

**Natixis Funding Corp. v Genon Mid-Atlantic, LLC**

2019 NY Slip Op 31511(U)

May 28, 2019

Supreme Court, New York County

Docket Number: 650817/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 48

-----X  
NATIXIS FUNDING CORP. and  
NATIXIS, NEW YORK BRANCH,

Plaintiffs,

-against-

Index No. 650817/2018

GENON MID-ATLANTIC, LLC, MORGANTOWN OL1  
LLC, *et al.*,

Defendants.

-----X  
**Masley, J.**

Motion sequence nos. 001, 002, and 006 are consolidated herein for disposition.

In sequence no. 001, defendants Morgantown OL1 LLC; Morgantown OL2 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, Morgantown OL7 LLC (collectively, Morgantown Owner Lessors), Dickerson OL1 LLC, Dickerson OL2 LLC, Dickerson OL3 LLC, and Dickerson OL4 LLC (collectively, Dickerson Owner Lessors) (collectively, Owner Lessors) move for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the claims asserted against them. In sequence no. 002, defendant U.S. Bank National Association, sued solely in its capacity as the Lease Indenture Trustee (US Bank), moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the claims asserted against it. In sequence no. 006, plaintiffs Natixis Funding Corp. (NFC) and Natixis, New York Branch (Natixis), move for an order, pursuant to CPLR 3124, directing the Morgantown Owner Lessors and Dickerson Owner Lessors to comply with plaintiffs' requests for discovery and inspection.

In the complaint, plaintiffs allege that the Owner Lessors were unjustly enriched at plaintiffs' expense when they submitted fraudulent draw requests under certain letters of credit and sought to draw funds in an amount in excess of the maximum that was intended to be made available to them.

Plaintiffs allege that:

In December 2000, the Owner Lessors and nonparty Southern Energy Mid-Atlantic, LLC, the predecessor-in-interest to defendant GenOn Mid-Atlantic, LLC (GenMa), a wholesale power generation company, entered into 11 sale-leaseback transactions for certain units in two power plants located in Maryland, the Morgantown and Dickerson Facilities. Pursuant to the Sale-Leaseback Agreements, the Owner Lessors acquired undivided interests in the Dickerson and Morgantown Facilities and then leased those interests to GenMa.

To implement each Sale-Leaseback Agreement transaction, each Owner Lessor and GenMa entered into a separate Lease and Participation Agreement for each of the Morgantown and Dickerson Facilities.

To protect each Owner Lessor in the event that GenMa were to default on its payment obligations imposed by a Lease Agreement, each Participation Agreement required GenMa to provide qualified credit support for its lease payment obligation in the form of either a third-party guaranty, surety bond, or letter of credit. For the credit support to be considered "qualified," the letter of credit, or other form of security, must be irrevocable, unconditional, and not collateralized by GenMa's assets.

From 2000 through December 2016, nonparty JPMorgan Chase Bank, N.A. (JPMorgan) provided the required qualified credit support in the form of letters of credit. The JPMorgan

letters of credit were collateralized by nonparty NRG North American LLC (NRG), GenMa's parent corporation.

On January 27, 2017, the JPMorgan letters of credit were replaced by a letter of credit issued by Natixis to each of the 11 Owner Lessors, pursuant to a Payment Agreement between GenMa and NFC. The Natixis letters of credit were intended to fulfill GenMa's obligation imposed by the Sale-Leaseback Agreements with the Owner Lessors and to provide credit support to secure GenMa's biannual lease payments to the Owner Lessors.

The Payment Agreements were intended to ensure that the Natixis letters of credit would not be collateralized by GenMa's assets, and required GenMa to pay \$131,466,787.56 to NFC, comprised of a one-time payment of \$130,054,174.56 and a fee in the amount of \$1,412,613. NFC holds the payment fund on behalf of the Owner Lessors. NFC is contractually obligated by the Payment Agreements to reimburse Natixis for amounts it paid to the Owner Lessors pursuant to the Natixis letters of credit.

Pursuant to the letters of credit, the Owner Lessors were entitled to draw in certain circumstances, including GenMa's default under the Sale-Leaseback Agreements; GenMa's failure to make a lease payment in full; or the expiration or termination of the qualifying credit support within 30 days, coupled with GenMa's failure to provide replacement qualifying credit support.

Soon after issuance of the Natixis letters of credit, the Owner Lessors advised that those letters of credit did not constitute qualifying credit support because they were collateralized by GenMa's assets. The Owner Lessors argued that a series of warranties from GenMa in the Payment Agreement between GenMa and NFC, pursuant to which the Natixis letters of credit

were issued, shifted the risk of loss, should the Natixis letters of credit not constitute qualifying credit support, from NFC to GenMa.

On February 24, 2017, five of the Morgantown Owner Lessors (Morgantown OL1, Morgantown OL2, Morgantown OL5, Morgantown OL6, and Morgantown OL7) each sent a notice of default under the appropriate Sale-Leaseback Agreement and drew down approximately \$125 million, the full amount of the JPMorgan letters of credit issued to them, on the grounds that those letters of credit were expiring within 30 days and that GenMa had failed to provide replacement qualifying credit support.

In June 2017, when GenMa's biannual lease payments to the Morgantown Owner Lessors were due, GenMa instructed those five Morgantown Owner Lessors to apply the drawn funds to the GenMa lease payments due on June 30, 2017. GenMa made the lease payments due Morgantown OL3 and Morgantown OL4 with its own funds.

The five Morgantown Owner Lessors then issued notices of default on the appropriate Sale-Leaseback Agreement on the ground that the Natixis letters of credit did not constitute qualifying credit support and that the transaction violated the Payment Agreement and several covenants in each Participation Agreement. They refused to apply the proceeds from the draws and submitted draw requests against the appropriate Natixis letters of credit in the aggregate amount of approximately \$125 million.

Upon confirmation by the Facility Lessee, GenMa, that the five Morgantown Owner Lessors' draw requests were valid, Natixis honored the requests.

Plaintiffs later discovered that the five draw requests were not proper and that they should not have paid them. On October 26, 2017, Natixis issued a notice of termination of the

appropriate letter of credit of each Owner Lessor, effective 60 days later.

Plaintiffs allege that, in November and December 2017, the six Owner Lessors who had not drawn on the JPMorgan letters of credit sought to take advantage of a drafting error in the Natixis letters of credit by fraudulently attempting to draw approximately \$175 million, or, approximately \$45 million beyond the intended \$130 million credit limit. Plaintiffs also allege that those six Owner Lessors made their draw requests on the grounds that the Natixis letters of credit had been terminated and that there was no replacement qualifying credit support.

No biannual lease payments were due the Dickerson Owner Lessors in June 2017.

Meanwhile, on February 24, 2017, US Bank, the Lease Indenture Trustee for the five Morgantown Owner Lessors who received draws under the JPMorgan letters of credit, received a notice of default from those Owner Lessors advising that GenMa had breached a number of the leases' terms. US Bank then drew an aggregate amount of \$124,865,624.88, allegedly pursuant to the terms of the expiring JPMorgan letters of credit. Pursuant to existing indentures, US Bank deposited those funds into the appropriate Lease Indenture Trustee account, to be held as security for the Owner Lessors.

On March 7, 2017, GenMa commenced an action against the five Owner Lessors who received draws on the JPMorgan letters of credit seeking, among other relief, a judgment declaring that those draws were improper (*see GenOn Mid-Atlantic, LLC v Morgantown OLI LLC*, Sup Ct, NY County, index no. 651181/2017). That action was voluntarily discontinued by the parties' stipulation dated May 14, 2018.

On June 8, 2017, the Owner Lessors commenced an action against GenMa, NRG, and others, seeking, among other relief, to recover the approximately \$125 million paid to the

defendants (*see Morgantown OLI LLC v GenOn Mid-Atlantic, LLC*, Sup Ct, NY County, index no. 653146/2017). That action was voluntarily discontinued by the parties' stipulation dated May 14, 2018.

On June 14, 2017, GenMa's parent company, nonparty GenOn Energy, Inc. (GenOn) and certain affiliated companies, including GenMa, filed for Chapter 11 relief (*see In re GenOn Energy, Inc.*, Bankruptcy Court, Houston Div., SD Tex, case no. 17-33695 [DRJ] [GenOn Bankruptcy Proceeding]). Certain issues raised in the GenOn Bankruptcy Proceeding were resolved by Amended Order entered January 18, 2018, entitled "Order (I) Authorizing and Directing Certain Actions in Furtherance of the GenMa Settlement, (II) Estimating U.S. Bank's Claims at Zero, and (III) Granting Related Relief."

On May 14, 2018, the Dickerson Owner Lessors commenced four actions by motions for summary judgment in lieu of complaint, pursuant to CPLR 3213 (*see Dickerson OLI LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652396/2018; *Dickerson OL2 LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652399/2018; *Dickerson OL3 LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652400/2018; *Dickerson OL4 LLC v Natixis, New York Branch*, Sup Ct, NY County, index no. 652395/2018).

Meanwhile, in February 2018, plaintiffs commenced this action. In the first and second causes of action, Natixis seeks an order and judgment (i) declaring that the Owner Lessors' outstanding draw requests made in November and December 2017 are not valid and that Natixis need not honor them on the ground that the Owner Lessors knowingly submitted draw requests that exceeded a \$130 million cap or, in the alternative, because the Owner Lessors based their draw requests on the incorrect premise that the Natixis letters of credit do not constitute

qualifying credit support; (ii) in the alternative, if Natixis is required to honor the outstanding draw requests, requiring that, upon the drawing, the Owner Lessors disgorge the funds to NFC; (iii) requiring the Owner Lessors to return all amounts previously improperly drawn under the Natixis letters of credit in June 2017; and (iv) awarding damages to plaintiffs from GenMa as a result of its breaches of warranties, together with costs, fees, and expenses incurred in connection with this action.

In the third, fourth, and fifth causes of action, NFC asserts against the Owner Lessors claims for unjust enrichment, money had and received, and a refund, as alternatives to the first and second causes of action.

The sixth and seventh causes of action, asserted by NFC against GenMa for breach of the express and implied terms of the Payment Agreement, were removed to an action pending before the Southern District (*see Natixis Funding Corp. v GenOn Mid-Atlantic, LLC*, US DC, SD NY, case no. 18-CV-002907) by order of this court entered April 2, 2018 granting GenMa's transfer request and are no longer part of this action.

In motion sequence no. 001, the Owner Lessors seek to dismiss the complaint in its entirety as asserted against them. In motion sequence no. 002, US Bank joins in the Owner Lessors' motion to dismiss and seeks to dismiss the declaratory judgment causes of action asserted against it.

The Owner Lessors contend, first, that the first and second causes of action for declaratory judgments are fatally defective on the grounds that the November and December 2017 draw requests strictly complied with the clear and unambiguous language of the Natixis letters of credit and that plaintiffs did not plead the elements of fraud with sufficient particularity.

In opposition, plaintiffs contend that Natixis adequately pleaded a justiciable dispute among the parties that requires resolution in the form of judicial declarations, and adequately alleged the elements of fraud in the circumstances surrounding the November and December 2017 draw requests.

In partial opposition, US Bank contends that the draw requests are facially compliant with the terms of the Natixis letters of credit.

*On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d at 87-88).*

*However, "[a]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and [are not] accorded every favorable inference" (Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999], aff'd 94 NY2d 659 [2000] [internal*

quotation marks and citation omitted]; *David v Hack*, 97 AD3d 437, 438

[1<sup>st</sup> Dept 2012]; see CPLR 3211 [a] [1]).

A letter of credit constitutes such documentary evidence.

"A letter of credit is governed by the same general principles of law applying to all other written contracts, and it is fundamental that courts enforce contracts, not rewrite them. '[W]here the intention of the parties is clearly and unambiguously set forth in the agreement itself effect must be given to the intent as indicated by the language used without regard to extrinsic evidence'"

(*Blonder & Co., Inc. v Citibank*, 28 AD3d 180, 182 [1<sup>st</sup> Dept 2006], quoting *Schmidt v*

*Magnetic Head Corp.*, 97 AD2d 151, 157 [1983] [citation omitted]; see CPLR 3211

[a] [1]).

To state a viable claim for declaratory relief pursuant to CPLR 3001, a plaintiff must plead the existence of "a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Chanos v MADOC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]).

In the first and second causes of action, Natixis seeks a judicial declaration regarding the parties' respective rights and obligations under

*the Natixis letters of credit.*

*Specifically, in the first cause of action, Natixis seeks a declaration that it properly refused to honor the six November and December 2017 draw requests on the ground that those requests were fraudulent because the Owner Lessors making those requests knew that they had no right to expect Natixis and NFC to honor requests for a draw in excess of \$130 million.*

*In the second cause of action, Natixis seeks a declaration that it properly refused to honor the November and December 2017 draw requests because they are materially fraudulent or constitute fraud in the transaction. Specifically, Natixis alleges that the Owner Lessors making those requests knew they did not have a right to the funds because they had previously admitted before a court of law that the Natixis letters of credit were not qualifying credit support and because the settlement of the GenOn Bankruptcy Proceeding replaced the qualifying credit support requirement*

with a new equity rent collateral account (ERCA).

*The branches of the Owner Lessors' motion and US Bank's motion to dismiss the first and second causes of action are granted on the ground that plaintiffs have failed to allege facts which would demonstrate the existence of material fraud or fraud in the transaction.*

In the complaint, plaintiffs do not allege that the November and December 2017 draw requests, in their face, fail to comply with the draw terms of the Natixis letters of credit. Instead, plaintiffs contend that those draw requests are fraudulent because of certain surrounding circumstances.

Section 5-109 (a) of the New York Uniform Commercial Code (UCC) permits the issuer of a letter of credit to dishonor a draw on the basis of fraud. That section provides, in relevant part, as follows:

"(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant

(2) the issuer, acting in good faith, may honor or dishonor the presentation"

(UCC § 5-109 [a]; *see* UCC § 5-108).

UCC § 5-109 (a) is an exception to the independence principle, codified in UCC § 5-103

(d). UCC § 5-103 (d) provides that the obligations of the issuer of a letter of credit must be separate from, or, independent of, the performance or breach of any contract relating to the letter of credit. UCC § 5-103 (d) provides, in relevant part, as follows:

"Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary"

(UCC § 5-103 [d]).

"[B]ecause the smooth operation of international commerce requires that requests for payment under letters of credit not be routinely obstructed by prepayment litigation, the fraud exception to the independence principle is a narrow one that is only available on a showing of intentional fraud" (*BasicNet S.p.A. v CFP Servs. Ltd.*, 127 AD3d 157, 171 [1<sup>st</sup> Dept 2015] [internal quotation marks and citation omitted]). "The fraud must also be material, and material fraud occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor" (*Great Wall de Venezuela C.A. v Interaudi Bank*, 117 F Supp 3d 474, 486 [SD NY 2015], citing UCC § 5-109 [a] [internal quotation marks and citation omitted]). The fraud "would have to be central to or a dominant part of the [beneficiary's] whole course of conduct in performance of the contract" (*Ross Bicycles v Citibank*, 178 AD2d 388, 390 [1<sup>st</sup> Dept 1991] [internal quotation marks and citation omitted]).

"[B]y conditioning payment solely upon the terms set forth in the letter of credit, the justifications for an issuing bank's refusal to honor the credit are severely restricted, thereby assuring the reliability of letters of credit as a payment mechanism" (*Nissho Iwai Europe v*

*Korea First Bank*, 99 NY2d 115, 121 [2002], quoting *Voest-Alpine Intl. Corp. v Chase Manhattan Bank*, 707 F2d 680, 682 [2d Cir 1983]).

None of the three grounds for fraud alleged by Natixis in the first and second causes of action demonstrate the existence of material fraud or fraud in the transaction.

Contrary to plaintiffs' contention, nothing in the documentary record demonstrates that, in the November and December 2017 draw requests, the Owner Lessors certified, either falsely or truthfully, that the Natixis letters of credit constituted qualifying credit support and, thereby, complied with § 5.13 of the Participation Agreements. None of the six draw requests include such a certification, although they do include a certification that GenMa had not provided any replacement qualifying credit support (*see* November & December 2017 draw requests § B-4).

Furthermore, nothing in the draw requests indicates that the Owner Lessors' use of the word "replacement" constituted a representation that the Natixis letters of credit were themselves qualifying credit support. Instead, the plain meaning of that word, when read in context, demonstrates that the Owner Lessors certified nothing more or less than that a replacement instrument of qualifying credit support had not been delivered to them.

Contrary to plaintiffs' contention, none of the Natixis letters of credit expressly incorporate the Participation Agreement. The documentary evidence demonstrates that the only documents expressly incorporated into the Natixis letters of credit are documents entitled Schedule A, which sets forth the maximum amount that could be drawn under the letter of credit; Annex 1, which sets forth the form of the drawing request under the letter of credit, and Annex 2, which sets forth the form of a notice of termination of the letter of credit.

Although Annex 1 refers to Participation Agreement § 5.13, that reference is expressly

limited. In relevant part, those clauses merely provide that, if replacement qualifying credit support satisfying the requirements of Participation Agreement § 5.13 is not provided by GenMa, the Facility Lessee, within a specified time period, the Owner Lessor can draw against the relevant letter of credit (*see* Natixis Letters of Credit, Annex 1 §§ B-3, B-4, B-5). "[T]o make an issuing bank's payment obligation conditional, the parties must clearly and explicitly set forth that requirement on the face of the letter of credit" (*Nissho Iwai Europe v Korea First Bank*, 99 NY2d at 121). "Mere general references to underlying agreements are surplusage and are not to be considered in deciding whether the beneficiary has complied with the terms of the credit" (*In re Lancaster Steel*, 284 BR 152, 160 [SD Fla, 2002] [internal quotation marks and citation omitted]).

Further, inasmuch as GenMa, the Facility Lessee, undisputedly failed to supply replacement qualifying credit support, reference to the Participation Agreement was not required.

Plaintiffs' second alleged instance of fraudulent conduct with regard to the December 2017 draw requests does not constitute material fraud or fraud in the transaction. Plaintiffs contend that, on December 10, 2017, the parties agreed to replace the qualifying credit support obligation with a new form of credit support – ERCA (new equity rent collateral account) – and that, therefore, the Owner Lessors' certification that GenMa failed to provide replacement qualifying credit account was fraudulent.

The documentary evidence demonstrates that the relevant Natixis letters of credit do not include a reference to a suitable alternative to qualifying credit support or to ERCA, and were not expressly modified to include such a reference. "[L]etters of credit must be strictly construed and performed in compliance with their stated terms" (*Nissho Iwai Europe v Korea First Bank*,

99 NY2d at 121).

In addition, the Natixis letters of credit do not incorporate, nor were they expressly modified to incorporate, the settlement agreement, whether proposed or binding, set forth in the Order Confirming the Third Amended Joint Chapter 11 Plan of Reorganization, entered December 12, 2017 in the GenOn Bankruptcy Proceeding.

Plaintiffs' third alleged instance of fraudulent conduct is belied by the documentary evidence. Plaintiffs contend that the Owner Lessors knew that plaintiffs' combined liability under the Natixis letters of credit was capped at approximately \$130 million, yet they attempted to draw down a larger amount, fraudulently taking advantage of a drafting error to obtain a windfall of \$44 million.

By their terms, the Natixis letters of credit do not limit Natixis' maximum liability to \$130 million. Instead, a literal reading of each of the 11 Natixis letters of credit demonstrates that plaintiffs' combined aggregate maximum liability is approximately \$286 million, more than double the alleged cap, assuming each of the letters were drawn upon on December 20, 2018, the specified expiration date (*see* Natixis letters of credit, schedule 1).

Contrary to plaintiffs' contention, the documentary evidence demonstrates that the Owner Lessors did not admit before any court that plaintiffs' aggregate payment obligation was capped at \$130 million. A reading of the alleged admissions cited by plaintiffs demonstrates that they were made by the Owner Lessors in litigation against GenMa in support of the Owner Lessors' position that GenMa had provided collateral to obtain the Natixis letters of credit in violation of the Participation Agreements among GenMa and the Owner Lessors, and refer to the Payment Agreement between NFC and GenMa (*see Morgantown OLI LLC v GenOn Mid-Atlantic, LLC*,

Sup Ct, NY County, index no. 653146/2017; GenOn Bankruptcy Proceeding).

In any event, even if those statements constitute admissions regarding an aggregate cap, they cannot modify the express terms of any of the Natixis letters of credit, pursuant to UCC § 5-103 (d), the independence principle, discussed above. Each of the Natixis letters of credit are independent of each other. None of them includes a provision capping the amounts that could be drawn based on prior draws on another Natixis letter of credit.

In addition, each of the Natixis letters of credit include a merger provision that provides, as follows:

"This Letter of Credit sets forth in full the terms of our undertaking and this undertaking shall not in any way be modified, amended, limited or amplified by reference to any document, instrument or agreement referred to herein except only the defined terms used herein and the drawing requests and certificates referred to herein; and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for such defined terms, drawing requests and certificates"

(Natixis letters of credit).

For the foregoing reasons, plaintiffs cannot demonstrate the existence of material fraud or fraud in the transaction in connection with the November or December 2017 draw requests against the Natixis letters of credit. Therefore, those branches of the Owner Lessors' motion and US Bank's motion to dismiss the first and second causes of action are granted and those claims are dismissed.

Next, the Owner Lessors contend that the third, fourth, and fifth causes of action for unjust enrichment, money had and received, and a refund are fatally defective, primarily on the ground that an express contract governing the underlying dispute exists.

In opposition, plaintiffs contend that those quasi contract claims are properly brought and are not barred by the existence of the Natixis letters of credit because those claims are asserted only by NFC and NFC is not a party to those agreements. Plaintiffs further contend that they sufficiently allege that, if the November and December 2017 draw requests are honored by Natixis, the Owner Lessors will be unjustly enriched at NFC's expense because NFC is contractually obligated to reimburse Natixis for payments to the Owner Lessors and the Owner Lessors should not be entitled to retain any funds resulting from improper draw requests. To the extent that the quasi contract claims are asserted by Natixis, plaintiffs contend that they are legally viable on the ground that those claims are pled as alternatives to the first and second causes of action for declaratory judgments.

Claims sounding in quasi contract, such as claims of unjust enrichment and money had and received, will be dismissed where, as here, there exists an express agreement governing the same subject matter (*see Board of Educ. of Cold Spring Harbor Cent. Sch. Dist. v Rettaliata*, 78 NY2d 128, 138 [1991]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, the Natixis letters of credit govern the dispute underlying this action.

Contrary to plaintiffs' contention, the fact that NFC is contractually required to reimburse Natixis for amounts paid by Natixis to the Owner Lessors (*see Payment Agreement* § 3.1 [a]) does not give rise to a legally cognizable quasi contractual relationship between NFC and the Owner Lessors. The Owner Lessors are not parties to the Payment Agreement, the Payment Agreement cannot modify the terms of the Natixis letters of credit, and plaintiffs do not allege that NFC is obligated to pay the Owner Lessors directly.

While the quasi contract claims are asserted by NFC, the Natixis letters of credit were

issued by Natixis, not NFC, and require Natixis to pay any draw request made against (*see* Natixis letters of credit). Natixis, not NFC, paid the June 2017 draw requests made against five of the Natixis letters of credit that plaintiffs now seek to recover.

In any event, plaintiffs failed to plead the elements of a legally viable claim for unjust enrichment or money had and received.

To plead a viable unjust enrichment claim, the plaintiff must allege that the defendant was enriched at the plaintiff's expense, and that it would be contrary to "equity and good conscience to permit [the defendant] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]).

Similarly, a viable claim for money had and received exists where the plaintiff alleges that the defendant possesses money that, in equity and good conscience, the defendant ought not retain and that belongs to another (*see Parsa v State of New York*, 64 NY2d 143, 148 [1984]).

Pursuant to the Natixis letters of credit, the funds drawn by the Owner Lessors will be paid to them by Natixis, not NFC. Moreover, as discussed above, plaintiffs fail to allege facts demonstrating the existence of fraud or fraud in the transaction with respect to the June, November, or December 2017 draw requests. In these circumstances, no unjust enrichment or inequitable conduct occurred or could occur.

For the foregoing reasons, the branches of the Owner Lessors' motion to dismiss the third, fourth, and fifth causes of action are granted, and those claims are dismissed.

Plaintiffs' request for leave to replead the complaint is denied. Plaintiffs have not demonstrated the possible existence of facts that would render legally viable any of the claims dismissed herein.

The court has considered plaintiffs' remaining arguments and contentions, and finds them to be without merit.

In motion sequence no. 006, plaintiffs seek an order compelling the Owner Lessors to comply with plaintiffs' discovery demands for production of documents relating to the December 2017 settlement between the Owner Lessors and GenMa in the GenOn Bankruptcy Proceeding, prior to the issuance of the December 2017 draw requests. Plaintiffs also seek to compel the Owner Lessors to produce relevant documents created or dated after May 2017.

By order dated December 20, 2018, this court granted defendants' motion (sequence no. 004) to stay discovery, pending resolution of defendants' pending motions to dismiss this action.

Inasmuch as defendants' motions to dismiss have been granted, the discovery stay is lifted and plaintiffs' motion to compel discovery is denied.

Accordingly, it is

ORDERED that motion sequence no. 001 is granted and all claims asserted against defendants Morgantown OL1 LLC, Morgantown OL2 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, Morgantown OL7 LLC, Dickerson OL1 LLC, Dickerson OL2 LLC, Dickerson OL3 LLC, and Dickerson OL4 LLC are dismissed; and it is further

ORDERED that motion sequence no. 002 is granted and all claims asserted against defendant U.S. Bank National Association are dismissed; and it is further

ORDERED that motion sequence no. 006 to compel discovery is denied in its entirety; and it is further

ORDERED that the Clerk of the Court, upon service upon him (60 Centre Street, Room

141B) of a copy of this order with notice of entry, is directed to enter judgment dismissing this action in its entirety, with prejudice, and with costs and disbursements to defendants, as taxed by the Clerk; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at

[www.nycouts.gov/suptmanh](http://www.nycouts.gov/suptmanh)).

Dated: May 28, 2019

ENTER:



~~HON. ANDREA MASLEY~~

J.S.C.