SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 651497/2010
ARROWGRASS MASTER FUND LTD.;
vs.
THE BANK OF NEW YORK MELLON,
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Order.

Dated: 2/24/12 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ARROWGRASS MASTER FUND LTD., et al.,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON,

Defendant.

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Index No. 651497/2010
DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

Before the court is defendant's motion to dismiss plaintiffs' claims for breach of fiduciary duty, breach of contract and negligence, pursuant to CPLR 3211 (a) (1), (5) and (7).

Plaintiffs,[1] noteholders under a trust indenture, commenced this action to recover hundreds of millions of dollars in losses they allege were caused by defendant The Bank of New York Mellon (BNY), in its capacity as indenture trustee. The notes, due 2015 (the Notes or the 2015 Notes, and the holders thereof, the Noteholders or 2015 Noteholders) were issued in August 2005 by Basell AF S.C.A. (Basell or the Company), a Luxembourg-based international chemical company, and were junior to approximately $2 billion in senior debt. Plaintiffs allege that, as a result of BNY's failure to protect their interests (by taking certain actions and not taking others), the Notes were subordinated to $20 billion of new senior debt, borrowed by Basell to finance the acquisition of Lyondell Chemical Company (Lyondell) in a leveraged buyout (LBO). In less

[1] Plaintiffs are Arrowgrass Master Fund Ltd., Arrowgrass Distressed Opportunities Fund Limited, Caspian Capital Partners, LP, Caspian Select Credit Master Fund, Ltd., Columbus Hill Overseas, Ltd., Columbus Hill Partners, Ltd., CQS Directional Opportunities Master Fund Limited, CVI GVF (Lux) Master S.A.R.L., Fortelus Special Situations Master Fund Ltd., Investcorp Interlachen Multi-Strategy Master Fund Limited, Kassahun Kebede, KIVU Investment Fund Limited, Mariner LDC and Panton Master Fund, L.P..

than two years, the combined company declared bankruptcy. Plaintiffs, now subordinated to $22 billion of senior debt, expect, under the confirmed plan of reorganization, to recover only a portion of the approximately $1 billion owed them. Plaintiffs contend that had BNY properly performed its obligations and exercised its rights and remedies on behalf of the Noteholders, the LBO would not have been completed or would have been completed on terms ensuring full payment of principal and interest to the 2015 Noteholders.

On its motion, BNY seeks dismissal of the complaint on two independent grounds. It argues that: (i) plaintiffs released the claims they assert as part of a settlement of an earlier action they brought in the United States Bankruptcy Court for the Southern District of New York; and (ii) the agreements underlying plaintiffs' claims -- a notes indenture and a related intercreditor agreement -- make clear that BNY did not breach any duty to plaintiffs. For the reasons that follow, BNY's motion is granted in part and denied in part.

I. Background

Except where otherwise indicated, the factual background is drawn from the complaint and the documents referred to in the complaint.

A. The Indenture and 2005 Intercreditor Agreement

On August 10, 2005, Basell entered into an indenture (the Indenture) with BNY as indenture trustee (Indenture Trustee), under which Basell issued 615 million of dollar-denominated and 500 million of euro-denominated ten-year notes. Plaintiffs hold, in the aggregate, approximately $500 million and €388 million, in principal amount, of 2015 Notes. The Indenture and the Notes provide for an 8-3/8% interest rate, paid on a semi-annual basis

through the Notes' maturity in 2015.[2]

At the same time it executed the Indenture, BNY, as Indenture Trustee, entered into an intercreditor agreement (the 2005 ICA), which sets forth the priority of the different levels of the Company's debt. The 2015 Notes were junior to approximately $2 billion in senior debt. The 2005 ICA also sets forth conduct in which Basell is or is not permitted to engage with respect to the debt.

B. Provisions Relating to Amendment and Replacement of the 2005 ICA

Because the 2005 ICA affects the Noteholders' rights, the Indenture protects the 2015 Noteholders against prejudicial amendments to the 2005 ICA. Relevant to the instant motion, Section 9.01 (11) of the Indenture limits the circumstances under which the 2005 Intercreditor Agreement can be amended without Noteholder consent. By its terms, Section 9.01 (11) permits amendment of the August 2005 Intercreditor Agreement by Basell without consent of the 2015 Noteholders only: (i) "when authorized by," among others, the Trustee (*i.e.*, BNY), and (ii) "in accordance with clause 37" of the 2005 ICA. Under Section 9.02, all "other modifications, waivers and amendments of . . . the [2005 ICA]" require the written consent of the holders of at least a majority of the then-outstanding Notes. Section 37.4 of the 2005 ICA allows for a replacement intercreditor agreement only if, among other things: (i) the replacement agreement is on "substantially the same terms and conditions" as the 2005 ICA; and (ii) the replacement is in connection with a permitted supplement, refinancing or replacing all or any part of the senior debt.

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[2] The Noteholders did not receive any further interest payments after the regular semi-annual interest payment distributed in August 2008.

C. Required Certificates and Opinions

Section 14.04 of the Indenture provides that "[u]pon any request or application by the Company to take any action under this Indenture, the Company shall furnish to [BNY]: (i) an "Officer's Certificate," certifying that all conditions precedent to be performed by Basell, provided for in the Indenture relating to the proposed action have been complied with, and (ii) an "Opinion of Counsel," opining that Basell has complied with all conditions precedent required by the Indenture.

D. Restrictive Covenants

In addition, the Indenture contains restrictive covenants limiting Basell's freedom of action as to indebtedness and related security arrangements, including, *inter alia*, the following: Section 4.12 of the Indenture ("Limitation on Incurrence of Additional Indebtedness") limited Basell's ability to incur debt in excess of "Permitted Indebtedness" unless certain conditions were satisfied.[3] These conditions were that: (a) "no Default or Event of Default shall have occurred and be continuing at the time of or as a consequence of the incurrence of any such Indebtedness," and (b) "on the date of the incurrence of such Indebtedness, after giving effect to the incurrence thereof, the Consolidated Fixed Charge Coverage Ratio of [Basell] [(the 'CFCC Ratio')] is greater than 2.0 to 1.0."

Further, Section 4.18 of the Indenture prohibits Basell from granting liens, other than

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[3] The Indenture defines Permitted Indebtedness, in relevant part, as "[i]ndebtedness incurred pursuant to [Basell's] Credit Facilities in an aggregate principal amount not exceeding €1.95 billion...." There is no dispute that the borrowing for the Lyondell acquisition exceeded this threshold.

Permitted Liens,[4] to secure any indebtedness (including guarantees of indebtedness) that is *pari passu* with the 2015 Notes, unless the 2015 Notes are "secured on an equal and ratable basis with the [new] obligations so secured." Moreover, Section 4.23 of the Indenture provides, among other things, that Basell can take no action that would result in a material impairment of the security interest in the collateral for the 2015 Notes. And, Section 4.23 expressly provides that Permitted Liens relating to the Collateral and consisting of indebtedness under senior credit facilities in an aggregate amount not exceeding €1.95 billion, will not be deemed a material impairment of the Noteholders' security interest.

E. Indenture Provisions Relating to the Rights and Duties of the Indenture Trustee

Section 7.01 ("Duties of Trustee") requires the Indenture Trustee, once a "Default" occurs of which the Trustee has "actual knowledge," to use "the same degree of care and skill" in the exercise of its "rights and powers" under the Indenture as a "prudent Person would exercise or use under the circumstances in the conduct of its own affairs." *See* affirmation of Allan J. Arffa, dated December 3, 2010 (Arffa aff.), Ex. B, § 7.01.

Section 7.02 ("Rights of Trustee") shields the Indenture Trustee from liability in various circumstances. It provides, *inter alia*, that: (i) the Indenture Trustee "shall not be liable for and shall be fully protected in respect of any action it takes or omits to take" in reliance upon an Officer's Certificate or an Opinion of Counsel (*id.*, § 7.02 [b]); (ii) the Indenture Trustee "shall not be liable for any action that it takes or omits to take in good faith ... that it reasonably believes to be authorized or within its rights or powers conferred upon it by this Indenture or the

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[4] The Indenture defines "Permitted Liens," in pertinent part, as liens to secure only €1.95 billion in indebtedness under Basell's various credit facilities.

[2005 ICA]" (*id.*, § 7.02 [c]); (iii) the Indenture Trustee is not required to make any "investigation into the facts or matters" stated in any document (*id.*, § 7.02 [d]); (iv) the "permissive rights of the [Indenture] Trustee to do things enumerated in [the] Indenture shall not be construed as a duty" (*id.*, § 7.02 [h]); (v) the Indenture Trustee "shall not be deemed to have notice of any Default or Event of Default unless the Indenture Trustee has "actual knowledge thereof" or unless the Indenture Trustee receives "written notice" so stating and expressly referencing the 2015 Notes and the Indenture (*id.*, § 7.02 [j]); (vi) the Indenture Trustee "may assume without inquiry" that the Company is complying with its obligations contained in the Indenture and that no default or event of default has occurred (*id.*, § 7.02 [k]); and (vii) the Indenture Trustee "shall have no duty to inquire as to the performance of the Company with respect to the covenants contained in Article Four" (which include the covenants relating to additional debt and related liens described above). *Id.*, § 7.02 (n).

F. The Lyondell Acquisition and Subsequent Bankruptcy

In July 2007, Basell and Lyondell entered into a merger agreement whereby Basell agreed to acquire Lyondell for $48 a share. In addition, Basell was required to refinance the existing debt of Lyondell, resulting in a total purchase price in excess of $20 billion. Basell determined to finance the acquisition solely with debt financing to be provided by a group of lenders (the LBO Lenders). The acquisition closed on December 20, 2007.

In connection with the acquisition, BNY as Indenture Trustee, entered into a December 20, 2007 intercreditor agreement (the 2007 ICA), intended to replace the 2005 ICA and to subordinate the 2015 Notes to the $20 billion of new LBO debt. As alleged in the complaint, the LBO could not have gone forward without this action by BNY, as the 2007 ICA was demanded

by the LBO Lenders as a condition to financing the acquisition. Plaintiffs claim that not only did the LBO violate certain provisions and covenants of the Indenture, but BNY, by signing the 2007 ICA without notice to or the consent of the Noteholders, breached its fiduciary and contractual duties to plaintiffs under the Indenture.

Over a year later, the new company, now known as LyondellBasell, became the subject of a Chapter 11 bankruptcy case.[5] About this time, Wilmington Trust Company (Wilmington Trust) succeeded BNY as Indenture Trustee. BNY resigned as Indenture Trustee immediately following Lyondell's bankruptcy filing due to a conflict between BNY's role as trustee for the Notes and its role as trustee for other Lyondell obligations. *See* affirmation of Michael S. Shuster, dated January 18, 2011 (Shuster aff.), ¶ 4. Subsequently, Wilmington Trust brought an adversary proceeding in the bankruptcy case on behalf of the 2015 Noteholders (the Adversary Proceeding). Wilmington Trust alleged that the Lyondell acquisition and related senior debt issuance violated the Indenture and the 2005 ICA. *Id.*, ¶ 5. BNY was not a party to the Adversary Proceeding. *Id.*

G. The Settlement Agreement

In March 2010, the 2015 Noteholders settled the Adversary Proceeding pursuant to a settlement agreement (the Settlement Agreement). *Id.*, ¶ 6. BNY is not named in the preamble to the Settlement Agreement, which named the settling parties. Arffa aff., Ex. S, p. 1. Wilmington Trust is named "solely in its capacity as "Successor Trustee for the holders of the 2015 Notes (the "2015 Notes Trustee" which definition shall not include any prior trustees)." *Id.* BNY, however, is named in the recitals as indenture trustee of ARCO and Equistar. *Id.*, p. 3.

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[5] On January 6, 2009, Lyondell and certain of its affiliates filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. On April 24, 2009, LyondellBasell filed its own Chapter 11 petition in the bankruptcy court.

Indeed, paragraph 2.18 of the Settlement Agreement specifically refers to BNY as the indenture trustee of ARCO and Equistar, who previously reached a separate settlement. BNY did not sign the Settlement Agreement. *Id.*, Ex. S.

Under the Settlement Agreement, the LBO lenders (as well as other lenders who had subsequently acquired a portion of the debt from the LBO lenders) agreed to set aside for the benefit of general unsecured creditors -- which included the 2015 Noteholders -- $450 million to be distributed pro rata. *Id.*, ¶ 33. In defining the "Approval Order," the Settlement Agreement states that the agreement shall be binding "on all parties in interest in the Bankruptcy Case..., and in each case, on each of their respective predecessors or successors." *Id.*, Ex. S, § 2.5(b). The recital clause speaking to the 2015 Notes refers only to the case brought by Wilmington Trust. *Id.*, p. 3.

The 2015 Noteholders agreed to release the 2015 Notes Trustee [defined in the preamble, as "Wilmington Trust" and further defined to exclude "any prior trustees"] . . ." and, *inter alia*,

> each of [its] *predecessors*, successors and assigns . . . from any and all claims . . . that arise from, or are based on, connected with, alleged in or related to the [Adversary Proceeding] (including claims that were asserted or could have been asserted in [the Adversary Proceeding Complaint]) or that arise from, in whole or in part, or relate to the transactions, occurrences or facts alleged in the [Adversary Proceeding Complaint]."

Id., §§ 5.1, 5.2 (emphasis added).

As part of the Settlement Agreement, the 2015 Noteholders also acknowledged the priority of the LBO debt and the validity of the 2007 ICA. *Id.*, § 3.1. They further agreed to "suspend all challenges to" the 2007 ICA. *Id.*, § 3.19.

Shortly after settling the Adversary Proceeding, plaintiffs brought this action against BNY.

They alleged that, in connection with the LBO and 2007 ICA, BNY breached various of its fiduciary and contractual obligations, including, among others: (i) failing to obtain the consent of a majority of the Noteholders before signing the 2007 ICA; (ii) failing to enforce restrictive covenants limiting the Company's ability to incur new indebtedness or liens; and (iii) failing to obtain the necessary opinions of counsel and officer's certificates.

II. Discussion

In deciding a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and give the plaintiff the benefit of every favorable inference. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). However, "allegations consisting of bare legal conclusions as well as factual claims either inherently or flatly contradicted by the documentary evidence are not entitled to such consideration." *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995).

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002).

A. Whether the Settlement Agreement Bars Plaintiffs' Claims

BNY maintains that it was explicitly included among the released parties under both release provisions in the Settlement Agreement – despite the fact that it was admittedly not a signatory to the Settlement Agreement (and took no part in its negotiation), or was otherwise a party to the Adversary Proceeding. BNY points to language in the releases, by which the 2015 Noteholders released "the 2015 Notes Trustee [*i.e.*, Wilmington Trust] . . ." and, *inter alia*, "each

of [its] respective *predecessors*, successors, and assigns" [emphasis added] from all claims related to the Adversary Proceeding or that "relate to the transactions, occurrences or facts alleged in" the Adversary Proceeding. Arffa aff., Ex. S, §§ 5.1, 5.2. BNY contends that, by their use of the term "predecessors," the parties to the Settlement Agreement made clear their intention to include BNY in the Settlement Agreement's releases, as predecessor to the then-current Indenture Trustee, Wilmington Trust. BNY argues that its proposed interpretation of the term is correct given that the Settlement Agreement elsewhere recognizes that Wilmington Trust had a predecessor as the Indenture Trustee for the 2015 Notes. In further support, BNY cites Merriam-Webster, as well as other dictionary definitions, for the proposition that "predecessors" in ordinary usage describes persons who previously held an office or position with respect to later holders. *See* defendant's reply memorandum of law, at 6-7.

BNY contends that plaintiffs bear the burden of showing that the parties to the Settlement Agreement did *not* intend to release BNY. *See Calavano v New York City Health & Hosps. Corp.*, 246 AD2d 317, 319 (1st Dept 1998) ("The burden falls on the releasor who tries to retract a release to demonstrate . . . that the parties had not intended the literal effect of the release."). Consequently, in the absence of such a showing, BNY argues that plaintiffs are barred from bringing this action, requiring dismissal of the complaint.

In opposition to the motion, plaintiffs argue that a straightforward reading of the entire Settlement Agreement makes it abundantly clear that there was no intention to release BNY from any liability. Rather, it was the parties' intent not to do so. Plaintiffs emphasize that BNY was explicitly excluded from the definition of "the 2015 Notes Trustee" in the Settlement Agreement. Plaintiffs contend that the word "predecessors" in the releases was part of standard boilerplate

language meant to encompass related corporate parties, such as successors, assigns and employees. The court agrees with plaintiff.

The preamble to the Settlement Agreement identifies the parties to the agreement and defines "2015 Notes Trustee" to include Wilmington Trust "as Successor Trustee" but not "prior trustees." Arffa aff., Ex. S, p. 1. Moreover, Section 2.5, defining the term "2015 Notes Indenture," refers to Wilmington Trust as the "(successor to The Bank of New York), as Trustee ...." *Id.*, § 2.5. If the court were to accept BNY's position, it would have to find that although BNY was purposefully and specifically carved out from the definition of the term "2015 Notes Trustee," the parties later intended to include BNY in the general term "predecessors."

> "It has long been the rule that a contract must be read as a whole in order to determine its purpose and intent, and . . . single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph, and the latter from the whole document."

Bijan Designer For Men v Fireman's Fund Ins. Co., 264 AD2d 48, 51-52 (1st Dept 2000) [internal quotation marks and citations omitted]. Additionally, "when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect." *John E. Andrews Mem'l. Home v De Buono*, 260 AD2d 635, 636 (2d Dept 1999) [citations omitted]; *see Burgdorf v Kasper*, 83 AD3d 1553, 1555 (4th Dept 2011) (elementary that clauses of contract must be read together). Finally, a release is a contract, and its construction is governed by contract law."

Cardinal Holdings, Ltd. v Indotronix Intl. Corp., 73 AD3d 960, 962 (2d Dept 2010) [citations omitted].

Applying these principles here, the court is persuaded that, when read as a whole, the Settlement Agreement makes clear that the parties did not intend to, and did not release, BNY. As BNY acknowledges, the Settlement Agreement expressly defines the 2015 Notes Trustee to exclude any prior trustees. In effect, the Settlement Agreement defines the "2015 Notes Trustee" (Wilmington Trust) as having no predecessors *in that role*. BNY's attempt to bring itself within the scope of the release, by arguing that the term " predecessor" refers to it as the predecessor to the 2015 Notes Trustee rather than predecessors of the Wilmington Trust entity, would ignore the explicit language of the preamble, thereby failing to give fair meaning to all of the contract language.[6] It is black letter law, "'that a court should not "adopt an interpretation" [of a contract] which will operate to leave a "provision of a contract without force and effect". '" *Gonzalez v Norrito*, 256 AD2d 440 (2d Dept 1998); *see Muttontown Pictures, Inc. v Levine*, 48 AD2d 818, 819 (1st Dept 1975); *Burgdorf, supra* (cardinal rule of construction that court adopt interpretation that leaves no portion of contract meaningless). Thus, the Settlement Agreement, read in its entirety, does not provide a basis to dismiss the claims asserted in the instant action.

B. Whether the Trust Indenture and 2005 ICA Bar Plaintiffs' Claims

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[6] Indeed, Section 3.20 of the Settlement Agreement, which appears to more specifically identify the parties intended to benefit from the release granted by the 2015 Noteholders, makes no mention of BNY, an otherwise significant and potentially culpable party. The Settlement Agreement also refers to a separate settlement agreement entered into by BNY and the Debtor on behalf of other noteholders. *See* Shuster aff., ¶ 7, Ex. C. In that settlement agreement, to which the Debtor and BNY are the only parties (unlike the Settlement Agreement to which BNY was not a party), the Debtor did not release BNY, making BNY's contention that it was released under the Settlement Agreement by virtue of the boilerplate term "predecessor," even more implausible.

1. Breach of Fiduciary Duty (1st Cause of Action)

In its first cause of action, plaintiffs allege that, prior to December 20, 2007 (the date that the merger was consummated), BNY had "actual knowledge of facts and circumstances giving rise to Events of Default under the Indenture." *See* Compl., ¶¶ 70, 71. Plaintiffs also contend that, even prior to the acquisition, BNY had fiduciary responsibilities to protect the Noteholders, pursuant to Section 7.01 of the Indenture [*see supra*, I(E)]. Plaintiffs then claim that as soon as Basell signed the 2007 ICA, it was in default of the Indenture, and BNY, "upon information and belief, knew of actual defaults and breaches by Basell and was under a fiduciary duty to act accordingly." Compl., ¶ 74.

BNY, on the other hand, contends that its obligations to the Noteholders were solely defined by the Indenture and the 2005 ICA. *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 (2008) ("[t]he trustee under a corporate indenture . . . has his [or her] rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His [or her] status is more that of a stakeholder than one of a trustee." [citation and inner quotation marks omitted]). BNY asserts that it consequently, owed no fiduciary duty to plaintiffs separate from its contract obligations.

More to the point, BNY argues, convincingly, that plaintiffs' allegations establish, at most, BNY's knowledge of the Lyondell acquisition, not any knowledge by BNY that a default had occurred under the Indenture and 2005 ICA. In addition, to the extent that an indenture trustee may be subject to fiduciary duties *after* it receives notice of a default, BNY claims immunity by virtue of Section 7.02 (j) of the Indenture, which provides that the Indenture Trustee does not have notice of a default unless it has: (i) "actual knowledge thereof," or (ii) the Indenture Trustee

receives written notice thereof and the notice makes reference to the Notes and Indenture. Arffa aff., Ex B, § 7.02 (j). Here, other than relying on entirely conclusory allegations, BNY argues that plaintiffs fail to sufficiently plead BNY's "actual knowledge" of any alleged default by the Company.

Plaintiffs tacitly acknowledge this defect in their pleadings by arguing that the allegations in paragraphs 70 and 71, concerning BNY's knowledge of facts from news reports and documents relevant to the transaction, was "sufficient to put BNY on notice that an event of default had occurred and was continuing," as alleged in paragraphs 73 and 74 of the complaint. *See* plaintiffs' opposition memorandum of law, at 22. This argument misses the mark.

In the first instance, it is apparent that plaintiffs are conflating the issue of whether Basell committed a default by signing the 2007 ICA with the separate question as to whether BNY had "actual knowledge," as that term is used in the Indenture, of such default at the time the merger was completed. Indeed, as BNY observes, it had no independent duty to inquire as to whether, as part of the Lyondell acquisition, any default had occurred under the Indenture, and, in fact, was permitted to assume no default had occurred. *See* Arffa aff., Ex. B, § 7.02 (k) (allowing BNY to "assume without inquiry . . . that no Default or Event of Default . . . has occurred"), § 7.02 (n) (providing that BNY has "no duty to inquire as to the performance of the Company . . . with respect to the covenants contained in Article 4"); *see also, Racepoint Partners, LLC v JPMorgan Chase Bank, N.A.*, 14 NY3d 419, 425 (2010) (noting "the limited 'ministerial' functions of indenture trustees" [citation omitted]).

Furthermore, as is clear from the inapposite authorities on which they rely, plaintiffs are blatantly attempting to excise Section 7.01's "actual knowledge" requirement and replace it with

"notice" as that term is defined in contexts outside of a trust indenture. *Fidelity & Deposit Co. of Md. v Queens County Trust Co.*, 226 NY 225 (1919) (involving a trustee in bankruptcy); *Deriggi v Brady*, 2008 NY Slip Op 30311(U) (Sup Ct, New York County 2008) (standard for notice pleading under CPLR 3013). Tellingly, plaintiffs do not even attempt to argue that their pleadings satisfy the written notice requirement in Section 7.02 (j).

In short, plaintiffs have not adequately pleaded that BNY had fiduciary obligations outside of its contractual obligations under the Indenture and the 2005 ICA. Hence, the breach of fiduciary duty claim is dismissed.

2. *Breach of Contract & Negligence (2d & 3d Causes of Action)*

In seeking to dismiss plaintiffs' contract and negligence claims, BNY maintains that it did not breach any of its obligations, by entering into the 2007 ICA without the consent of the Noteholders. BNY's principal argument is that the Lyondell acquisition and the 2007 ICA (that enabled the issuance of additional $20 billion of senior debt) were permitted under the terms of the Indenture and 2005 ICA. Moreover, BNY asserts that the Indenture and the 2005 ICA *required* it to enter into the 2007 ICA.

In particular, BNY relies on Section 9.01 (11) of the Indenture, which states that the consent of the 2015 Noteholders is not required for the Company "to amend the [2005 ICA] in accordance with clause 37 thereof." BNY contends that Section 9.01 permits the Company, when authorized by the Indenture Trustee, to take certain actions to amend or supplement the Indenture or 2005 ICA "without the consent of any [2015 Note] Holders" of the 2015 Notes. To complete its argument, BNY focuses in particular on Section 37.4, entitled "Replacement Intercreditor Agreement," which states, in relevant part, that the Indenture Trustee, "for itself and

as trustee for the [] Noteholders," "*shall* enter into a replacement intercreditor agreement . . . on substantially the same terms and conditions as this Agreement (mutatis mutandis) on the novation, *supplement, refinancing or replacement* of all or any part of the Senior Debt ...." [emphasis added]. Relying on these provisions, BNY argues that it acted appropriately in entering into the 2007 ICA without the Noteholders' consent because (i) Section 37.4, by its express terms, not only contemplates the supplement of senior debt, it obligated ("shall") BNY to enter into the 2007 ICA, and (ii) under Section 9.01 (11) of the Indenture, BNY was permitted to do so without the consent of the 2015 Noteholders.

As an additional source of immunity for its alleged failure to obtain consent, BNY relies on Section 7.02 (c) of the Indenture which relieves BNY of liability for any action "that it reasonably believes to be authorized or within its rights or powers conferred upon it by the Indenture or the [2005 ICA]." BNY maintains that "[a]t the least, it would have been (more than) reasonable" for it to believe that it had authority for its actions. *See* defendant's memorandum of law, at 26.

In opposition, plaintiffs argue that Section 9.01 (11) is limited to *amendments* to, not *replacements* of, the 2005 ICA, a contingency specifically covered by Sections 37.1 (entitled "Amendments") and 37.2 (entitled "Amendments affecting only certain parties") of the 2005 ICA. Plaintiffs further note that Sections 37.3 and 37.4, respectively "Refinancing" and "Replacement Intercreditor Agreement," do not concern, or even mention, amendments to the 2005 ICA. Plaintiffs, thus, argue that BNY's execution of an entirely new intercreditor agreement was not an action contemplated by Section 9.01 (11). Instead, plaintiffs assert the replacement of 2005 ICA was governed by Section 9.02 of the Indenture, which covers all "other modifications, waivers

and amendments of . . . the [2005 ICA]," and requires consent of a majority of the holders of outstanding Notes.[7]

The court agrees. There is an appreciable distinction between an amendment to an agreement and its wholesale replacement, one which, at least at this stage of the litigation, the mere title of Section 37 alone cannot blur. However, there is more.

Plaintiffs also challenge BNY's purported compliance with Section 37.4 of the 2005 ICA. Specifically, plaintiffs assail BNY's assertion that the 2007 ICA was "on substantially the same terms and conditions" as the prior agreement. As plaintiffs correctly observe, BNY, despite moving pursuant to CPLR 3211 (a) (1), has provided little in the way of documentary support for its bald conclusion that the 2005 ICA, an agreement to subordinate their notes to $2 billion in ordinary course of business debt, is substantially the same as the 2007 ICA, an agreement to subordinate their notes to an additional $20 billion in LBO debt. At most, BNY offers up a single term that remained unchanged in the two agreements, namely, that the Noteholders would hold the same rank among the Company's creditors. *See* defendant's memorandum of law, at 24 n 8. Whether or not the 2007 ICA satisfied Section 37.4's requirement of substantial similarity, is a factual issue that is not susceptible to resolution at this stage of the proceeding.[8] For the same

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[7] The court does not see how, other than in hindsight, Section 6.07 of the Indenture (requiring consent when a Noteholder's right to receive payment of principal, premium or interest is "impaired or affected") is implicated. As plaintiffs acknowledge, the Noteholders received a regular semi-annual payment of interest in August of 2008 (Compl. ¶ 63), more than half a year after the LBO closed.

[8] Plaintiffs' additional argument, that Section 37.4 required that the Noteholders, as Junior Creditors, be a party to any new intercreditor agreement, is without merit. To the contrary, 37.4 provides that BNY "(for itself and as trustee for the . . . Noteholders) . . . shall enter into a replacement intercreditor agreement ...." Thus, Section 37.4 is clear that the 2015 Noteholders were not, in fact, required to sign the 2007 ICA.

reason, BNY cannot rely on Section 7.02 (c) of the Indenture to shield it from liability. Simply put, what BNY believed and whether it acted "reasonably" is a fact issue that cannot be resolved on this motion to dismiss.

In sum, plaintiffs have adequately stated claims for breach of the Indenture and for negligence based on BNY's failure to obtain the 2015 Noteholders' consent pursuant to Section 9.02 of the Indenture. *See AG Capital Funding Partners, L.P.*, 11 NY3d at 157 (finding that negligence claim was not duplicative of breach of contract claim because "indenture trustees owe note holders an extracontractual duty to perform basic, non-discretionary ministerial functions redressable in tort if such duty is breached").

Nevertheless, plaintiffs' allegations that BNY, by executing the 2007 ICA, failed to prevent the Company's breach of additional indebtedness and lien covenants in the Indenture (Sections 4.12, 4.18 and 4.23), cannot be sustained in the face of certain provisions in the Indenture that excused BNY from monitoring the Company's compliance with these restrictive covenants. As discussed previously [*supra*, II(B)(1)], BNY had "no duty to inquire as to the performance of the Company . . . with respect to the covenants contained in Article 4." *See* Arffa aff., Ex. B, § 7.02 (n). BNY was permitted, in the absence of actual knowledge, to "assume without inquiry" that the Company was complying with the Indenture and that no default had occurred. *Id.*, § 7.02 (k). BNY cannot be liable for the breach of Section 4 covenants if it had no duty even to inquire into whether the Company was in compliance with the covenants and could "assume without inquiry" they were being satisfied.

Likewise, plaintiffs' allegations that BNY breached the Indenture failing to obtain an Opinion of Counsel and an Officer's Certificate, pursuant to Section 14.04, does not withstand

scrutiny. Section 14.04, by its plain terms, places an obligation on the Company only. It provides: "Upon any request or application by the Company . . . to the Trustee to take any action under this Indenture, *the Company shall* furnish to the Trustee . . . an Officer's Certificate . . . and an Opinion of Counsel ...." *Id.*, § 14.04 [emphasis added]. The Indenture did not impose a duty on BNY. Moreover, Section 7.02 (h) of the Indenture provides that the Indenture Trustee's permissive rights, including the right to obtain an officer's certificate and opinion of counsel, "shall not be construed as a duty." *Id.*, § 7.02 (h).[9]

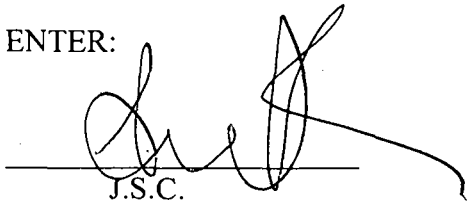
Accordingly, it is

ORDERED that The Bank of New York Mellon's motion to dismiss the complaint is granted to the extent that the first cause of action, for breach of fiduciary duty, is dismissed, and the motion is otherwise denied; and it is further

ORDERED, that defendant The Bank of New York Mellon is directed to serve an Answer within 20 days after service of a copy of this order with notice of entry.

Dated: February 24, 2012

ENTER:



J.S.C.

[9] Although BNY argues (and the court agrees) that it was not subject to any obligations under Section 14.04, BNY contends that this provision was, in any event, satisfied. BNY claims that an officer's certificate and an opinion of counsel was provided in connection with the execution of a supplemental indenture (involving the same transaction as the 2007 ICA), and, therefore, shields it from any liability. *See* Arffa aff., Exs., G, H. However, on their face, those documents speak only to whether the addition of guarantors in the supplemental indenture satisfied all conditions precedent provided for in the Indenture. Significantly, they are bereft of any language that would have permitted BNY to conclude that the conditions precedent for execution of a replacement intercreditor agreement had been satisfied.