SELECTA:
Purposeful Opposition to the Motions to Dismiss

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Selecta: Purposeful Opposition to the Motions to Dismiss

The Bottom Line™:

- Bondholders challenging Selecta's liability management transaction have filed their oppositions to the defendants' motions to dismiss the New York complaint.
- We discuss the counterarguments raised by the plaintiffs, including their responses to the challenges raised in relation to the antitrust and English law minority protection principle claims.

Overview

Swiss vending machine company Selecta undertook an aggressive liability management transaction in 2025, prompting litigation in the United States District Court for the Southern District of New York by minority bondholders Deltroit, CQS, Algebris, and others.

The lawsuit raises claims against Selecta group entities (the "**Selecta Defendants**"), investors who were parties to a cooperation agreement in connection with the restructuring (the "**Co-op Defendants**"), and certain Selecta directors, including allegations of antitrust violations in connection with the cooperation agreement as well as the framework agreement between Selecta and the Co-op Defendants. Plaintiffs also alleged a breach of the "minority protection principle" under English law.

In March, the defendants filed motions to dismiss the New York complaint (see our report Selecta: Notable Arguments in the Motions to Dismiss for a discussion). Last week, the plaintiffs responded with their oppositions, which we review below.

Background: Selecta's LMT and the New York Litigation

Selecta's multi-step restructuring was implemented using the distressed disposal mechanics under the group's intercreditor agreement, including the sale of shares in Selecta Group B.V. ("**Selecta**") to a company incorporated by an ad hoc group of the company's bondholders, Seagull Bidco Limited ("**Bidco**").

In connection with the distressed disposal, holders of Selecta's First Lien Notes due 2026 (the "**Old 1L Notes**") received new third-out notes issued by Bidco (the "**3O Notes**") at 85% of par, plus 15.3% of Class B non-voting shares in Bidco's indirect parent Seagull Topco Limited ("**Topco**"). Ad hoc group members then exchanged their 3O Notes and Topco equity for first-out notes issued by Bidco (the "**1O Notes**") at par in a private exchange offer, recouping the 15% haircut.

Bidco subsequently made a public exchange offer to the remaining former holders of the Old 1L Notes. On paper, the minority holders of the Old 1L Notes were offered the same deal as the ad hoc group: the opportunity to swap their 3O Notes and Topco equity for new 1O Notes at par. But the fine print revealed a sword of Damocles, as the new 1O Notes had no sacred rights protection or Payments for Consent

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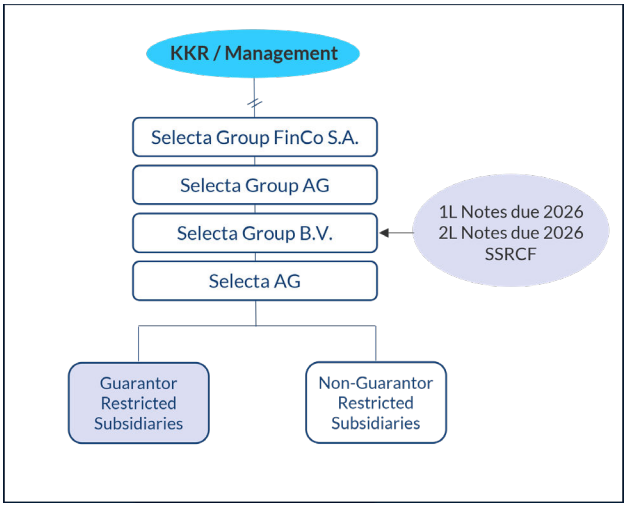
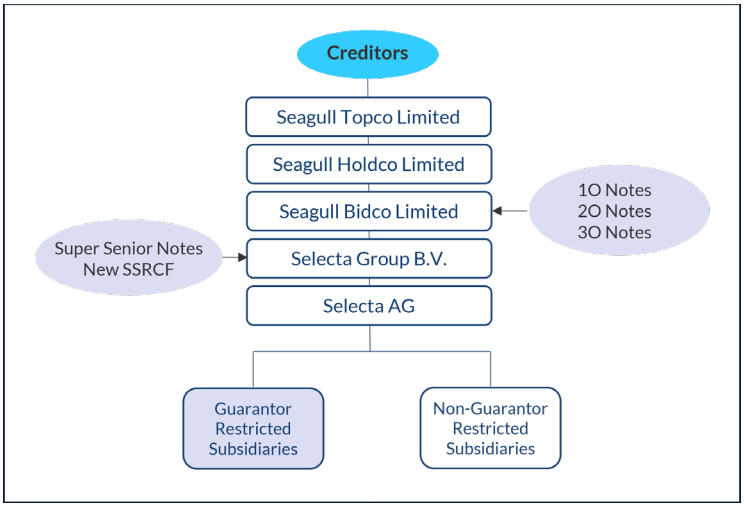
covenant for the first 12 months. This left minority holders completely at the mercy of the ad hoc group (who controlled not only the terms of the 1O Notes but also the voting shares of Topco).[1]

Simplified Pre-Transaction Structure



Simplified Post-Transaction Structure



Deltroit, Algebris, CQS, and others (all former minority holders of the Old 1L Notes) filed a complaint with the United States District Court for the Southern District of New York on October 28, 2025, with subsequent amendments on December 5, 2025, and February 12, 2026 (references to the "**Complaint**" in this report refer to the second amended complaint). Motions to dismiss followed on March 13, 2026, with oppositions to those motions filed on May 11, 2026. We discuss the counterarguments raised in the oppositions below.

Answering the "Out of Bounds" Antitrust Arguments

The Complaint garnered headlines for raising antitrust claims, with the plaintiffs alleging that the ad hoc group of holders and the company entered into anticompetitive and collusive agreements and engaged in an unlawful price fixing conspiracy and group boycott. In their motions to dismiss, the Selecta Defendants and Co-op Defendants raised several objections to these claims, which the plaintiffs challenge in their oppositions.

Case Law Doesn't Bless Collusion that Excludes A Subset of Creditors

The Co-op Defendants placed heavy weight on the *Sharon Steel* case and similar decisions finding coordinated creditor action to be pro-competitive and therefore not subject to challenge on antitrust grounds.[2] In response, the plaintiffs argue that those cases considered whether coordinated action by a company's creditors caused antitrust harm *to the company*, not the question of whether collective action by some of a company's creditors caused antitrust harm *to its other creditors* (a distinction we noted in our review of the motions to dismiss). As the plaintiffs put it, the cases in the Sharon Steel line "do not bless

[1] Selecta's Second Lien Notes due 2026 (the "**Old 2L Notes**") were also marked down in connection with the distressed disposal, with holders receiving 1% of Topco's Class B shares. Ad hoc group members who were former holders of the Old 2L Notes then purchased €156.4 million of second-out notes issued by Bidco (the "**2O Notes**") and received a pro rata share of 62.7% of Class A1 voting shares in Topco. They also agreed to backstop additional 2O Notes in return for 20% of Class A2 voting shares in Topco. Remaining holders of the Old 2L Notes were offered the chance to purchase up to €17.5 million of additional 2O Notes and receive a pro rata share of 62.7% of Class A1 voting shares in Topco.

[2] *Sharon Steel v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982).

'coordination' (*i.e.*, collusion)" where the purpose is to exclude similarly situated creditors, appropriate their value, and fracture a creditor class. They also highlight that the decisions specifically refer to joint activity that protects "all concerned" or benefits all parties, which is precisely the opposite of what plaintiffs allege here.

Per Se Is Still on the Table

In their motion to dismiss, the Co-op Defendants argued that *Sharon Steel* immunized creditor cooperation from *per se* antitrust claims, based on the court's comments regarding pro-competitive effects of coordinated creditor conduct. (A *per se* antitrust violation is a category of conduct deemed automatically illegal without investigation of its effects on competition.)

In response, the plaintiffs argue that "no court in the Second Circuit or elsewhere has deemed procompetitive a naked 'cooperation' agreement that has the aim and effect of excluding competing creditors to concentrate the value owned by excluded creditors among a subset of favored creditors." Additionally, the plaintiffs contend that the question at this stage is not whether the cooperation agreement had pro-competitive effects but instead whether they have "adequately alleged the elements of a *per se* unlawful price fixing and group boycott conspiracy among horizontal competitors" (and they say they have), pointing to case law that treats those types of conduct as *per se* unlawful without further inquiry.

Real World Rule of Reason Claims

Unlike *per se* violations, "rule of reason" claims involve analysis of the challenged conduct's competitive effects to determine whether it unreasonably restrains trade. Central to this analysis is the definition of the relevant market, and the plaintiffs proposed two markets in the Complaint: the market for Selecta debt and the leveraged finance market. In response, the Co-op Defendants challenged both market definitions, rejecting the first as a single product market and the latter as too broadly and imprecisely defined. They also argued that the plaintiffs failed to consider plausible substitutes for either market (namely, other companies' debt trading in the secondary market and alternative financing sources such as private credit and equity capital).

Plaintiffs respond that both markets reflect real-world investing behavior, arguing that Selecta debt is a distinct, non-substitutable product and that leveraged finance has its own risk, liquidity, and borrower dynamics that set it apart from equity, private credit, and other forms of financing. More fundamentally, however, they contend that it's premature to set market boundaries at the pleading stage, arguing that "[b]oth parties will have the opportunity to develop evidence on their preferred market definitions during discovery. The court is not required, nor permitted, to pick sides now."

As for injury, the Co-op Defendants claimed that the plaintiffs were attempting to recast contractual sour grapes as antitrust harm – an argument that ties into the Co-op Defendants' broader theme that the indenture and intercreditor agreement explicitly gave them contractual rights to take the actions at issue. As they see it, if the plaintiffs were concerned about the majoritarian structure, they should have negotiated more protective provisions in the first place. The plaintiffs disagree, arguing that "[a] contract cannot be used to immunize otherwise anticompetitive conduct." They characterize the harm as a coordinated squeeze-out that cut off supply in the U.S. secondary market, rigging the playing field in a way that no amount of "bargaining for better terms" could have prevented.

Selecta Defendants Were Along for the Ride

In their motion to dismiss, the Selecta Defendants argued that they cannot have engaged in the alleged anticompetitive scheme because they weren't parties to the cooperation agreement. In opposition, the plaintiffs say the Selecta Defendants can't sidestep liability just because they weren't formal signatories, alleging they knowingly played a critical behind-the-scenes role in carrying out the scheme. As the plaintiffs tell it, Selecta willingly facilitated a multi-step process, signaling active participation rather than innocent bystander status.

The FTAIA Doesn't Close the Door on the Claims

The Co-op Defendants argued that the U.S. Foreign Trade Antitrust Improvements Act (the "**FTAIA**"), which limits the extraterritorial reach of U.S. antitrust laws, bars the plaintiffs' claims because the alleged conduct was foreign and the alleged harm was to foreign plaintiffs. The plaintiffs pushed back on both prongs. First, they contend that the FTAIA's "import exclusion" is satisfied (meaning U.S. antitrust laws can apply) because the conduct was directed at U.S. import trade and commerce, including secondary market trading on U.S. desks. Secondly, they argue that the FTAIA's "domestic effect" exception applies because the defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, including reduced supply and increased prices that devalued Selecta debt in the U.S. market.

Dueling Declarations Put the ICA Drag to the Test

In another notable feature of the Complaint, the plaintiffs alleged that the Co-op Defendants' actions in relation to the distressed disposal breached the "minority protection principle" under English law (the governing law of the intercreditor agreement), which requires majority powers to be exercised in the interests of the class as a whole, rather than in a way that is unfair to the minority. Responding to this claim, the Co-op Defendants relied on a declaration from Lord Neuberger of Abbotsbury, former President of the United Kingdom Supreme Court, to support their motion to dismiss. The plaintiffs, in turn, have supported their opposition with a declaration from Dame Elizabeth Gloster DBE, former Vice-President of the Civil Division of the English Court of Appeal.

Lord Neuberger and Dame Elizabeth take fundamentally different approaches to the majority power analysis. Their divergence underscores the heart of the matter in this case: whether the permissibility of the LMT should be judged strictly by reference to the words on the page, or by a more holistic assessment of the purpose and practical effect of how those provisions were used. This distinction is central not only to the plaintiffs' claims, but also to the broader question of whether intercreditor majority powers can be deployed to impose non-pro rata liability management transactions on minority creditors.

- Lord Neuberger's position is that the minority protection principle exists only as an implied contract term that can be overcome by the agreement's express language. He contends that the intercreditor agreement's enforcement provisions "occupy the field" and that applying the minority protection principle to undermine those provisions would be inappropriate. In his telling, the Co-op Defendants exercised their majority power in a way that complied with the intercreditor agreement's explicit terms and was therefore permitted.
- Dame Elizabeth's view is that the minority protection principle is one component of a broader "proper purpose rule" under English law, which she describes as a longstanding equitable

safeguard that requires a contractual power to be "exercised within its scope and consistently with its contractual purpose." She argues that the proper purpose rule serves as a check on majority power, whether as an implied term or as an incident of the power itself, creating an inherent limitation on the exercise of contractual rights that has not been excluded here (and may not be excludable at all). In her view, the Co-op Defendants exercised their majority power to issue enforcement instructions for an improper purpose, rendering the enforcement instructions unlawful.

What's the Purpose?

As we've said before, distressed disposal and instructing group provisions in most European intercreditor agreements were intended to facilitate a "free-and-clear" enforcement sale and limit the risk of junior creditor holdouts, not to permit a subset of senior secured creditors to circumvent consent thresholds in the underlying debt documents and orchestrate a non-pro rata restructuring of the senior secured debt.

Dame Elizabeth's reading of the Selecta intercreditor agreement is aligned with that construct. She concludes that the enforcement power's purpose is to allow the majority senior secured creditors, on behalf of all senior secured creditors, to protect their first-ranking security interests – not to split the senior secured class and procure a better outcome for themselves. She is firmly of the view that the Co-op Defendants failed to exercise the power for this purpose, and that the exercise of majority power was therefore invalid.

> *"Had the Instructing Noteholders issued the Enforcement Instructions for the purpose of enforcing the security so that it could be distributed within the Senior Secured Creditor pool pari passu, that would have been a proper purpose. However, the purpose for which the Instructing Noteholders in fact issued the Enforcement Instructions was to set in train a series of interconnected steps that would lead ultimately to them improving their own economic position at the expense of other creditors within their same class - namely the Excluded Holders of 1L Notes. In my opinion, as a matter of English law, such a purpose was plainly improper; "*

Compliance with Express Terms: Necessary, But Not Sufficient

While Lord Neuberger held up the Co-op Defendant's compliance with the enforcement provisions as evidence of a valid exercise of their majority power, Dame Elizabeth draws a distinction between compliance with a contract's terms and exercise of power for an improper purpose. As she puts it, the proper purpose rule "deals with the intention behind the use of the power" as opposed to whether or not "the mechanical process of exercising it is in accordance with the terms of the document." For example, it would be possible to maximize value as required under the enforcement principles while allocating proceeds in a way that was inconsistent with the proper purpose of the enforcement power. She argues that allocating the "lion's share" of value to one faction within a class cannot be viewed as a proper purpose, emphasizing that the proper purpose rule exists to guard against precisely this type of use of contractual power.

Nor is she persuaded that the fairness opinion mechanism in the intercreditor agreement offers a safe harbor. While Lord Neuberger placed weight on the opinion as conclusive proof that the enforcement maximized value and complied with the intercreditor agreement's enforcement principles (contending that such an enforcement "cannot sensibly be regarded as abusive or tainted in any other relevant way"), Dame

Elizabeth dismisses that argument, noting that the opinion simply assesses whether proceeds are "fair from a financial point of view" rather than assessing whether the enforcement instruction power was exercised for a proper purpose.

This distinction is closely tied to the broader issue in the case and to how it is assessed in practice – specifically, whether adherence to contractual mechanics, on its own, is sufficient to justify the use of majority power to achieve an outcome that effectively reallocates value within a single creditor class. Contract terms are, of course, critical. But, as Dame Elizabeth's framing illustrates, there is a meaningful difference between following the steps set out in the documents and using those steps to reach an end result that those documents were not designed to facilitate.

Re-reading the Authorities

Dame Elizabeth crosses swords with Lord Neuberger on interpretation of the relevant case law, offering a markedly different view as to what it means for the scope and application of the minority protection principle / proper purpose rule.

Lord Neuberger argued that the courts in *British America*, *Redwood*, and *Assénagon* were willing to imply the minority protection principle into the contracts in these cases because they had limited, if any, express constraints on majority power, unlike the explicit enforcement provisions in the intercreditor agreement.[3] In his telling, the decisions in these cases reinforce the argument that the minority principle can only exist as an implied term, and only then if it is not overridden by the agreement's explicit provision.

Dame Elizabeth, on the other hand, reads these cases as confirmation of the proper purpose rule. In addition to pointing out the "telling" factual similarities of the *British America* case (where the vote of a bondholder made in his own self-interest was found to be invalid), Dame Elizabeth highlights the court's statement that a majority's power to bind the minority must "be exercised for the purpose of benefiting the class as a whole and not individual members." She also paints *Assénagon* as a factually similar case where the court found an exit consent to be "entirely at variance with the purposes for which majorities in a class are given power to bind minorities," analogizing the exit consent in *Assénagon* to the alleged expropriation of minority rights here.

Dame Elizabeth also argues that Lord Neuberger's failure to reference several cases that relate to the proper purpose rule "necessarily undermine the conclusions" he reached in his declaration. She relies on *Braganza*, which concerned payment of death benefits to an employee, as support for her argument that English law imposes constraints on contractual power by "implying a term as to the manner in which such powers may be exercised."[4] Additionally, she refers to the *Tesco Stores* case as confirming that the exercise of unilateral discretionary power is "subject to an implied restriction that the power must be exercised for a proper purpose."[5] Dame Elizabeth also calls out the *Eclairs Group* case (contractual power must be exercised "with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object") and *Grand View* case ("the

[3] *British America Nickel Corp Ltd v MJ O'Brien Ltd* [1927] AC 369; *Redwood Master Fund v TD Bank Europe Ltd* [2006] 1 BCLC 149; *Assénagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch), 2013 Bus LR 266
[4] *Braganza v BP-Shipping* [2015] UKSC 17, [18].
[5] *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and others* [2024] UKSC 28, [115].

proper purpose rule … involves identifying the purpose for which the power has been exercised and asking whether such purpose is a purpose for which the power has been given").[6]

Commercial Reality of Conflict Between the Intercreditor Agreement and Indenture

Clause 1.2(z) of the intercreditor agreement deals with conflict between the terms of the intercreditor agreement and the indenture, giving the intercreditor agreement precedence unless doing so would present a material risk of liability or breach of fiduciary or statutory duties. The Complaint alleged that the enforcement and related actions presented those risks, meaning that the indenture (including its 90% consent threshold for amendments of economic terms) should have controlled.

As a threshold matter, Lord Neuberger saw no conflict between the two agreements. He also argued that even if there had been a conflict, the "saving provision" in clause 1.2(z) did not apply because there was not a material risk of liability or breach of fiduciary or statutory duties.

Dame Elizabeth takes issue with Lord Neuberger's argument that there was no conflict between the indenture and intercreditor agreement "because it lacks commercial reality." She challenges his form-over-substance argument that the enforcement instructions did not directly amend the indenture and therefore didn't implicate the indenture's 90% consent requirements, arguing that an English court would not focus exclusively on the immediate step of issuing enforcement instruction but would instead consider the ultimate outcome that resulted from the full series of steps (i.e., a material alteration of the economic terms of the Old 1L Notes). She also discounts his argument on material risk, pointing to the current Dutch litigation as evidence that the risk was real.

Again, Lord Neuberger's position is a formalistic one, grounded in a narrow view of each step in sequence, while Dame Elizabeth takes a more holistic view that assesses the end result, namely, a restructuring outcome that could not have been implemented directly under the indenture with simple majority consent.

Standing: Substance Over Structure

On standing, Gloster again departs sharply from Lord Neuberger, who argued that the plaintiffs (who are not parties to the intercreditor agreement or indenture and held the Old 1L Notes through clearing systems) would lack standing to sue under English law due to the "no look-through principle."

Dame Elizabeth finds that the "machinery" of the agreements is unworkable unless the relevant references to holders are read as references to the ultimate beneficial owners rather than to the clearing system nominees or custodians. She highlights cases that establish exceptions to the no look-through principle for beneficial owners with even a remote right to obtain direct rights against the debtor (such as the plaintiffs' rights under the indenture to acquire definitive notes), treating them as contingent creditors who were therefore entitled to vote.[7] She also argues that the plaintiffs have rights – and the Co-op Defendants have obligations – under the Contracts (Rights of Third Parties) Act 1999. That act is generally disapplied in

[6] *Eclairs Group Ltd v JKX Oil & Gas plc and Glengary Overseas Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [15] and *Grand View Private Trust Co Ltd & anor v WenYoung Wong & ors* [2022] UKPC 47.

[7] *In the matter of the Co-operative Bank plc* [2013] EWHC 4072 (Ch) and *Re Noble Group Ltd* [2018] EWHC 2911 (Ch).

clause 1.3 of the intercreditor agreement, but she argues that the clause's exception for noteholders could bring them within the scope of the act.

Conclusion

In addition to testing the outer bounds of U.S. antitrust law in the cooperation agreement context, the Selecta litigation raises a significant debate about the exercise of majority power under English law documents, with dueling expert views on whether the type of outcome engineered here can pass muster.

If the plaintiffs prevail, the decision could impose meaningful constraints on majority lenders, reinforcing the minority protection principle (and/or broader proper purpose rule) as a real check on non-pro rata LMTs. If the defendants succeed, it may further entrench a playbook in which formal compliance with contractual mechanics is sufficient to bless LMTs that fracture a creditor class and seriously disadvantage minority creditors. The outcome remains uncertain, but the court's treatment of both the antitrust and English law issues seems likely to shape the next phase of European liability management.

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