UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: SILVERGATE CAPITAL CORPORATION, et al., Debtors.	Chapter 11 Case No. 24-12158 (KBO) (Jointly Administered)
SILVERGATE CAPITAL CORPORATION, Plaintiff, v. STILWELL ACTIVIST INVESTMENTS, L.P., Defendant.	Adv. Case No. 24-50132 (KBO) **Related Adv. D.I.: 2, 3**

STILWELL ACTIVIST INVESTMENTS, L.P.'S OPPOSITION TO DEBTOR SILVERGATE CAPITAL CORPORATION'S MOTION FOR TEMPORARY RESTRAINING ORDER

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STATEMENT OF NATURE AND STAGE OF PROCEEDINGS

On September 17, 2024, Silvergate Capital Corporation ("Silvergate") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, §§ 101-1532. Two days later, on September 19, 2024, Silvergate filed an adversary complaint seeking injunctive relief against its annual meeting, as well as a motion for a temporary restraining order (the "Motion") and a Memorandum of Law in Support of Silvergate Capital Corporation's Motion for Temporary Restraining Order ("MOL"). Defendant Stilwell Activist Investments, L.P. ("Stilwell") now submits this brief in opposition to the Motion.

SUMMARY OF ARGUMENT

On September 17, 2024, Silvergate notified thousands of common stockholders that its annual meeting will be held on September 27, 2024 in La Jolla, California at 8 AM PST. In the wake of the collapse of Silvergate's cryptobank subsidiary in late 2022, Silvergate has been run by four incumbent directors with collective ownership of approximately 0.006% of the common shares. These incumbents chose not to hold an annual meeting in 2023.

Now, for the first time since Silvergate's collapse, and due to Stilwell's efforts in seeking a court order compelling Silvergate's compliance with its own corporate charter, shareholders will be able to have a voice in corporate affairs. There are six board seats open for election, with Silvergate nominating five directors, so the election of Joseph Stilwell, the candidate proposed by Silvergate shareholder Stilwell, appears likely. Holding the annual meeting, at which Stilwell has nominated *only one* of six directors, clearly poses no risk to the Debtors' rehabilitation.

This meeting results from a writ of mandamus issued by the Circuit Court for Baltimore County, Maryland (the "Circuit Court"). When Stilwell sought mandamus in the Circuit Court earlier this year, Silvergate's board of directors (the "Board") claimed that its "business judgment" gave it discretionary power to override Maryland's statutory mandate for an annual meeting. On

May 30, 2024, the Circuit Court rejected this argument, issuing a writ requiring the annual meeting to be held no later than September 27, 2024 (the "Writ").

After unsuccessfully asking the Maryland courts four times to delay or enjoin the annual meeting, Silvergate now moves this Court to temporarily enjoin the Writ. It has overreached. Silvergate's claim presents a quintessential "Rooker-Feldman" dispute. The Rooker-Feldman doctrine forbids this Court from readjudicating the final judgments of state courts. This is particularly relevant with respect to annual shareholder meetings, which both federal and state courts in Delaware have repeatedly ruled are not impacted or barred by the automatic stay. *Official Bondholders Comm. v. Chase Manhattan Bank (In re Marvel Entm't Grp., Inc.)*, 209 B.R. 832 (D. Del. 1997); *Fogel v. U.S. Energy Sys., Inc.*, C.A. No. 3271-CC, 2008 WL 151857, at *1 (Del. Ch. Jan. 15, 2008).

It is well-settled that "[s]hareholders … should have the right to be adequately represented in the conduct of the debtor's affairs, particularly in such an important matter as the reorganization of the debtor." *Marvel*, 209 B.R. at 838. This bedrock principle is particularly true in a solvent debtor case, like the one at bar. Indeed, Silvergate's shares are actively trading on the over-the-counter markets even after the Chapter 11 filing.

Silvergate has shown neither "clear abuse" from Stilwell nor irreparable harm arising out of holding the annual meeting of a solvent corporation. The gravamen of Silvergate's "clear abuse" argument is merely that Stilwell should not still seek to enforce the Writ now that the Debtors have filed for bankruptcy. But this District recognizes that even during bankruptcy, "[t]he right of shareholders 'to be represented by directors of their choice and thus to control corporate policy is paramount.'" *Id*. Here, the proposed Chapter 11 plan that the Debtors have just filed pays creditors in full but does not maximize value, given the Debtors' backroom agreement with certain preferred

shareholders to pursue a value-destructive liquidation strategy. In fact, the Debtors propose to abandon over $2 billion in combined valuable state and federal net operating loss carryforwards ("NOLs") in their rush to obtain insider releases without regard to their duties to maximize value for all stakeholders.

This Court must reject Silvergate's invitation to interfere with the court-ordered annual shareholder's meeting, scheduled to occur in just three days. Silvergate's alleged desire to prevent the meeting in order to avoid expense rings hollow. It could have called the annual meeting voluntarily, for far less than the legal fees it has incurred in its scorched-earth campaign to frustrate the Writ. Either way, Silvergate has conceded that it has already incurred the time and expense to arrange for the meeting, so its arguments regarding cost fail on their own merits. Likewise, Silvergate's claim of harm, two days into Chapter 11 proceedings, is also baffling. Stilwell has nominated ***one*** director, who would be seated on a board of six. At most, shareholders stand to obtain a voice in the boardroom. Creditors would remain unaffected.

The balance of the equities weighs against enjoining the Writ. The meeting will not result in the removal of any of the incumbents but will simply give Silvergate's largest equity holder a seat in the boardroom. Silvergate acknowledges that it is solvent. Despite Silvergate's claim that common holders will receive nothing, it is far too early to decide.

Silvergate's conduct is plainly strategic. Its claim that common stockholders will recover nothing comes merely 48 hours into the Chapter 11 proceeding, well before Stilwell and other common holders have been afforded an opportunity to test the merits of this assertion, which is certain to be contested. Assets that the Board deems of "no value," such as significant cash reserves of $163.1 million, valuable technology and IP assets, and its combined total of $2.6 billion in federal and state NOLs, are often preserved in these circumstances for the benefit of the Company.

Here, the Board has proposed a liquidation plan that does not preserve these valuable assets, nor – despite discussion with Stilwell – have the Debtors yet filed a standard "first day NOL motion," which relief this Court routinely grants as being in the best interests of a bankruptcy estate.

Silvergate's tactics are also apparent outside the courtroom. Although it is customary to give shareholders several weeks' notice of an annual meeting, Silvergate delayed calling the annual meeting until the last possible day, thereby making it more difficult to gather votes. It has refused to give Stilwell a customary list of stockholders, which impedes Stilwell's ability to communicate with other holders ahead of the election. By doing so, Silvergate has also made it more difficult to obtain a majority quorum at the annual meeting.

For the reasons more fully set forth below, the Court should deny the Motion and allow Silvergate's common stockholders to exercise their right to meet and vote.

STATEMENT OF FACTS

Parties

Plaintiff Silvergate Capital Corporation is a Maryland corporation. Until July of this year, Silvergate was a bank holding company for Silvergate Bank (the "Bank," now the Silvergate Liquidation Corporation). Silvergate's board is currently comprised of five directors. Four are holdover directors – Michael T. Lempres, Paul D. Colucci, Scott A. Reed, Thomas C. Dircks – whose terms were either set to expire at the 2023 Annual Meeting or the 2024 Annual Meeting. (Declaration of E.J. Borrack ("Borrack Decl.") ¶ 12.) These four incumbent directors collectively own approximately 0.006% of the common shares. (*Id.*) The final director, Ivona Smith, is a so-called restructuring expert who was appointed to the Board last month, apparently to investigate potential claims against directors and officers, including the four holdover directors. (*Id.* ¶ 13.)

Defendant Stilwell Activist Investments, L.P. is a Delaware limited partnership and a stockholder of record of Silvergate, with its principal place of business in New York, New York.

Stilwell holds more than 9.9% of the common stock of Silvergate and is its largest holder of record. Stilwell and/or its affiliates regularly invest in bank holding companies, including investments in more than 70 such companies since 2000.

Silvergate Goes Dark, Fails to Hold Annual Meeting

A small community banking provider for 30 years, the Bank shifted its business by 2016 to a "crypto" client base, primarily driven by its close association with Sam Bankman-Fried and his cryptocurrency exchange platform, FTX Trading Ltd. ("FTX"); it launched various services including a crypto technology platform called the Silvergate Exchange Network. By 2019, the Bank was on its way to becoming the largest cryptocurrency bank in the U.S., according to the Financial Times. Its deposits rose from roughly $2 billion in 2020 to more than $10 billion in 2021. (*See* Borrack Decl. ¶ 5, Ex. A.)

In November 2022, a cryptocurrency exchange known as FTX imploded after questionable financial practices came to light. In the aftermath of FTX's failure, certain U.S. senators claimed that the Bank "appears to be at the center" of how FTX moved funds around its founder Sam Bankman-Fried's "crypto empire." (*Id.* ¶ 6, Ex. B, Senators' letter.) The senators sent a letter to the Bank's chief executive saying that failure to detect FTX's scheme could mean that the Bank breached anti-money laundering laws. (*Id.*) In the midst of this news, Silvergate's stock price collapsed. Regulators such as the U. S. Securities and Exchange Commission (the "SEC"), the Federal Reserve Board, and California's bank regulator opened inquiries into the Bank, later leading to multimillion-dollar fines from all of these regulators. (*See id.* ¶ 7, Ex. C.)

Silvergate stopped filing quarterly and annual financial reports with the SEC in late 2022. (*Id.* ¶ 8.) Silvergate did not hold an annual meeting in 2023; its last annual meeting was held on June 10, 2022. (*Id.* ¶ 9.) For more than two years, common stockholders have been in the dark regarding the financial affairs of the corporation, apart from being informed of the Bank's self-

liquidation plan in March 2023. (Borrack Decl. ¶ 10.) In November 2023, Silvergate announced that it had repaid all of the Bank's depositors in full. (*Id.* ¶ 11.)

In December 2023, Stilwell sought more detailed information from Silvergate pursuant to Section 1601 of the California Corporations Code, but Silvergate refused to comply. (*Id.*) On August 9, 2024, the Superior Court of San Diego County ordered Silvergate to produce said financial books and records to Stilwell. (*Id.*) It was not until the very last day for compliance under the California court's order that Silvergate produced any records, a mere week prior to initiating the instant bankruptcy cases. (*Id.*)

As Silvergate finalized the Bank's liquidation and became embroiled in regulatory investigations and securities litigation, four of the eight directors who served at the 2022 annual meeting resigned, leaving four incumbents who collectively held a nominal interest in Silvergate's common stock. (*Id.* ¶ 12.) In August 2024, one director resigned, and the Board appointed a new director, Ms. Ivona Smith, a so-called restructuring expert, purportedly to investigate potential claims against directors and officers, presumably including the four holdover directors. (*Id.* ¶ 13.)

Maryland Court Requires Silvergate to Hold Its Annual Meeting

On February 16, 2024, Stilwell filed a petition for a writ of mandamus in the Circuit Court to compel Silvergate to comply with Maryland law and hold an annual meeting. (*Id.* ¶ 14.) Stilwell's proposed writ requested an annual meeting be ordered to occur within 120 days and that the quorum for the annual meeting comprise the shares of stock represented at the meeting, in person or by proxy, a standard quorum for court-ordered meetings. (*Id.*)

Silvergate moved to dismiss the petition on March 18, 2024. In its motion, Silvergate argued that mandamus should not issue because the Business Judgment Rule under Maryland law granted Silvergate's Board discretion not to call a meeting in 2023 or at any other time; and that the requested quorum was contrary to its governing documents and Maryland law. (*Id.* ¶ 15.)

Stilwell opposed the motion to dismiss, arguing that the Board exceeded the limits of its discretion by failing to hold an annual meeting in 2023, in violation of Md. Code Ann., Corps. & Ass'ns § 2-501(a). Stilwell also argued that the Circuit Court should issue the requested quorum in its discretion to ensure that the Court's order be effective, and that shareholders would not be disenfranchised by the lack of a quorum, which the incumbent Board might facilitate.

While the motion to dismiss was pending, Stilwell submitted a notice of intent to nominate Joseph Stilwell to the Board at its next annual meeting. The notice was submitted within the window set by Silvergate's corporate bylaws. (Borrack Decl. ¶ 16.)

The Circuit Court held a hearing on the motion to dismiss on May 23, 2024. Silvergate made no promise to hold a shareholder meeting and insisted that the decision of whether and when to do so was the Board's alone. (Timlin Decl. Ex. 1 at 9:08-10:19.) The Circuit Court denied Silvergate's motion to dismiss and ordered that the writ be granted as requested. The Court then entered the Writ on May 30, 2024. The Writ requires Silvergate to hold its annual meeting within 120 days of issuance—*i.e.*, by September 27, 2024 (the "Meeting Date")—and included the requested quorum provision. (Borrack Decl. ¶ 18 & Ex. D.)

Silvergate Attempts to Block the Writ

On June 7, 2024, Silvergate moved the Circuit Court to alter and amend the Writ, seeking yet again to delay the meeting and to undo the quorum relief (the "Motion to Alter"). (*See id.* ¶ 19, Ex. E.) The Motion to Alter sought to delay the meeting by another forty-five days, and to undo the quorum relief. It again argued that the Writ issued in error, including with respect to the quorum provision (the same claim that Silvergate raises in its Motion). (*Id.*) On July 10, 2024, the Circuit Court denied Silvergate's Motion to Alter. (*Id.* ¶ 20.)

On August 1, 2024, Silvergate filed a notice of appeal to the Appellate Court of Maryland. (Borrack Decl. ¶ 21.) However, it did not seek to expedite the appeal pursuant to Md. Rule 8-207, which would have permitted the Appellate Court to rule on the Writ before the Meeting Date. (*Id.*)

Stilwell began to prepare for the annual meeting and the proxy contest, including by actively and publicly soliciting shareholder participation in the contested election. (*Id.* ¶ 22.) In late August 2024, Stilwell sought shareholder lists from Silvergate pursuant to Maryland law and Silvergate's bylaws. Amongst the materials requested was a copy of a list of certain shareholders who held shares through brokerage accounts (the "NOBO list"), which Silvergate had ordered on August 8, 2024. (*Id.* ¶ 23.) Consistent with established law and Stilwell's experience, corporations will commonly provide NOBO lists in their possession in response to requests for shareholder lists. (*Id.* ¶ 24.) Silvergate continues to refuse to provide its NOBO list to Stilwell. (*Id.*¶ 25.) As a result, Stilwell cannot identify and communicate with the majority of Silvergate's shareholders, who are beneficial owners and not holders of record. (*Id.*)

On September 3, 2024, more than three months after the Writ issued, Silvergate filed a Motion to Suspend and Stay Enforcement of the Writ Pending Appeal (the "Motion to Stay") (*Id.* ¶ 26), as well as an accompanying motion to shorten time to brief the Motion to Stay (the "Motion to Shorten Time") in the Circuit Court, again arguing the Writ was contrary to law. (*Id.* ¶ 26.) The Circuit Court denied the Motion to Shorten Time on September 6, 2024. (D.I. 3.)

On September 12, 2024, Silvergate filed a Motion to Suspend and Stay Enforcement of the Writ in the Appellate Court of Maryland (the "Appellate Stay Motion") on identical grounds to the motion below. The Appellate Court of Maryland denied the Appellate Stay Motion without prejudice. (*Id.*)

September 17, 2024, the last possible day to give notice of the annual meeting in compliance with the Writ, Silvergate delivered to Broadridge Financial Solutions its Notice of Annual Meeting ("Notice"), which advised shareholders that the meeting would occur on September 27, 2024. (Borrack Decl. ¶ 27.) The Notice also revealed that Silvergate had expanded the board to six seats but is only nominating five directors. (*Id.* ¶ 3.) Broadridge sent out the Notice to Silvergate shareholders on September 19, 2024. (*Id.* ¶ 27.)

As a result of Silvergate's timing, very few shareholders will have time to receive Silvergate's package, vote their shares, and return the proxy. Typically, shareholders are afforded 30-45 days to respond to a corporation's notice of annual meeting and vote their shares via proxy. (*Id.* ¶ 28.)

By drafting and issuing the Notice of Annual Meeting, Silvergate has now incurred a majority of the costs associated with calling the annual meeting. (*Id.* ¶ 29).

Just before midnight on September 17 and into the early hours of September 18, 2024, Silvergate filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware.

The Debtors' proposed Chapter 11 plan of reorganization (Dkt. No. 10) (the "Plan") pays all creditors in full. (*See* Plan at Art. III.B.3 & B.4.) The Plan also improperly seeks to deprive shareholders of the right to vote. (*See* Plan at Art. III.B.8.)

On September 18, 2024, counsel for Silvergate sent a letter to counsel for Stilwell claiming that with its "bankruptcy filing, a shareholder meeting no longer has any potential utility," and claiming based on Silvergate's and its advisors' projections, "no common shareholders will receive any funds in connection with [Silvergate's] liquidation," and that even if Mr. Stilwell received a Board seat, no benefit would be provided for common shareholders. (Borrack Decl. ¶ 31.)

On September 19, 2024, counsel for Stilwell responded, rejecting Silvergate's latest bid to stay the Maryland Writ and deprive the common shareholders of their right to elect a representative responsive to their interests. (Borrack Decl. ¶ 32.)

On September 19, 2024, Silvergate filed Notices of Bankruptcy in both the Circuit Court and the Appellate Court of Maryland. That same day, this Court had its First Day Hearing.

Minutes before midnight on September 19, 2024, Silvergate filed its Motion to enjoin the Writ and halt the annual meeting.

Silvergate's shares still actively trade on the over-the-counter markets, even after its Chapter 11 filing. (*Id.* ¶ 33.)

STANDARD

Pursuant to Bankruptcy Rule 7065, bankruptcy courts may issue temporary restraining orders pursuant to Rule 65 of the Federal Rules of Civil Procedure in adversary proceedings. *MF Glob. Holdings Ltd. v. Allied World Assurance Co. Ltd. (In re MF Glob. Holdings Ltd.)*, 561 B.R. 608, 624 (Bankr. S.D.N.Y. 2016). For a temporary restraining order ("TRO") to issue, the Court must be convinced that the following factors favor granting preliminary relief: (1) a strong probability of success that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest. *Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharm. Co.,* 290 F.3d 578, 586 (3d Cir. 2002); *Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc. (In re Advanced Mktg. Servs., Inc.),* 360 B.R. 421, 426 (Bankr. D. Del. 2007).

To enjoin an annual meeting or the outcome thereof, this District examines whether there has been "clear abuse," meaning "a showing of delay and real jeopardy to a debtor's reorganization." *See In re SS Body Armor I, Inc.*, 527 B.R. 597, 607 (Bankr. D. Del. 2015).

ARGUMENT

The Motion should be denied for at least two reasons. First, this Court is not permitted to relitigate matters that have already been decided by another court of competent jurisdiction. Second, there is no showing of clear abuse. Silvergate has totally failed to show a likelihood of success on the merits, irreparable harm, or that the balance of the equities and public interest weigh in its favor.

I. Silvergate's Collateral Attack on the Writ Is Barred

The leitmotif of Silvergate's motion papers is that the Circuit Court erred when it issued the Writ. (MOL at 2, 15, 18.) In seeking a TRO against the annual meeting[1], Silvergate invites this Court to effectively serve as an appellate court over the state court. That invitation is foreclosed by both (i) the Rooker-Feldman doctrine and (ii) collateral estoppel.

A. Silvergate's Claim Is Barred By the Rooker-Feldman Doctrine

As the Third Circuit has observed, "[t]he Rooker-Feldman doctrine deprives a federal district [or bankruptcy] court of jurisdiction to review, directly or indirectly, a state court adjudication." *Ayres-Fountain v. E. Sav. Bank*, 153 F. App'x 91, 92 (3d. Cir. 2005). The doctrine arises from 28 U.S.C. § 1257, which provides that appeals of state court decrees are to be heard only by the U.S. Supreme Court; lower federal courts lack jurisdiction over appeals of state court decisions. *Knapper v. Bankers Trust Co., (In re Knapper)*, 407 F.3d 573, 580 (3d Cir. 2005).

Accordingly,

> a claim is barred by Rooker–Feldman [doctrine] under two circumstances; first, if the federal claim was actually litigated in state court prior to the filing of the federal action or, second, ***if the federal claim is inextricably intertwined with the state adjudication***, meaning that federal relief can only be predicated upon a conviction that the state court was wrong.

[1] Stilwell is not the proper defendant for this TRO, as it is not the party bound to implement the Circuit Court's Writ.

Id. (emphasis added); *Edwards v. New Century Mortg. Corp. (In re New Century TRS Holdings, Inc.)*, 423 B.R. 467, 472 (Bankr. D. Del. 2010). "[A] federal claim is 'inextricably intertwined' with an issue adjudicated by a state court when (1) the federal court must determine that the state court judgment was erroneously entered in order to grant the requested relief, or (2) the federal court must take an action that would negate the state court's judgment." *Madera v. Ameriquest Mortg. Co. (In re Madera)*, 586 F.3d 228, 232 (3d Cir. 2009).

The Rooker-Feldman doctrine applies when (1) a plaintiff lost in state court, (2) the state-court judgment caused the plaintiff's injuries, (3) the state court rendered judgment before the federal claim was filed, and (4) the plaintiff invites the district court to review and reject the state judgment. *See Great Western Mining & Min. Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010); *Shawe v. Pincus*, 265 F. Supp. 3d 480, 485-86 (D. Del. 2017); *see, e.g., Kosachuk v. Selective Advisors Grp., LLC (In re NLG, LLC)*, No. 21-11269, 2023 WL 2055344, at *8 (Bankr. D. Del. Feb. 16, 2023) (finding the Rooker-Feldman doctrine applies to loser of state court judgment seeking relief in bankruptcy court, and finding further that the "Bankruptcy Court is a court of limited jurisdiction and cannot review and collaterally attack the [state court judgment] under its section 105 powers").

All four elements are met. Silvergate, the plaintiff, opposed Stilwell's mandamus petition in the Circuit Court, and lost. It filed a Motion to Alter asking the Circuit Court to further push the deadline for holding the annual meeting and claiming the ordered quorum violated Maryland law. It lost again. *See Shawe*, 265 F. Supp. 3d at 488 (plaintiffs lost when the Delaware Chancery Court ordered the sale of the corporation over their objections); *infra* Section II.A.2. The Writ, which issued nearly *four months* ago, commands Silvergate to hold its annual meeting by September 27. By seeking its injunction, Silvergate now invites this Court to negate the Circuit Court's judgment.

While the Writ was correctly issued in all respects, its correctness is not a matter that falls within this Court's jurisdiction. *See, e.g.*, *New Century*, 423 B.R. at 473; *JNA-1 Corp. v. Uni-Marts, LLC (In re Uni-Marts, LLC)*, 404 B.R. 767, 788-789 (Bankr. D. Del. 2009) (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S.280, 284 (2005)). The Court should decline Silvergate's invitation to sit as an appellate court in review of the Writ. *See Besing v. Hawthorne (In re Besing)*, 981 F.2d 1488, 1496 (5th Cir. 1993) ("The Bankruptcy Code was not intended to give litigants a second chance to challenge a state court judgment nor did it intend for the Bankruptcy Court to serve as an appellate court [for state court proceedings]").

The District of Delaware regularly dismisses parties' attempts to enjoin state court orders. *See, e.g.*, *Shawe*, 265 F. Supp. 3d at 487-90 (claim seeking injunction against implementation of state court order to sell corporation is equivalent to seeking to enjoin the order itself, and is thus barred by Rooker-Feldman); *Klein v. McQueen*, No. C.A. No. 19-869, 2019 WL 6307770, at *2 (D. Del. Nov. 25, 2019) (district court lacks jurisdiction "[b]ecause this action is the functional equivalent of an appeal from an order issued by the Delaware Court of Chancery").

B. Silvergate Is Collaterally Estopped from Seeking a TRO

The collateral estoppel doctrine also precludes Silvergate's collateral attack on the Writ. "It is well-settled that a final judgment in a civil action may be challenged on direct review but cannot be collaterally attacked in a subsequent proceeding." *Uni-Marts*, 404 B.R. at 788. "[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Garrity v. Maryland St. Bd. Of Plumbing*, 447 Md. 359, 368 (Md. 2016). Again, all factors are present here.

The Writ is a valid and final judgment. It decided that Silvergate should be compelled to hold its meeting by September 27, 2024, after not having held one in 2023, and it prescribed a modified quorum for this court-ordered meeting.

The issues Silvergate raises were actually litigated. "An issue is 'actually litigated' when it 'is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *O'Leary v. Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1066 (3d Cir. 1991) (finding issue that was briefed in prior action, submitted for determination, and ruled upon was "actually litigated"). Silvergate presented the Circuit Court with its claim that the quorum violates Maryland law, and lost. The Circuit Court reviewed the brief Silvergate submitted, and it rejected that argument. (*Compare* Motion at 2, 7, 8; *with* Borrack Decl. Ex. E (Silvergate Motion to Alter)).

To be clear, and as detailed below, the Circuit Court properly exercised its discretion to fashion equitable remedies when it issued the Writ with a deadline of September 27 and a modified quorum. That the Circuit Court did not list its reasons on the record (MOL at 1, 8) does not mean the matter was *not* "actually litigated." Whether the Writ should issue, and whether its quorum was permitted by Maryland law, was fully briefed, submitted, and decided. *See* 923 F.2d at 1066. Both parties, Silvergate and Stilwell, were fully represented and had a fair opportunity to be heard.

There have been no material changed circumstances since the Circuit Court's order that preclude collateral estoppel. Specifically, it is a truism that Chapter 11 bankruptcy does not deprive shareholders of their right to an annual meeting, least of all under these circumstances, where Silvergate has made every effort to avoid complying with its obligations. *See NKFW Partners v. Saxon Indus., Inc.*, No. 7468, 1984 WL 8234, at *2 (Del. Ch. Aug. 8, 1984) ("[P]endency of a proceeding in bankruptcy ordinarily will not impair the right of a shareholder to compel an annual

meeting."), *aff'd*, 488 A.2d 1298, 1303 (Del. 1984). Thus, Silvergate is collaterally estopped from seeking yet another chance at a stay.

II. Silvergate Is Not Entitled to a TRO

There has been no clear abuse. Stilwell properly petitioned the Circuit Court to order a meeting, and the resulting Writ, which issued nearly *four months ago*, includes a standard quorum commonly used for court-ordered meetings. Silvergate has no likelihood of success on the merits, and faces no irreparable harm. The balance of equities and public interest both weigh against enjoining the Writ. Silvergate's Motion should be denied.

A. Silvergate Is Not Likely to Succeed on the Merits Because the Court-Ordered Meeting Is Plainly Not the Result of Clear Abuse

1. Seeking a Stockholder Meeting, Without More, Is Not Clear Abuse

Silvergate accuses Stilwell of "clear abuse in its attempt to compel the annual meeting … because it has no valid corporate governance purpose to do so[,]" (MOL at 13), now that Silvergate has filed for bankruptcy. Silvergate claims that Stilwell's goals of advocating for shareholders and obtaining information about the Company's financial status will "no longer be satisfied." (MOL at 14.) This is plainly wrong.

It is not clear abuse for a shareholder to seek a board seat to have a voice in the formulation of a Chapter 11 plan. The entire purpose of a Chapter 11 case is to determine the valuation of a business and the best way to maximize that value. The Debtors' self-serving conclusion that if it *liquidates* its assets, only preferred shareholders will recover and not common equity, is exactly the reason why common shareholders need a voice in the boardroom and a seat at the table. "The fact that the shareholders' action may be motivated by a desire to arrogate more bargaining power in the negotiation of a reorganization plan, without more, does not constitute clear abuse." *Marvel*, 209 B.R. at 838; *see also Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville*

Corp.), 801 F.2d 60, 64 (2d Cir. 1986) ("[W]e cannot agree that the Equity Committee's professed desire to arrogate more bargaining power in the negotiation of a plan…may itself constitute clear abuse"); *Van Siclen v. Bush (In re Bush Terminal Co.)*, 78 F.2d 662 (2d Cir. 1935) (reversing order enjoining a shareholder meeting called for the purpose of advancing a rehabilitation plan more favorable to equity).

To the extent Silvergate, a solvent corporation, claims that a shareholder is acting "abusively" by pursuing an annual meeting, it relies on inapposite precedent. Its only example is *In re GenCanna Glob. USA, Inc.*, 619 B.R. 364 (Bankr. E.D. Ky. 2020), a factually inapposite case. In *GenCanna*, the Bankruptcy Court found that a group of equity holders who, while the bankruptcy process was firmly underway, attempted to take control of the board and stop the bankruptcy proceedings by removing three directors via written consent, had abused their voting rights. In that case, a Section 363 sale process resulted in a $75 million bid. Certain equity holders attempted to submit a plan proposal to overcome the bid at the auction. The Bankruptcy Court found that the equity holders' plan had no funds, not even a deposit, and approved the sale to the winning $75 million bidder. A month *after* that sale approval and the closing of the sale, the equity holders sought to derail the bankruptcy process by seeking to remove the directors of the debtor. The equity holders appointed one new director and then further resolved to "immediately dismiss the current Chapter 11 bankruptcy proceeding of the Corporation." *Id.* at 367. In finding a stay violation, the Bankruptcy Court observed that "the Violating Shareholders no longer had any expectation of a recovery and no equity interest to protect." *Id.* at 370.

None of those circumstances apply here. The Board failed to hold its meeting in 2023. The Circuit Court issued its Writ months ago. Silvergate only filed for bankruptcy last week, its common stock is still trading on the market, and it is far too early for the Court to decide the

valuation and how to best maximize the value of the assets. Moreover, even if elected, Mr. Stilwell would become one of six directors. Stilwell would hardly have control of the board, and even if it wanted to derail the bankruptcy process, it could not.

Indeed, the balance of the cases Silvergate cites *reverse* the TROs issued in bankruptcy against attempts to compel annual shareholder meetings. *See Marvel*, 209 B.R. at 838; *Johns-Manville*, 801 F.2d at 64 (reversing bankruptcy court injunction against ongoing DGCL § 211(c) action to compel an shareholder meeting); *Bush Terminal*, 78 F.2d at 664 (cited by *Johns-Manville*) ("No reason is advanced why stockholders, if they feel that the present board of directors is not acting in their interest, or has caused an unsatisfactory plan to be filed on behalf of the debtor, should not cause a new board to be elected which will act in conformance with the stockholders' wishes").

Courts universally recognize that corporate governance rights, such as the right to an annual meeting, do not cease upon the filing of a Chapter 11 petition. Where, as here, existing state court orders compel annual meetings, those orders are not stayed by bankruptcy petitions. *Fogel*, 2008 WL 151857, at *2 (previously ordered annual meeting is not stayed because "the passage into bankruptcy does not sound the death knell for the shareholders' role in corporate governance"); *see also Saxon*, 488 A.2d at 1303 (affirming lower court order compelling annual meeting issued two years into Chapter 11 proceedings).

The gravamen of Silvergate's Motion is that Stilwell should not seek to exercise its stockholder rights now that the Company has commenced Chapter 11 proceedings. But it is black letter law that "[t]he right of shareholders 'to be represented by directors of their choice and thus to control corporate policy is paramount.'" *Marvel*, 209 B.R. at 838.

As discussed, clear abuse does not occur when a shareholder merely wishes to appoint new directors and negotiate a better outcome for equity. *See id.*; *Johns-Manville*, 801 F.2d at 64-65 (equity's "mere intention to exercise bargaining power … cannot without more constitute clear abuse."). Instead, clear abuse occurs only if stockholders act in bad faith, to "risk rehabilitation altogether[.]" *Johns-Manville*, 801 F.2d at 65; s*ee SS Body Armor*, 527 B.R. at 607 ("clear abuse" requires "a showing of delay and real jeopardy to a debtor's reorganization"). No such risk exists here. First, Stilwell has only nominated one director, and his election would not create a change of control, nor would it in any way interfere with the reorganization. Second, here no rehabilitation is even proposed, but instead a value-destructive liquidation, whereas Stilwell believes rehabilitation may be available.

By contrast, Silvergate's conduct is classic gamesmanship. When Silvergate appealed the Writ to the Maryland Appellate Court in August, it did not try to seek expedition. Then, three months after the Writ issued, it filed three motions in state court in quick succession (presumably at substantial legal cost to the Debtors): a Motion to Stay the Writ in Circuit Court, a motion to expedite the Motion to Stay, and a motion to stay the Writ in Appellate Court. By deliberately waiting until September to ask the Circuit Court to stay the Writ, Silvergate precluded a timely decision. The latter two motions have been denied.

Silvergate's theories for why the Writ would be overturned on appeal are easily dispatched. The core of its theory is that its Board has total discretion over "when" within the year to hold an annual meeting, which precludes a Maryland court from ordering a meeting by a date certain. This notion was rejected by Maryland courts long ago. *See Mottu v. Primrose*, 23 Md. 482, 499-500 (1865) ("[t]he power to fix the time for the annual election, cannot be construed into a power in the incumbents, to extend their term of office indefinitely, so to hold would defeat the provisions

of the charter"). Maryland law requires that annual meetings be held every year; any Board must act "within the limits of the powers delegated" to it by law. *See Mahoney v. Bd. of Supervisors of Elections of Queen Anne's Cnty.*, 205 Md. 325, 335 (1954).

2. The Court-Ordered Quorum Is Not Evidence of Clear Abuse

Silvergate also takes issue with the Writ's quorum, which is comprised of "the shares of stock represented at such meeting, either in person or by proxy." It insinuates that Stilwell somehow "led the Circuit Court to commit error" out of ill-intent, supposedly while "knowing full well that few common stockholders would attend the meeting, and that this would be its only hope to impose its minority will on the company." (MOL at 1.) These accusations disrespect the Circuit Court's considered judgment and defy logic.

As discussed below, Stilwell asked the Court to change the quorum for the court-ordered meeting to the ***standard*** quorum commonly used in court-ordered meetings. The language is identical to -- and modeled after -- the quorum proscribed in 8 *Del. C.* § 211(c). Annual meetings ordered by the Delaware Court of Chancery uniformly use this quorum, which is designed to allow meetings to proceed without majority quorums. Indeed, the Court of Chancery observes that "[t]his special quorum rule helps guarantee that corporate stockholders—who have been deprived of their 'annual' meeting … will *actually have* such a meeting on the date set by the [C]ourt and will elect directors that day." *MFC Bancorp Ltd. v. Equidyne Corp.*, 844 A.2d 1015, 1019 (Del. Ch. 2003).

Stilwell's proposed Writ sought the "special quorum" for the same reason: to ensure the meeting occurs by the date ordered. An incumbent board may defeat an order to hold meeting simply by "fail[ing] to solicit proxies, which prevents the presence of a quorum and thus results in self-perpetuation of management." *See Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934*, Comm. on Interstate & Foreign Commerce, House Comm. Print, 77th Cong., 1st Sess. (1941) at

35. Alternatively, incumbent directors may gather proxies, but then refuse to attend the annual meeting, and thereby fail to bring votes needed to constitute a quorum. *See Bentas v. Haseotes,* No. 17223, 1999 WL 1022112 (Del. Ch. Nov. 5, 1999.

Although Maryland law does not mandate a particular quorum for court-ordered meetings, Maryland courts nonetheless have "inherent authority" to adjust the rights of all parties in a litigation to ensure complete relief. *Harris v. Harris*, 213 Md. 592, 597 (1957); *Jacham Enters., Inc. v. Hoffman*, 233 Md. 432, 438 (1964); *cf. Whiteley v. Schoenlein*, 183 Md. 590, 596 (1944) ("equity gives relief to adjust the rights of those who are entitled to share in the profits[]" of a company).

The Circuit Court properly used its discretion both when it ordered the modified quorum, and when it later denied Silvergate's Motion to Alter the Writ. Courts will routinely waive or modify quorum requirements set by statute or bylaw to prevent gamesmanship and the disenfranchisement of shareholders. *See, e.g.*, *Duffy v. Loft, Inc.*, 151 A. 223, 227 (Del. Ch. 1930) ("So important" is the statutory duty to hold annual meetings "that in some instances courts have brushed aside all strictness and technicality of view in the interest … of securing a statutorily commanded election[.]"), *aff'd*, 152 A. 849 (Del. 1930); *Lutz v. Webster*, 94 A. 834, 835 (1915) (Pennsylvania court waived quorum bylaw that was used to prevent annual shareholder meeting).

The core problem is that Silvergate held no meeting at all in 2023, in violation of Maryland law, and its legal positions raised red flags to the Circuit Court about its willingness to give shareholders a vote this year. If Silvergate wanted a routine quorum for its meeting, it should have called an annual meeting voluntarily and not waited for a court to order one.

3. Silvergate's Dilatory Behavior Evidences the Need for the Quorum

Furthermore, the implication that Stilwell "knew" whether a majority of Silvergate's shares will be voted is false. Instead, the course of conduct establishes that it is *Silvergate* that has been creating obstacles to a majority quorum.

Silvergate waited until the very last day allowable under its bylaws to notice the meeting: September 17, 2024. On that day, it delivered its proxy statement to Broadridge, which handles transmitting the proxy statements to brokerage firms for delivery to shareholders. As a result, the proxy statement was not actually mailed until September 19th. (Borrack Decl. ¶ 27.) As a result, very few shareholders will be able to receive Silvergate's package, vote their shares, and return the proxy card. (*Id.* ¶ 28.) In a typical election, shareholders are afforded 30-45 days to respond to proxy statements and vote their shares via proxy. (*Id.*) Here, they may not even have a week to do so.

Stilwell has been actively and publicly soliciting shareholder participation in the contested election for weeks. (*Id.* ¶ 22.) To support its efforts, Stilwell sent a demand for a NOBO list to Silvergate. Because the majority of stockholders are not shareholders of "record" but beneficial owners, Stilwell requested the list so that it would be able to contact Silvergate's beneficial holders to discuss the election. (*Id.* ¶¶ 23, 25.) Providing nominating shareholders a NOBO list within a company's possession is standard practice in contested elections. (*Id.* ¶ 24). *See also Shamrock Assocs. v. Tex. Am. Energy Corp.*, 517 A.2d 658 (Del. Ch. 1986) (ordering Delaware corporation to share NOBO list in its possession with shareholder); *Sadler v. NCR Corp.*, 928 F.2d 48 (2d Cir. 1991) (affirming district court order that Ohio corporation doing business within New York must provide shareholder with a NOBO list); *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 662 F. Supp. 1144, 1148 (D. Nev. 1987) (ordering Nevada corporation to give shareholder access to NOBO list

within its possession). Silvergate continues to refuse to provide the NOBO list, despite having ordered a copy of the list in August 2024. (Decl. ¶ 25.)

There may well be less than a majority quorum in attendance at the annual meeting on September 27th. If that occurs, it will be a direct result of Silvergate's tactics.

B. Silvergate Is Not Likely to Suffer Irreparable Harm if the Proposed Annual Meeting Were to Occur

Silvergate contends it will be "irreparably harmed" because it will "incur further costs if the meeting were to go forward on September 27," and because it will "force [Silvergate's] current directors and officers to shift their focus from the Chapter 11 liquidation efforts to the annual meetings[.]" (MOL at 16-17.) These arguments, which are unsupported by any record evidence, utterly fail to show irreparable harm. *See Bullock v. Carney*, 463 F.Supp.3d 519, 525 (D. Del. 2020) ("attorney argument [alone] cannot establish a showing of irreparable harm").

The costs Silvergate must expend to comply with the Writ do not constitute irreparable harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay [of a court decision] are not enough" to show irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). "It has long been recognized that mere [] expense, even if substantial and unrecoupable, does not constitute irreparable injury." *In re Countrywide Home Loans, Inc.*, 387 B.R. 467, 474 (W.D. Pa. 2008) (the costs of following court order compelling discovery do not suffice to show irreparable harm). Moreover, Silvergate has already drafted the majority of its proxy materials and invited shareholders to attend the scheduled meeting. (Decl. ¶ 29). Thus, a good part of the supposed harm "has already occurred and would not be undone by a stay." 387 B.R. at 475.

Moreover, the types of future expenses Silvergate cites – "preparing the balance of the remaining meeting materials, coordinating with the proxy solicitors and the actual running of the

annual meeting at the venue" – are routine expenses incurred in any annual meeting. Had Silvergate merely complied with its statutory duty to hold an annual meeting in 2023, these expenses would already have been incurred.

None of the cases cited by Silvergate apply. They all discuss the financial or attentional burden posed by adverse litigation against the debtor, and not the debtors' affirmative challenges to a court order. *See LTL Mgmt. v. San Diego Cnty. Emps. Ret. Ass'n (In re LTL Mgmt, LLC),* 640 B.R. 322 (Bankr. D.N.J. 2022); *MCorp v. Bd. Of Gov'rs of Fed. Res. Sys of United States (In re MCorp.),* 101 B.R. 483 (S.D. Tex. 1989), *rev'd in part on other grounds*, 900 F.2d 852 (5th Cir. 1990), *aff'd in part, rev'd in part*, 502 U.S. 32 (1991). Moreover, any ostensible burden will be short-lived. The annual meeting is scheduled to occur in three days, after which the Board can focus full time on the administration of the Chapter 11 case. The annual meeting will not "dissolve the focus" the Debtors need in Chapter 11, but rather sharpen that focus and ensure the owners of the Debtors are not continually disenfranchised.

C. The Balance of the Equities and Public Interest Weigh Against Enjoining the Ordered Meeting

Plainly, the balance of equities falls on the side of shareholders. By this point, Broadridge has mailed notice to thousands of shareholders inviting them to attend the annual meeting in La Jolla, California, on September 27th. They have not had a director election in over two years. It would work obvious hardship on these shareholders' governance rights to halt the meeting at the last minute.

The annual meeting is especially important because common shareholders have been left in the dark for two years by a board that led them into a catastrophic bank failure; a board which they never re-elected in 2023. A vote at the annual meeting is shareholders' only chance to wield their fundamental right to choose who represents them in the boardroom. After all, "[t]he notion

that directors know better than the stockholders about who should be on the board is no justification at all." *Mercier v. Inter-Tel*, 929 A.2d 786, 811 (Del. Ch. 2007). "[E]ven a board's honest belief that its incumbency protects and advances the best interests of the stockholders is not a compelling justification. Instead, such action typically amounts to an unintentional violation of the fiduciary duty of loyalty." *Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 602 (Del. Ch. 2006).

Silvergate offers three equally meritless reasons why it is favored by the balance of equities. Indeed, one of these reasons is actually an admission: that electing *one* new director to a six-person board does not result in a change of control. (*See* MOL at 18 (admitting that "whether Mr. Stilwell is on [Silvergate's] Board or not will not affect the [Board's] reasoned business judgment in how it administers" the Chapter 11 cases)).

Silvergate also contends that "the proposed annual meeting and proposed appointment of a new director will not serve the interests of the shareholders, or change the value of Stilwell's investment," because Silvergate "does not expect to make any distributions to common shareholders." (MOL at 17-18.)

Yet, it is far too early to determine whether the Board is correct that the remaining assets have no value. These assets include, among other things (i) $163.1 million in cash, (ii) intellectual property and other technology assets, (iii) over $1.3 billion in federal NOLs and $1.29 billion in state NOLs, and (iv) claims and causes of action. These are material assets far greater than those possessed by many debtors who have successfully reorganized under Chapter 11. To claim, two days after filing for bankruptcy, that "Stilwell is simply incorrect that [the NOLs] have value to the estate" is presumptuous and, at the very least, premature. The Debtors have not yet filed a customary NOL preservation order, which is routinely approved by this Court. *See, e.g.*, *In re Sunpower Corp.*, No. 24-11649 (CTG) (Bankr. D. Del. Aug. 28, 2024); *In re Vyaire Med., Inc.*,

No 24-11217 (BLS) (Bankr. D. Del. July 9, 2024); *In re Express, Inc*., No 24-10831 (KBO) (Bankr. D. Del., June 6, 2024); *In re Appgate, Inc*., No 24-10956 (CTG) (Bankr. D. Del. May 28, 2024).

At bottom, common shareholders must have a chance to elect someone whose interests are aligned with theirs: a new director who does not face the conflicts of interest faced by the remaining Board members who drove Silvergate straight into disaster.

Third, Silvergate argues that a TRO would "allow the appeals process in Maryland state court to play out further." (MOL at 18.) If Silvergate truly intended to obtain timely appellate review of the Circuit Court's Writ, it could have tried to expedite its appeal before the Chapter 11 filing. It chose not to. As a result, the Maryland appeal is unlikely to be heard before the end of the year. Any injunction would result in shareholders losing their right to choose their board – perhaps forever.

This is now the third motion Silvergate has filed, in the third court, in three weeks, seeking to stay the Writ. It repeats identical arguments as its predecessors in Circuit Court and Maryland Appellate Court. It was also not accompanied by any record evidence. *See Bullock v. Carney*, 463 F. Supp. 3d 519, 525 (2020) (collecting cases) ("The court cannot rely on factual representations in the parties' briefs to decide a motion for a … temporary restraining order.").

Silvergate's blatant forum-shopping is not the conduct of a party sincerely seeking timely review, but of a sophisticated actor schooled in the art of delay. Its Motion, which mounts an improper collateral attack on a state court order, plainly attempts to distract Stilwell from its efforts to solicit shareholder support before the annual election and is nothing more than a bad faith litigation tactic. *See 15375 Mem'l Corp. v. BEPCO, LP (In re 15375 Mem'l Corp.)*, 589 F.3d 605 (3d Cir. 2009) (finding the timing of filing dispositive in a ruling of bad faith where debtors filed Chapter 11 petition to avoid liability in another action); *In re Metrogate, LLC*, No. 15-12593, 2016

WL 3150177, at *17 (Bankr. D. Del. May 26, 2016) (dismissing an involuntary petition where the petition was filed "to obtain a tactical advantage in an ongoing dispute already properly pending in state court through forum shopping," finding "[f]orum shopping [to be] an archetypical bad faith litigation tactic") (*citing In re Silberkraus*, 253 B.R. 890, 905–07 (Bankr. C.D. Cal. 2000), *aff'd*, 336 F.3d 864 (9th Cir. 2003)); *Pharm. Research Assoc., Inc. v. Innovative Clinical Sols., Ltd.*, No. 00–1621, 2001 WL 1819314 at *3 (Bankr. D. Del. July 12, 2001) (disregard for contractual choice of forum suggests forum-shopping).

The public interest will best be served by protecting shareholders' franchise rights. Maryland shareholders have a "fundamental right to vote in director elections." *In re Laureate Educ. Inc. S'holder Litig.*, No. 24-C-07-000664, 2007 WL 5021405, at n.1 (Md. Cir. Ct. Balt. Cnty., June 26, 2007); *Shaker v. Foxby Corp.*, No. 24-C-04-007613, 2005 WL 914385, at *5 (Md. Cir. Ct. Balt. City, Mar. 15, 2005). The law is clear: even "insolvency … does not divest stockholders of their right to exercise the powers of corporate democracy." *Fogel*, 2008 WL 151857, at *1. Here, Silvergate is clearly *not* insolvent. The Circuit Court decided months ago to protect shareholders' right to elect their representatives. Its judgment should not be overruled, and this Court should not enjoin the owners of the Debtors from exercising their most fundamental, and now court-ordered, right to a meeting.

CONCLUSION

For the reasons stated above, Stilwell respectfully asks the Court to deny Silvergate's Motion.

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