UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/MCALILEY

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to
09-23835-CIV-GOLD/McALILEY.

VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS CARLYLE HIGH YIELD PARTNERS 2008-1, LTD.; CARLYLE HIGH YIELD PARTNERS VI, LTD.; CARLYLE HIGH YIELD PARTNERS VII, LTD.; CARLYLE HIGH YIELD PARTNERS VIII, LTD.; CARLYLE HIGH YIELD PARTNERS IX, LTD.; AND CARLYLE HIGH YIELD PARTNERS X, LTD.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Carlyle High Yield Partners 2008-1, Ltd.; Carlyle High Yield Partners VI, Ltd.; Carlyle High Yield Partners VII, Ltd.; Carlyle High Yield Partners VIII, Ltd.; Carlyle High Yield Partners IX, Ltd.; and Carlyle High Yield Partners X, Ltd. ("Carlyle Plaintiffs") hereby voluntarily dismiss this action without prejudice. The Second Amended Complaint was filed on January 15, 2010. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the Carlyle Plaintiffs in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

Dated: February 17, 2010.

Respectfully submitted,

By: /s David A. Rothstein
David A. Rothstein
DIMOND KAPLAN & ROTHSTEIN, P.A.
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Attorneys for Plaintiffs

Of counsel:
J. Michael Hennigan
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DillmanD@hbdlawyers.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS CARLYLE HIGH YIELD PARTNERS 2008-1, LTD.; CARLYLE HIGH YIELD PARTNERS VI, LTD.; CARLYLE HIGH YIELD PARTNERS VII, LTD.; CARLYLE HIGH YIELD PARTNERS VIII, LTD.; CARLYLE HIGH YIELD PARTNERS IX, LTD.; AND CARLYLE HIGH YIELD PARTNERS X, LTD.** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 17, 2010

By: /s David A. Rothstein
David A. Rothstein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/MCALILEY

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to
09-23835-CIV-GOLD/McALILEY.

VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS PRIMUS CLO I, LTD. AND PRIMUS CLO II, LTD.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Primus CLO I, Ltd. and Primus CLO II, Ltd. ("Primus Plaintiffs") hereby voluntarily dismiss this action without prejudice. The Second Amended Complaint was filed on January 15, 2010. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the Primus Plaintiffs in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

Dated: February 17, 2010.

Respectfully submitted,

By: /s David A. Rothstein
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Attorneys for Plaintiffs

Of counsel:
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Email: Hennigan@hbdlawyers.com
DillmanD@hbdlawyers.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **ERROR! NO TEXT OF SPECIFIED STYLE IN DOCUMENT.** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 17, 2010

By: /s David A. Rothstein
David A. Rothstein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/MCALILEY

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to
09-23835-CIV-GOLD/McALILEY.

NOTICE OF INADVERTENT INCLUSION OF CERTAIN PLAINTIFFS IN SECOND AMENDED COMPLAINT

PLEASE TAKE NOTICE that Plaintiffs Carlyle Loan Investment, Ltd. ("Carlyle"), Emerald Orchard Limited ("Emerald"), Longhorn Credit Funding, LLC ("Longhorn"), and Centurion CDO VI, Ltd.; Centurion CDO VII, Ltd.; Centurion CDO 8, Limited; Centurion CDO 9, Limited; Cent CDO 10 Limited; Cent CDO XI Limited; Cent CDO 12 Limited; Cent CDO 14 Limited; and Cent CDO 15 Limited ("RiverSource") were inadvertently included as plaintiffs in the Second Amended Complaint filed on January 15, 2010. Pursuant to Fed. R. Civ. P. 41(a)(1), Carlyle was dismissed without prejudice from this action on September 24, 2009; Emerald, Longhorn and RiverSource were dismissed on October 6, 2009. *See* Exhibits 1, 2 and 3. Accordingly, none of them are parties to this action.

Dated: February 17, 2010.

Respectfully submitted,

By: /s David A. Rothstein
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DillmanD@hbdlawyers.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE TO COURT REGARDING INADVERTENT INCLUSION OF CERTAIN PLAINTIFFS IN SECOND AMENDED COMPLAINT** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 17, 2010

By: /s David A. Rothstein
David A. Rothstein

EXHIBIT 1

DEANER, DEANER, SCANN, MALAN & LARSEN
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AVENUE CLO FUND, LTD., et al., Plaintiffs, vs. BANK OF AMERICA, N.A., et al., Defendants.	Case No. 09-CV-01047-KJD-PAL **RULE 41(A)(1) DISMISSAL BY PLAINTIFF CARLYLE LOAN INVESTMENT, LTD.**

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Carlyle Loan Investment, Ltd. hereby voluntarily dismisses this action without prejudice. The First Amended

Complaint was filed on July 21, 2009. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by Carlyle Loan Investment, Ltd. in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

DATED: September 24, 2009

DEANER, DEANER, SCANN, MALAN & LARSEN
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By: /s/ Peter J. Most
Peter J. Most
Attorneys for Plaintiffs

PROOF OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 865 South Figueroa Street, Suite 2900, Los Angeles, California 90017. On September 24, 2009, I served the foregoing document described as **RULE 41(a)(1) DISMISSAL BY CARLYLE LOAN INVESTMENT, LTD.** on the interested parties in this action as follows:

☐ by transmitting via facsimile the documents listed above to the fax number set forth below on this date. This transmission was reported as complete without error by a transmission report issued by the facsimile machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission is attached hereto and incorporated herein by this reference.

☒ by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by electronic transmission. I caused the document(s) listed above to be transmitted by electronic mail to the individuals on the service list as set forth below.

☐ by placing the document listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for Delivery.

☐ by personally delivering the document listed above to the persons at the address set forth below.

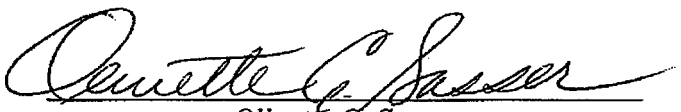
PLEASE SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postal meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 24, 2009 at Los Angeles, California.

☐ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.



Olivette C. Sasser

SERVICE LIST

Attorneys/Firms:	Representing:
Thomas C. Rice, Esq. David Woll, Esq. Justin S. Stern, Esq. SIMPSON THACHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017 Telephone:: (212) 455-2000 Facsimile: (212) 455-2502	Defendants JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, and The Royal Bank of Scotland PLC
Rodney M. Jean, Esq. LIONEL SAWYER & COLLINS 300 South Fourth Street, Suite 1700 Las Vegas, NV 89101 Telephone: (702) 383-8888 Facsimile: (702) 383-8845 -and- Bradley J. Butwin, Esq. Jonathan Rosenberg, Esq. Daniel L. Cantor, Esq. William J. Sushon, Esq. O'MELVENY & MYERS LLP Times Square Tower Seven Times Square New York, NY 10036 Telephone: (212) 326-2000 Facsimile: (212) 326-2061	Defendants Bank of America, N.A. and Merrill Lynch Capital Corporation

Attorneys/Firms:	Representing:
Randolph Howard, Esq. Peter Navarro, Esq. KOLESAR & LEATHAM, CHTD. 3320 West Sahara Avenue, Suite 380 Las Vegas, NY 89102 Telephone: (702) 362-7800 Facsimile: (702) 362-9472 -and- Jean-Marie L. Atamian, Esq. Jason I. Kirschner, Esq. MAYER BROWN LLP 1675 Broadway New York, NY 10019-5820 Telephone: (212) 506-2500 Facsimile: (212) 262-1910	Defendant Sumitomo Mitsui Banking Corporation
Anthony L. Paccione, Esq. KATTEN MUCHIN ROSENMAN LLP 575 Madison Avenue New York, NY 10022 Telephone: (212) 940-8800 Facsimile: (212) 940-8776 -and- Stanley W. Parry, Esq. BALLARD SPAHR ANDREWS & INGERSOLL, LLP 100 North City Parkway, Suite 1750 Las Vegas, NV 89106-4617 Telephone: (702) 471-7000 Facsimile: (702) 471-7070	Defendant Bank of Scotland

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Peter Roberts, Esq. SHAW GUSSIS FISHMAN GLANTZ| WOLFSON & TOWBIN LLC 321 N. Clark Street, Suite 800 Chicago, IL 60610 Telephone: (312) 541-0151 Facsimile: (312) 980-3888	Defendant MB Financial

EXHIBIT 2

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AVENUE CLO FUND, LTD., et al., Plaintiffs, vs. BANK OF AMERICA, N.A., et al., Defendants.	Case No. 09-CV-01047-KJD-PAL **RULE 41(A)(1) DISMISSAL BY CERTAIN PLAINTIFFS**

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Emerald Orchard Limited and Longhorn Credit Funding, LLC ("Two Highland Plaintiffs") hereby

voluntarily dismiss this action without prejudice. The First Amended Complaint was filed on July 21, 2009. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the Two Highland Plaintiffs in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

DATED: October 6, 2009

DEANER, DEANER, SCANN, MALAN & LARSEN
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Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

By: /s/ Peter J. Most
Peter J. Most
Attorneys for Plaintiffs

PROOF OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 865 South Figueroa Street, Suite 2900, Los Angeles, California 90017. On October 6, 2009, I served the foregoing document described as **RULE 41(a)(1) DISMISSAL BY CERTAIN PLAINTIFFS** on the interested parties in this action as follows:

☐ by transmitting via facsimile the documents listed above to the fax number set forth below on this date. This transmission was reported as complete without error by a transmission report issued by the facsimile machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission is attached hereto and incorporated herein by this reference.

☒ by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by electronic transmission. I caused the document(s) listed above to be transmitted by electronic mail to the individuals on the service list as set forth below.

☐ by placing the document listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for Delivery.

☐ by personally delivering the document listed above to the persons at the address set forth below.

PLEASE SEE ATTACHED SERVICE LIST

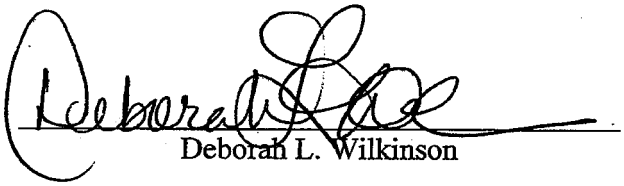
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postal meter date is more than one day after date of deposit for mailing in affidavit.

HENNIGAN, BENNETT & DORMAN LLP
LAWYERS
LOS ANGELES, CALIFORNIA

Executed on October 6, 2009 at Los Angeles, California.

☐ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.



Deborah L. Wilkinson

SERVICE LIST

Attorneys/Firms:	Representing:
Thomas C. Rice, Esq. David Woll, Esq. Justin S. Stern, Esq. Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 Telephone:: (212) 455-2000 Facsimile: (212) 455-2502	Defendants JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, And The Royal Bank Of Scotland PLC
Rodney M. Jean, Esq. Lionel Sawyer & Collins 300 South Fourth Street, Suite 1700 Las Vegas, NY 89101 Telephone: (702) 383-8888 Facsimile: (702) 383-8845 -And- Bradley J. Butwin, Esq. Jonathan Rosenberg, Esq. Daniel L. Cantor, Esq. William J. Sushon, Esq. O'melveny & Myers LLP Times Square Tower Seven Times Square New York, NY 10036 Telephone: (212) 326-2000 Facsimile: (212) 326-2061	Defendants Bank Of America, N.A. And Merrill Lynch Capital Corporation
Randolph Howard, Esq. Peter Navarro, Esq. Kolesar & Leatham, CHTD. 3320 West Sahara Avenue, Suite 380 Las Vegas, NV 89102 Telephone: (702) 362-7800 Facsimile: (702) 362-9472 -And-	Defendant Sumitomo Mitsui Banking Corporation

Attorneys/Firms:	Representing:
Jean-Marie L. Atamian, Esq. Jason I. Kirschner, Esq. Mayer Brown LLP 1675 Broadway New York, NY 10019-5820 Telephone: (212) 506-2500 Facsimile: (212) 262-1910	
Anthony L. Paccione, Esq. Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022 Telephone: (212) 940-8800 Facsimile: (212) 940-8776 -And- Stanley W. Parry, Esq. Ballard Spahr Andrews & Ingersoll, LLP 100 North City Parkway, Suite 1750 Las Vegas, NV 89106-4617 Telephone: (702) 471-7000 Facsimile: (702) 471-7070	Defendant Bank Of Scotland
Aaron R. Maurice, Esq. Woods Erickson Whitaker & Maurice LLP 1349 Galleria Drive, Suite 200 Henderson, NV 89014 Telephone: (702) 433-9696 Facsimile: (702) 434-0615 -And- Aaron Rubinstein, Esq. Philip A. Geraci, Esq. Kay Scholer LLP 425 Park Avenue New York, NY 10022 Telephone: (212) 836-8000 Facsimile: (212) 836-8689	Defendant HSH Nordbank AG

Attorneys/Firms:	Representing:
Peter Roberts, Esq. Shaw Gussis Fishman Glantz Wolfson & Towbin LLC 321 N. Clark Street, Suite 800 Chicago, IL 60610 Telephone: (312) 541-0151 Facsimile: (312) 980-3888	Defendant MB Financial

EXHIBIT 3

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Telephone: (213) 694-1200
Facsimile: (213) 694-1234

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AVENUE CLO FUND, LTD., et al., Plaintiffs, vs. BANK OF AMERICA, N.A., et al., Defendants.	Case No. 09-CV-01047-KJD-PAL **RULE 41(A)(1) DISMISSAL BY CERTAIN PLAINTIFFS**

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Centurion CDO VI, Ltd.; Centurion CDO VII, Ltd.; Centurion CDO 8, Limited; Centurion CDO 9, Limited;

Cent CDO 10 Limited; Cent CDO XI Limited; Cent CDO 12 Limited; Cent CDO 14 Limited; and Cent CDO 15 Limited ("RiverSource Plaintiffs") hereby voluntarily dismiss this action without prejudice. The First Amended Complaint was filed on July 21, 2009. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the RiverSource Plaintiffs in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

DATED: October 6, 2009

DEANER, DEANER, SCANN, MALAN & LARSEN
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Telephone: (213) 694-1200
Facsimile: (213) 694-1234

By: /s/ Peter J. Most
Peter J. Most

Attorneys for Plaintiffs

PROOF OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 865 South Figueroa Street, Suite 2900, Los Angeles, California 90017. On October 6, 2009, I served the foregoing document described as **RULE 41(a)(1) DISMISSAL BY CERTAIN PLAINTIFFS** on the interested parties in this action as follows:

☐ by transmitting via facsimile the documents listed above to the fax number set forth below on this date. This transmission was reported as complete without error by a transmission report issued by the facsimile machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission is attached hereto and incorporated herein by this reference.

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PLEASE SEE ATTACHED SERVICE LIST

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Executed on October 6, 2009 at Los Angeles, California.

☐ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Deborah L. Wilkinson

SERVICE LIST

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Thomas C. Rice, Esq. David Woll, Esq. Justin S. Stern, Esq. Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 Telephone:: (212) 455-2000 Facsimile: (212) 455-2502	Defendants JP Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, And The Royal Bank Of Scotland PLC
Rodney M. Jean, Esq. Lionel Sawyer & Collins 300 South Fourth Street, Suite 1700 Las Vegas, NV 89101 Telephone: (702) 383-8888 Facsimile: (702) 383-8845 -And- Bradley J. Butwin, Esq. Jonathan Rosenberg, Esq. Daniel L. Cantor, Esq. William J. Sushon, Esq. O'melveny & Myers Llp Times Square Tower Seven Times Square New York, NY 10036 Telephone: (212) 326-2000 Facsimile: (212) 326-2061	Defendants Bank Of America, N.A. And Merrill Lynch Capital Corporation
Randolph Howard, Esq. Peter Navarro, Esq. Kolesar & Leatham, CHTD.. 3320 West Sahara Avenue, Suite 380 Las Vegas, NV 89102 Telephone: (702) 362-7800 Facsimile: (702) 362-9472 -And-	Defendant Sumitomo Mitsui Banking Corporation

Attorneys/Firms:	Representing:
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Anthony L. Paccione, Esq. Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022 Telephone: (212) 940-8800 Facsimile: (212) 940-8776 -And- Stanley W. Parry, Esq. Ballard Spahr Andrews & Ingersoll, LLP 100 North City Parkway, Suite 1750 Las Vegas, NV 89106-4617 Telephone: (702) 471-7000 Facsimile: (702) 471-7070	Defendant Bank Of Scotland
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE No.: 09-2106-MD-GOLD/BANDSTRA

IN RE :

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to Case Numbers:

09-CV-23835-ASG
10-CV-20236-ASG

DEFENDANT BANK OF AMERICA, N.A.'s MOTION TO DISMISS THE TERM LENDERS' DISBURSEMENT AGREEMENT CLAIMS AND SUPPORTING MEMORANDUM OF LAW

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Bank of America, N.A. ("BANA") moves, under Federal Rule of Civil Procedure 12(b)(6), to dismiss Counts I, III and V of the Second Amended Complaint in *Avenue CLO Fund, Ltd. v. Bank of Am., N.A.* ("Avenue Compl."), and Count III of the Amended Complaint in *ACP Master, Ltd. v. Bank of Am., N.A.* ("ACP Compl.") (together, the "Complaints"). BANA submits this memorandum of law in support of its motion. BANA also joins in the Revolving Lenders' contemporaneously filed motion to dismiss the Term Lenders' other claims.

PRELIMINARY STATEMENT

The Term Lenders are sophisticated financial institutions, many of whom first acquired their interests in the Term Loans after some or all of the events alleged in the Complaints. They were all fully capable of reading and understanding the Disbursement Agreement. But now, ignoring the Disbursement Agreement's unambiguous terms, the Term Lenders allege that BANA should somehow have prevented Fontainebleau from accessing funds that the Term Lenders had already committed to lend. The Term Lenders' baseless attempt to hold BANA responsible for the Term Lenders' own ill-fated loans to the now-bankrupt Fontainebleau should be rejected.

The Term Lenders' claims that BANA breached the Disbursement Agreement by approving Fontainebleau's Advance Requests fail because BANA's obligations with respect to the Advance Requests were limited to determining whether (i) Fontainebleau had submitted "all required documentation," and (ii) the Advance Requests included all of the representations, warranties, and certifications necessary to satisfy Section 3.3's conditions precedent to an Advance. The Complaints do not allege that the Advance Requests were missing any required documentation or failed to include the necessary representations regarding Section 3.3's conditions. And the Term Lenders' allegations that BANA "knew" that Fontainebleau had failed to satisfy Section 3.3's conditions are unavailing because Section 9.3.2 provides, among other

things, that BANA "may rely and *shall be protected in acting or refraining from acting* upon any … certificate" (emphasis added) from Fontainebleau, and in approving Advance Requests, "shall be entitled to rely on certifications from the Project Entities … as to satisfaction of any requirements and/or conditions imposed by this Agreement."

Section 2.5.1 defeats the Term Lenders' other claim—that BANA breached the Disbursement Agreement by failing to issue Stop Funding Notices. That provision requires BANA to issue a Stop Funding Notice only if "(i) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing." Fontainebleau's certifications satisfied the conditions precedent, and BANA had no obligation independently to assess Section 3.3's conditions precedent. And the Complaints plead no facts establishing that BANA received the specific written notice the Disbursement Agreement requires to trigger an obligation to issue a Stop Funding Notice.

The Avenue plaintiffs' tag-along claim that this same alleged misconduct breached the implied covenant of good faith and fair dealing must also be dismissed because (i) it improperly duplicates their deficient breach of contract claim, and (ii) it impermissibly seeks to impose obligations on BANA that are contrary to the Disbursement Agreement's provisions.

BACKGROUND

On June 6, 2007, Fontainebleau (and certain of its affiliates) entered into a series of agreements intended to provide financing to construct a luxury hotel and casino project at the Las Vegas Strip's north end (the "Project").[1] Among these agreements were a Second Mortgage Indenture, a Retail Facility Agreement, and a Bank Credit Agreement (the "Credit Agreement"). The Credit Agreement provided Fontainebleau with access to $1.85 billion in financing through

three senior secured loans: (i) a $700 million initial term loan, (ii) a $350 million delay draw term loan (the "Delay Draw Loan"), and (iii) an $800 million revolving loan (the "Revolver") (together the "Senior Credit Facility").[2] Fontainebleau also entered into an agreement with the Second Mortgage Indenture Trustee, the Retail Facility Agreement Agent, and the Credit Agreement Administrative Agent (each a "Funding Agent"), governing the disbursement of funds under those financing arrangements to Fontainebleau (the "Disbursement Agreement"). The Funding Agents each agreed that BANA would act as Disbursement Agent under the agreement.[3] The Term Lenders have sued BANA in its capacity as Disbursement Agent.[4]

A. The Disbursement Agreement's Relevant Provisions

The Disbursement Agreement and the Credit Agreement established a two-step funding procedure for the Senior Credit Facility. First, no more than once per month Fontainebleau could submit a Notice of Borrowing that, subject to Fontainebleau's satisfaction of the Credit Agreement's terms, would require Lenders to fund loans into the Bank Proceeds Account.[5] Next, Fontainebleau could submit a monthly Advance Request to request funds from the Bank Proceeds Account to pay Project Expenses.[6]

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1 *See* Avenue Compl. ¶ 115; ACP Compl. ¶ 23.

2 BANA respectfully refers the Court to the Revolver Lenders' motion to dismiss for a more detailed discussion of the Project, the Credit Agreement and Fontainebleau's March 2009 Notices of Borrowing. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Disbursement Agreement.

3 Disbursement Agmt. § 9.1 ("Each of the Funding Agents hereby irrevocably appoints and authorizes the Disbursement Agent to act on its behalf hereunder.") (The Disbursement Agreement, and Exhibits A, C-1, and T thereto, are attached as Exhibit B to the February 18, 2010 Declaration of Thomas C. Rice in Support of Defendants' Joint Motions to Dismiss the Term Lender Complaints ("Rice Declaration")); *see also id.*, Ex. A. at 11 ("'Disbursement Agent' means Bank of America, N.A., in its capacity as the disbursement agent for the Funding Agents under this Agreement."); *see Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleading for purposes of Rule 12(b)(6) dismissal.") (internal quotation marks omitted).

4 Avenue Compl. ¶ 102; ACP Compl. ¶ 84.

5 *See* Credit Agmt. §§ 2.1(c), 2.4(c). (The Credit Agreement is attached as Exhibit A to the Rice Declaration.)

6 *Id.* §§ 2.1.2, 2.4.

1. *The Advance Request Procedure*

The Disbursement Agreement prescribed the form and contents of the Advance Request required to obtain funds from the Bank Proceeds Account (an "Advance").[7] Each Advance Request required Fontainebleau, among other things, to "represent, warrant and certify" that "the conditions set forth in Sections 3.3 … of the Disbursement Agreement are satisfied as of the Requested Advance Date."[8] Section 3.3 sets forth numerous conditions precedent to Fontainebleau Advances, including:

- "Representations and Warranties. Each representation and warranty of … [e]ach Project Entity set forth in Article 4 … shall be true and correct in all material respects as if made on such date."[9]
- "Default. No Default or Event of Default shall have occurred and be continuing."[10]
- "In Balance Requirement. The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied."[11]
- "Material Adverse Effect. Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect."[12]
- "Retail Advances. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request."[13]

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7 Disbursement Agmt. § 2.4.1 ("Each Advance under this Agreement shall be requested jointly by the Borrowers, the Issuers and the Retail Affiliate pursuant to an Advance Request substantially in the form of Exhibit C-1.").

8 *Id.*, Ex. C-1 ¶ I.O.23.

9 *Id.* § 3.3.2.

10 *Id.* § 3.3.3.

11 *Id.* § 3.3.8.

12 *Id.* § 3.3.11.

13 *Id.* § 3.3.23.

In addition to representing that Section 3.3's conditions precedent were satisfied, Fontainebleau specifically represented in the Advance Requests that, among other things:

- "Each representation and warranty of each Project Entity set forth in Article 4 of the Master Disbursement Agreement or in any Material Contract is true";
- "No Default or Event of Default has occurred and is continuing";
- "The In Balance Test is satisfied";
- "Each Financing Agreement is in full force and effect";
- "Since the Closing Date, there has not occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect"; and
- Each attachment to the Advance Request, including the In Balance Report, "is accurate in all material respects, is consistent with the requirements of the Disbursement Agreement, and reflects the information required by the Disbursement Agreement to be reflected therein."[14]

And in Disbursement Agreement Article 4, Fontainebleau represented and warranted, among other things, that:

- "As of each Advance Date following the Closing Date, there has been no development or event that has or could reasonably be expected to have a Material Adverse Effect since the Closing Date."[15]
- "There is no default or event of default under any of the Financing Agreements."[16]
- "There is no Default or Event of Default hereunder."[17]
- "As of each Advance Date … the In Balance Test is satisfied."[18]

After receiving an Advance Request, BANA was required to "review the Advance Request and attachments thereto to determine whether all required documentation has been

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[14] *Id.*, Ex. C-1 ¶¶ I.A, I.O.2, I.O.3, I.O.5, I.O.8, I.O.20.

[15] *Id.* § 4.7.2.

[16] *Id.* § 4.9.1.

[17] *Id.* § 4.9.2.

provided."[19] In addition, BANA was required to ensure that the Advance Request contained all of the representations, warranties, and certifications necessary to satisfy Section 3.3's conditions precedent to an Advance.[20] The Agreement left BANA with no discretion: if the conditions were satisfied, BANA and Fontainebleau were required to execute an Advance Confirmation Notice to the Funding Agent and on the Scheduled Advance Date, the Funding Agent would transfer the requested funds to Fontainebleau.[21]

2. *Stop Funding Notices*

Conversely, if the conditions precedent were not satisfied, BANA was required to issue a Stop Funding Notice to the Project Entities and Funding Agent.[22] BANA's determination that "the conditions precedent to an Advance have not been satisfied" was a purely ministerial act, limited to identifying Fontainebleau's failure to make one or more of the requisite representations. BANA was *not* required to determine whether any of those representations was accurate. The Disbursement Agreement provides that

> Notwithstanding anything else in this Agreement to the contrary, in performing its duties hereunder, *including approving any Advance Requests*, … the Disbursement Agent shall be entitled to rely on certifications from [Fontainebleau] as to satisfaction of any requirements and/or conditions imposed by this Agreement. *The Disbursement Agent shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items or to investigate any other facts or circumstances to verify compliance by [Fontainebleau] with [its] obligations hereunder*.[23]

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18 *Id.* § 4.14.

19 *Id.* § 2.4.4(a).

20 *Id.* § 2.4.6.

21 *Id.* ("… the Project Entities and the Disbursement Agent *shall* execute an Advance Confirmation Notice setting forth the amount of the Advances to be made [and] … the Funding Agents *shall* make the Advances contemplated by that Advance Confirmation Notice …") (emphasis added).

22 *Id.* § 2.5.1.

23 *Id.* § 9.3.2 (emphasis added).

The Disbursement Agreement requires "[e]ach Stop Funding Notice [to] specify, in reasonable detail, the conditions precedent which the Disbursement Agent has determined have not been satisfied."[24] A Stop Funding Notice's issuance temporarily suspends the lenders' obligations to fund loans under the Credit Agreement.

A Stop Funding Notice would also be issued if "the [Funding Agent] notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing."[25] In addition, Section 9.2.3 provides that if the Disbursement Agent is otherwise "notified that an Event of Default or a Default has occurred and is continuing, [it shall] exercise such of the rights and powers vested in it by this Agreement … and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs." Section 11.1 requires that all notices under the Disbursement Agreement—including those under Sections 2.5.1, 9.2.3 or 9.3.2—be in writing: "All notices or other communications required or permitted to be given hereunder shall be in writing and shall be considered as properly given (a) if delivered in person, (b) if sent by overnight delivery service, or (c) if sent by prepaid telex, or by telecopy with correct answer back received."

3. *The Disbursement Agent's Limited Obligations*

Disbursement Agreement Article 9 sets forth the Disbursement Agent's rights and responsibilities, and includes several provisions that establish that the Disbursement Agent's position is merely administrative and does not involve making analytical determinations about the Project. For example, as discussed above, Section 9.3.2 provides that BANA can "rely and shall be protected in acting or refraining from acting upon" certifications and other statements by Fontainebleau, "[n]otwithstanding anything else in this Agreement to the contrary." Section

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[24] *Id.* § 2.5.1.

[25] *Id.*

9.3.2 further provides that BANA "shall be entitled to rely on certifications from the Project Entities … as to satisfaction of any requirements and/or conditions imposed by this Agreement." Moreover, Section 9.2.5, recognizing BANA's multiple roles in the Project, provides that "[n]otwithstanding anything to the contrary in this Agreement, [BANA] shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that [it] is also a Funding Agent or Lender."

Section 9.10 (captioned "Limitation of Liability") builds on these protections to limit BANA's potential liability as Disbursement Agent, providing, among other things, that BANA:

- "… shall have no duties or obligations [under the Disbursement Agreement] except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof";
- "… shall not have, by reason of this Agreement, a fiduciary relationship in respect of any Person; and nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon [BANA] any obligations in respect of this Agreement except as expressly set forth herein or therein";
- "… does not represent, warrant or guaranty to … the Lenders the performance by the Project Entities [(*i.e.*, Fontainebleau)] … of their respective obligations under the Operative Documents and shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing"; and
- "… shall not have any duty or responsibility, either initially or on a continuing basis, to make any such investigation [of the Project Entities' financial condition and affairs] or any such appraisal [of the Project Entities' creditworthiness] on behalf of the Funding Agents or Lenders or to provide any Funding Agent or Lender with any credit or other information with respect thereto."[26]

B. The Term Lenders' Disbursement Agreement Claims

The Term Lenders allege that BANA breached the Disbursement Agreement by approving Fontainebleau's September 2008 through March 2009 Advance Requests and failing

[26] The Credit Agreement contains essentially identical provisions concerning the Bank Agent. *See* Credit Agmt. §§ 9.3, 9.4.

to issue a Stop Funding Notice during that period, despite Fontainebleau's alleged failure to satisfy one or more of Section 3.3's conditions precedent for an Advance.[27]

The Term Lenders' claims rely principally on Lehman Brothers Holdings Inc.'s September 15, 2008 bankruptcy filing and its alleged subsequent failures to make advances under the Retail Facility Agreement (the "Lehman Defaults").[28] The Term Lenders allege that the Lehman Defaults were Defaults and Events of Default under the Credit Agreement, and otherwise prevented Fontainebleau from satisfying Disbursement Agreement Section 3.3's conditions precedent for an Advance.[29] But the Term Lenders offer only vague allegations that BANA, as Disbursement Agent, "was made aware" of Lehman's bankruptcy filing and "knew" of Lehman's failure to fund its Retail Facility commitments, without providing any facts to support these conclusory assertions.[30] The Complaints also allege that "[i]n September and October 2008, at least one of the Term Lenders wrote to BofA and expressed the position that Lehman's failure to comply with its funding obligations … meant that certain of the conditions precedent to disbursement of funds … were not satisfied."[31] But the Complaints fail to attach this purported "notice" or even identify the lender who sent the alleged communication.

The Term Lenders also allege that several lenders' failed to fund roughly $21 million of the $350 million Delay Draw Loan requested in Fontainebleau's March 9, 2009 Notice of Borrowing; this alleged failure includes the FDIC's repudiation of First National Bank of Nevada's $1,666,666 Delay Draw Loan commitment after the FDIC put the bank in

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27 Avenue Compl. ¶ 176; ACP Compl. ¶¶ 127-28.

28 Avenue Compl. ¶¶ 127-28; ACP Compl. ¶¶ 96-111.

29 *Id.*

30 ACP Compl. ¶ 98.

31 ACP Compl. ¶ 109; Avenue Compl. ¶ 129.

receivership.[32] The Term Lenders claim that these failures to fund constituted a Default under the Disbursement Agreement and precluded satisfaction of Section 3.3's conditions precedent.[33] The Term Lenders cite to a March 23, 2009 letter as evidence that BANA, as Disbursement Agent, was aware that several lenders, including First National Bank of Nevada, had not funded the Delay Draw Loan. But they fail to attach the letter or acknowledge that it also requested that the Term Lenders notify BANA if they objected to the Advance Request's approval.[34] And the Term Lenders do not allege that any of them objected to the Advance Request.

Moreover, notwithstanding Fontainebleau's alleged inability to satisfy Section 3.3's conditions precedent as a result of the Lehman Defaults and the failures to fund the Delay Draw Loan, the Term Lenders do not allege that any of Fontainebleau's Advance Requests failed to include the required representations, warranties, or certifications, or were otherwise inadequate.

ARGUMENT

The Supreme Court recently clarified the federal pleading standard set forth in Federal Rule of Civil Procedure 8.[35] Under *Iqbal* and *Twombly*, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," and a complaint does not "suffice if it tenders naked assertions devoid of further factual

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[32] Avenue Compl. ¶¶ 134, 157; ACP Compl. ¶¶ 117-20.

[33] *Id.*

[34] Avenue Compl. ¶ 157; ACP Compl. ¶ 117; *see also* March 23, 2009 letter from Bank of America, N.A., as Disbursement Agent and Administrative Agent, to Fontainebleau Las Vegas Lenders. (The March 23, 2009 letter is attached hereto as Exhibit 1.)

[35] *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

enhancement."[36] Even before *Iqbal* and *Twombly*, a court has never been "bound to accept as true a legal conclusion couched as a factual allegation."[37]

Furthermore, a breach of contract claim "cannot withstand a motion to dismiss if the express terms of the contract contradict plaintiff's allegations of breach."[38] Under New York law,[39] courts must enforce a contract that is "complete, clear and unambiguous on its face" according to "the plain meaning of its terms."[40] A contract is unambiguous if its language has "a definite and precise meaning … concerning which there is no reasonable basis for a difference of opinion."[41] The Court "is not required to accept the allegations of the complaint as to how to construe the parties' agreement."[42] Rather, the Court should construe it "so as to give full meaning and effect to [its] material provisions."[43]

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36 *Iqbal*, 129 S. Ct. at 1949, citing *Twombly*, 550 U.S. at 557, 570 (internal quotation marks and brackets omitted); *accord Wackenhut Corp. v. Serv. Employees Int'l Union*, 593 F. Supp. 2d 1289, 1294 (S.D. Fla. 2009) ("[P]laintiff's factual allegations, when assumed to be true, must be enough to raise a right to relief above the speculative level.") (internal quotation marks omitted).

37 *Twombly*, 550 U.S. at 555 (internal quotation marks omitted); *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.").

38 *Merit Group, LLC v. Sint Maarten Int'l Telecomms. Servs., NV*, No. 08-cv-3496 (GBD), 2009 WL 3053739, at *2 (S.D.N.Y. Sept. 24, 2009) (granting motion to dismiss contract-breach claim).

39 New York law governs both the Credit Agreement and the Disbursement Agreement. Credit Agmt. § 10.11; Disbursement Agmt. § 11.6.

40 *See Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1342 (11th Cir. 2005) (affirming dismissal of complaint based on contract's plain meaning) (New York law); *Instead, Inc. v. ReProtect, Inc.*, No. 08 Civ. 5236(DLC), 2009 WL 274154, at *5 (S.D.N.Y. Feb. 5, 2009) (granting motion to dismiss based on plain language); *accord Fontainebleau Las Vegas, LLC v. Bank of Am., N.A.*, 417 B.R. 651, 659 (S.D. Fla. 2009) (Gold, J.).

41 *Maxcess*, 433 F.3d at 1342.

42 *Merit Group*, 2009 WL 3053739, at *2 (internal quotation marks omitted).

43 *Allman v. Sony BMG Music Entm't*, No. 06 CV 3252 (GBD), 2008 WL 2477465, at *1 (S.D.N.Y. June 18, 2008).

I. THE TERM LENDERS' COMPLAINTS FAIL TO STATE A CLAIM AGAINST BANA FOR BREACHING THE DISBURSEMENT AGREEMENT

A. BANA Did Not Breach the Disbursement Agreement by Relying on Fontainebleau's Representations and Certifications

As described above, BANA's obligations under the Disbursement Agreement with respect to approving Fontainebleau's Advance Requests were limited to determining whether (i) Fontainebleau had submitted "all required documentation," and (ii) the Advance Request included all of the representations, warranties, and certifications necessary to satisfy Section 3.3's conditions precedent to an Advance.[44] The Term Lenders' Complaints do not allege that any of Fontainebleau's Advance Requests were missing required documentation or failed to include the necessary representations regarding Section 3.3's conditions. Accordingly, the Term Lenders cannot state a breach of contract claim against BANA based on its approval of Fontainebleau's Advance Requests.

The Term Lenders' allegations that BANA "knew" that Fontainebleau had failed to satisfy Section 3.3's conditions cannot salvage the Term Lenders' deficient contract-breach claims. Under Section 9.3.2, what BANA "knew" is irrelevant because that provision states that BANA "may rely and *shall be protected in acting or refraining from acting* upon any … certificate … believed by it on reasonable grounds to be genuine and to have been signed or presented by the proper party" (emphasis added). And it further states that "[n]otwithstanding anything else in this Agreement to the contrary, in … approving any Advance Requests, … [BANA] shall be entitled to rely on certifications by the Project Entities … as to satisfaction of any requirements and/or conditions imposed by this Agreement." Thus, Section 9.3.2 eviscerates the Term Lenders' allegations. Provisions such as Section 9.3.2 are common in financing

[44] Disbursement Agmt. §§ 2.4.4(a), 2.4.6.

agreements,[45] and courts routinely enforce this type of provision, especially against "[s]ophisticated parties" who should be "held to the terms of their contracts."[46] Accordingly, BANA did not breach the Disbursement Agreement by approving Advance Requests based on Fontainebleau's representations and certifications.

B. BANA Did Not Breach the Disbursement Agreement by Failing to Issue Stop Funding Notices

The Term Lenders' allegations that BANA should have issued a Stop Funding Notice also fail to state a claim. Disbursement Agreement Section 2.5.1 requires BANA to issue a Stop Funding Notice if "(i) the conditions precedent to an Advance have not been satisfied, or (ii) the [Bank Agent] notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing." The Stop Funding Notice must specify the conditions precedent that "the Disbursement Agent has determined" are not satisfied, or annex a copy of "any notice of default received by the Disbursement Agent."[47] The Term Lenders' contract-breach claim fails because they cannot establish that BANA, as Disbursement Agent, either determined that any conditions precedent were not satisfied or received a notice of default.

As discussed above, the Term Lenders' Complaints do not allege that Fontainebleau's

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[45] *See Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 883 N.Y.S.2d 486, 488 (N.Y. App. Div. 2009) ("Administrative Agent … shall not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation … (ii) the contents of any certificate, report or other document … (iii) … the occurrence of any default."); *UniCredito Italiano SpA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 491 (S.D.N.Y. Oct. 14, 2003) (Credit agreement contained provisions disclaiming agent's "duty to ascertain or to inquire").

[46] *See UniCredito*, 288 F. Supp. 2d at 499, 503 (New York law) (implied covenant of good faith and fair dealing claim fails where loan syndication agreement provisions "specifically absolve the Defendant banks from any duty to disclose financial information regarding [borrower]"); *Cont'l Cas. Co. v. State of N.Y. Mortgage Agency*, No. 94 Civ. 8408(KMW), 1998 WL 513054, at *15 (S.D.N.Y. Aug. 18, 1998) (New York law) (trustee satisfied contractual duties where contract expressly permitted it to "rely conclusively upon any certificate, requisition, opinion or other instrument required or permitted to be filed … [with] no duty to make any investigation or inquiry as to any statement contained [in a certificate]"); *Stanfield*, 883 N.Y.S.2d at 490 (aiding and abetting fraud claims fail where loan agreement provides that administrative agent "did not have a duty to disclose any information relating to [borrower] and could not be held liable for failure to disclose any information").

[47] Disbursement Agmt. § 2.5.1.

Advance Requests failed to certify that Section 3.3's conditions precedent to an Advance were satisfied. Fontainebleau's certifications satisfied the conditions precedent, and BANA therefore had no obligation to issue a Stop Funding Notice under Section 2.5.1's first prong. The Term Lenders' assertions that BANA should have ignored Fontainebleau's certifications and independently assessed whether Section 3.3's conditions precedent were satisfied contradict the Disbursement Agreement:

- Section 9.3.2 expressly permits BANA "to rely on certifications by the Project Entities … as to satisfaction of any requirements and/or conditions imposed by this Agreement."
- Section 9.3.2 also provides that BANA "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items [in the Advance Request] or to investigate any other facts or circumstances to verify compliance by the Project Entities with their [Disbursement Agreement] obligations."
- Section 9.10 provides that BANA "does not represent, warrant or guaranty to the … Lenders the performance by the Project Entities … of their respective obligations under the Operative Documents and shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing."

The Term Lenders cannot impose obligations on BANA that are contrary to these express terms.

Likewise, the Term Lenders cannot state a claim against BANA for breaching Section 2.5.1's second prong because they do not allege that BANA, as Disbursement Agent, ever received the formal written notice from the Bank Agent necessary to trigger its obligation to issue a Stop Funding Notice.

To the extent the Term Lenders' Stop Funding Notice claims are based on Section 9.2.3—which provides that if BANA, as Disbursement Agent, "is notified that an Event of Default or a Default has occurred and is continuing," it "shall exercise such of the rights and powers vested in it by this Agreement … and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable

administration of its own affairs"—they are similarly deficient. The Term Lenders' Complaints do not plead facts sufficient to establish that BANA received a specific written notice stating "that an Event of Default or a Default has occurred and is continuing."[48]

For example, with respect to the Lehman Defaults, the Term Lenders merely offer conclusory assertions that BANA "was made aware" of Lehman's bankruptcy filing and "knew" of Lehman's failure to fund its Retail Facility Agreement commitments.[49] The only written "notice" to which the Term Lenders refer is an alleged letter from an unidentified lender that "expressed the position that Lehman's failure to comply with its funding obligations ... that certain of the conditions precedent to disbursement of funds ... were not satisfied."[50] But this alleged letter (which is not attached to the Complaints) falls far short of the notice Section 9.2.3 requires. Moreover, Section 9.2.5 provides that, as Disbursement Agent, BANA "shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that the Disbursement Agent is also [the Administrative Agent] or Lender." And Section 11.1 requires that "[a]ll notices or other communications required or permitted to be given hereunder shall be in writing" and that any communications to the Disbursement Agent be sent to BANA in its capacity as "Disbursement Agent for Fontainebleau Resorts." Thus, even if this alleged letter properly identified the Event of Default, unless it was addressed to BANA in its capacity as Disbursement Agent, it would not be a proper notice of the Lehman Defaults under Section 9.2.3.

As for the failures by First National Bank of Nevada and other lenders to fund the Delay Draw Loan, the Term Lenders do not even attempt to allege that BANA received a proper notice

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[48] *See id.* § 11.1 ("All notices or other communications required or permitted to be given hereunder shall be in writing ....").

[49] ACP Compl. ¶ 98.

under either Section 2.5.1 or Section 9.3.2 of those alleged defaults. Moreover, even proper notice to BANA of these failures to fund would not have required BANA to issue a Stop Funding Notice. The Credit Agreement expressly provides that a lender's failure to fund its loan commitment does *not* relieve the other lenders on the same loan of their funding obligations.[51] Thus, not only was BANA not required to issue a Stop Funding Notice, it would have been improper for it to do so.

II. THE AVENUE PLAINTIFFS FAIL TO STATE A CLAIM AGAINST BANA FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. The Avenue Plaintiffs' Implied Covenant Claim Duplicates their Breach of Contract Claim

While New York law implies a covenant of good faith and fair dealing into every contract, it does not "recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also [pleaded]."[52] And implied covenant claims that "seek to recover damages that are intrinsically tied to the damages allegedly resulting from the breach of contract must be dismissed as redundant."[53] The Avenue plaintiffs' implied covenant claim against BANA indisputably duplicates their claim that BANA breached the Disbursement Agreement. Both claims rest on identical allegations that BANA improperly approved Fontainebleau's Advance Requests and

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50 ACP Compl. ¶ 109; Avenue Compl. ¶ 129.

51 Credit Agmt. § 2.23(g) ("The failure of any Lender to make any Loan … on any date required hereunder shall not relieve any other Lender of its corresponding obligation to do so on such date.").

52 *Ari & Co. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 522 (S.D.N.Y. 2003) (New York law) (granting motion to dismiss implied covenant of good faith and fair dealing claim).

53 *Ari*, 273 F. Supp. 2d at 523; *Alter v. Bogoricin*, 97 Civ. 0662 (MBM), 1997 U.S. Dist. LEXIS 17369, at **21-22 (S.D.N.Y. Nov. 4, 1997) (dismissing implied covenant breach claim where "the damages plaintiff seeks as a result of defendants' alleged [implied covenant breach] is identical to the damages he seeks for the alleged breach of contract"); *see also Century-Maxim Constr. Corp. v. One Bryant Park, LLC*, No. 24683/08, 2009 WL 1218895, at *24 (N.Y. Sup. Ct. Apr. 7, 2009) ("[A]n independent cause of action for breach of the implied covenant cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of contract.").

failed to issue Stop Funding Notices.[54] And both claims seek the same damages: the Avenue plaintiffs' "*pro rata* share of the funds wrongfully disbursed from the Bank Proceeds Account and their *pro rata* share of the Delay Draw Loans."[55] For this reason alone, the Avenue plaintiffs' claim for breach of the implied covenant of good faith and fair dealing against BANA should be dismissed.[56]

B. The Implied Covenant of Good Faith and Fair Dealing Claim is Inconsistent with the Disbursement Agreement's Express Terms

Even if it were not impermissibly duplicative, the Avenue plaintiffs' implied covenant of good faith and fair dealing claim would still fail because it seeks to impose obligations on BANA that are inconsistent with the Disbursement Agreement's provisions.[57] The Avenue plaintiffs' implied covenant claim is clearly inconsistent with Sections 9.3.2, 9.10, 2.5.1, 9.2.5 and 11.1, which, as demonstrated above, establish that BANA fully complied with all its Disbursement Agreement duties in approving Fontainebleau's Advance Requests and not issuing Stop Funding Notices. Similarly unavailing is the Avenue plaintiffs' allegation that BANA breached the implied covenant by "failing to communicate information to the Term Lenders regarding Events of Default that were known of [sic] should have been known to [BANA]."[58] Disbursement Agreement Section 9.10 provides the opposite, that BANA "shall not have any duty or

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54 *See* Avenue Compl. ¶¶ 176, 192.

55 *See id.* ¶ 172.

56 *See Atlantis Info. Tech., GmbH v. CA, Inc.*, 485 F. Supp. 2d 224, 230-31 (E.D.N.Y. 2007) (dismissing implied covenant breach claim "as duplicative" where "the allegations set forth in support of [contract-breach and implied covenant breach] claims are almost identical"); *EUA Cogenex Corp. v. N. Rockland Cent. Sch. Dist.*, 124 F. Supp. 2d 861, 873 (S.D.N.Y. 2000) (New York law) (dismissing "claim for breach of the implied covenant … as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of an express provision of the underlying contract").

57 *Merit Group*, 2009 WL 3053739, at *3 (New York law) (dismissing implied-covenant breach claim); *see also UniCredito Italiano SpA*, 288 F. Supp. 2d at 503 (New York law) ("[N]o obligation can be implied that would be inconsistent with other terms of the contractual relationship.") (internal quotation marks omitted); *Ari*, 273 F. Supp. 2d at 523 ("[B]reach of the covenant of good faith claim must be dismissed [where] it seeks to recover for obligations that were not explicitly part of the Agreement.").

58 Avenue Compl. ¶ 192.

responsibility … to provide any Funding Agent or Lender with any credit or other information with respect" to the "financial conditions and affairs of the Project Entities in connection with the making of the extensions of credit contemplated by the Financing Agreements … [and] the creditworthiness of the Project Entities." Accordingly, the Avenue plaintiffs fail to state a claim against BANA for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

The Term Lenders' Complaints fail to state a claim against BANA for breaching the Disbursement Agreement. BANA did not breach the agreement by approving Fontainebleau's Advance Requests because there are no allegations that the Advance Requests were missing any required documents or failed to include Fontainebleau's certifications regarding Section 3.3's conditions precedent. BANA's role as Disbursement Agent was merely administrative; the Disbursement Agreement entitles BANA to rely on those certifications and absolves BANA of any duty to assess independently the conditions' satisfaction. The Term Lenders' Stop Funding Notice claims are similarly deficient. Fontainebleau's certifications regarding the conditions established, for BANA's purposes, that there was no obligation to issue a Stop Funding Notice under Section 2.5.1's first prong. And the Complaints plead no facts establishing that BANA received the specific written notice of an Event of Default necessary to trigger BANA's obligation to issue a Stop Funding Notice under Section 2.5.1's second prong or Section 9.2.3. Finally, the Avenue plaintiffs' implied covenant of good faith and fair dealing claim fails because it is duplicative of the deficient breach of contract claim and impermissibly seeks to imply duties that are inconsistent with BANA's limited obligations under the Disbursement Agreement.

Accordingly, BANA respectfully requests that the Court dismiss Counts I, III and V of the Second Amended Complaint in *Avenue CLO Fund, Ltd. v. Bank of America, N.A.*, and Count III of the Amended Complaint in *ACP Master, Ltd. v. Bank of America, N.A.*, with prejudice.

Date: Miami, Florida
February 18, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service list either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 18, 2010

By: */s Craig V. Rasile*
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EXHIBIT 1

March 23, 2009

Re: Fontainebleau Las Vegas, LLC

Dear Fontainebleau Las Vegas Lenders.

Bank of America as Disbursement Agent and Administrative Agent has been working with JVI and the Borrower through the weekend to clarify their respective positions on the Remaining Cost Report and the In-Balance Test. We anticipate that the Borrower will submit revised draw materials which will reflect an approximately $13.8 million positive In-Balance calculation. There are two issues which may impact this calculation:

1) Revolver Availability. There is a divergence in opinions as to the reading of 2.1(c)(iii) of the Credit Agreement. Bank of America's position is that since the Borrower has requested all of the Delay Draw Term Loans, and almost all of the loans have funded (whether or not the outstanding $21,666,667 is ultimately received), Section 2.1(c)(iii) now permits the Borrower to request Revolving Loans which result in the aggregate amount outstanding under the Revolving Commitments being in excess of $150,000,000. As a result, we would permit the relevant portion of the Revolving Commitment to be reflected in Available Funds.

2) Treatment of Unfunded Delay Draw Commitments. Several Lenders (including First National Bank of Nevada, whose commitment has been terminated) have not funded the $350MM Delay Draw Term Loan requested by the Borrower. The Borrower continues to include a $21,666,667 portion of the Delay Draw Term Loans in its calculation of "Available Funds" for the purpose of the In-Balance Test in their Advance Request certifications. The $21,666,667 does not include the former commitments of First National Bank of Nevada.

Bank of America's position is that it is willing to include the $21,666,667 for the March 25 Advance, pending further information about whether these lenders will fund. Absent any other changes, note that the exclusion of the $21,666,667 amount from Available Funds would result in a failure to satisfy the In-Balance Test.

Please note that we cannot discuss these matters with our public-side colleagues who hold or manage a small term loan exposure, so the positions ascribed to Bank of America do not apply to our public-side colleagues.

We request that any Lender which does not support these interpretations immediately inform us in writing of their specific position.

Sincerely,

BANK OF AMERICA, N.A.
As Disbursement Agent and Administrative Agent

By: _____
Henry Yu, Senior Vice President

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to Case Numbers:

09-CV-23835-ASG
10-CV-20236-ASG
_____/

DEFENDANTS' JOINT MOTIONS
TO DISMISS THE TERM LENDER COMPLAINTS
AND SUPPORTING MEMORANDUM OF LAW

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Defendants[1] jointly move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Amended Complaints filed in *Avenue CLO Fund, Ltd.*, et al. *v. Bank of America, N.A.*, et al. (the "Avenue Action") and *ACP Master, Ltd.*, et al. *v. Bank of America, N.A.*, et al., (the "Aurelius Action") (collectively, the "Term Lender Actions" maintained by the "Term Lenders" or "Plaintiffs") for failure to state a claim upon which relief can be granted. Defendants also respectfully submit this memorandum of law and the Declaration of Thomas C. Rice ("Rice Decl.") in support of their joint motions.

PRELIMINARY STATEMENT[2]

The Avenue and Aurelius Actions arise out of the same Credit and Disbursement Agreements (as defined below) and substantially the same circumstances that were the subject of this Court's August 26, 2009 Decision and Order (the "August 26 Decision")[3] denying partial summary judgment to Fontainebleau Las Vegas LLC ("Fontainebleau") in its lawsuit against the same Revolving Lenders named herein (the "Fontainebleau Action"). The Plaintiffs in the Avenue Action (the "Avenue Plaintiffs") are a group of lenders that participated in Initial and/or Delay Draw Term Loans under the Credit Agreement with Fontainebleau. The Plaintiffs in the Aurelius Action (the "Aurelius Plaintiffs") claim to be successors in interest to other institutions that were Initial Term and/or Delay Draw Lenders under the Credit Agreement.

The Amended Complaints are predicated on the same two flawed theories on which Fontainebleau based its motion for partial summary judgment that this Court rejected in

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1 Bank of America, N.A., Merrill Lynch Capital Corporation, JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, The Royal Bank of Scotland plc, Sumitomo Mitsui Banking Corporation, Bank of Scotland plc, HSH Nordbank AG, MB Financial Bank, N.A., and Camulos Master Fund, L.P. (collectively, the "Revolving Lenders" or "Defendants").

2 Unless otherwise indicated, capitalized terms have the same meaning as in the Credit Agreement and/or Disbursement Agreement. *See* Rice Decl. Exs. A (Credit Agreement) & B (Disbursement Agreement).

3 The August 26 Decision has been published as *In re Fontainebleau Las Vegas Holdings, LLC*, 417 B.R. 651 (S.D. Fla. 2009).

the August 26 Decision. These theories—that "fully drawn" means "fully requested" rather than "fully funded" and that Fontainebleau's prior material breaches of the Credit Agreement did not relieve the Revolving Lenders of their obligation to loan money under the Credit Agreement—are even less viable here than they were in the Fontainebleau Action. The Amended Complaints fail to state a claim for relief and should be dismissed.

First, Plaintiffs allege that the Revolving Lenders breached the Credit Agreement by not honoring a March 2, 2009 Notice of Borrowing delivered by Fontainebleau, which was amended on March 3 and which simultaneously requested $350 million in Delay Draw Term Loans and $656.5 million in Revolving Loans (the "March 2 and 3 Notices of Borrowing"). As a threshold matter, Plaintiffs lack standing to assert a claim against the Revolving Lenders for breach of any lending commitment to Fontainebleau. Furthermore, Fontainebleau's March 2 and 3 Notices of Borrowing did not comply with the Credit Agreement, which provides that the outstanding balance under the revolving loan facility (the "Revolver") cannot exceed $150 million "unless the Total Delay Draw Commitments have been fully drawn." Plaintiffs contend—as did Fontainebleau in the Fontainebleau Action—that "fully drawn" means "fully requested" and that Fontainebleau satisfied the Credit Agreement's sequential funding requirements by simply requesting all of the Delay Draw funds and the remainder available under the Revolver in the same notice.

This Court rightly rejected Plaintiffs' strained interpretation in the August 26 Decision, ruling that "in the context of the entire agreement, the unambiguous meaning of 'fully drawn' in section 2.1(c)(iii) means 'fully funded.'"[4] The "fully requested" argument is even less convincing in this action, because, as alleged in the Aurelius Action, certain of the Delay Draw

[4] August 26 Decision, 417 B.R. at 660.

Lenders also declined to honor the March 2 and 3 Notices of Borrowing.

Second, Plaintiffs allege that the Revolving Lenders were obligated to fund the March 2 and 3 Notices of Borrowing despite pre-existing material breaches of the Credit Agreement by Fontainebleau. In rejecting this argument in the August 26 Decision, this Court recognized that the Credit Agreement and established New York law relieved the Revolving Lenders of their funding obligations if Fontainebleau materially breached the Credit Agreement before March 2. Furthermore, here Plaintiffs affirmatively allege that Events of Default occurred prior to March 2009, based, *inter alia*, on defaults by Lehman Brothers Holdings, Inc. ("Lehman Brothers") and First National Bank of Nevada under certain Material Agreements, as defined in the Credit Agreement. These allegations, taken as true for purposes of the present motion, are fatal to Plaintiffs' claims.

Finally, the claim by the Avenue Plaintiffs for breach of the covenant of good faith and fair dealing is facially deficient. This claim is duplicative of the Avenue Plaintiffs' breach of contract claim and seeks to impose obligations beyond those contained in the Credit Agreement. Under well-settled New York law, this claim should also be dismissed.

BACKGROUND[5]

A. The Loans

On June 6, 2007, Fontainebleau and a number of sophisticated financial institutions (the "Lenders," or individually, a "Lender") entered into an agreement that provided for $1.85 billion in financing (the "Credit Agreement") for the construction of the Fontainebleau

[5] The following background facts are taken from the Amended Complaints (the "Avenue Compl." and the "Aurelius Compl.") and from the Credit Agreement and Disbursement Agreement, which the Court may consider on this motion to dismiss. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (a court may consider a document on a motion to dismiss "if the document's contents are alleged in a complaint and no party questions those contents" and the document is "central to the plaintiff's claim"); *see also Hubbard v. BankAtlantic Bancorp Inc.*, 625 F. Supp. 2d 1267, 1279 (S.D. Fla. 2008) (same).

Las Vegas Resort and Casino (the "Project"). The Credit Agreement created three credit facilities: (i) a $700 million initial term loan facility (the "Initial Term Loan"); (ii) a $350 million delay draw term facility (the "Delay Draw Term Loan," and with the Initial Term Loan, the "Term Loan Facility"), and (iii) an $800 million revolving loan facility (the "Revolver").[6] The Avenue Plaintiffs were participants in either the Initial Term Loan and/or the Delay Draw Term Loan.[7] The Aurelius Plaintiffs purport to be successors in interest to Initial Term and/or Delay Draw Lenders.[8] Defendants were Lenders under the Revolver.[9] In addition, defendant Bank of America, N.A. ("Bank of America") acted as Administrative Agent under the Credit Agreement.[10]

Construction of the Project was to be funded by, among other sources, the three facilities established under the Credit Agreement, the proceeds from a $675 million Second Mortgage Note offering (the "Second Lien Facility") and a $350 million Retail Facility Agreement.[11] In addition to the Credit Agreement, on June 6, 2007, Fontainebleau, Bank of America, as Disbursement Agent, Wells Fargo Bank, N.A., as Trustee for the Second Mortgage Notes and Lehman Brothers, as Agent for the Retail Facility Agreement, entered into an agreement governing the disbursement of the funds loaned to Fontainebleau under each of the Credit Agreement, the Second Lien Facility, and the Retail Facility Agreement (the "Disbursement Agreement").

Together, the Credit Agreement and the Disbursement Agreement governed the

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6 Aurelius Compl. ¶¶ 23-24; Avenue Compl. ¶ 115.

7 Avenue Compl. ¶¶ 115, 117.

8 Aurelius Compl. ¶ 25.

9 Aurelius Compl. ¶¶ 11-22; Avenue Compl. ¶¶ 102-12.

10 Aurelius Compl. ¶ 11; Avenue Compl. ¶ 102.

11 Aurelius Compl. ¶ 28; Avenue Compl. ¶ 114.

Fontainebleau Project lending relationships and established a two-step funding process.[12] First, following Fontainebleau's submission of a notice of borrowing specifying the requested loans and a designated borrowing date (a "Notice of Borrowing"), the Lenders were required, subject to Fontainebleau's satisfaction of the Credit Agreement's terms, to fund loans made pursuant to their respective commitments into a Bank Proceeds Account.[13] Second, to access funds in the Bank Proceeds Account, Fontainebleau was required to submit an advance request pursuant to the Disbursement Agreement (an "Advance Request"), and upon the satisfaction of certain conditions, Fontainebleau could obtain funds from this account under an Advance Request to pay Project Expenses.[14]

Most pertinent to the present motions, the making of loans under the Revolver was governed by, *inter alia*, Section 2.1(c) of the Credit Agreement. That provision reads:

> ***Subject to the terms and conditions [of the Credit Agreement], and in reliance upon the applicable representations and warranties set forth herein and in the Disbursement Agreement***, each Revolving Lender severally agrees to make Revolving Loans . . . to Borrowers . . . provided that . . . (iii) unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans . . . shall not exceed $150,000,000.[15]

As Section 2.1(c) makes clear and as this Court determined in the August 26 Decision, the Revolving Lenders' obligation to make loans was subject to Fontainebleau's compliance with the terms and conditions of the Credit Agreement, and an Event of Default under the Credit Agreement would relieve the Revolving Lenders of their funding obligation. Section 8 of the Credit Agreement sets forth various circumstances that would constitute an Event of Default.

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[12] Aurelius Compl. ¶ 33; Avenue Compl. ¶ 119.

[13] Aurelius Compl. ¶ 33; Avenue Compl. ¶ 119; Credit Agmt. §§ 2.1(c), 2.4(c).

[14] Aurelius Compl. ¶ 37; Avenue Compl. ¶ 120.

[15] Credit Agmt. § 2.1(c) (emphasis added).

B. The March 2009 Notices of Borrowing

On March 2, 2009, Fontainebleau submitted a Notice of Borrowing that requested $350 million under the Delay Draw Term Loan and $679 million under the Revolver (the "March 2 Notice of Borrowing").[16] On March 3, 2009, citing a purported "scrivener's error," Fontainebleau issued an amended Notice of Borrowing, reducing the amount requested under the Revolver to $656.5 million (the "March 3 Notice of Borrowing").[17]

On March 3, 2009, the Administrative Agent, Bank of America, informed Fontainebleau that the March 2 Notice of Borrowing did not comply with Section 2.1(c)(iii) of the Credit Agreement because the notice contained a simultaneous request for loans under the Delay Draw Term Loan, which had not yet been "fully drawn."[18] In a March 4, 2009 message posted on Intralinks and available to all Lenders, Bank of America reported that a Steering Committee, which included both Term and Revolving Lenders, "unanimously supports the position that the [March 3 Notice] does not comply with the terms of the Credit Agreement."[19] Bank of America further advised that Lenders who disagreed with that position should "immediately contact Bank of America . . . to make operational arrangements for funding their portion of the requested borrowing."[20] The Aurelius Plaintiffs allege that certain of their predecessors in interest participating as Delay Draw Term Lenders did not fund the March 2 or 3 Notices of Borrowing.[21]

Several days later, on March 9, 2009, Fontainebleau issued a new Notice of

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16 Aurelius Compl. ¶ 44 (referencing Ex. C, Rice Decl. (March 2 Notice of Borrowing)); Avenue Compl. ¶ 141.

17 Aurelius Compl. ¶ 56 (referencing Ex. D, Rice Decl. (March 3 Notice of Borrowing)); Avenue Compl. ¶ 141.

18 Aurelius Compl. ¶¶ 50-51; Avenue Compl. ¶¶ 144-45.

19 Aurelius Compl. ¶ 57 (referencing Ex. E, Rice Decl. (March 4 Intralinks posting)); *accord* Avenue Compl. ¶ 143.

20 Aurelius Compl. ¶ 57 (referencing Ex. E, Rice Decl.).

21 *Id.* ¶ 53.

Borrowing to the Delay Draw Lenders alone for the full amount of the $350 million Delay Draw Term Loan (the "March 9 Notice of Borrowing").[22] The Term Lenders allege that they (or their predecessors in interest, as applicable) funded $337 million of the $350 million sought under the March 9 Notice of Borrowing on March 10, 2009.[23]

C. Termination of The Revolving Lenders' Commitments and the April 21 Notice of Borrowing

Section 8 of the Credit Agreement allows a majority of the Revolving Lenders to terminate the Revolver upon the occurrence of an Event of Default.[24] In accordance with this section, on April 20, 2009, Bank of America, in its capacity as Administrative Agent, sent a letter to Fontainebleau, the Lenders, and others advising that the Revolving Lenders had determined that "one or more Events of Default have occurred and are continuing" (the "April 20 Termination Letter").[25] This letter followed a number of disclosures by Fontainebleau indicating that numerous Events of Default had occurred, some of which may have pre-dated the March 2 Notice of Borrowing.[26]

According to the Avenue and Aurelius Complaints, at least two such Events of Default had taken place prior to March 2009. The first arose out of the bankruptcy of Lehman Brothers and its ensuing breach of the Retail Facility Agreement.[27] The second arose out of the failure of First National Bank of Nevada, which went into receivership in July 2008, and thereafter repudiated its obligations as a Lender.[28] Plaintiffs allege that these events constituted

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22 Aurelius Compl. ¶ 65; Avenue Compl. ¶ 151 (referencing Ex. F, Rice Decl. (March 9 Notice of Borrowing)).

23 Aurelius Compl. ¶ 66; Avenue Compl. ¶ 154.

24 Credit Agmt. § 8.

25 Aurelius Compl. ¶ 73; Avenue Compl. ¶ 167 (referencing Ex. G, Rice Decl. (April 20 Termination Letter)).

26 *See, e.g.*, Avenue Compl. ¶¶ 139, 157-59.

27 Aurelius Compl. ¶¶ 99-106; Avenue Compl. ¶ 128.

28 Aurelius Compl. ¶¶ 118-21; Avenue Compl. ¶¶ 133-35.

breaches of Material Agreements under the Credit Agreement, and thus constituted an Event of Default under Section 8(j) and other provisions of the Credit Agreement.

The April 20 Termination Letter further notified its recipients that pursuant to Section 8 of the Credit Agreement, the Revolver was "terminated effectively immediately."[29] Despite the Revolving Lenders' termination of their obligations, one day later, on April 21, 2009, Fontainebleau submitted a Notice of Borrowing (the "April 21 Notice of Borrowing") to Bank of America, requesting $710 million under the Revolver.[30] The Revolving Lenders did not fund that request.

ARGUMENT

Plaintiffs fail to allege the essential elements of a cognizable claim for relief.[31] As a threshold matter, Plaintiffs lack standing to pursue claims based on contractual promises made by the Revolving Lenders to Fontainebleau. Even if Plaintiffs had standing, they do not allege facts that constitute a breach of the Credit Agreement by the Revolving Lenders. Nor do Plaintiffs allege due performance of the Credit Agreement by Fontainebleau or themselves; rather, Plaintiffs allege material breaches of the Credit Agreement that relieved the Revolving Lenders of any funding obligation. Finally, the Avenue Plaintiffs' claim for breach of the covenant of good faith and fair dealing fails to state a claim because it is duplicative of the

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29 Aurelius Compl. ¶ 73; Avenue Compl. ¶¶ 167-68 (referencing Ex. G, Rice Decl.).

30 Aurelius Compl. ¶ 71; Avenue Compl. ¶ 169 (referencing Ex. H, Rice Decl. (April 21 Notice of Borrowing)).

31 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citation omitted). As the Supreme Court has confirmed, the plausibility test applies to "'all civil actions,'" including, but not limited to breach of contract cases. *Id.* at 1953 (citing Fed. R. Civ. P. 1 and 8 and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see Uphoff v. Wachovia Secs., LLC*, No. 09 CIV 80420 (KAM), 2009 WL 5031345, at *2 (S.D. Fla. Dec. 15, 2009) (dismissing breach of contract claim and citing *Iqbal* instruction that "only a complaint that states a plausible claim for relief survives a motion to dismiss").

contract claims asserted and seeks to impose obligations beyond those contained in the Credit Agreement.

I. THE TERM LENDERS LACK STANDING TO ENFORCE THE REVOLVING LENDERS' PROMISES TO FONTAINEBLEAU

The mere fact that Plaintiffs as Term Lenders are parties to the Credit Agreement does not give them standing to enforce every obligation set forth in the Credit Agreement. Rather, as New York courts[32] have recognized for more than a century, a party to a multi-party contract can enforce only those promises expressly intended for that party's benefit and supported by mutual consideration.[33]

In *Berry Harvester*, the court considered a tripartite contract in which (i) plaintiff Berry Harvester agreed to license to defendant Wood Mowing certain patented machine designs; (ii) Wood Mowing agreed to pay Berry Harvester a license fee plus a royalty for every machine sold; and (iii) Wood Mowing agreed to employ Mr. Berry (the machine's inventor) for three years to develop new machines, which Wood Mowing would then sell subject to its royalty agreement with Berry Harvester.[34] After unsuccessful development efforts, Wood Mowing withdrew its support for Mr. Berry's research, and Berry Harvester sued Wood Mowing for breach of contract.

The court identified the intended beneficiary of each individual promise in the

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[32] New York law governs both the Credit Agreement and the Disbursement Agreement. Credit Agmt. § 10.11; Disbursement Agmt. § 11.6.

[33] *Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Mach. Co.*, 46 N.E. 952, 955 (N.Y. 1897) ("Whether the right or privilege conferred by the promise of one party to a tripartite contract belongs to one or both of the other parties depends upon the intention of the parties; the mere fact that there are three parties to the contract does not enlarge the effect of any promise"); *accord Alexander v. U.S.*, 640 F.2d 1250, 1253 (Ct. Cl. 1981) ("[T]he mere fact that [a party] signed the agreement is not controlling; they may have enforceable rights under some of its provisions and not have enforceable rights under other provisions. The critical inquiry is whether the parties to the agreement intended to give the [party] the right to enforce . . . [the] obligation." (citing *Berry Harvester* as a "leading case")); *see also* 22 N.Y. Jur. 2d Contracts § 260 (2008).

[34] *Berry Harvester*, 46 N.E. at 954.

contract and concluded that while Wood Mowing was "interested in every stipulation, the interests of the others are mainly severed. [Wood Mowing] covenanted with [Berry Harvester] as to certain things, with Mr. Berry as to others, and with both as to others still."[35] The court found this structure unambiguous because "the covenants in favor of [Berry Harvester] were supported by a consideration furnished by it only, while those in favor of [Mr.] Berry rest upon a consideration flowing from him only."[36] Thus, it held that "[w]here a several right is conferred upon [Berry Harvester], Mr. Berry is not interested in it, and where a several right is conferred upon Mr. Berry, [Berry Harvester] has no interest in that."[37] The court then affirmed the trial court's judgment for Wood Mowing because the covenant that Wood Mowing allegedly breached "was, by the form of the agreement, confined to [Mr. Berry] . . . [and, thus,] would be immaterial in this controversy between the other parties to the contract."[38]

Here, Plaintiffs do not identify any provision in the Credit Agreement that gives them standing to assert breach of contract claims based on the Revolving Lenders' alleged failure to fund Revolver commitments. As with the *Berry Harvester* contract, the Credit Agreement's unambiguous terms reflect separate promises between the various parties. Credit Agreement Section 2.1 provides that each Lender "*severally agrees* to make [either Term or Revolving] loans to *Borrowers*,"[39] and further provides separate conditions precedent for each of the Initial Term Loans, Delay Draw Term Loans, and Revolving Loans. Credit Agreement Section 2.23(g) reiterates that the Revolving and Term Lenders' individual funding obligations "are *several and*

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35 *Id.*

36 *Id.* at 955.

37 *Id.*

38 *Id.*

39 Credit Agmt. § 2.1(a)-(c) (emphasis added); *Berry Harvester*, 46 N.E. at 955 (observing that contractual promise introduced with words specifically limiting the promise to two of a tripartite contract's three parties showed intent that the provision should only apply to two of the three contracting parties).

not joint" (emphasis added). Moreover, each Lender's funding commitment was supported by separate consideration received from Fontainebleau, including, among other things, Fontainebleau's obligations to repay the loans "for the account of the appropriate [Lender]"[40] and to pay each Lender a commitment fee.[41]

In contrast, there is no provision in the Credit Agreement that permits the Term Lenders to enforce the Revolving Lenders' commitments. Indeed, no Lender received consideration from any other Lender for its funding commitment.[42] As this Court has previously recognized, the Credit Agreement "did not impose *any shared obligations* on lenders to ensure the absence of a financing gap."[43]

The Term Lenders' attempt to manufacture new inter-Lender obligations is unavailing and is undermined by the clear terms of the Credit Agreement. For example, the Term Lenders allege that they entered into the Credit Agreement in reliance on their ability to enforce the Revolving Lenders' funding obligations.[44] But each Term Lender expressly acknowledged, in Credit Agreement Section 9.7, that it had not relied "on any other Lender . . . [in making the] decision to enter into this Agreement," and "will . . . *without reliance* upon . . . any other Lender . . . make its own decisions in taking or not taking action under or based upon this Agreement." (Emphasis added.)[45] In a related vein, in Section 2.1(a), the Term Lenders

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[40] Credit Agmt. § 2.7(a).

[41] *Id.* § 2.2.

[42] *See Berry Harvester*, 46 N.E. at 955 ("The covenants in favor of plaintiff were supported by a consideration furnished by it only, while those in favor of Berry rest upon a consideration flowing from him only.").

[43] *See* August 26 Decision, 417 B.R at 661 (emphasis added).

[44] Aurelius Compl. ¶ 76 (alleging Term Lenders "relied upon their ability to enforce loan commitments made by the Revolving Lenders"); Avenue Compl. ¶ 118 (alleging Term Lenders "relied upon the obligation of the other lenders to comply with their funding obligations").

[45] *See also UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 499 (S.D.N.Y. 2003) (contract provision in which plaintiff lenders agreed to "make their own credit decisions and would not rely on the Defendant banks" barred plaintiffs from arguing they relied on the banks).

agreed to lend to Fontainebleau in "*reliance* upon the representations and warranties" in the Credit Agreement—none of which was made by the Revolving Lenders or concern any Revolving Lender obligations (emphasis added).[46]

Similarly unavailing is the Term Lenders' allegation that the Credit Agreement reflects some vague, unstated inter-Lender agreement to "share the risks of the lending transaction ratably."[47] The Term Lenders ignore the Credit Agreement's structure, which, as this Court held, "reflects the parties' intent to employ a sequential borrowing and lending process" that did not permit Fontainebleau access to the entire Revolver until the Term and Delay Draw Lenders fully funded their commitments.[48] Thus, the Term Lenders always bore the risk that Fontainebleau would not receive the Revolver funds. Contrary to the Term Lenders' assertions, Credit Agreement Section 2.4(b) says nothing about the allocation of risk between Term and Revolving Lenders—it simply establishes procedures for the Lenders to meet their several funding obligations.[49] Therefore, the Term Lenders lack standing to assert the alleged breaches on which they sue, and the Amended Complaints should be dismissed on that basis alone.

II. THE TERM LENDERS CANNOT STATE A BREACH OF CONTRACT CLAIM BASED ON FONTAINEBLEAU'S MARCH 2 AND 3 NOTICES OF BORROWING

Even if Plaintiffs had standing to sue for breach, the Revolving Lenders did not breach the Credit Agreement by rejecting Fontainebleau's March 2 and 3 Notices of Borrowing. The notices were improper under the Credit Agreement's unambiguous terms because they

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[46] *See* Credit Agmt. § 4 ("Each Borrower hereby represents and warrants to . . . each Lender that . . . .").

[47] Aurelius Compl. ¶ 77.

[48] August 26 Decision, 417 B.R. at 660.

[49] *See* Aurelius Compl. ¶¶ 78-79; Credit Agmt. § 2.4(b) ("Upon receipt of each Notice of Borrowing . . . such [L]ender will make the amount of its pro rata share of each borrowing available."). The Aurelius Complaint's reliance on the March 9 Notice of Borrowing is improper because such parol evidence cannot be used to alter the Credit Agreement's unambiguous terms. *See infra* at II.B.2.

simultaneously requested the full amounts available under both the Delay Draw Term Loan and the Revolver. Credit Agreement Section 2.1(c)(iii) forbids Fontainebleau to borrow more than $150 million under the Revolver "unless the Total Delay Draw Commitments have been fully drawn." As this Court has already held, the plain meaning of "fully drawn" in Section 2.1(c)(iii) is fully funded.[50] Thus, the Revolving Lenders properly rejected Fontainebleau's $656.5 million Revolver request, and the Term Lenders' claims based on the March 2 and 3 Notices of Borrowing (Avenue Compl. Counts II, IV, and VI; Aurelius Compl. Count I) must be dismissed.[51]

A. Breach of Contract Claims That Contradict Unambiguous Contract Language Fail as a Matter of Law

A breach of contract claim "cannot withstand a motion to dismiss if the express terms of the contract contradict plaintiff's allegations of breach."[52] Under New York law, courts must enforce a contract that is "complete, clear and unambiguous on its face" according to "the plain meaning of its terms."[53] A contract is unambiguous if its language has "a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion."[54] The Court "is not required to accept the allegations of the complaint as to how to construe the

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50 August 26 Decision, 417 B.R. at 662.

51 Separate and apart from the question of what "fully drawn" means, neither the March 2 Notice of Borrowing nor the March 3 Notice of Borrowing complied with all of the conditions set forth in the Credit Agreement. As Fontainebleau has acknowledged, the March 2 Notice of Borrowing failed to take into account outstanding letters of credit, which reduced the amount available under the Revolver to less than the $670 million requested. The March 3 Notice of Borrowing, which sought $656.5 million under the Revolver, did not comply with Section 2.4(d) of the Credit Agreement (or the condition set forth in Section 5.2(a) that the Notice of Borrowing be in compliance with Section 2), which required that the requested amount under the Revolver be a multiple of $5 million.

52 *Merit Group, LLC v. Sint Maarten Int'l Telecomms. Servs., NV*, No. 08-cv-3496 (GBD), 2009 WL 3053739, at *2 (S.D.N.Y. Sept. 24, 2009) (granting motion to dismiss breach of contract claim).

53 *See Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1342 (11th Cir. 2005) (affirming dismissal of complaint based on contract's plain meaning and applying New York law); *Instead, Inc. v. ReProtect, Inc.*, No. 08 Civ. 5236 (DLC), 2009 WL 274154, at *5 (S.D.N.Y. Feb. 5, 2009) (granting motion to dismiss based on plain language); *accord* August 26 Decision, 417 B.R. at 662.

54 *Maxcess*, 433 F.3d at 1342.

parties' agreement."[55] Rather, the Court "'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'"[56] The fact that the Term Lenders and the Revolving Lenders "urge different interpretations" of Section 2.1(c)(iii) does not create an ambiguity or prevent the Court from enforcing the Credit Agreement according to its terms.[57]

B. Fontainebleau's March Notices of Borrowing Were Improper Under Credit Agreement Section 2.1(c)(iii)

1. The Credit Agreement, Read as a Whole, Makes Clear That "Fully Drawn" Means "Fully Funded"

In the August 26 Decision, this Court held that "the unambiguous meaning of the term 'fully drawn' is 'fully funded.'"[58] As the Court explained,

> The structure of the lending facilities, as discerned from the Credit Agreement itself, reflects the parties' intent to employ a sequential borrowing and lending process that places access to Delay Draw Term Loans ahead of Revolving Loans when the amount sought under the Revolving Loan facility was in excess of $150 million. The most persuasive interpretive approach is to read section 2.1(b), which governs Delay Draw Term Loans, and section 2.1(c), which governs Revolving Loans, together.[59]

The Court correctly observed that Section 2.1(b)(iii) provides that "the proceeds of each Delayed [sic] Draw Term Loan will be applied first to *repay in full* any then outstanding Revolving Loans . . . and second, *to the extent of any excess*, be credited to the Bank Proceeds Account."[60]

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55 *Merit Group*, 2009 WL 3053739, at *2 (citations omitted).

56 *Kass v. Kass*, 696 N.E.2d 174, 180-81 (N.Y. 1998) (finding contractual language unambiguous in context of the entire agreement) (quoting *Atwater & Co. v. Panama R.R. Co.*, 159 N.E. 418 (N.Y. 1927)); *accord* August 26 Decision, 417 B.R. at 559 ("[T]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed.").

57 *ReProtect*, 2009 WL 274154, at *5.

58 August 26 Decision, 417 B.R. at 660.

59 *Id.*

60 *Id.*

(underscore in original, italics added). Thus, the Credit Agreement's plain terms require that the proceeds of a Delay Draw Term Loan—*i.e.*, the money that is actually provided to the Borrower—first be used to repay in full any outstanding Revolving Loans before the remainder is deposited into the Bank Proceeds Account.[61]

To ensure that a Delay Draw Term Loan would be sufficient "to repay in full" any outstanding Revolving Loans, Section 2.1(b)(i) sets the minimum Delay Draw Term Loan amount at $150 million—which, as the Court observed, is the same as the maximum amount that Section 2.1(c)(iii) permits Fontainebleau to "borrow[] 'freely' under the Revolving Loan facility without [the] conditions associated with the Delay Draw Term Loans."[62] Permitting Fontainebleau simultaneously to request a Delay Draw Term Loan and a Revolving Loan exceeding $150 million would render Section 2.1(b)(iii)'s "repay in full" requirement meaningless. In order for "section 2.1(b)(iii) to be given effect, all of the proceeds from the Delay Draw [Term Loan] must *first* be made available and used to repay outstanding Revolving Loans, which would be under $150 million, before the rest of the Revolving Loan facility could be made available."[63] Accordingly, as the Court concluded, "'fully drawn' must mean 'fully funded.'"[64]

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61 *Id*.

62 *Id.*

63 *Id.* (emphasis in original) (citing *Zullo v. Varley*, 868 N.Y.S.2d 290, 291 (N.Y. App. Div. 2008) ("a court should not adopt an interpretation which would leave any provision without force and effect") (citation omitted)).

64 August 26 Decision, 417 B.R. at 660. This conclusion is further supported by examining what would have happened had Lenders honored the March 2 Notice of Borrowing. Fontainebleau simultaneously requested $350 million under the Delay Draw Term Loan and $670 million under the Revolver, with the loans to fund on the same day. Therefore, on the day Fontainebleau would have received the Delay Draw Term Loan proceeds, the then-outstanding Revolving Loans would have been $738 million (Fontainebleau had borrowed $68 million in Revolving Loans in February 2009). This means that Fontainebleau could not have complied with Section 2.1(b)(iii)'s mandate because the Delay Draw Term Loan's proceeds ($350 million) were insufficient to "repay in full any then outstanding Revolving Loans." Thus, Plaintiffs' "fully requested" interpretation would render Section 2.1(b)(iii) superfluous. Under New York law, it is "a fundamental rule of contract interpretation [that] . . . when interpreting a contract, the entire contract must be considered so as to give each part meaning." *Brooke*

The Revolving Lenders were not the only ones who determined that the March 2 and 3 Notices of Borrowing did not comply with the Credit Agreement. As acknowledged in the Aurelius Complaint, most Delay Draw Lenders refused to fund the March 2 and 3 Notices and did not provide funds to Fontainebleau until the company issued a March 9 Notice of Borrowing that sought to borrow funds through only the Delay Draw Term Loan and no monies under the Revolver.[65] Indeed, the Delay Draw Lenders did not honor the March 3 Notice of Borrowing despite a March 4, 2009 message from Bank of America to all Lenders explaining that a Steering Committee of Lenders, including Term and Revolving Lenders, "unanimously supports the position that the [March 3 Notice] does not comply with the terms of the Credit Agreement" and advising that Lenders who disagreed with that position should "immediately contact Bank of America . . . to make operational arrangements for funding their portion of the requested borrowing."[66]

Because Section 2.1 does not permit the outstanding Revolver balance to exceed $150 million until the Delay Draw Term Loan has been fully funded, the claims based on the March 2 and 3 Notices of Borrowing must be dismissed.

2. The Term Lenders' In Balance Test Argument Does Not Alter the Plain Meaning of "Fully Drawn"

The Term Lenders incorrectly assert that the contract parties' alleged course of dealing with respect to the In Balance Test calculation somehow establishes that "drawn" means

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Group v. JCH Syndicate 488, 663 N.E.2d 635, 637 (N.Y. 1996) (citations omitted); *Helmsley-Spear, Inc. v. New York Blood Ctr., Inc.*, 687 N.Y.S.2d 353, 357 (N.Y. App. Div. 1999) (contract must be interpreted to "give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract").

65 Aurelius Compl. ¶ 68.

66 *Id.* ¶ 57 (referencing Ex. E, Rice Decl.).

"requested" under Section 2.1(c)(iii).[67] As an initial matter, the Term Lenders' argument must be rejected because it improperly attempts to use parol evidence to alter an unambiguous contract's meaning.[68] This includes evidence concerning the parties' conduct during the contract term.[69] Thus, the Term Lenders' course-of-dealing allegations are simply not relevant to this motion.

Moreover, the Term Lenders' tortured interpretation of the In Balance Test provisions set forth in the Disbursement Agreement (an argument not previously raised in their prior complaints or amicus filing on Fontainebleau's summary judgment motion) does not alter the plain meaning of "fully drawn" and would result in a palpably unreasonable construction of the operative documents. Under the Disbursement Agreement, the "In Balance Test is 'satisfied' when Available Funds equal or exceed the Remaining Costs."[70] "Remaining Costs" are those costs needed to complete the Project.[71] Among the components of "Available Funds" is "Bank

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67 Avenue Compl. ¶¶ 146-49; Aurelius Compl. ¶¶ 62-63.

68 "It is a fundamental principle of contract interpretation that, in the absence of ambiguity, the intent of the parties must be determined from their final writing and no parol evidence or extrinsic evidence is admissible." *Int'l Klafter Co. v. Cont'l Cas. Co.*, 869 F.2d 96, 100 (2d Cir. 1989) (applying New York law); *see also Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (applying New York law and holding that an unambiguous contract's meaning must "be fathomed from the terms expressed in the instrument itself rather than from extrinsic evidence as to terms that were not expressed"). This is especially true where, as here, the contracts at issue contain an integration clause. *See* Credit Agmt. § 10.10 ("[T]here are no promises, undertaking, representations or warranties by the Administrative Agent, any Arranger, any Manager or any Lender relative to the subject matter hereof not expressly set forth or referred to herein or in the other Loan Documents."); Disbursement Agmt. § 11.5 ("[The Loan Documents] integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof, all of which negotiations and writings are deemed void and of no force and effect.").

69 *Int'l Klafter*, 869 F.2d at 100 ("Since the language of the contracts is unambiguous, there is no need here to examine the conduct of the parties over the intervening years to ascertain their intent.") (citation omitted); *In re Ionosphere Clubs, Inc.*, 147 B.R. 855, 863 (Bankr. S.D.N.Y. 1991) ("Having determined that the language chosen by the parties is clear and unambiguous on its face, extrinsic evidence, such as the parties' subsequent course of conduct, may not properly be received in evidence"); *Slatt v. Slatt*, 477 N.E.2d 1099, 1100 (N.Y. 1985) ("There is no need here to examine the conduct of the parties over the intervening years to ascertain their intent in respect to the application of the cost of living increase. Such an inquiry might be appropriate in the instance of an ambiguity or where the contract is of 'doubtful meaning' . . . none of which is present").

70 Disbursement Agmt. Ex. A at 15.

71 Disbursement Agmt. Ex. A at 26; Disbursement Agmt. Ex. C-1 at Appendix VIII.

Revolving Availability *minus* $40,000,000."[72] "Bank Revolving Availability" means "as of each determination, the aggregate principal amount available to be drawn on that date under the Bank Revolving Facility."[73]

The Term Lenders allege that prior to March 2009, the parties calculated the In Balance Test using the total unfunded Revolver commitment (minus $40 million) as the "amount available to be drawn on that date."[74] The Term Lenders claim that this somehow proves that the parties interpreted "drawn" to mean "requested" rather than "funded" because otherwise "the [Revolver] amount 'available to be drawn on th[e] date' of each In Balance Test . . . could not have exceeded $150 million unless and until the Delay Draw Loans were fully funded" and the In Balance Test would not have been satisfied.[75] These verbal gymnastics are unavailing.

The Term Lenders' In Balance Test argument turns on an unjustifiable construction of the words "on that date." The Term Lenders ask the Court to read those words as limiting the phrase "amount available to be drawn" to funds that could be borrowed *without condition* on the In Balance Test date. This limitation is inconsistent with the In Balance Test's undisputed purpose of ensuring that "the remaining available financing is sufficient to cover the remaining anticipated costs required to *complete* the Project."[76] It would be nonsensical to weigh the anticipated costs to complete the Project against anything other than the total financing available through completion.

Indeed, the Term Lenders' suggested "on that date" limitation would lead to the

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[72] Disbursement Agmt. Ex. A at 3 (emphasis in original).

[73] *Id.* at 4.

[74] Avenue Compl. ¶ 147; Aurelius Compl. ¶ 61.

[75] Avenue Compl. ¶¶ 148-49; Aurelius Compl. ¶¶ 61, 92.

[76] Avenue Compl. ¶ 146 (emphasis added); *see also* Aurelius Compl. ¶ 87 (the In Balance Test "was used to ensure that the project was on track [and] weighed the Borrowers' available financing against expected costs necessary to complete construction").

absurd conclusion that the Credit Agreement's original closing conditions were not met. Satisfaction of the In Balance Test was a condition precedent to the Credit Agreement's closing.[77] Credit Agreement Section 2.1(b)(ii) provides that Fontainebleau cannot request any Delay Draw Term Loans before the "date upon which the amount on deposit in the Second Mortgage Proceeds Account is disbursed." But the full amount of the Second Mortgage Proceeds Account was not to be disbursed until after closing.[78] Consequently, Fontainebleau could not request a Delay Draw Term Loan on the closing date, and could only request a Revolver Loan of up to $150 million. Thus, even if the Term Lenders were correct that "drawn" means "requested," the Term Lenders' "on that date" limitation would mean that the In Balance Test was not satisfied at closing and the Credit Agreement's closing conditions were not met.[79]

The only construction of "Bank Revolving Availability" that avoids absurd results and is consistent with the provision's text and the In Balance Test's purpose is that "aggregate principal amount available to be drawn on that date" simply refers to the total unfunded Revolver commitment as of that date.[80] In any event, the "Bank Revolving Availability" definition does not depend on—and thus has no bearing on—whether "drawn" means "funded" or "requested."

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77 Credit Agmt. § 5.1; Disbursement Agmt. § 3.1.29.

78 *See* Disbursement Agmt. Ex. T (Flow of Funds Memo) at 10-12 (requiring that Fontainebleau confirm satisfaction of conditions precedent to closing before the funds are transferred to the Second Mortgage Proceeds Account), 14 (listing disbursements from the Closing Date Advance); *see also* Disbursement Agmt. §§ 2.1.1 (stating that the Closing Date Advance will be conducted in accordance with the disbursements in the Flow of Funds Memo), 2.1.2 (stating that all other advances shall be made after the Closing Date).

79 The Term Lenders' interpretation would lead to a similarly absurd result in that it would also have precluded Fontainebleau from treating any available Revolver balances as Available Funds when the date of the In Balance Test representation was less than 30 days after a Notice of Borrowing. That is because under Section 5.2(c) of the Credit Agreement, Fontainebleau must wait 30 days after a borrowing request before submitting a new Notice of Borrowing.

80 *InterDigital Commc'ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 529 (S.D.N.Y. 2005) ("It is hornbook law that a contract should be interpreted so as not to render its terms nonsensical."); *Perlbinder v. Bd. of Managers of the 411 E. 53rd Street Condo.*, 886 N.Y.S.2d 378, 381 (N.Y. App. Div. 2009) ("In construing a contract, [a]n interpretation that gives effect to all the terms of agreement is preferable to one that . . . accords them an unreasonable interpretation."); *Superb Gen. Contracting Co. v. City of N.Y.*, 833 N.Y.S.2d 64, 67 (N.Y. App. Div. 2007) ("A contract should not be interpreted to produce a result that is absurd").

Accordingly, the Term Lenders' convoluted In Balance Test argument does not alter the plain meaning of "fully drawn" in Section 2.1(c)(iii), and cannot salvage their breach of contract claims.

III. MATERIAL BREACHES OF THE CREDIT AGREEMENT, AS ALLEGED IN THE COMPLAINTS, ARE FATAL TO THE TERM LENDERS' CLAIMS

To state a claim for breach of contract, a plaintiff must allege that the counterparty fully performed its obligations under the operative contract.[81] As this Court correctly observed in the August 26 Decision, even if the Revolving Lenders otherwise had an obligation to honor the March 2 or 3 Notices of Borrowing, that obligation would be excused if Fontainebleau materially breached the Credit Agreement prior to the March 2 and 3 Notices of Borrowing.[82] Nonetheless, the Term Lenders do not—because they cannot—allege that Fontainebleau fully performed its obligations under the Credit Agreement prior to the March 2 and 3 Notices of Borrowing. To the contrary, Plaintiffs affirmatively allege the existence of material breaches of the Credit Agreement prior to March 2009. These allegations are fatal to Plaintiffs' claims.

A. Plaintiffs' Allegations of Material Breaches Defeat Their Claims

The Term Lenders allege that Lehman Brothers breached its obligations under the Retail Facility Agreement following its bankruptcy. For example, the Aurelius Plaintiffs allege that "Lehman Brothers breached the Retail Facility Agreement by declaring bankruptcy and failing to honor advance requests made by the Borrower in September 2008, December 2008, January 2009, February 2009 and March 2009. In total, Lehman Brothers failed to honor its

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[81] *See, e.g.*, *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998); *Furia v. Furia*, 498 N.Y.S. 2d 12, 13 (N.Y. App. Div. 1986) .

[82] August 26 Decision, 417 B.R. at 663-66.

obligations under the Retail Facility Agreement in the amount of $14,259,409.47."[83] The Avenue Plaintiffs also allege that Lehman's breach of the Retail Facility Agreement was a breach of a Material Agreement that had a Material Adverse Effect, as those terms are defined in the Credit Agreement and, thus, constituted an Event of Default under Section 8(j) of the Credit Agreement.[84] Plaintiffs further allege that the Lehman Brothers Event of Default violated the representation and warranty contained in Section 4.9 of the Disbursement Agreement that "[t]here is no default or event of a default under any of the Financing Agreements," which includes the Retail Facility Agreement.[85] Such a materially inaccurate representation under the Disbursement Agreement constitutes an additional Event of Default under Section 8(b) of the Credit Agreement.[86] Accordingly, these allegations, deemed true for purposes of the present motion, establish the existence of an Event of Default under the Credit Agreement prior to the March 2 and 3 Notices of Borrowing that excused any performance by the Revolving Lenders.

The Term Lenders similarly allege that the July 25, 2008 collapse of First National Bank of Nevada, a Term Lender and a Revolving Lender under the Credit Agreement, resulted in the breach of another Material Agreement and constituted another Event of Default that occurred prior to the March 2 and 3 Notices of Borrowing. Specifically, the Term Lenders allege that the Federal Deposit Insurance Company, as receiver for the First National Bank of Nevada,

> [R]epudiated the [bank's] commitments under the Credit Agreement. As a result,

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[83] Aurelius Compl. ¶ 99; *see also* Avenue Compl. ¶ 128 ("[B]eginning in September 2008 and on four occasions thereafter, Lehman failed to honor 'its obligation to fund a total of $14, 259,409.74 under the Retail Facility,' and thereby defaulted in its lending obligations under the Retail Facility Agreement.").

[84] Avenue Compl. ¶ 128.

[85] *Id.*; *accord* Aurelius Compl. ¶ 106.

[86] *See* Credit Agmt. § 8(b) (stating that an inaccurate representation or warranty creating a Disbursement Agreement Event of Default shall also constitute an Event of Default under the Credit Agreement).

> beginning in January 2009, the Borrower's calculation of Available Funds under the In Balance Test was therefore reduced by the amount of the total commitment by First National Bank of Nevada . . . Such a breach by a party to a Material Agreement (which the Credit Agreement was) was a Default, based upon Section 8(j) of the Credit Agreement.[87]

Plaintiffs also allege that the First National Bank of Nevada Event of Default violated the "no default" representation in Section 4.9 of the Disbursement Agreement, which, as stated above, resulted in an Event of Default under Section 8(b) of the Credit Agreement.[88] These allegations, deemed true for purposes of the present motion, establish the existence of another Event of Default prior to the March 2 and 3 Notices of Borrowing that defeats Plaintiffs' breach of contract claims.[89]

B. Section 2.1(c) Does Not Eliminate the Due Performance Requirement

Despite their inability to allege due performance under the Credit Agreement, Plaintiffs nonetheless allege that "the [Revolving Lenders] were, and continue to be, obligated to honor the [March 2 and 3] Notices of Borrowing."[90] In support of this contention, Plaintiffs cite the following language in Section 2.1(c):

> The making of Revolving Loans which are Disbursement Agreement Loans to the Bank Proceeds Account shall be subject **only** to the fulfillment of the applicable

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87 Avenue Compl. ¶¶ 133-34; *accord* Aurelius Compl. ¶¶ 118-19.

88 Avenue Compl. ¶ 134; Aurelius Compl. ¶ 121.

89 Notably, Plaintiffs also do not allege that each of them or their predecessors in interest, many of whom were Delay Draw Term Lenders, honored the March 2 or 3 Notices of Borrowing. As discussed in Point II *supra*, each of the Lenders was given the opportunity to fund its share of the Notices of Borrowing if it believed that those Notices complied with the Credit Agreement. Indeed, the Aurelius Plaintiffs allege that certain of their predecessors in interest breached the Credit Agreement by not funding the March 2 or 3 Notices of Borrowing. Aurelius Compl. ¶¶ 53, 68. Both sets of Plaintiffs are precluded by their failure to perform their own obligations from seeking to pursue a contract claim for the same alleged breach against the Revolving Lenders. *See In re Adelphia Commcn's Corp.*, No. 02-41729 (REG), 2007 WL 2403553, at *4 (Bankr. S.D.N.Y. 2007) ("The failure to allege all four elements required under New York law to state a breach of contract claim [including the plaintiff's performance under the contract] will result in dismissal."); *R.H. Damon & Co., Inc. v. Softkey Software Prods., Inc*., 811 F. Supp. 986, 991 (S.D.N.Y. 1993) ("[W]hen pleading a claim for the breach of an express contract…the complaint must contain some allegation that the plaintiffs actually performed *their* obligations under the contract.") (emphasis added).

90 Avenue Compl. ¶ 183; Aurelius Compl. ¶ 136.

> conditions set forth in Section 5.2, and shall thereafter be disbursed from the Bank Proceeds Account subject only to the conditions set forth in Section 3.3 of the Disbursement Agreement.[91]

Plaintiffs also point to Section 5.2, which states that the "agreement of each Lender to make Disbursement Agreement Loans . . . is subject only to the satisfaction of the following conditions precedent."[92] Plaintiffs presumably contend, much like Fontainebleau did on its motion for partial summary judgment, that whether any of the other terms of the Credit Agreement were breached is irrelevant, so long as the March 2 and 3 Notices of Borrowing complied with the conditions set forth in Sections 2.1 and 5.2.

As noted in Point II above, the March 2 and 3 Notices of Borrowing did not comply with the conditions set forth in Sections 2.1 and 5.2 of the Credit Agreement. Moreover, even if the Notices of Borrowing had complied, the pre-existing material breaches that Plaintiffs themselves affirmatively allege would excuse any funding obligation on the part of the Revolving Lenders. As this Court rightly observed in its August 26 Decision, Section 5.2 expressly requires compliance with "applicable provisions of Section 2" of the Credit Agreement which, in turn:

> [I]ndicates that the making of [Revolving] loans is "[s]ubject to the terms and conditions hereof, and in reliance upon the applicable representations and warranties set forth herein and in the Disbursement Agreement." Consequently, while [the] word "only" is emphasized in section 2.1 as one of only two terms that are in boldface in the entire Credit Agreement, by the plain language of the relevant provisions, the word "only" is intended to make clear that other than applicable provisions of sections 2 and 5.2 of the Credit Agreement, no other provisions shall control the Revolver Bank's obligation to make their share of the loans to the Bank Proceeds Account. It cannot be read to disregard the requirement that the terms and conditions set forth in the Credit Agreement and

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91 Aurelius Compl. ¶ 34; Credit Agmt. § 2.1(c).

92 Aurelius Compl. ¶¶ 34-36; Avenue Compl. ¶ 119.

representations and warranties under the Credit Agreement and Disbursement Agreement be satisfied.[93]

Indeed, contractual conditions are distinguishable from other contractual terms or covenants.[94] A condition precedent is an event that must occur to trigger performance by one or more parties to a contract. If a condition does not occur, there is no breach, but there is no obligation to perform unless and until the condition precedent is satisfied.[95] Thus, while Sections 2.1 and 5.2 set forth the conditions precedent to the Revolving Lenders' funding obligations, those obligations were also dependent on Fontainebleau's substantial performance of the other terms of the Credit Agreement, both as a matter of New York contract law and the terms of the of the Credit Agreement.

New York law makes clear that one party's material breach of a contractual term or covenant relieves a counterparty of its obligation to perform.[96] Where, as here, Plaintiffs do not and cannot allege due performance and, to the contrary, affirmatively allege the existence of material breaches of the Credit Agreement, a claim against the Revolving Lenders for failure to

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93 August 26 Decision, 417 B.R. at 664.

94 *See, e.g.*, 13 Williston on Contracts § 38:5 (4th ed. 2009) ("A ***promise*** is a manifestation of an intention to act or refrain from acting in a specified way, so made as to justify the promisee in understanding that a commitment has been made, while a ***condition*** is an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due.") (emphasis added).

95 *See Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 460 N.E.2d 1077, 1081 (N.Y. 1984); *see also AIG Centennial Ins. Co. v. Fraley-Landers*, 450 F.3d 761, 764 (8th Cir. 2006) ("Unlike a mere contract term, the breach of which must be material before it excuses another party from performing, one party's failure to fulfill a condition precedent entirely excuses any remaining obligations of the other party."); *Biltmore Bank of Ariz. v. First Nat'l Mortgage Sources*, No. CV-07-936-PHX-LOA, 2008 WL 564833, at *7-8 (D. Ariz. Feb. 26, 2008) (same).

96 *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186-87 (2d Cir. 2007); *Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 361 F. Supp. 2d 283, 291 (S.D.N.Y. 2005); *see also* 13 Williston on Contracts § 63:3 (4th ed. 2009) ("A party who first commits a material breach cannot enforce the contract. Otherwise stated, a party who has materially breached a contract is not entitled to recover damages for the other party's subsequent nonperformance of the contract, since the latter party's performance is excused.").

lend fails as a matter of law to state a claim on which relief can be granted.[97]

IV. PLAINTIFFS FAIL TO ALLEGE A BREACH OF CONTRACT CONCERNING TERMINATION OF COMMITMENTS

Plaintiffs' half-hearted claims for breach based on the April 20, 2009 termination are woefully deficient. Pursuant to Section 8 of the Credit Agreement, if one or more Events of Default occur, then "with the consent of the Required Facility Lenders for the respective Facility, the Administrative Agent shall, by notice to Borrowers, declare the Revolving Commitments and/or the Delay Draw Commitments, as the case may be, to be terminated forthwith, whereupon the applicable Commitments shall immediately terminate."[98] Pursuant to this provision, on April 20, 2009, after receiving information that indicated the occurrence of numerous Events of Default and with the consent of the Revolving Lenders, Bank of America, as Administrative Agent, delivered the April 20 Termination Letter. While Plaintiffs allege that the Revolving Lenders' termination under the April 20 Termination Letter was improper or ineffective, neither alleges any facts to support this claim.

Plaintiffs do not assert the absence of Events of Default prior to April 20, 2009. To the contrary, Plaintiffs affirmatively allege that several Events of Default occurred prior to March 2009.[99] The Aurelius Plaintiffs further allege that the Revolving Lenders "did not identify or set forth the Events of Default upon which they were relying to terminate their

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[97] *See R.H. Damon*, 811 F. Supp. at 991 (S.D.N.Y. 1993) (dismissing breach of contract claims because plaintiffs failed to allege due performance); *All States Warehousing, Inc. v. Mammoth Storage Warehouses, Inc.*, 180 N.Y.S.2d 118 (N.Y. App. Div. 1958) (same); *Greiner v. A. Rosenblum, Inc.*, 207 N.Y.S.2d 75, 76 (N.Y. Sup. Ct. 1959) (dismissing breach of contract action where "[p]laintiff has failed to plead, as he must, the necessary facts showing compliance on his part or due performance").

[98] "Required Facility Lenders" means "with respect to any Facility at any time, Non-Defaulting Lenders holding more than 50% of the Obligations outstanding under such Facility." Credit Agmt. § 1.1.

[99] *See supra* Point III.A.

commitment."[100] There is, however, nothing in Section 8 or in any other part of the Credit Agreement that required the Revolving Lenders to identify the Events of Default in the notice of termination. In short, Plaintiffs do not allege any facts or contractual provisions or theory of any kind that even remotely suggests a basis for a breach of contract claim arising out of the April 20 Termination Letter.

V. THE AVENUE PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH.

The Avenue Plaintiffs allege that the Revolving Lenders breached a duty of good faith and fair dealing under the Credit Agreement.[101] This allegation fails to state a claim because it is duplicative of Plaintiffs' breach of contract claim and seeks to impose obligations beyond those set forth in the governing agreement.

Under New York law, a claim for breach of the implied covenant of good faith and fair dealing fails where "a breach of contract claim, based upon the same facts, is also pled."[102] Claims for breach of the implied covenant of good faith that seek to recover damages "intrinsically tied to the damages allegedly resulting from the breach of contract" must be dismissed as redundant.[103]

Here, the allegations underlying the Avenue Plaintiffs' breach of the implied covenant of good faith claim against all Revolving Lenders (Count IV) are identical to those underlying their breach of contract claim against the same defendants (Count II). The Avenue Plaintiffs allege that the Revolving Lenders breached the implied covenant "by adopting a

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[100] Aurelius Compl. ¶ 73.

[101] Avenue Compl. ¶¶ 194-200.

[102] *Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002).

[103] *Ari & Co. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 522-23 (S.D.N.Y. 2003); *see also Long v. Marubeni Am. Corp.*, No. 05 Civ. 0639, 2006 WL 1716878, at *1 (S.D.N.Y. June 20, 2006) (dismissing plaintiffs' breach of good faith claim where "the claims clearly arise from the same contract and the same breach, and seek essentially the same relief").

contrived construction of the Credit Agreement in order to justify their refusal to fund the March 2 Notice and the March 3 Notice,"[104] an allegation that mirrors their earlier contentions that "[t]he March 2 Notice and March 3 Notice complied with all applicable conditions under the Credit Agreement" and that the Revolving Lenders "breached the Credit Agreement" by "fail[ing] to honor [those] Notices of Borrowing."[105] Moreover, the damages asserted for the alleged breach of the implied covenant are the same as those requested for the alleged breach of the Credit Agreement.[106]

Furthermore, as New York's highest court has explained, the obligation of good faith cannot be employed to imply an "obligation . . . that would be inconsistent with other terms of the contractual relationship."[107] Accordingly, "[t]he parties' contractual rights and liabilities may not be varied, nor their terms eviscerated, by a claim that one party has exercised a contractual right but has failed to do so in good faith."[108] In particular, a party cannot be found liable for breach of the implied covenant of good faith and fair dealing for merely exercising its own rights under a contract, even if doing so "may incidentally lessen the other party's anticipated fruits from the contract."[109]

As demonstrated in Point II *supra*, the Revolving Lenders simply exercised their

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104 Avenue Compl. ¶ 198.

105 *Id.* ¶¶ 181-86.

106 *Compare id.* ¶ 188 *with* ¶ 200 (alleging injury suffered as a result of each breach because "the amount and value of Plaintiffs' collateral has been and continues to be diminished.").

107 *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 396-97 (N.Y. 1995) (citations omitted).

108 *CIBC Bank & Trust Co. v. Banco Central do Brasil*, 886 F. Supp. 1105, 1118 (S.D.N.Y. 1995) (defendants' exercise of their rights under a debt restructuring agreement was not actionable as a breach of the implied covenant of good faith) (citation omitted).

109 *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) ("[T]he implied covenant does not extend so far as to undermine a party's general right to act in its own interests."); *see also Bank of N.Y. v. Sasson*, 786 F. Supp. 349, 353 (S.D.N.Y. 1992) (implied covenant of good faith did not require bank to extend a line of credit to the borrower because an event of default under the loan agreement had occurred).

contractual rights under the Credit Agreement when they declined to fund the March 2 and 3 Notices of Borrowing. Therefore, even if the Revolving Lenders' conduct "incidentally lessened" the Avenue Plaintiffs' "anticipated fruits from the contract," such conduct is not actionable.[110]

CONCLUSION

For all of the foregoing reasons, the Revolving Lenders respectfully submit that the Term Lenders' Complaints should be dismissed.

Respectfully Submitted,

Dated: February 18, 2010

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[110] *Galesi*, 904 F.2d at 136.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants' Joint Motions to Dismiss the Term Lender Complaints and Supporting Memorandum of Law was furnished via e-mail (where an e-mail address is listed) and First Class U.S. Mail to those on the attached service list on February 18, 2010.

By: /s/ John B. Hutton
John B. Hutton

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