaired.  
11 Plaintiff also argues that this violates RWHI's more general duty under section 1.304 to act in good  
12 faith when performing and enforcing the Loan Agreement. Although not express, the Complaint  
13 appears to treat this cause of action as one sounding in tort. But there is no allegation that RWHI  
14 and the Debtors had any of the relationships that Texas law recognizes as a "special relationship"  
15 giving rise to potential tort liability for breach of the duty of good faith. To the contrary, the

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17  
18 <sup>34</sup> *See also* Tex. Bus. & Comm. Code § 1.304 cmt. n.1. The text of that comment provides in relevant part:

19 This section sets forth a basic principle running throughout the Uniform  
20 Commercial Code. The principle is that in commercial transactions good  
21 faith is required in the performance and enforcement of all agreements or  
22 duties. While this duty is explicitly stated in some provisions of the  
23 Uniform Commercial Code, the applicability of the duty is broader than  
24 merely these situations and applies generally, as stated in this section, to  
25 the performance or enforcement of every contract or duty within this  
26 Act. . . . *This section does not support an independent cause of action for  
27 failure to perform or enforce in good faith. Rather, this section means  
28 that a failure to perform or enforce, in good faith, a specific duty or  
obligation under the contract, constitutes a breach of that contract or  
makes unavailable, under the particular circumstances, a remedial right  
or power. This distinction makes it clear that the doctrine of good faith  
merely directs a court towards interpreting contracts within the  
commercial context in which they are created, performed, and enforced,  
and does not create a separate duty of fairness and reasonableness which  
can be independently breached.*

*Id.* (emphasis added)

1 Complaint alleges that the contractual relationship between the Debtors and RWHI was that of  
2 lender and borrower under the Loan Agreement.

3 Accordingly, to the extent Plaintiff is alleging a tort for breach of the covenant of good  
4 faith and fair dealing under the Loan Agreement, the Motion to Dismiss will be granted with  
5 prejudice. Under the circumstances alleged, such a tort does not exist under Texas law and  
6 repleading would be futile. However, to the extent Plaintiff is asserting a breach of contract claim  
7 based on RWHI's alleged breaches of the implied duty of good faith and fair dealing, the Motion  
8 will be granted with leave to amend. If the Plaintiff elects to replead this claim, he should be sure  
9 to allege all of the elements of such a claim and allege facts to support those elements. In  
10 particular, Plaintiff should pay special attention to the issue of damages and identify those damages  
11 it alleges are compensable as a result of the breach of contract.

12 **G. Third Cause of Action: Unjust Enrichment**

13 The Complaint alleges that (a) "wrongful actions include using the acceleration and  
14 sweeping provisions of the Loan Agreement to coerce unreasonable terms and other consideration  
15 from [the Debtors], including a pre-payment fee and the Break-Up Fee," Complaint, ¶ 43, (b) "[b]y  
16 receiving such payments, [RWHI] was unjustly enriched, and the Debtors' estates were unjustly  
17 damaged, *id.*, ¶ 44, and (c) "[RWHI] should return such payment to the Debtors' estates, *id.*, ¶ 45.  
18 In its Opposition, the Plaintiff says the "third cause of action seeks return of the pre-payment fee  
19 and Break-up Fee on unjust enrichment grounds." Opp. at 14.

20 The asset purchase agreement among RWHI and the Debtors (the "APA") provided that  
21 RWHI would receive a breakup fee of \$500,000 (the "Breakup Fee") if RWHI was not the winning  
22 bidder in an auction for the Debtors' assets or if the Debtors proceeded with a plan of  
23 reorganization. *See* Greulich Decl. at 271-72. On September 28, 2017, the Court entered an order  
24 approving the form of the APA and the bidding procedures (the "Bidding Procedures Order").  
25 Case Dkt. 71. On November 3, 2017, the Court entered an order approving the sale of substantially  
26 all the Debtors' assets (the "Sale Order"). Case Dkt. 177. The Court made the following findings  
27 in the Bidding Procedures Order:  
28

1 D. The \$500,000 break-up fee proposed to be paid to [RWHI] in the  
2 event of a successful overbid (the "Breakup Fee") is reasonable and  
3 appropriate under the circumstances of these cases, is in the best interests  
4 of these bankruptcy estates, and, under the circumstances of these cases, is  
5 the best option currently available to the Debtors to enable the Debtors to  
6 (i) attract and retain the [RWHI] bid, (ii) establish a bid standard or  
7 minimum for other bidders to follow, and (iii) attract additional bidders.  
8 [RWHI] was not willing to serve as the stalking horse bidder without the  
9 payment of the \$500,000 Breakup Fee.

10 H. There is no other buyer who is in a position at this time to sign a  
11 binding sale agreement at [RWHI's] proposed purchase price, agree to a  
12 lower break-up fee than [RWHI] is requiring, and provide the Debtors the  
13 necessary post-bankruptcy financing to enable the Debtors to operate their  
14 business in the ordinary course pending the Auction.

15 Case Dkt. 71, ¶¶ D, H. In the Sale Order, the Court explicitly ordered the escrow agent for the sale  
16 of the Debtors' assets to pay RWHI the Breakup Fee. *See* Case Dkt. 177, ¶ 11.

17 The prepayment fee referred to in the Complaint was a result of the August 1 Forbearance  
18 Agreement negotiated by the parties prepetition. The August 1 Forbearance Agreement modified  
19 the Loan Agreement to provide RWHI with a prepayment fee of \$120,000 if the loan was repaid in  
20 conjunction with financing or an asset sale to a party other than RWHI (the "Prepayment Fee").  
21 *See* August 1 Forbearance Agreement at 3-4, § 7. Unlike the Breakup Fee, the Prepayment Fee  
22 was never expressly approved by the Court.

23 Plaintiff's argument that the Estates should recover the Breakup Fee is an impermissible  
24 collateral attack on a final order of a federal court. The Bidding Procedures Order and the Sale  
25 Order became final orders no later than November 3, 2017, when the Sale Order was entered. *See*  
26 *Bullard v. Blue Hills Bank*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1686, 1692 (2015) ("Congress has long provided  
27 that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete  
28 disputes within the larger case."); *Bonham v. Compton (In re Bonham)*, 229 F.3d 750, 761 (9th Cir.  
2000) (bankruptcy court order is final and appealable where it resolves and seriously affects  
substantive rights and finally determines the discrete issue to which it is addressed). The deadline  
to appeal the Bidding Procedures Order and the Sale Order was no later than November 17, 2017,  
14 days after the Sale Order was entered. *See* Fed. R. Bankr. P. 8002(a); 28 U.S.C. § 158(c)(2).  
There was no appeal of either order, and their finality is therefore not subject to challenge. A final  
order of a federal court may not be collaterally attacked. *Alakozai v. Citizens Equity First Credit*

1 *Union (In re Alakozai)*, 499 B.R. 698, 704 (B.A.P. 9th Cir. 2013 (citing *Watts v. Pinckney*, 752  
2 F.2d 406, 410 (9th Cir. 1985), *Heritage Pac. Fin. LLC v. Machuca (In re Machuca)*, 483 B.R. 726,  
3 733 (B.A.P. 9th Cir. 2012), and *Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R.  
4 721, 731 (B.A.P. 9th Cir. 2008)). Therefore, Plaintiff cannot now challenge—under the guise of an  
5 unjust enrichment claim—the Bidding Procedures Order, the Sale Order, or the findings made in  
6 those orders in order to recover the Breakup Fee.

7         As to both the Prepayment Fee and the Breakup Fee, the unjust enrichment claim also fails  
8 because the parties' dispute was covered by a valid, express contract. Unjust enrichment is "an  
9 equitable principle holding that one who receives benefits unjustly should make restitution for  
10 those benefits." *Villareal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App. 2004, pet.  
11 denied). "A party may recover under a theory of unjust enrichment when one party has obtained a  
12 benefit from another by fraud, duress, or the taking of an undue advantage." *First Union Nat'l*  
13 *Bank v. Richmond Capital Partners I, L.P.*, 168 S.W.3d 917, 931 (Tex. App. 2005), *aff'd*, 168  
14 S.W.3d 917 (Tex. 2005). But the doctrine of unjust enrichment "applies the principles of  
15 restitution to disputes which are not governed by a contract between the contending parties." *Id.*  
16 The policy is rooted in contract theory:

17                     Unjust enrichment claims are based on quasi-contract and are predicated  
18                     on the absence of an express contract controlling the circumstances.  
19                     Generally, when a valid, express contract covers the subject matter of the  
20                     parties' dispute, there can be no recovery under a quasi-contract theory  
21                     because parties should be bound by their express agreements.

22 *Id.* (internal citations omitted).

23         Plaintiff argues that he has a claim for unjust enrichment because RWHI obtained certain  
24 benefits from the Debtors by duress, namely the Prepayment Fee and the Breakup Fee. Opp. at 14.  
25 At oral argument, Plaintiff contended that there was no valid, express contract controlling the  
26 circumstances here because the Complaint alleges that the Forbearance Agreements were obtained  
27 by duress. But this argument suffers a fatal flaw. Even if Plaintiff can prove that the Forbearance  
28 Agreements are voidable because they were procured by duress, this does nothing to void the  
original Loan Agreement—the valid, express agreement that governed the debtor-creditor  
relationship between RWHI and the Debtors. Nor would it do anything to void the Court-

1 approved APA, which governed their relationship as potential buyer and seller of the Debtors'  
2 assets in the bankruptcy case. "[T]here can be no recovery under a quasi-contract theory because  
3 the parties should be bound by their express agreements." *First Union Nat'l Bank v. Richmond*  
4 *Capital Partners I, L.P.*, 168 S.W.3d at 931.

5 For these reasons, the Third Cause of Action: Unjust Enrichment fails to state a claim upon  
6 which relief can be granted. The Court will grant the Motion to Dismiss with respect to this claim  
7 with prejudice because the Court finds that additional pleading of this claim would be futile.<sup>35</sup>

8 **H. Fourth Cause of Action: Recovery of an Unauthorized Postpetition Transfer**

9 The Fourth Cause of Action for Avoidance and Recovery of Property Transfer seeks to  
10 avoid and recover, under Bankruptcy Code sections 549 and 550, "the transfer of property in the  
11 form of the payment based on Radians' Claim." Complaint, ¶¶ 29, 46-49. Although the "Claim" is  
12 defined in the Complaint to mean RWHI's prepetition debt claim under the Loan Agreement, *see*  
13 Complaint, ¶ 7, the Court understands the Plaintiff to mean *all* amounts paid to RWHI in the case,  
14 including the Break-Up Fee, which first arose when the Court approved the APA between RWHI  
15 and the Debtors. Bankruptcy Code section 549 provides for the avoidance of unauthorized  
16 postpetition transfers by a debtor in possession.

17 Under 11 U.S.C. § 549, a trustee may "avoid a transfer of property of the estate -  
18 - (1) that occurs after the commencement of the case; and . . . (2) . . . (B) that is not  
19 authorized under this title or by the court." 11 U.S.C. § 549(a)(1), (2)(B) (West  
20 2004). "If a trustee seeks to recover a postpetition transfer under section 549, . . . the  
21 trustee must show that a transfer occurred after the filing of the bankruptcy petition  
22 and that the transfer was not authorized by either the bankruptcy court or the  
[Bankruptcy] Code." *Mora v. Vasquez (In re Mora)*, 199 F.3d 1024, 1026 (9th Cir.  
1999) (citations omitted).

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23 <sup>35</sup> The Court notes that if the Plaintiff successfully pleads and proves that the Forbearance  
24 Agreements are void because they resulted from duress under Texas law, the Court's holding here  
25 does not preclude Plaintiff from arguing that by receiving the Prepayment Fee RWHI received  
26 more than it was entitled to receive under the Loan Agreement and/or that payment of the  
27 Prepayment Fee is compensable as damages arising from the duress. Likewise, if the Plaintiff  
28 successfully pleads and proves that the APA resulted from duress, and proves that the Break-Up  
Fee is a compensable form of damages for that cause of action, the Court's holding here does not  
preclude such recovery. The Court is merely holding that unjust enrichment is not an independent  
cause of action when there are contracts governing the relationships of the parties.

1 *Aalfs v. Wirum (In re Straightline Invs.)*, 525 F.3d 870, 877 (9th Cir. 2008). Section 550 permits  
2 the recovery of transfers avoided under section 549. *See* 11 U.S.C. § 550. The problem is that the  
3 Complaint does not identify any unauthorized transfers that are avoidable. Payment of the original  
4 prepetition debt obligation, the Prepayment Fee and the Break-Up Fee were all authorized by the  
5 Court pursuant to the Sale Order.

6 Accordingly, the Fourth Cause of Action: Recovery of an Unauthorized Postpetition  
7 Transfer will be dismissed with prejudice. Repleading would be futile because the payment of  
8 these amounts was expressly authorized by an order of the Court.

9 **I. The Claim Objection**

10 The Complaint objects to the Claim filed in the Debtors' cases by RWHI for amounts owed  
11 under the Loan Agreement (the "Claim Objection"). *See* Complaint, ¶¶ 7, 29. The Complaint  
12 states that the claim is objectionable under Bankruptcy Code section 502 "[b]ased on the above-  
13 described misconduct and inequitable actions on the part of the Radians entities. . . ." *Id.*, ¶ 29.  
14 But the Complaint fails to address any basis for objection under Bankruptcy Code section 502(b).  
15 This section provides that if an objection to a claim is made, after notice and a hearing, the court  
16 shall allow such claim, except to the extent any of a list of circumstances are present. The most  
17 common circumstance asserted is under section 502(b)(1), that "such claim is unenforceable  
18 against the debtor and property of the debtor, under any agreement or applicable law for a reason  
19 other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). The Complaint  
20 fails to show that this or any other basis for objection under section 502(b) has been satisfied.  
21 What the Plaintiff effectively argues is that RWHI's conduct leading up to the bankruptcy somehow  
22 invalidates the Debtors' obligation to repay the prepetition debt outstanding under the Loan  
23 Agreement—not including the Prepayment Fee and the Break-Up Fee. But the Plaintiff has  
24 provided no legal basis on which to reach such a conclusion.

25 Accordingly, the Court will grant the Motion to Dismiss the Claim Objection. However,  
26 the Court will grant leave to the Plaintiff to replead. Although the Court is skeptical that there is a  
27 legal basis to invalidate the entirety of the prepetition debt, the Court acknowledges that this issue  
28 was not the focus of the briefing or the argument on the Motion to Dismiss. If the Plaintiff repleads

1 its claim objection, it should be sure to identify and explain both the factual and legal basis for  
2 disallowing the Claim.


3 **VI. CONCLUSION**

4 Based on the foregoing, Defendants' Motion to Dismiss will be GRANTED IN PART and  
5 DENIED IN PART as follows:

- 6 • As to all claims against Safety Supply and Radians: GRANTED WITH LEAVE TO  
7 AMEND.
- 8 • As to all claims based on the Prepetition Releases: DENIED.
- 9 • As to all claims based on the Postpetition Release: DENIED.
- 10 • As to the First Cause of Action – GRANTED WITH LEAVE TO AMEND.
- 11 • As to the Second Cause of Action – GRANTED WITH LEAVE TO AMEND, TO THE  
12 EXTENT PLAINTIFF ASSERTS A CLAIM FOR BREACH OF CONTRACT.
- 13 • As to the Third Cause of Action – GRANTED WITH PREJUDICE.
- 14 • As to the Fourth Cause of Action – GRANTED WITH PREJUDICE
- 15 • As to the Claim Objection: GRANTED WITH LEAVE TO AMEND.

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23 Date: March 11, 2019

  
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Martin R Barash  
United States Bankruptcy Judge