IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
COOKS VENTURE, INC., *et al.*,[1]	)	Case No. 24-10828 (KBO)
	)	
Debtors.	)	(Jointly Administered)
	)	
COOKS CA LLC,	)	
	)	Adv. Proc. No. 24-50064 (KBO)
Plaintiff,	)	
	)	
v.	)	**Related to Docket Nos. 40 & 43**
	)	
UMB BANK, N.A.,	)	
	)	
Defendant.	)	
	)	
UMB BANK, N.A.,	)	
	)	
Counterclaim Plaintiff,	)	
	)	
v.	)	
	)	
COOKS CA LLC,	)	
	)	
Counterclaim Defendant.	)	
	)	

MEMORANDUM ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF UMB

Before the Court are cross motions for summary judgment filed by Plaintiff Cooks CA LLC ("Cooks CA") and Defendant UMB Bank, N.A. ("UMB").[2] For the reasons set forth herein, the Court will grant summary judgment in favor of UMB on all counts of the Complaint and in doing so, **HEREBY FINDS AND CONCLUDES** as follows:

[1] The Debtors in these chapter 7 cases, along with the last four digits of their federal tax identification numbers are: Cooks Venture, Inc. (4510); Cooks Venture Poultry, Inc. (4475); and Cooks Venture Poultry Jay, Inc. (7291). The Debtors' headquarters is located at 352 N. Main Street, Decatur, AR 72722.

[2] Adv. D.I. 40 & 43.

I. JURISDICTION

The Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and the *Amended Standing Order of Reference* of the United States District Court for the District of Delaware. It has the authority to enter a final order as this is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (K)[3] and all parties consent to entry of a final order or judgment by this Court.[4] Venue is proper pursuant to 28 U.S.C. § 1409(a).

II. SUMMARY OF UNDISPUTED MATERIAL FACTS

A. Relevant Parties

Cooks Venture, Inc. ("Cooks CV") and its affiliated debtors, Cooks Venture Poultry, Inc. and Cooks Venture Poultry Jay, Inc. (collectively, the "Debtors"), filed for chapter 7 bankruptcy protection on April 19, 2024. At the time of filing, the Debtors were engaged in the business of breeding and raising chickens for sale in direct-to-consumer and wholesale distribution channels.

Cooks CA is an equity interest holder of the Debtors and one of their prepetition lenders. It was established by Cleveland Avenue Food and Beverage Fund II, LLC, an agricultural and ag-tech focused investment fund of Cleveland Avenue, LLC ("Cleveland Avenue"), as a vehicle for investment in the Debtors. Randall Lewis, a managing partner of Cleveland Avenue, served on the Board of Directors of Cooks CV along with representatives of significant equity holders, including Cultivian Sandbox ("Cultivian").

UMB serves as indenture trustee and disbursing agent for the Cooks Venture, Inc. Fixed Rate Senior Notes, Series 2023-C (the "Notes"). On June 5, 2023, Cooks CV issued the Notes in the aggregate face amount of $60,000,000 (the "Note Obligations"). Each Debtor is an obligor of the Note Obligations, and each granted a first priority security interest in substantially all of their assets to secure the payment obligations (the "UMB Security Interest"). Newlight Capital LLC ("Newlight") was appointed as servicer and monitor for UMB. In its role, Newlight held the UMB Security Interest.

The Debtors' Note Obligations are collateralized by an insurance policy issued by Great American E & S Insurance Company ("Great American") for the benefit of UMB. PIUS Limited, LLC ("PIUS") is an affiliate of Newlight and the licensed managing general agent for Great American. At the time of the events giving rise to the dispute before the Court, Mr. Agiato was employed by Newlight and served as PIUS's Chief Executive Officer.[5]

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[3] *See also Shubert v. Lucent Techs. Inc. (In re Winstar Communs., Inc.)*, 348 B.R. 234, 249 (Bankr. D. Del. 2005) (stating equitable subordination is a core proceeding because it "affect[s] the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship . . . .").

[4] Adv. D.I. 1 at 2; Adv. D.I. 4 at 2.

[5] Mr. Agiato once served as Newlight's Chief Executive Officer. However, Newlight was purchased by Arthur J. Gallagher in 2022. Following that transaction, Mr. Agiato testified that he was unsure whether he continued to serve as Chief Executive Officer. Adv. D.I. 42, Ex. 6 at 116:15–19 (Agiato deposition).

The Notes transaction is memorialized in a collection of transaction documents (collectively, the "Transaction Documents"): (i) a Trust Indenture (the "Trust Indenture") between Cooks CV and UMB; (ii) a Proceeds Disbursing and Security Agreement (the "PDSA") between UMB, Newlight, and the Debtors; (iii) a Trustee Services Agreement (the "TSA") between UMB, Newlight, and the Debtors; and (iv) a Disbursement Monitoring Agreement (the "DMA") between UMB, the Debtors, Newlight, and Great American.

B. Certain Events Leading To This Proceeding

Due to financial distress, the Debtors defaulted on their November 1, 2023 payment obligation under the Notes and failed to cure within the required ten-day period. This failure triggered an event of default under the Indenture and PDSA, and UMB provided notice of such default to the Debtors promptly thereafter.

Attempts to raise additional capital failed, and the Debtors prepared for a liquidation while conducting a marketing and sales process. Before completion of that process, the Debtors' liquidity issues became unsustainable. In need of emergency funding, the Debtors borrowed $1.0 million from Cooks CA and $500,000 from Cultivian on November 17 to pay employees and feed their chickens until a potential buyer could complete an impending site visit and hopefully commit to buy the Debtors' operations. That site visit did not yield a viable sale and another $500,000 was extended by Cooks CA to the Debtors on November 29 (together with the prior $1 million extended by Cooks CA, the "Loan").

The Debtors ultimately filed for bankruptcy. Alfred T. Giuliano was appointed as the chapter 7 trustee (the "Trustee") for their estates. The Trustee obtained post-petition financing and consensual use of cash collateral from UMB to fund the Debtors' operations while completing a marketing and sales process. The Court ultimately approved the sale of substantially all the Debtors' assets for approximately $7.1 million.

Cooks CA objected to both the financing and the sale, asserting that the Debtors' outstanding obligations under the Loan were secured by a security interest in the Debtors' assets superior to the UMB Security Interest. According to Cooks CA, Mr. Agiato, on behalf of Newlight, agreed to subordinate up to $2 million of the Note Obligations in exchange for the Loan and the Cultivian loan. That alleged agreement is reflected in a November 16, 2023 email exchange between Mr. Lewis and Mr. Agiato with the subject "Subordination Agreement" (the "Alleged Subordination Agreement").[6] The Alleged Subordination Agreement starts with the following email from Mr. Lewis to Mr. Agiato:

> I understand Newlight Capital LLC (PIUS) has agreed to subordinate its loan facility up to $2M funded by Cooks CA LLC and Cultivian Sandbox Food & Agriculture Fund III, LP. We

[6] *See id.*, Ex. 22. UMB provided many of the same documents in support of its motion for summary judgment that Cooks CA provided to the Court in support of its motion. Out of convenience, when the documents have been duplicated, the Court cites to the version provided by Cooks CA.

> understand a draft of the subordination agreement will be circulated later.
>
> In the interim, this email will be deemed as a subordination agreement between the parties.
>
> Cooks CA LLC and Cultivian Sandbox Food & Agricultural Fund III, LP will fund based on this understanding.
>
> Please confirm your agreement.
>
> Randall J. Lewis . . . .[7]

Mr. Agiato then responds:

> Agreed
>
> Joe Agiato
> Chief Executive Officer, PIUS[8]

No formal subordination agreement followed. However, the Debtors executed a Secured Convertible Promissory Note (the "Cooks Note") in favor of Cooks CA, granting it a first priority security interest and continuing lien upon all of the Debtors' property "in accordance with the Subordination Agreement of November 16, 2023 . . . between [Cooks CA] and Newlight Capital LLC, as servicer . . . ."[9] At the time of the Alleged Subordination Agreement, UMB was not aware of the Loan or the Alleged Subordination Agreement.

While UMB disputed Cooks CA's arguments regarding the validity and enforceability of the Alleged Subordination Agreement, the parties reserved all rights and allowed the financing and sale on an uncontested basis. They agreed for sale proceeds sufficient to satisfy the Loan to be held in escrow until the priority dispute could be resolved.

C. The Complaint

Cooks CA commenced this proceeding against UMB to determine the priority dispute between itself and UMB arising from the Alleged Subordination Agreement. The Complaint contains three counts. The first seeks a declaratory judgment confirming that the Alleged Subordination Agreement is an enforceable and binding contract between Cooks CA and UMB that confers lien and payment priority to Cooks CA. The second seeks a judgment enforcing the Alleged Subordination Agreement and subordinating the Note Obligations to the Loan obligations pursuant to 11 U.S.C. § 510(a). The third and final count seeks equitable subordination of the Note

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[7] *See id.*

[8] *Id.*

[9] *Id.*, Ex. 40 at 2 § 2; *see also id.* at 5 § 9.

Obligations to the Loan obligations pursuant to 11 U.S.C. § 510(c). More specifically, Cooks CA asserts that UMB is acting inequitably in refusing to be bound by the subordination because it had actual and constructive knowledge through its agent, Newlight, that Cooks CA relied on the Alleged Subordination Agreement when it extended the Loan to the Debtors.

UMB answered the Complaint, denying all allegations. It also asserted two counterclaims against Cooks CA should the Court find the Alleged Subordination Agreement enforceable (the "Alternative Counterclaims"). First, UMB seeks equitable subordination of the Loan under 11 U.S.C. § 510(c) because of Cooks CA's part in seeking to subordinate the Note Obligations in knowing violation of the PDSA for its own financial gain. Second, it seeks to recharacterize the Loan obligations as equity under 11 U.S.C. § 105.

Pending before the Court is *Cooks CA LLC's Motion for Summary Judgment*, which seeks summary judgment in its favor on all counts of the Complaint. Also before the Court is the *Defendant's Motion for Summary Judgment*, which seeks summary judgment in UMB's favor on all counts of the Complaint, or, in the alternative, on its Alternative Counterclaims. The parties did not request oral argument. This matter is ripe for adjudication.

III. APPLICABLE LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that a court may grant summary judgment in whole or in part of a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[10] An issue is genuine if there is a "sufficient evidentiary basis" on which a reasonable factfinder could find for the non-movant, and a factual dispute is material "if it might affect the outcome of the suit under governing law."[11] Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[12]

IV. DISCUSSION

For Cooks CA to succeed on each count, the Court must find at a minimum that the Alleged Subordination Agreement is an enforceable agreement to which UMB is bound. The burden to establish each of these elements falls on Cooks CA.[13] On enforceability, UMB argues that the

[10] FED. R. CIV. P. 56(a).

[11] *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006).

[12] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[13] *See, e.g.*, *United Health Alliance v. United Med., LLC*, No. 7710, 2013 Del. Ch. LEXIS 289, at *22 (Del. Ch. Nov. 27, 2013) ("[T]he burden of proving a valid contract existed-and its terms-is on the party seeking to enforce the contract . . . ." (internal citation omitted)); *Kramer v. Greene*, 142 N.Y.S.3d 448, 450 (N.Y. App. Div. 2016) (explaining that the "party seeking to enforce the contract bears the burden at trial to establish that a binding agreement was made and to prove its terms."); *see also supra* note 15 (discussing applicable law).

Alleged Subordination Agreement is missing terms essential to subordination agreements and is more akin to an agreement to agree. Cooks CA disagrees and points to the express terms of the Alleged Subordination Agreement as evidence of its unambiguity. On binding UMB, Cooks CA asserts that Mr. Agiato acted on behalf of Newlight, which possessed agency authority as servicer and monitor to subordinate the UMB Security Interest and Note Obligations. UMB, on the other hand, argues that Mr. Agiato acted on behalf PIUS and that neither PIUS nor Newlight possessed subordination authority.[14]

Under both Delaware and New York law,[15] an agency relationship arises when a principal "manifests assent to [an agent] that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[16] Only acts that are within the scope of the agency relationship are binding on the principal.[17] The scope of the agency relationship is determined by the type of authority the agent possesses.[18] An agent's authority may be either actual or apparent, and actual authority can be express or implied.[19]

The parties do not dispute that Mr. Agiato could act for and bind Newlight and PIUS as each's agent. However, the evidence does not support the conclusion that Newlight or PIUS possessed the actual or apparent authority to bind UMB to the Alleged Subordination Agreement.

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[14] UMB also argues that the Alleged Subordination Agreement represents Mr. Agiato's agreement to subordinate PIUS's claims and liens against the Debtors – not those of UMB and the Noteholders. The evidence lends credence to an argument that Mr. Agiato may have been agreeing to subordinate future rights of Great American gained with respect to the Notes under theories of subrogation after Great American fulfilled its obligations to UMB under the applicable insurance agreement. However, the Court need not address the argument considering its conclusions herein.

[15] The parties argue that either New York or Delaware govern the questions before the Court. Because there is no conflict between New York and Delaware law on the issues presented, the Court need not conduct a choice of law analysis. *Auto-Owners Ins. Co. v. Stevens & Ricci, Inc.*, 836 F.3d 388, 404 (3d Cir. 2016) ("If there are no relevant differences between the laws of two states, the court need not engage in further choice-of-law analysis, and may instead refer to the states' laws interchangeably.").

[16] RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *N.Y. Marine & Gen. Ins. Co. v. Tradeline, L.L.C.*, 266 F.3d 112, 122 (2d Cir. 2001) ("[A]n agency relationship 'results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act.'"); *Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 843 n.14 (Del. Ch. 2022) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01).

[17] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c.

[18] *See Sarissa Cap. Domestic Fund LP v. Innoviva, Inc.*, No. 17-0309, 2017 Del. Ch. LEXIS 842, at *35 (Del. Ch. Dec. 8, 2017) ("The scope of an agent's actual authority is determined by the agent's reasonable understanding of the principal's manifestations and objectives."); *36 Convent Ave. HDFC v. Fishman*, No. 03-3998, 2004 U.S. Dist. LEXIS 8172, at *9 (S.D.N.Y. April 24, 2004) ("The scope of apparent authority is defined by the principal's manifest acts[.]").

[19] *Jurimex Kommerz Transit G.M.B.H. v. Case Corp.*, No. 06-3523, 2007 U.S. App. LEXIS 18113, at *5–6 (3d Cir. July 27, 2007) ("'Actual authority is that authority which a principal expressly or implicitly grants to an agent.'"); *Dinaco, Inc. v. Time Warner, Inc.*, 346 F.3d 64, 68 (2d Cir. 2003) ("[Actual authority may be express or implied[.]").

Accordingly, judgment for UMB on each count of the Complaint is appropriate without the need to decide whether the Alleged Subordination Agreement is enforceable.[20]

1. Neither Newlight Nor PIUS Possessed Actual Authority

Actual authority arises when a principal explicitly or implicitly grants an agent the power to act on its behalf.[21] It "is created by a principal's manifestations to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf."[22] The parties present no argument or evidence that UMB, through the Transaction Documents or otherwise, conferred upon PIUS actual authority to enter into the Alleged Subordination Agreement on its behalf. Rather, the focus is on Newlight's actual authority as servicer and monitor for UMB.

Cooks CA contends that the express language of the PDSA and TSA vested Newlight with actual authority. It points to section 4.1 of the PDSA, conferring on Newlight the power to act "as representative" and "as collateral agent for the benefit of [UMB]."[23] It also cites to the TSA's fifth Recital stating that UMB "desires to assign to [Newlight] any components of the Trust Estate . . . as [Newlight] may need to carry out its obligations"[24] as loan servicer. Finally, it relies on section 2(b) of the TSA providing that "[Newlight] is fully authorized and empowered to take" certain actions, including "amend[ing] and/or modify[ing] any of the terms of the [PDSA] and the other Disbursement Documents and/or issue consents or any forbearance thereunder."[25] According to Cooks CA, these provisions, combined with UMB's alleged inaction and lack of interest in the Debtors' financial status, conferred upon Newlight the actual authority to subordinate the Note Obligations and the UMB Security Interest.

The Court does not agree. To start, the Transaction Documents when read together[26] cannot be interpreted convincingly to give Newlight the authority Cooks CA claims. The TSA, DMA,

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[20] *Pyfer v. Am. Mgmt. Servs. (In re Nat'l Pool Constr., Inc.)*, 598 Fed. Appx. 841, 843 (3d Cir. 2015) ("failure of proof on one of the essential elements of a claim renders both the [requirements of Rule 56(a)] met." (citing *Celotex*, 477 U.S. at 322–23)); *accord Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d. Cir. 2014) ("[W]here a non-moving party fails sufficiently to establish the existence of an essential element of its case on which it bears the burden of proof at trial, there is not a genuine dispute with respect to a material fact and thus the moving party is entitled to judgment as a matter of law.").

[21] *See Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989); *Jurimex*, 2007 U.S. App. LEXIS 18113, at *6 (quoting *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197 (Del. 1978)).

[22] *Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A.3d 701, 712 (Del. 2019); *see Highland Cap. Mgmt. LP v. Schneider*, 607 F.3d 322, 328 (2d Cir. 2010) (citing *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1088 (2d Cir. 1997)).

[23] Adv. D.I. 42, Ex. 11 (the "PDSA") at 18 § 4.1(a)–(b).

[24] *Id.*, Ex. 13 (the "TSA") at 1.

[25] *Id*. at 2–3 § 2(b)(ii).

[26] *Sebastian v. Schmitz (In re WorldSpace, Inc.)*, No. 15-25, 2016 U.S. Dist. LEXIS 129497, at *24 (D. Del. Sept. 22, 2016) ("A writing is interpreted as a whole and all writings that are part of the same transaction are interpreted together" (citing *Williams v. Metzler*, 132 F.3d 937, 947 (3d Cir. 1997))); *Genger v. Genger*,

and PDSA set forth Newlight's authorized scope of services. Under the TSA and DMA, Newlight was given duties to monitor the financial status of the Debtors.[27] In addition, section 2(b) of the TSA, upon which Cooks CA relies, authorizes Newlight to:

> (i) waive any failure of any of the [Debtors] to perform or observe certain covenants set forth in Section 8 of the [PDSA] ("Covenant Defaults");
>
> (ii) amend and/or modify any of the terms of the [PDSA] and the other Disbursing Documents and/or issue consents or any forbearance thereunder; and
>
> (iii) ***during the continuance of an Event of Default, on behalf of the Trustee,*** market and assist in liquidating the Collateral, ***take such other actions as Trustee reasonably requests to protect its interests in the Collateral***; and at the Servicer's direction, take such other actions to enforce the obligations under the Disbursing Documents and the Indenture.[28]

Nothing in this list of services permitted Newlight to enter into the Alleged Subordination Agreement on behalf of UMB without its knowledge and consent. In fact, section 2(b)(iii) provides the contrary. Moreover, there is no evidence that the Transaction Documents were properly amended or modified under section 2(b)(ii) to provide for such authority.[29] And finally, section 9.03 of the Indenture prohibited the waiver of Covenant Defaults under section 2(b)(i) when the Debtors' payment default arose.[30]

Furthermore, Newlight's performance of its obligations under the TSA could "not conflict with or breach any of the material terms or provisions of . . . any agreement or other instrument to which [Newlight] is a party or by which it is bound."[31] The DMA to which Newlight is bound sets forth a very specific list of Newlight's "Collateral Enforcement Services" during an event of

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67 F. Supp. 3d 488, 495 (S.D.N.Y. 2015) ("all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together[.]" (quoting *This is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir. 1998))).

[27] TSA at 2 § 2(a); *see also* Adv. D.I. 42, Ex. 13 ("DMA") at 7 § 2(a) (defining "Monitoring Services").

[28] TSA at 2–3 § 2(b) (emphasis added).

[29] Amendments were required to be in writing and signed by Newlight, the Debtors, and UMB. *See* PDSA at 42–43 § 13.5; TSA at 8 § 15; DMA at 16 § 14.

[30] Adv. D.I. 42, Ex. 4 ("Trust Indenture") at 60 § 9.03 ("The Disbursing Agent, the Co-Obligors and the Servicer may, without the consent of any Noteholder, enter into any amendment of or supplement to the [PDSA] as may be required . . . (d) to modify or waive any of the covenants, agreements, limitations or restrictions of the Co-Obligors set forth in the [PDSA] unless there exists and is continuing a payment default pursuant to Section 8.1 of the [PDSA] . . . .").

[31] TSA at 4 § 5(a)(iv).

default, and none support the unilateral actions that Mr. Agiato took to subordinate the Notes.[32] Additionally, Newlight is a party to the PDSA, which sets forth the terms on which UMB disbursed the proceeds of the Notes to the Debtors and the terms on which the Debtors were to repay the Notes.[33] These terms do not support, and are inconsistent with, Newlight's actions for several reasons.

First, the first priority UMB Security Interest was granted subject to a defined set of "Permitted Liens," in which the Loan's security interest does not fall.[34] The Debtors were obligated to maintain and defend the first priority of the UMB Security Interest and to take any action that Newlight may reasonably request to enforce the interest.[35]

Second, the PDSA prohibits the Debtors from creating any indebtedness of a kind like the Loan, let alone a loan with a priority payment obligation and lien over the Notes.[36] While subordination agreements were contemplated by the parties, the permitted agreements required subordination *to the Notes*.[37]

Third, section 9.1 of the PDSA includes its own enumerated list of actions the parties agreed for Newlight to take upon an event of default.[38] Absent from this specific list is the ability to

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[32] DMA at 7–8 § 2(b) ("(i) prepare and submit a Claim Notice to Insurer . . .; (ii) consult with Disbursing Agent and Insurer regarding any possible responses and responses to any Occurrences . . .; (iii) market and assist the Disbursing Agent and/or Insurer in liquidating or monetizing the Collateral; (iv) prepare and submit a Proof of Loss to Insurer . . .; (v) ***take such other actions as Disbursing Agent or Insurer reasonably requests to protect their interests in the Collateral***; and (vi) direct the Disbursing Agent regarding what . . . enforcement actions, costs and expenses and other actions are commercially reasonable, do not have an adverse impact on Insurer and do not unnecessarily impair the Collateral and shall be approved as commercially reasonable Collection Efforts and Collection Costs and shall be deemed to satisfy the obligation to have Mitigated Losses as required under the Insurance Policy." (emphasis added)).

[33] PDSA at 1.

[34] *Id.* at 18 § 4.1; *id.* at 9–10 § 1.1 (defining "Permitted Liens"); *see also id.* at 30 § 7.5(a) (prohibiting the creation of non-Permitted Liens).

[35] *Id.* at 29 § 6.16 & 20 § 4.6; *see also id.* at 29 § 6.14(d) (requiring Debtors to notify the Servicer of "any Lien (other than Permitted Liens) on any of the Collateral which would adversely affect the ability of the Servicer to exercise any of its remedies").

[36] *Id.* at 30 § 7.4; *see also id.* at 8 § 1.1 (defining "Permitted Indebtedness").

[37] *Id.* at 8 (including "Subordinated Debt" as a "Permitted Indebtedness"); *id.* at 12 § 1.1 (defining "Subordinated Debt" and "Subordination Agreement"); *see also id.* at 31 § 7.9 (discussing Newlight's right to make future changes to the terms of authorized subordinated debt and subordination agreements).

[38] *Id.* at 35–36 § 9.1 ("(a) Declare all Obligations . . . immediately due and payable . . .; (b) Cause the advancing of money or extending of credit . . . under this Agreement . . . to cease; (c) Settle or adjust disputes and claims with account debtors . . . (d) Make such payments . . . and do such acts as Servicer considers necessary or reasonable to protect its security interest in any of the Collateral . . . (e) Ship, reclaim, recover, store, finish, maintain, repair, prepare for sale, advertise for sale, and sell . . . any of the Collateral . . . (f) Dispose of the Collateral . . . (g) credit bid and purchase at any public sale; and (h) . . . instruct the bank . . . to pay the balance of such Deposit Account to or for the benefit of Servicer . . . and instruct the securities intermediary maintaining . . . to transfer any cash . . . or . . . liquidate any financial assets . . . .").

further encumber the Debtors' assets or subordinate the Note Obligations. This makes sense because such actions would be inconsistent with the above-referenced provisions of the PDSA that serve to protect the payment and lien priority of the Notes.[39] They would also conflict with section 9.1(d) of the PDSA allowing Newlight to "do such acts as Servicer considers necessary or reasonable to protect its security interest in any of the Collateral [*i.e.* the UMB Security Interest]."[40]

Fourth, and finally, the PDSA provides that an event of default occurs if an event of default arises under the Trust Indenture.[41] The Trust Indenture requires the consent of the Noteholders before granting a non-"Permitted Lien" with priority to the UMB Security Interest.[42] Therefore, the Alleged Subordination Agreement violated the Trust Indenture because no approval was sought or obtained from the Noteholders.

After considering the applicable contracts, the Court concludes that Newlight was not permitted by UMB to subordinate the Notes under the Transaction Documents and acted inconsistent with its delegation of authority thereunder. The Court also finds Cooks CA's reliance on UMB's alleged inaction equally unpersuasive. The Transaction Documents define the roles and responsibilities of UMB, the Servicer, the Debtors, Great American, and the Noteholders. Cooks CA points to no provision requiring UMB to monitor the Debtors' financial performance – that was Newlight's responsibility. Moreover, representatives of Newlight admit that they did not inform UMB of the Loan or alleged subordination.[43] UMB was unaware.[44] In light of the foregoing, the Court is unable to infer that UMB delegated to Newlight any express or implied actual authority to subordinate the Notes or the UMB Security Interest.

2. Neither Newlight Nor PIUS Possessed Apparent Authority

Apparent authority "is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[45] The creation of the apparent authority allegedly possessed by Newlight or PIUS to subordinate the Notes is

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[39] *See id.* at 37 § 9.6 ("Servicer and Disbursing Agent shall have all other rights and remedies not inconsistent herewith . . . .").

[40] *Id.* at 35 § 9.1.

[41] *Id.* at 35 § 8.15.

[42] Trust Indenture at 60 § 9.02; *see also id.* at 67 § 10.01(q)–(r) (requiring Debtors to maintain the first priority security interest of UMB); Adv. D.I. 42 at Ex. 4 (Private Placement Memorandum) at 42 ("[N]othing contained in the Indenture will permit . . . without the consent of the Minimum Noteholder Percentage . . . (d) the creation of a lien on the Trust Estate prior to or on parity with the lien of the Indenture (other than Permitted Liens) . . . .").

[43] *See* Adv. D.I. 42, Ex. 5 at 57:23–58:3, 108:1–4 (Berlin deposition); *id.*, Ex. 6 at 165:21–24, 191:5–10, 208:12–23 (Agiato deposition); *id.*, Ex. 15 at 92:4–93:4 (Renert deposition).

[44] *See id.*, Ex. 15 at 93–94 (Renert deposition).

[45] *Parke*, 217 A.3d at 712; *Ephrat v. MedcCPU, Inc.*, No. 17-0493, 2018 Del. Ch. LEXIS 320, at *4 (citing *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d, 725, 799 (Del. Ch. 2014) (quoting RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006))); *Hallock v. State of New York*, 64 N.Y.2d 224, 231 (1984).

dependent on the words or conduct of UMB, as principal, that caused Mr. Lewis to reasonably believe Newlight or PIUS possessed authority to enter into transactions on behalf of UMB.[46]

The parties present no arguments or evidence that UMB conferred upon PIUS the apparent authority to subordinate the Notes. Like actual authority, the issue of apparent authority is limited to Newlight. Cooks CA contends that UMB's absence from discussions and inquiries regarding the Debtors' debt, collateral, and business was sufficient manifestation to it from UMB conferring apparent authority onto Newlight through Mr. Agiato. It contends that Mr. Agiato was the sole representative on these topics to Mr. Lewis, and at no time did Mr. Agiato include UMB in the conversations or direct third-parties to UMB. UMB argues that this is insufficient to suggest that Newlight had apparent authority to agree to subordination on behalf of UMB. The Court concurs.

In support of its position, Cooks CA relies on *Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*[47] for the proposition that apparent authority is present where the alleged agent is the only person with whom a third party communicates and where the principal never communicates to the third party that the alleged agent is not authorized to enter into agreements on its behalf. However, the principal in *Sarissa* designated the agent as "lead negotiator" to serve as the principal's exclusive channel on all negotiations relating to a specific subject matter.[48] Such manifestation and overt conduct is indisputably absent here, and the Court was unable to find anything else in the record to support a theory of apparent authority.[49]

V. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** the following:

1. *Cooks CA LLC's Motion for Summary Judgment* is denied.

2. *Defendant's Motion for Summary Judgment* is granted as set forth herein.

3. Summary judgment is entered in favor of UMB on Counts I, II, and III of the Complaint.

4. Any relief with respect to the Alternative Counterclaims is denied as moot.

Dated: April 4, 2025
Wilmington, Delaware

Karen B. Owens
United States Bankruptcy Judge

[46] *Id.*

[47] No. 17-0309, 2017 WL 6209597 (Del. Ch. Dec. 8, 2017).

[48] *Id.* at *19.

[49] *See, e.g.*, Adv. D.I. 42, Ex. 5 at 152:16–19 (Lewis deposition) (testifying that he had no communication or requests for communication from UMB after the Notes transaction in June 2023).