AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC
2021 NY Slip Op 33848(U)
November 18, 2021
Supreme Court, New York County
Docket Number: Index No. 650413/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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AEA MIDDLE MARKET DEBT FUNDING LLC, AEA MIDDLE MARKET DEBT II FUNDING LLC, BANCALLIANCE INC., MIDCAP FINANCIAL TRUST, MIDCAP FUNDING XVIII TRUST, and SUN LIFE ASSURANCE COMPANY OF CANADA, individually and derivatively on behalf of ARCHWAY MARKETING SERVICES, INC.,

Plaintiffs,

- v -

MARBLEGATE ASSET MANAGEMENT, LLC, MARBLEGATE SPECIAL OPPORTUNITIES MASTER FUND L.P., P. MARBLEGATE LTD., MARBLEGATE STRATEGIC OPPORTUNITIES MASTER FUND I, L.P., MARBLEGATE PARTNERS MASTER FUND I, L.P., NEW TERACO, INC., FIELD POINT AGENCY SERVICES, INC., AWM HOLDINGS, INC., ARCHWAY MARKETING HOLDINGS, INC., ARCHWAY MARKETING SERVICES, INC., CORPORATE SERVICES, INC., and JOHN BRECKER,

Defendants.

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INDEX NO. 650413/2019

MOTION DATE 05/10/2021

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 160, 161, 162, 163, 164, 165, 166, 206, 207, 209

were read on this motion to/for DISMISS.

This dispute arises from restructuring a syndicated loan that turned plaintiffs' secured loans into unsecured loans. Defendants Marblegate Asset Management, LLC (Marblegate Asset), Marblegate Special Opportunities Master Fund L.P., P. Marblegate Ltd., Marblegate Strategic Opportunities Master Fund I, L.P., Marblegate Partners Master Fund I, L.P. (collectively, the Marblegate Funds) (with Marblegate Asset, Marblegate), New Teraco, Inc. (Teraco), Field Point Agency Services, Inc. (Field Point), AWM Holdings, Inc. (AWM), Archway Marketing Holdings, Inc. (AMH), Archway Marketing Services, Inc. (Archway), Corporate Services, Inc. (Corporate

Services) (with AWM, AMH and Archway, the Archway Defendants), and John Brecker (Brecker) (collectively, defendants) move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss with prejudice the second amended complaint brought by plaintiffs AEA Middle Market Debt Funding LLC, AEA Middle Market Debt II Funding LLC (together, AEA), BancAlliance Inc. (BancAlliance), Midcap Financial Trust (Midcap), Midcap Funding XVIII Trust (Midcap Funding), and Sun Life Assurance Company of Canada (Sun Life), individually and derivatively on behalf of Archway Marketing Services, Inc. (collectively, plaintiffs).

BACKGROUND

The following facts are from the second amended complaint (the complaint) and the exhibits referenced therein unless otherwise indicated and are assumed to be true for purposes of this motion[1] (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]).

Archway, a Delaware corporation with headquarters in Rogers, Minnesota, is engaged in the business of furnishing marketing logistics and fulfillment and supply chain management services (NY St Cts Elec Filing [NYSCEF] Doc No. 158, complaint, ¶¶ 30 and 36). Archway's parent corporation, AMH, and AWM are organized in Delaware (*id.*, ¶¶ 28-29). Corporate Services is organized in Indiana (*id.*, ¶ 31).

Pursuant to a $165 million credit facility agreement dated July 2, 2012 (the Credit Agreement), plaintiffs and Marblegate,[2] as "lenders" or "secured parties," loaned $122 million to the "credit parties," namely the Archway Defendants. The funds were to finance AWM's

[1] The court refers to the previously filed documents in the record instead of the exhibits on the motion where possible, as the exhibits were filed in a single, bookmarked 436-page document (NYSCEF Doc No. 163, Janice I. Goldberg [Goldberg] affirmation, exhibits 1-12).

[2] Defendants maintain that Marblegate Asset managed the Marblegate Funds, and that Marblegate Funds are the actual lenders on the Credit Agreement (NYSCEF Doc No. 209, oral argument 5/10/21 tr at 15). The complaint does not distinguish between the Marblegate entities.

acquisition of all the capital stock of AMH and its subsidiaries[3] (*id.*, ¶¶ 1 and 37-38). The Credit Agreement involved different types of loans, including "Term Loans" and those made on "Revolving Credit" (NYSCEF Doc No. 59, Nannette McNally [McNally] aff, exhibit A at 34-43 [§1.1]). Several provisions in the Credit Agreement granted the "Required Lenders" the authority to dictate certain actions. The Credit Agreement defines the "Required Lenders" to mean:

> "at any time (a) Lenders then holding more than fifty percent (50%) of the sum of the Aggregate Revolving Loan Commitment then in effect plus the aggregate unpaid principal balance of the Term Loans … then outstanding plus the unfunded portion of the Aggregate Delayed Draw Term Loan Commitment then in effect, or (b) if the Aggregate Revolving Loan Commitments have terminated, Lenders then holding more than fifty percent (50%) of the sum of the aggregate unpaid principal amount of Loans (other than Swing Loans) then outstanding, outstanding Letter of Credit Obligations, amounts of participations in Swing Loans, the principal amount of unparticipated portions of Swing Loans and the unfunded portion of the Aggregate Delayed Draw Term Loan Commitment then in effect"

(*id.* at 176 [§11.1]).

To secure their obligations on the Credit Agreement, the Archway Defendants, as "grantors," executed a "Guaranty and Security Agreement" dated July 2, 2012 (the Security Agreement) in which they granted a lien on substantially all of the Archway Defendants' assets (NYSCEF Doc No. 158, ¶ 38). The Security Agreement defined the "collateral" (the Collateral) serving as security as "all of the following property now owned or at any time hereafter acquired by a Grantor or in which a Grantor now has or at any time in the future may acquire any right, title

[3] The Credit Agreement defines a "Secured Party" as the "Agent, each Lender, each L/C Issuer, each other Indemnitee and each other holder of any Obligation of a Credit Party …" (NYSCEF Doc No. 59 at 177 [§11.1]). "Credit Parties" means AWM (or "Ultimate Holdings"), AMH (or "Intermediate Holdings"), Archway (or "Borrower") and "and each other Person (i) which executes a guaranty of the Obligations, (ii) which grants a Lien on all or substantially all of its assets to secure payment of the Obligations and (iii) all of the Stock of which is pledged to Agent for the benefit of the Secured Parties" (NYSCEF Doc No. 59 at 158 [§11.1]).

or interests," such as accounts, commercial tort claims, and all proceeds of the foregoing, among other items (NYSCEF Doc No. 60, McNally aff, exhibit B at 14 [§3.1]).

Field Point was designated as the lenders' administrative agent on the Credit Agreement[4] (NYSCEF Doc No. 158, ¶ 4). Field Point is a Delaware corporation. Marblegate owns, controls, and shares staff and office space with Field Point (*id.*, ¶¶ 4 and 27). Field Point's obligations and duties as the agent included taking "such action on [each lender's] behalf and to exercise all rights, powers and remedies and perform the duties as are expressly delegated to Agent" under the Credit and Security Agreements (together, the Loan Documents) (NYSCEF Doc No. 59 at 114-115 [§8.1(a)(ii)] and 169 [§11.1]). Field Point had the sole and exclusive right to act as the "Collateral and Disbursing Agent" with the responsibility to "manage, supervise, and otherwise deal with the Collateral" and to "exercise all remedies given to Agent and the other Secured Parties with respect to the Credit Parties and/or the Collateral, whether under the Loan Documents, applicable Requirements of Law or otherwise" (*id.* at 115 [§8.1(b)(iv) and (b)(vi)]). Section 8.3(c) vests the exclusive authority to enforce the rights and remedies under the Loan Documents in Field Point "for the benefit of all the Lenders" (*id.* at 116). Otherwise, Field Point's duties were limited under Section 8.1(c):

> "(i) is acting solely on behalf of the Secured Parties … with duties that are entirely administrative in nature …, (ii) is not assuming any obligation under any Loan Document other than as expressly set forth therein or any role as agent … and (iii) shall have no implied functions, responsibilities, duties, obligations or other liabilities under any Loan Document, and each Secured Party, by accepting the benefits of the Loan Documents, hereby waives and agrees not to assert any claim against Agent based on the roles, duties and legal relationships expressly disclaimed in clauses (i) through (iii) above"

[4] The Credit Agreement had initially designated nonparty GE Electrical Capital Corporation as the lenders' agent (NYSCEF Doc No. 59 at 27) before nonparty Antares Capital LP (Antares) replaced it. Field Point replaced Antares as the agent on October 26, 2018 pursuant to an "Agency Resignation, Appointment, Assignment and Assumption Agreement" (NYSCEF Doc No. 158, ¶ 46).

(*id.* at 115). Section 8.3(a), titled No Action without Instructions," also states that:

> "Agent shall not be required to exercise any discretion or take, or to omit to take, any action, including with respect to enforcement or collection, except any action it is required to take or omit to take (i) under any Loan Document or (ii) pursuant to instructions from the Required Lenders (or, where expressly required by the terms of this Agreement, a greater proportion of the Lenders).

(*id.* at 116). Additionally, each lender or secured party,

> "by accepting the benefits of the Loan Documents, agrees that (i) any action taken by Agent or the Required Lenders … in accordance with the provisions of the Loan Documents, (ii) any action taken by Agent in reliance upon the instructions of Required Lenders … and (iii) the exercise by Agent or the Required Lenders … of the powers set forth herein or therein, together with such other powers as are reasonably incidental thereto, shall be authorized and binding upon all of the Secured Parties"

(*id.* [§8.2]). Section 8.5 contains an exculpatory clause in subsection (b) (*id.* at 117).

The non-payment of the principal, interest and other fees when due constitutes an "Event of Default" under Section 7.1(a) of the Credit Agreement (NYSCEF Doc No. 59 at 110-111). Additionally, a "Specified Event of Default" includes a default under section 7.1(a) (*id.* at 178 [§11.1]). When an Event of Default occurs, Section 7.2 provides that the "Agent shall at the request of the Required Lenders … (c) exercise on behalf of itself and the Lenders all rights and remedies available to it and the Lenders under the Loan Documents or applicable law," subject to certain conditions not relevant here (*id.* at 113-114). Article VI of the Security Agreement also describes the remedies available when a default occurs. Section 6.1(a) provides that the "Agent may exercise … all rights and remedies of a secured party under the UCC" and Section 6.1(d) specifies that the "Agent shall apply the cash proceeds of any action taken by it pursuant to this Section 6.1 … to the payment in whole or in part of the Secured Obligations, as set forth in the Credit Agreement" (NYSCEF Doc No. 60 at 23-24).

Beginning in mid-2018, Archway began experiencing cash flow difficulties. This caused it to miss paying the principal, interest and fees due on July 2, 2018 (NYSCEF Doc No. 158, ¶ 39). Section 9.1 of the Credit Agreement governs the process for amending or modifying the Loan Documents (NYSCEF Doc No. 59 at 123), and, on September 14, 2018, the Archway Defendants, Marblegate and all plaintiffs, except BancAlliance, executed a Forbearance Agreement and Fifth Amendment to the Credit Agreement (the Fifth Amendment) to address Archway's liquidity issues (NYSCEF Doc No. 158, ¶¶ 47-48). The parties to the amendment agreed to appoint Field Point as Antares's successor (NYSCEF Doc No. 59 at 7 [§5]). The agent and the "Consenting Lenders" agreed to "forbear from exercising …[their] default-related rights and remedies against the Borrower or any other Credit Party under the Loan Documents" during the "Forbearance Period" as that term is defined in the amendment[5] (*id.* at 4 [§3(a)]). The Fifth Amendment established a $10 million First Out Revolver facility (NYSCEF Doc No. 158 at 2 n 2 and 12 n 6). This saw Marblegate and certain plaintiffs increase the loan commitments extended to Archway (*id.*, ¶ 48). The facility was scheduled to terminate at the end of January 2019 (*id.*).

Because of these new loan commitments, Marblegate held approximately 51% of Archway's outstanding debt and claimed the position of "Required Lenders" under the Credit Agreement (*id.*, ¶¶ 3 and 48). Plaintiffs held the remaining 49%, or $60 million, of the outstanding debt (*id.*, ¶¶ 3 and 5[b]). Importantly, the Fifth Amendment granted the parties an opportunity to consummate a restructuring, that, under an amended Section 4.11 of the Credit Agreement, entailed "a comprehensive recapitalization or restructuring transaction refinancing and/or

[5] The lenders signing the Fifth Amendment "collectively constitute the Required Lenders (as defined in the Amended Credit Agreement) (collectively, the 'Consenting Lenders' and, each, a 'Consenting Lender')" (NYSCEF Doc No. 59 at 2).

equitizing, in whole or in part, [of] the Obligations (a 'Restructuring')" (NYSCEF Doc No. 59 at 2-3 and 83).

Meanwhile, Archway failed to pay the principal, interest and fees due on August 21, September 21, October 1, October 22, November 23 and December 24, 2018 and failed to maintain the minimum levels of "Actual Liquidity" and maintain "Senior Leverage Ratios" and Fixed Charge Coverage Ratios" as the Credit Agreement required (NYSCEF Doc No. 158, ¶ 39). As a result, Field Point, Marblegate and Archway tasked nonparty Mackinac Partners to evaluate a potential Archway restructuring (*id.*, ¶ 49).

At a December 7, 2018 meeting, Archway presented an updated business plan (*id.*, ¶ 51). Marblegate indicated that it would replace Archway's board of directors and suggested combining Archway with Teraco, a Marblegate portfolio company organized in Texas, "through a foreclosure auction with a minimal distribution of 'take back paper'" (*id.*, ¶¶ 26 and 51). Marblegate subsequently replaced Archway's board with Brecker, a Field Point appointee (*id.*, ¶ 53).

On December 26, 2018, Field point circulated a memorandum announcing a restructuring transaction (the Restructuring Transaction) (*id.*, ¶ 55). The memorandum included a notice of the execution of a "Restructuring Support Agreement" (the Restructuring Support Agreement) between Archway, Field Point and Marblegate dated December 24, 2018 (*id.*; NYSCEF Doc No. 61, McNally aff, exhibit C at 2). At the outset, the Restructuring Support Agreement distinguished an "Initial Consenting Lender" from other lenders. The Initial Consenting Lenders collectively owned in the aggregate more than 50% of the outstanding amounts due on the Credit Agreement (*id.* at 15). Marblegate comprised all the Initial Consenting Lenders (*id.* at 44-47). A lender executing a joinder agreement would become a party to the Restructuring Support Agreement as a "Consenting Lender," and, together with the Initial Consenting Lenders, would be referred to as

"Consenting Lenders" (*id.* at 15). Each Consenting Lender would be entitled to receive "on a *pro rata* basis, an aggregate principal amount of $5.0 million additional existing Term Loans (the '<u>Additional Loans</u>')" as a "restructuring support agreement fee" (*id.* at 53). Field Point set Friday, January 4, 2019 as the deadline for each lender to execute a joinder agreement in order to receive its share of the consent fee (*id.* at 2; NYSCEF Doc No. 158, ¶ 55).

A "Restructuring Term Sheet" (the Term Sheet) incorporated into the Restructuring Support Agreement explained the material terms and conditions of the transaction (NYSCEF Doc No. 61 at 16 [§1]). First, the Consenting Lenders, in accordance with Section 8.3(a) of the Credit Agreement, had directed Field Point to act, as provided under Sections 7.5 and 8.3(a), and initiate foreclosure proceedings to sell 100% of AMH's stock (the Foreclosed Assets) at a public auction under Uniform Commercial Code (UCC) § 9-610 (a) (*id.* at 49). Second, the Consenting Lenders had directed Field Point to submit a credit bid (the Lender Credit Bid) at the foreclosure sale.[6] The relevant section in the Term Sheet reads:

> "The Consenting Lenders shall direct the Agent to, and the Agent shall, on behalf of the Lenders, credit bid all or a portion of the Obligations (consisting of outstanding principal amounts under the Last Out Revolving Loans and Term Loans (the '<u>Credit Bid Obligations</u>')) for the Foreclosed Assets at the Foreclosure Sale (the '<u>Lender Credit Bid</u>'), and such direction to the Agent shall acknowledge that the existing indemnity in the Credit Agreement shall apply to the entire Lender Credit Bid and Foreclosure (as defined below) process.
>
> In the event that the Lender Credit Bid is declared the winning bid at the Foreclosure Sale, a *pro rata* portion of the Credit Bid

[6] A credit bid is a bid that uses the value of the secured debt, rather than cash, as currency (*see Rapillo v CitiMortgage, Inc.*, 2018 WL 1175127, *3, 2018 US Dist LEXIS 35491, *6 n 5 [ED NY, Mar. 5, 2018, No. 15-CV-5976(KAM)(RML)]; 2 Bankruptcy Law Manual § 15:16 [5th ed. 2021] [stating that a credit bid under 11 USC § 363 (k) allows a secured creditor to "bid its claim at a sale" and pay the purchase price at the sale with its claim instead of cash]). A credit bid "enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan" (*RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 644 n 2 [2012]).

> Obligations held by each Lender shall be extinguished, up to the outstanding aggregate amount of the Credit Bid Obligations.
>
> In the event that the Lender Credit Bid is declared the winning bid at the Foreclosure Sale, immediately after the Foreclosure Sale, a new limited liability company ('New Archway') shall (i) purchase the Agent's right to the Foreclosed Assets and (ii) arrange for and obtain financing in the form of the Foreclosure Financing (as defined below). The Consenting Lenders shall direct the Agent, on behalf of the Lenders, to assign the Foreclosed Assets to New Archway as consideration for the Foreclosure Financing, as described below.
>
> In the event that the Lender Credit Bid is declared the winning bid at the Foreclosure Sale, the governance of New Archway upon consummation of the Foreclosure will be as determined by the Consenting Lenders.
>
> . . .
>
> The '<u>Foreclosure Financing</u>' shall mean, collectively, the New First Lien Credit Facility and the New Unsecured Credit Facility …
>
> The '<u>Foreclosure</u>' shall mean, taken together, the Foreclosure Sale and the Foreclosure Financing"

(*id.* at 50). Thus, the Lender Credit Bid encompassed only those amounts due on the Last Out Revolving Loans and Term Loans, but not the First Out Revolving Loans.[7]

The Term Sheet explained how the existing loans extended to Archway would transfer into new loans extended to New Archway if the Lender Credit Bid was successful. Holders of "First Out Revolving Loan Claims" may elect to have their claims paid in full or rolled over into "New Priority First Lien Term Loans on a *pro rata* basis" up to $10 million (*id.* at 50). A "First Out Revolving Loan Claim" includes "all claims against the Credit Parties on account of the First Out

[7] A "Last Out Revolving Loan" is any loan made between the "Closing Date" of July 2, 2012 (NYSCEF Doc No. 59 at 156 [§11.1]) through the "Final Availability Date" (*id.* at 35 [§1.1(b)(i)]), which is the earlier of January 31, 2019 and the date on which the "Aggregate First Out Revolving Loan Commitment shall terminate" (*id.* at 163 and 177 [§11.1]). A "Term Loan" includes any loan made to any borrower on the Closing Date (a "Term A Loan"), a "Delayed Draw Term Loan" and an "Incremental Term Loan" (*id.* at 34 [§1.1(a)(iii)]). A "First Out Revolving Loan" is any loan made between the effective date of the Fifth Amendment, or September 14, 2018 (*id.* at 163 [§1.11]) through the Final Availability Date, as defined above (*id.* at 35 [§1.1(b)(ii)]).

Revolving Loans under the Credit Agreement" (*id.* at 51). All other "Existing Credit Agreement Claims (other than the First Out Revolving Loan Claims) shall be exchanged into New Unsecured Term Loans on a *pro rata* basis ... subject to the subsequent exchange of New Unsecured Term Loans held by Priority Electing Lenders into New First Lien Term Loans" (*id.*). The "Existing Credit Agreement Claims" encompassed "all principal amounts owed by the Credit Parties to the Lenders under the Credit Agreement (including, without limitation, the First Out Revolving Loans, Last Out Revolving Loans and Term Loans)" (*id.*).

As for New Archway's debt and equity capital structure, the Term Sheet described two new credit facilities. The "New First Line Credit Facility" subsection provides that:

> "New Archway will enter into a new first lien credit facility (the '<u>New First Lien Credit Facility</u>') through which New Archway will issue (i) new first out first lien term loans (the '<u>New Priority First Lien Term Loans</u>') in an original aggregate principal amount of up to $30.0 million and (ii) new first lien term loans (the '<u>New First Lien Term Loans</u>') in an original aggregate principal amount of $15.0 million. All New Unsecured Lenders (as defined below) will be offered the opportunity to participate in the New First Lien Credit Facility as follows: (i) up to $10.0 million of the New Priority First Lien Term Loans shall be funded through the conversion of the First Out Revolving Loan Claims on a *pro rata* basis (calculated based on relative holdings of First Out Revolving Loan Claims), (ii) $20.0 million of the New Priority First Lien Term Loans shall be funded by a new money investment (the '<u>New Money Priority First Lien Term Loans</u>') offered on a *pro rata* basis (calculated based on relative holdings of Existing Credit Agreement Claims) (such New Unsecured Lenders who elect to fund, the '<u>Priority Electing Lenders</u>') and (iii) the New First Lien Term Loans shall be funded by an exchange of each Priority Electing Lenders' New Unsecured Term Loans into the New First Lien Term Loans on a *pro rata* basis"

(*id.* at 51-52). The assets of New Archway and its subsidiaries would be used to guarantee payment on the New Priority First Lien Terms Loans and the New First Lien Term Loans (*id.* at 52). In addition, "[t]he New Priority First Lien Term Loans shall have waterfall priority and shall be paid in full in cash prior to the repayment of any other obligations of New Archway, including prior to

the repayment of the New First Lien Term Loans" (*id.*). The "New Unsecured Credit Facility" subsection states that:

> "New Archway will enter into a new unsecured credit facility (the '<u>New Unsecured Credit Facility</u>') through which New Archway will issue new unsecured term loans (the '<u>New Unsecured Term Loans</u>') in an original aggregate principal amount of $15.0 million. Subject to the exchange as set forth in 'New First Lien Credit Facility' above, all current Lenders under the Credit Agreement shall receive New Unsecured Term Loans on a *pro rata* basis (calculated based on relative holdings of Existing Credit Agreement Claims) (such Lenders, the '<u>New Unsecured Lenders</u>')"

(*id.* at 52). Finally, "upon the consummation of the Foreclosure," New Archway and Teraco shall enter into a separate agreement whereby Teraco would contribute certain assets to New Archway in exchange for 100% of New Archway's equity interests (*id.* at 54). Ultimately, the Restructuring Transaction would result in a legal winding down of AWM, AMH and Archway (*id.*).

On December 28, 2018, Field Point sent plaintiffs a notice of foreclosure (NYSCEF Doc No. 158, ¶ 58), with the public sale to be held on January 28, 2019 (NYSCEF Doc No. 62, McNally aff, exhibit D at 2). Consistent with the Restructuring Support Agreement, the notice identified the "Auctioned Collateral" as "[a]ll right, title and interest of AWM Holdings, Inc. … in and to stock of Archway Marketing Holdings, Inc." (*id.* at 6). The Foreclosed Assets would be sold in a single block to a single purchaser (*id.* at 2). The notice further provided that the assets "shall be sold for cash at such price and on such other commercially reasonable terms as the Agent (at the direction of the Required Lenders) may determine in its sole discretion" and that Field Point may submit a credit bid "against all or a portion of its secured claim and become the purchaser of the Auctioned Collateral" (*id.* at 4).

Plaintiffs objected to the proposed restructuring on two grounds (NYSCEF Doc No. 158, ¶ 59). First, plaintiffs alleged that the Restructuring Transaction would violate the pro rata sharing

provisions in the Credit Agreement (*id.*). Second, they claimed that the transaction was masked as an amendment to the Credit Agreement and could not proceed without the consent of all lenders (*id.*). Plaintiffs lodged further objections on January 9, 2019, asserting that Field Point and Marblegate had engaged in various acts constituting willful misconduct, breaches of fiduciary duty and conversion (*id.*, ¶ 60). Plaintiffs maintained that defendants refused to engage in good faith discussions on alternatives to the proposed Restructuring Transaction (*id.*, ¶ 61).

On January 28, 2019, Field Point instituted foreclosure proceedings and put forth the Lender Credit Bid (*id.*, ¶¶ 62-63). The Lender Credit Bid allegedly included nearly $60 million, or 49% of the total obligations then held by plaintiffs (*id.*, ¶¶ 3 and 64). On January 31, 2019, Field Point announced that the Restructuring Transaction had been consummated (*id.*, ¶¶ 8 and 72). According to a "Transaction Agreement" (the Transaction Agreement) dated January 30, 2019 between Field Point, New Archway, Teraco, AWM and Archway, the Lender Credit Bid was the winning bid for the Foreclosed Assets (NYSCEF Doc No. 163, Goldberg affirmation, exhibit 11 at 412-413). The Transaction Agreement states that Field Point, on behalf of the lenders on the Credit Agreement, shall "sell, assign, transfer and deliver" and that New Archway shall "purchase, acquire and accept" all of Field Point's rights, title and interest in and to the Foreclosed Assets (*id.* at 416 [§2.1]). At Field Point's direction, AWM will then transfer, assign and deliver its right, title and interest in the Foreclosed Assets by delivering executed stock powers directly to New Archway (*id.* [§2.3]). As consideration, New Archway agreed to incur debts comprised of "(i) $7,090,045 of New Subordinate Terms Loans to each Lender that does not elect to participate in the New First Lien Credit Facility … and (ii) $45,000,000 of New First Lien Term Loans … provided by Lenders who elect to participate in the New First Lien Credit Facility" (*id.* at 416 [§2.2]). Immediately after the transfer and assignment of the Foreclosed Assets to New Archway,

Teraco and New Archway would complete the transactions described in the Term Sheet under a separate "Global Contribution Agreement" (*id.* at 417 [§3.1]).

Archway's operating entities held approximately $45 million in assets before the foreclosure sale, and Teraco contributed assets worth approximately $4 million (NYSCEF Doc No. 158, ¶¶ 8 and 71). Apart from $3.7 million paid to Midcap and Sun Life under the First Out Revolver facility, plaintiffs received unsecured, unguaranteed, subordinated replacement term loans totaling 13% of the $56.5 million in secured loans, whereas Marblegate, through its affiliates, received all the equity in Archway (*id.*, ¶¶ 7 and 73).

PROCEDURAL HISTORY

Plaintiffs commenced this action on January 22, 2019 and moved by order to show cause for a preliminary injunction and a temporary restraining order the next day (NYSCEF Doc No. 3). On January 25, 2019, the court (Friedman, J.) temporarily restrained defendants from consummating the Restructuring Transaction and taking any action that would defeat plaintiffs' interest in the Foreclosed Assets without their express consent, and temporarily restrained defendants from using plaintiffs' 49% share of the obligations as currency to credit bid at any public foreclosure sale of the Foreclosed Assets (NYSCEF Doc No. 43 at 3). The court also directed plaintiffs to file an undertaking for $6.5 million (*id.* at 4). On January 28, 2019, Hon. Jeffrey K. Oing of the Appellate Division, First Department granted the application for interim relief brought by Field Point and Marblegate and vacated the temporary restraining order issued January 25, 2019 "in all respects effective 12:35 pm, 1/28/19" (NYSCEF Doc No. 44 at 1-2). The Restructuring Transaction then took place. On February 13, 2019, the court (Friedman, J.) deemed the motion for a preliminary injunction withdrawn as moot (NYSCEF Doc No. 54). Plaintiffs subsequently filed an amended complaint on February 28, 2019 (NYSCEF Doc No. 57). They

have also discontinued their claims against Audax Mezzanine Fund III, L.P., Audax Co-Invest III, L.P. and Audax Trust Co-Invest, L.P. without prejudice (NYSCEF Doc No. 63). Former plaintiff Modern Bank, N.A. has assigned its claims to Midcap Funding (NYSCEF Doc No. 158 at 11 n 4).

The complaint dated June 21, 2019 pleads 15 causes of action for: (1) breach of fiduciary duty against Marblegate; (2) aiding and abetting breach of fiduciary duty against Field Point and Teraco; (3) conversion against Field Gate, Marblegate and Teraco; (4) conspiracy to commit conversion against all defendants; (5) a judgment declaring that the Fifth Amendment is void *ab initio*; (6) breach of the Credit Agreement against Field Point; (7) breach of the Security Agreement against Field Point; (8) breach of the Credit Agreement against Marblegate; (9) breach of the Credit Agreement against the Archway Defendants; (10) breach of the covenant of good faith and fair dealing against Marblegate, Field Point and the Archway Defendants; (11) unjust enrichment against Teraco and Marblegate; (12) tortious interference with contract against Teraco; (13) breach of fiduciary duty against Brecker, derivatively; (14) a judgment declaring that any liabilities relating to the conduct of Marblegate and Field Point in connection with the Restructuring Transaction arise from their gross negligence and/or willful misconduct and are not subject to indemnification or reimbursement; and (15) indemnification against the Archway Defendants.

In lieu of serving an answer, defendants move to dismiss the complaint with prejudice. Plaintiffs oppose.

DISCUSSION

"In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference'" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]). "'[I]f from its four corners factual

allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail'" (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013] [citation omitted]). That said, "bare legal conclusions" will not suffice (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]). When the defendant submits documentary evidence, "'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]). Whether a plaintiff can ultimately prevail on a claim is not part of the court's calculus on a motion to dismiss (*see J.P. Morgan Sec. Inc.*, 21 NY3d at 334]).

Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]).

A. Breach of Fiduciary Duty against Marblegate

The first cause of action for breach of fiduciary duty alleges that Marblegate and plaintiffs became majority and minority shareholders, respectively, in AMH after the foreclosure sale because the Foreclosed Assets ceased to be "Collateral" subject to Field Point's authority (NYSCEF Doc No. 158, ¶¶ 6 and 66). As such, Marblegate, the majority and controlling shareholder, allegedly owed plaintiffs a fiduciary duty, and Marblegate allegedly breached this duty when it engaged in self-dealing to cause the sale of the Foreclosed Assets to Teraco for

inadequate consideration (*id.*, ¶¶ 84-85). The complaint alleges that Marblegate had no intention of respecting plaintiffs' rights under the Credit Agreement (*id.*, ¶ 50). Marblegate also allegedly failed to furnish plaintiffs with information about the proposed transaction and ignored their requests for materials that would normally constitute due diligence information, such as audits and interim financials, so as to assess the merits of the restructuring Transaction (*id.*, ¶¶ 52, 54 and 57).

The parties agree that Delaware law governs this claim because Archway is a Delaware corporation. Under Delaware law, the plaintiff must plead that the defendant owed a fiduciary duty and that it breached this duty (*see Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010], *affd sub nom. ASDI, Inc. v Beard Research, Inc.*, 11 A3d 749 [Del 2010]). "A shareholder owes a fiduciary duty [to other shareholders] only if it owns a majority interest in or exercises control over the business affairs of the corporation" (*Ivanhoe Partners v Newmont Mining Corp.*, 535 A2d 1334, 1344 [Del 1987]).

To begin with, plaintiffs concede that no fiduciary duty exists between lenders (NYSCEF Doc No. 209 at 12). Therefore, the existence of a fiduciary duty depends on whether plaintiffs acquired an ownership interest in the Foreclosed Assets.

Here, the documentary evidence refutes the allegation that the Restructuring Transaction transformed plaintiffs into equity or beneficial owners in Archway. Section 6.1 of the Security Agreement, that provides, in part:

> "(a) UCC Remedies. During the continuance of an Event of Default, Agent may exercise, in addition to all other rights and remedies granted to it in this Agreement and in any other instrument or agreement securing, evidencing or relating to any Secured Obligation, all rights and remedies of a secured party under the UCC or any other applicable law.
> (b) Disposition of Collateral. Without limiting the generality of the foregoing, Agent may ... "(ii) collect, receive, appropriate and realize upon any Collateral and (iii) sell, assign, convey, transfer, grant option or options to purchase and deliver any Collateral (enter

> into Contractual Obligations to do any of the foregoing), in one or more parcels at a public or private sale or sales … upon such terms and conditions as it may deem advisable and at such prices as it may deem best, for cash or on credit or for future delivery without assumption of any credit risk. Agent shall have the right, upon any such public sale or sales and, to the extent permitted by the UCC and other applicable Requirements of Law, upon any such private sale, to purchase the whole or any part of the Collateral so sold"
>
> …
>
> (d) Application of Proceeds. Agent shall apply the cash proceeds of any action taken by it pursuant to this Section 6.1, after deducting all reasonable costs and expenses of every kind incurred in connection therewith or incidental to the care or safekeeping of any Collateral or in any way relating to the Collateral or the rights of Agent and any other Secured Party hereunder, including reasonable attorneys' fees and disbursements, to the payment in whole or in part of the Secured Obligations, as set forth in the Credit Agreement …"

(NYSCEF Doc No. 60 at 23-24). The Term Sheet specifies that the foreclosure sale would take place in accordance with UCC § 9-610. Under UCC § 9-610 (a), "a secured party may sell, lease, license or otherwise dispose of any or all of the collateral." The term "collateral" for purposes of the UCC "means the property subject to a security interest" (UCC § 9-102 [12]). Proceeds following a disposition or sale may take the form of "cash proceeds" (UCC § 9-615 [a]), or "noncash proceeds" (UCC § 9-615 [c]). This distinction is important. "'Cash proceeds' means proceeds that are money, checks, deposit accounts, or the like" (UCC § 9-102 [9]), whereas "[n]oncash proceeds' means proceeds other than cash proceeds" (UCC § 9-102 [58]). If a sale of a security interest meant to secure a payment obligation results in noncash proceeds, UCC § 9-608 (a) (3) provides, in pertinent part, that a "secured party need not apply or pay over for application noncash proceeds of collection and enforcement under Section 9-607 unless the failure to do so would be commercially unreasonable." UCC § 9-615 (c) similarly states that "[a] secured party need not apply or pay over for application of noncash proceeds of disposition under Section 9-610 unless the failure to do so would be commercially unreasonable" (UCC § 9-615 [c]).

In this instance, the record demonstrates that the sale of the Foreclosed Assets did not deliver cash proceeds capable of distribution. Instead, the sale resulted in the receipt of noncash proceeds as the Lender Credit Bid utilized the value of Archway's debt as currency. While Section 6.1(d) of the Security Agreement provides that cash proceeds from a sale may be used to pay the obligations due on the Credit Agreement, this same section does not discuss the disposition of noncash proceeds. Plaintiffs have not argued whether "cash proceeds" from a foreclosure sale can constitute a credit bid.

Moreover, a secured party does not have to pay over noncash proceeds if doing so would be commercially unreasonable under UCC § 9-615. Critically, UCC § 9-615 (c), Comment 3 states that "[w]hen the secured party is not required to 'apply or pay over for application noncash proceeds,' the proceeds nonetheless remain collateral subject to this Article." Here, defendants correctly point out that a distribution of the noncash proceeds after the sale would have been commercially unreasonable. Again, the failure to pay the principal and interest when due constitutes an Event of Default and a Specified Event of Default under the Credit Agreement. Section 1.10(c) specifies the order in which the "Agent may, and shall upon the direction of Required Lenders apply all payments received by Agent" during the continuance of a Specified Event of Default (NYSCEF Doc No. 59 at 56). These payments include "all proceeds of Collateral received by Agent or any Lender as a result of the exercise of remedies under any Collateral Document after the occurrence and during the continuance of an Event of Default" (*id.*). After the payment of certain costs, expenses and attorneys' fees, the agent shall apply the payments to "all accrued unpaid interest on the First Out Revolving Loan Obligations and fees related thereto," then to the outstanding principal due on the First Out Revolving Loans, and then to the payment of other accrued unpaid amounts due on the First Out Revolving Loans (*id.*). The Lender Credit Bid

consisted only of the principal amounts due on the Last Out Revolving Loans and Term Loans, and specifically excluded the First Out Revolving Loans. Thus, it would have been contrary to the terms of the Credit Agreement, (i.e. commercially unreasonable), for Field Point to distribute the Foreclosed Assets to plaintiffs without first accounting for the amounts due to the holders of the First Out Revolving Loans. Consequently, the Foreclosed Assets remained collateral, and nothing in the Credit or Security Agreements or UCC § 9-615 entitled plaintiffs to a pro rata distribution of the Foreclosed Assets.

The documentary evidence also shows that Field Point never possessed the Archway Assets. The terms of the Restructuring Support Agreement, Term Sheet and Transaction Agreement show that Field Point transferred the right to the Foreclosed Assets to New Archway. Hence, plaintiffs and Marblegate never possessed or owned the Foreclosed Assets.

Plaintiffs rely on the definition of "collateral" in the Credit Agreement to support their position that the Foreclosed Assets ceased to be "collateral" after the sale. Preliminarily, the Credit Agreement employs a different definition for the term "collateral" than the one used in the Security Agreement. The Credit Agreement defines "collateral" as:

> "all Property and interests in Property and proceeds thereof now owned or hereafter acquired by any Credit Party, any of their respective Subsidiaries and any other Person who has granted a Lien to Agent, in or upon which a Lien is granted, purported to be granted, or now or hereafter exists in favor of any Lender or Agent for the benefit of Agent, Lenders and other Secured Parties, whether under this Agreement or under any other documents executed by any such Persons and delivered to Agent"

(NYSCEF Doc No. 59 at 156 [§11.1]). Plaintiffs, though, ignore the application of UCC 9-615 (c). While the Foreclosed Assets ceased to be the property of the Archway Defendants, the Foreclosed Assets remained "collateral" for purposes of the UCC. Under Section 6.1(b)(iii) of the Security Agreement, Field Point could sell, assign, convey, transfer, or grant option or options to

purchase and deliver the Collateral for cash or on credit (NYSCEF Doc No. 60 at 23). That is precisely what the Restructuring Transaction entailed; Field Point transferred the right to the Foreclosed Assets to New Archway.

Even assuming Marblegate became the controlling shareholder after the public sale, "[w]hen a controller exercises contractual or statutory rights as a third-party lender, its actions are not subject to fiduciary review" (*In re CNX Gas Corp. Shareholders Litig.*, 4 A3d 397, 409 [Del Ch 2010], *appeal refused* 30 A3d 782 [Del 2010], citing *Odyssey Partners, L.P. v Fleming Companies, Inc.*, 735 A2d 386, 414-415 [Del Ch 1999]). Under this precept, "where a controlling stockholder owns a majority of a company's debt, it may choose to enforce those obligations, even if that means minority stockholders might be wiped out" (*Youlu Zheng v Icahn*, 53 Misc 3d 1213[A], 2016 NY Slip Op 51630[U], *21 [Sup Ct, NY County 2016], *affd sub nom. R2 Invs. LDC v Icahn*, 161 AD3d 567 [1st Dept 2018] [applying Delaware law]). Accordingly, the first cause of action is dismissed.

B. Aiding and Abetting Breach of Fiduciary Duty against Field Point and Teraco

The second cause of action alleges that Field Point and Teraco aided and abetted Marblegate in breaching its fiduciary duty owed to plaintiffs (NYSCEF Doc No. 158, ¶ 91). This cause of action requires the plaintiff to plead the existence of a fiduciary relationship, the fiduciary's breach of that relationship, the knowing participation by the alleged aider and abettor in the breach, and damages (*see Gatz v Ponsoldt*, 925 A2d 1265, 1275 [Del 2007]). In the absence of an underlying breach of fiduciary duty, as is the case here, plaintiffs cannot prevail on a claim for aiding and abetting a breach of fiduciary duty (*see Gerber v EPE Holdings, LLC*, 2013 WL 209658, *11, 2013 Del Ch LEXIS 8, *46 [Del Ch, Jan. 18, 2013, C.A. No. 3543-VCN]). The second cause of action is dismissed.

C. Conversion

The third cause of action for conversion against Field Point, Marblegate and Teraco alleges these defendants improperly exercised dominion and control over the Foreclosed Assets by delivering them to Teraco to the exclusion of plaintiffs (NYSCEF Doc No. 158, ¶¶ 97-98). "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). To state a cause of action for conversion, the plaintiff must plead its possessory right or interest in the property and the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights (*id.*). A cause of action for conversion is duplicative of a breach of contract claim when the complaint fails to allege separate facts implicating tort liability (*see Johnson v Cestone*, 162 AD3d 526, 527 [1st Dept 2018]).

Defendants' reliance on Section 7.5 of the Credit Agreement is unavailing. The section provides that no secured party shall have an individual right to realize upon any of the Collateral because that right to realize upon the Collateral is vested in the agent (NYSCEF Doc No. 59 at 114). While provisions granting an agent the authority to act on behalf of a group of lenders are generally upheld (*see Beal Sav. Bank v Sommer*, 29 AD3d 388, 389 [1st Dept 2006], *affd* 8 NY3d 318 [2007], *rearg denied* 8 NY3d 993 [2007]), plaintiffs have not sought individually to realize the Collateral as the complaint pleads that Field Point had already done so. Nevertheless, the documents utterly refute the allegation that plaintiffs possessed the right to own or control the Foreclosed Assets after the sale, as explained above. Therefore, the court dismisses the third cause of action.

D. Conspiracy to Commit Conversion against All Defendants

The fourth cause of action pleads a conspiracy to commit conversion against all defendants (NYSCEF Doc No. 158, ¶ 102). While New York does not recognize civil conspiracy as an independent tort (*see Errant Gene Therapeutic, LLC v Sloan-Kettering Inst. For Cancer Research*, 174 AD3d 473, 474 [1st Dept 2019]), a plaintiff may plead allegations of a civil conspiracy "to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]). In that regard, "the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury" (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020]). Given the dismissal of the third cause of action, the fourth cause of action for conspiracy to commit conversion is dismissed.

E. A Judgment Declaring the Fifth Amendment as Void Ab Initio

The fifth cause of action seeks a judgment declaring the Fifth Amendment void ab initio on the ground BancAlliance neither signed nor consented to the Fifth Amendment (NYSCEF Doc No. 158, ¶ 109). Therefore, any actions taken thereunder, including the First Out Revolver facility and Marblegate's instructions to Antares or Field Point, were ultra vires (*id.*, ¶ 106).

Defendants argue that this cause of action is contradicted by the terms of Section 9.1 in the Credit Agreement contradict defendant's allegations. This section required that each lender be given an opportunity to participate in the Fifth Amendment. Defendants submit that BancAlliance was given the opportunity to participate on a pro rata basis, but declined. As such, they contend that BancAlliance was not "directly and adversely affected" by the amendment. Plaintiffs submit that they have adequately pled a cause of action for a declaratory judgment.

CPLR 3001 provides that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." To state a cause of action for a declaratory judgment, the plaintiff must plead the existence of a justiciable controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]), and that it has a sufficient interest in the action for purposes of standing (*see American Ins. Assn. v Chu*, 64 NY2d 379, 383 [1985], *cert denied* 474 US 803 [1985]). A motion seeking to dismiss a declaratory judgment focuses on "whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*Neuman v City of New York*, 186 AD3d 1523, 1525 [2d Dept 2020] [internal quotation marks and citation omitted]). The court, though, should grant the motion to dismiss "where 'no questions of fact are presented [by the controversy],'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011] [citation omitted]).

Section 9.1(a) dictates the process for amending the Credit Agreement, and provides:

> "no amendment ... [to] any Loan Document ... shall be effective unless the same shall be in writing and signed by the Agent, the Required Lenders ...and the Borrower and then such waiver shall be effective only in the specific instance and for the specific purpose for which given; provided, however, that no such waiver, amendment, supplement (including any additional Loan Document) or consent shall, unless in writing and signed by all the Lenders directly affected thereby (or by Agent with the consent of all the Lenders directly and adversely affected thereby), in addition to Agent, the Required Lenders (or by Agent with the consent of the Required Lenders) and the Borrower, do any of the following:
>
> (i) increase or extend the Commitment of any Lender ...;
>
> (ii) postpone or delay any date fixed for, or reduce or waive, any scheduled installment of principal or any payment of interest, fees or other amounts (other than principal) due ...;

> (iii) reduce the principal of, or the rate of interest specified herein … or the amount of interest payable in cash specified herein on any Loan, or of any fees or other amounts payable hereunder …;
>
> (iv) (A) change or have the effect of changing the priority or pro rata treatment of any payments … Liens, proceeds of Collateral or reductions in Commitments … or (B) advance the date fixed for, or increase, any scheduled installment of principal due to any of the Lenders under any Loan Document;
>
> …
>
> (vii) discharge Borrower or all or substantially all of the Guarantors … from their respective payment Obligations under the Loan Documents, or release all or substantially all of the Collateral, except as otherwise may be provided in this Agreement or the other Loan Documents"

(NYSCEF Doc No. 59 at 123). The First Out Revolving Loan facility established by the Fifth Amendment constitutes a new loan or indebtedness that affects the priority of payments set forth in section 1.10(c). Thus, it appears that the amendment must be signed by a lenders "directly affected thereby." Section 9.1(a), though, also states that, notwithstanding the foregoing,

> "only those Lenders that have not been provided a reasonable opportunity, as determined in the good faith judgment of Agent, to receive the most-favorable treatment under or in connection with the applicable amendment, waiver or supplement described in the preceding clause (iv) that is provided to any other Person, including the opportunity to participate on a pro rata basis on the same terms in any new loans or other Indebtedness permitted to be issued as a result of such amendment, waiver or supplement, shall be deemed to be directly and adversely affected by such amendment, waiver or supplement"

(*id.* at 124). Therefore, only those lenders who were not given a reasonable opportunity to participate are deemed to be directly and adversely affected.

The documentary evidence establishes that BancAlliance is not a Lender directly or adversely affected by the Fifth Amendment. On September 4, 2018, Antares emailed all lenders a revised draft of a new "Priming" facility term sheet (NYSCEF Doc No. 163, Goldberg affirmation, exhibit 5 at 373). The next day, Antares requested a response from the lenders

regarding their support for the new facility and a "commitment of your pro rata share" (NYSCEF Doc No. 163, Goldberg affirmation, exhibit 6 at 375). BancAlliance responded one day later and declined to support the new facility and the amendment (NYSCEF Doc No. 163, Goldberg affirmation, exhibit 7 at 377). Because BancAlliance had been given an opportunity to participate, its consent was unnecessary as it was not directly and adversely affected by the amendment.

Plaintiffs maintain that discovery is necessary to determine whether the opportunity afforded to BancAlliance was "reasonable" and whether Field Point exercised "good judgment." Antares, though, extended the opportunity to BancAlliance to join the new facility, not Field Point. The complaint is devoid of any allegations that Antares lacked good judgment or that its offer was not reasonable. While Section 9.1(a) does not define what constitutes a "reasonable opportunity," a reasonable opportunity includes "the opportunity to participate on a pro rata basis on the same terms in any new loans or other Indebtedness permitted to be issued." Plaintiffs do not dispute that BancAlliance declined the opportunity. In the absence of a justiciable controversy, a declaration would be improper (*see Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 680 [1st Dept 2017]). The fifth cause of action is dismissed.

F. Breach of Contract against Field Point

The sixth cause of action alleges that Field Point breached Sections 7.5, 8.3(c) and 9.1(a)(ii), (iii), (iv) and (vii) of the Credit Agreement when it advanced Marblegate's interests over those of the other lenders (NYSCEF Doc No. 158, ¶¶ 114-115). The seventh cause of action alleges that Field Point breached the Security Agreement when it claimed to possess authority under section 6.1(b) to transfer the Foreclosed Assets to Teraco (*id.*, ¶¶ 120-121).

Defendants contend that the exculpatory clause in Section 8.5(b) of the Credit Agreement shields Field Point from liability. Alternatively, they argue that the terms of the Credit Agreement

bar the sixth and seventh causes of action. Plaintiffs submit that the exculpatory provision carves out exceptions for gross negligence and willful misconduct on the part of Field Point.

"'Exculpatory clauses immunize a party from liability for its own misconduct'" (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 355 [2020] [citation omitted]). Contract provisions that tend "to insulate a party from liability for its own negligence are enforceable, albeit disfavored and closely scrutinized, so long as the contract language is clear and unequivocal and the clause does not violate statutory law or a separate rule of public policy" (*id.* at 352). A contract clause that shields a party from liability for its willful or grossly negligent acts is against public policy and will not be enforced (*see Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 383-384 [1983]). Conduct that "smacks of intentional wrongdoing ... can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith," or it may be implicit, as in the case of gross negligence (*id.* at 385). Gross negligence encompasses conduct that "betokens a reckless indifference to the rights of others" (*id.*). Stated another way, gross negligence concerns "the failure to exercise even slight care" (*Food Pageant, Inc. v Consolidated Edison Co.*, 54 NY2d 167, 172 [1981]). Thus, exculpatory provisions shield parties from claims of ordinary negligence (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]) and from claims involving "conduct [that is] is merely intentional breach of contract" (*see Intrepid Invs., LLC v Selling Source, LLC*, 165 AD3d 523, 525 [1st Dept 2018], *lv denied* 32 NY3d 1079 [2018], citing *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 192 AD2d 83, 88 [1st Dept 1993], *affd* 84 NY2d 430 [1994]).

The conduct complained of falls far short of the standards for gross negligence or willful misconduct (*see Retty Fin. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [1st Dept 2002] [dismissing a complaint where the allegations of gross negligence were insufficient to defeat

the exculpatory clause in the parties' contract]). Plaintiffs largely complain that Marblegate directed or caused Field Point to act (NYSCEF Doc No. 158, ¶¶ 5, 10-11, 49, 63-64, 67, 69, and 79), but the terms of the Loan Documents, in particular Section 7.2(c) in the Credit Agreement, expressly permitted Marblegate, as the Required Lenders, to direct Field Point, the administrative agent, to act when an Event of Default occurs (NYSCEF Doc No. 59 at 113-114). Additionally, under Section 8.3(a), Field Point had no discretion to ignore a request from the Required Lenders (*id.* at 116). Consequently, the allegation that Field Point is affiliated with Marblegate, standing alone, is insufficient as Field Point had "ministerial duties to carry out its specified obligations" (*Eaton Vance Mgt. v Wilmington Sav. Fund Socy.*, 2018 NY Slip Op 30727[U], *10 [Sup Ct, NY County 2018], *affd* 171 AD3d 626 [1st Dept 2019]).

Plaintiffs fail to correct this deficiency in reply. They allege that "Field Point was a complicit conduit for the looting of the [Foreclosed Assets]", but this allegation is entirely conclusory and is contrary to the plain terms in Sections 7.2(c) and 8.3(a). A conclusory allegation is "not adequate to overcome the exculpatory provision in the parties' contracts" (*see Fried v Lehman Bros. Real Estate Assoc. III, L.P.*, 156 AD3d 464, 465 [1st Dept 2017], *lv denied* 31 NY3d 1137 [2018]). As such, the complaint lacks any factual allegations that "smack[ ] of intentional wrongdoing" (*Kalisch-Jarcho, Inc.*, 58 NY2d at 385). The sixth and seventh causes of action are dismissed. Therefore, the court need not address the alternative arguments advanced for dismissal of these causes of action.

G. Breach of Contract Against Marblegate and the Archway Defendants

The eighth cause of action against Marblegate and the ninth cause of action against the Archway Defendants plead claims for breach of the Credit Agreement. The complaint alleges that Marblegate willfully violated Sections 9.1(a)(ii), (a)(iii), (a)(iv) and (a)(vii) when, without

plaintiffs' consent, it directed Field Point to issue Loan Documents and consummated the Restructuring Transaction that had the effect of changing the payment schedule, amount and interest rate for Archway's debt, changing the pro rata treatment of plaintiffs and releasing all or substantially all of the Collateral (NYSCEF Doc No. 158, ¶¶ 126). The complaint alleges that Marblegate violated Section 1.10(c) when it received payments in excess of its pro rata share and Section 9.11(b) when it obtained payments through Teraco in excess of its pro rata share (*id.*). The complaint pleads similar allegations as against the Archway Defendants (*id.*, ¶ 132).

To state a cause of action for breach of contract, the plaintiff must prove the existence of a contract, the plaintiff's performance, the defendant's breach, and damages (*see Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). Here, the documentary evidence refutes the allegations that these defendants breached the Credit Agreement, as the Restructuring Transaction was accomplished in accordance with its terms. As described above, the Fifth Amendment contemplated a potential restructuring of the Archway debt. The amendment involved supplementing existing or adding new provisions to the Credit Agreement, such as Section 7.5 (NYSCEF Doc No. 59 at 115). Archway's failure to pay the principal and interest constitutes an Event of Default and, more specifically, a Specified Event of Default. Once such an event occurs, Field Point "shall at the request" of the Required Lenders, namely Marblegate, exercise those rights and remedies available to it in the Loan Documents (NYSCEF Doc No. 59 at 113-114 [§ 7.2(c)]), such as a foreclosure sale under the UCC (NYSCEF Doc No. 60 at 23 [§6.1(a)]). The Term Sheet sets out that the Consenting Lenders, who were comprised of the Required Lenders, had directed Field Point to institute foreclosure proceedings with the Lender Credit Bid acting to extinguish the Last Out Revolving Loans and Term Loans. Field Point then sold its right to the Foreclosed Assets on credit to New Archway, as was permissible under Section

8.1(b). New Archway swapped the Last Out Revolving Loans, Term Loans and the First Out Revolving Loans for new term loans, issued pro rata, to satisfy Section 1.10(c) of the Credit Agreement. Only after the two new credit facilities were issued would the "Foreclosure" be deemed "consummated" (NYSCEF Doc No. 61 at 54). At that point, New Archway was free to enter into a separate agreement with Teraco (*id.*).

Plaintiffs, in opposition, express that they "operated faithfully under the terms of the governing contracts" only for Marblegate and the Archway Defendants to "disregard" their objections and take command of the Foreclosed Assets for Marblegate's benefit (NYSCEF Doc No. 164, plaintiffs' mem of law at 23). Plaintiffs add that the Archway Defendants were complicit in the Restructuring Transaction by "stonewalling every request for transparency" (*id.* at 24). These allegations, though, do not implicate a specific provision in the Loan Documents that Marblegate and the Archway Defendants are alleged to have breached. The eighth and ninth causes of action are dismissed.

H. Breach of the Covenant of Good Faith and Fair Dealing against Marblegate, Field Point and the Archway Defendants

For a tenth cause of action, the complaint alleges that Marblegate, Field Point and the Archway Defendants breached the implied covenant of good faith and fair dealing by secretly designing the Restructuring Transaction to defeat plaintiffs' contractual expectations, withholding information on the transaction from plaintiffs, and structuring the transaction in such a way to preclude plaintiffs' participation in order to undermine their reasonable economic expectations on the Credit Agreement (NYSCEF Doc No. 158, ¶ 136).

Defendants argue that the tenth cause of action should be dismissed on two grounds. First, the cause of action is duplicative of the breach of contract claim. Second, plaintiffs cannot alter the plain terms of the Credit Agreement to imply an obligation that is inconsistent with its terms.

"Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that … would deprive the other party of receiving the benefits under their agreement" (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]). This implied covenant "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [citation omitted]). The implied covenant, though, will be enforced only to the extent it is consistent with other provisions in the contract (*id.*). To the extent the claim "merely restates [a] breach of contract claim," it will be dismissed (*Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438 [1st Dept 2017]).

Here, the complaint adequately states a cause of action for breach of the implied covenant of good faith and fair dealing (*see Aozora Bank, Ltd. v J.P. Morgan Sec. LLC*, 144 AD3d 440, 441 [1st Dept 2016]). Plaintiffs allege that defendants' machinations have frustrated their ability to recover on the Credit Agreement. Under the Restructuring Transaction, New Archway, whose corporate governance would be controlled by the Required Lenders, exchanged plaintiffs' $60 million in secured loans for new loans under two new credit facilities. The New First Lien Credit Facility provided for $20 million in New Priority First Lien Term Loans, that were secured by New Archway's assets, and the New Unsecured Credit Facility provided for $15 million in unsecured loans. Both facilities were offered on a pro rata basis based on the obligations the lenders held at the time of the Restructuring Transaction. Shortly thereafter, New Archway sold the Foreclosed Assets to Teraco, a Marblegate company, that allegedly injured plaintiffs' rights to the fruits of the Credit Agreement. Thus, the court denies the motion insofar as it seeks dismissal of the fifteenth cause of action.

I. Unjust Enrichment against Teraco and Marblegate

The eleventh cause of action allege that Teraco and Marblegate were unjustly enriched at plaintiffs' expense (NYSCEF Doc No. 158, ¶ 144).

Defendants contend that this cause of action is deficient because the Credit Agreement governs the dispute between plaintiffs and Marblegate. Defendants maintain the same principle applies to the claim against Teraco even though Teraco was not a signatory to the Credit Agreement. Plaintiffs oppose, claiming that the actions Marblegate and Teraco took fall outside of the Credit Agreement even though Teraco was not a signatory to that agreement.

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). It is not a "catchall cause of action" and exists only where "circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012]). Thus, to state a claim for unjust enrichment, the "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]). The existence of a valid contract that governs the dispute at issue precludes a plaintiff from recovering on a claim in quasi contract (*see Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here, the Loan Documents govern the dispute at issue between plaintiffs and Marblegate. Plaintiffs admit as much when they claim that "[t]he Credit Agreement does not bar, in so many words, Marblegate from commandeering the Archway Equity and transferring it to a wholly owned subsidiary" (NYSCEF Doc No. 164 at 25). Plaintiffs' assertion that they may maintain an unjust

enrichment claim as an alternative to their breach of contract claims is unpersuasive. A plaintiff may plead both breach of contract and unjust enrichment as alternative theories of recovery where there is a bona fide dispute as to the validity of the contract (*see Renk v Renk*, 188 AD3d 502, 504 [1st Dept 2020). This is not the case here where plaintiffs do not dispute the validity of the Credit Agreement (*see International Dev. Inst., Inc. v Westchester Plaza, LLC*, 194 AD3d 411, 413 [1st Dept 2021]). Nor may plaintiffs plead a cause of action for unjust enrichment against Teraco (*see Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014], *lv dismissed, lv denied* 24 NY3d 1041 [2014]). Thus, the eleventh cause of action is dismissed.

J. Tortious Interference with Contract against Teraco

The twelfth cause of action alleges that plaintiffs fully performed their obligations under the Credit and Security Agreements, that Teraco knew of the agreements, and that it improperly induced Marblegate and Field Point to breach them (NYSCEF Doc No. 158, ¶¶ 148-151).

Defendants contend that this cause of action should be dismissed for plaintiffs' failure to plead "but for" causation. Plaintiffs respond that Teraco's involvement is essential to their claims because Marblegate and Field Point had designed the Restructuring Transaction to ensure the Teraco acquired the Foreclosed Assets.

To state a cause of action for tortious interference with contract, the plaintiff must plead "(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages" (*Foster v Churchill*, 87 NY2d 744, 749-750 [1996]). The defendant's conduct must have been the "but for" cause of the breach (*see Wiesen v Verizon Communications, Inc.*, 183 AD3d 485, 485 [1st Dept 2020]).

Here, the complaint fails to plead any improper or intentional conduct on the part of Teraco that would have resulted in a breach of contract (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 425 [1996] [finding that the complaint lacked any allegations that the defendant had intentionally procured a breach]). The allegation that "Marblegate and Field Point would not have consummated the Restructuring Transaction but for the transaction's improper enrichment of Teraco" (NYSCEF Doc No. 158, ¶ 152) does not suffice, as it pleads only that Teraco was improperly enriched and does not describe Teraco's own conduct in procuring a breach (see *Kind Operations, Inc. v AUA Private Equity Partners, LLC*, 195 AD3d 446, 447 [1st Dept 2021] [reasoning that the complaint fails to plead any conduct on the part of the individual defendants to procure a breach]; *Klein v Deutsch*, 193 AD3d 707, 710 [2d Dept 2021] [stating that the complaint failed to allege specific conduct by the defendants to induce a breach]). In addition, plaintiffs' allegation of "but for" cause is "vague and conclusory and supported by 'mere speculation'" (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018], quoting *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]). Plaintiffs' opposition fails to cure this deficiency as they have not sufficiently pled specific conduct on the part of Teraco to procure a breach of the Loan Documents (*see Meers Enters., LLC v Kocak*, 173 AD3d 629, 630-631 [1st Dept 2019]). Accordingly, the eleventh cause of action for tortious interference with contract is dismissed.

K. Breach of Fiduciary Duty against Brecker

The thirteenth cause of action for breach of fiduciary duty against Brecker is pled derivatively on behalf of Archway. The complaint alleges that plaintiffs have standing to pursue the derivative claim because they became shareholders in Archway, an insolvent company, after the foreclosure sale (NYSCEF Doc No. 158, ¶ 157). The complaint alleges that Brecker owed

Archway and its shareholders a fiduciary duty to maximize value for the Archway in the Restrucutring Transaction, but Brecker failed to run a competitive process and seek counterparties for the transaction (*id.*, ¶¶ 158-159). Brecker, who had been appointed by Field Point, allegedly championed Field Point's interests over those of Archway and its creditors in allowing Marblegate, through Teraco, to take significant value from the Restructuring Transaction, thereby breaching his duties of loyalty and care (*id.*, ¶¶ 159-160). The complaint alleges that no demand has been made upon Archway's current board because the demand is futile (*id.*, ¶ 162).

Defendants argue that plaintiffs failed to plead demand futility under both Delaware and New York law. In the alternative, defendants argue that the terms of the Credit Agreement refute this claim because Section 6.7 of the Credit Agreement, as amended, prohibited Archway from hiring "any new third party financial or restructuring advisor outside of the ordinary course of business without the consent of the Agent and the Required Lenders" (NYSCEF Doc No. 59 at 110). Defendants add that Archway's certificate of incorporation exculpates directors "for monetary damages for breach of fiduciary duty as a director to the fullest extent permitted by Delaware Law" (NYSCEF Doc No. 163, Goldberg affirmation, exhibit 9 at 388). Plaintiffs respond that they have adequately pled demand futility by alleging that Brecker is beholden to Marblegate, Teraco and Field Point and that he favored them in the Restructuring Transaction (NYSCEF Doc No. 158, ¶ 163).

"Under Delaware law, the board of directors manages the business and affairs of the corporation" (*McElrath v Kalanick*, 224 A3d 982, 990 [Del 2020]; *accord International Painters & Allied Trades Indus. Pension Fund v Cantor Fitzgerald, L.P.*, 41 Misc 3d 770, 774 [Sup Ct, NY County 2013], *affd* 132 AD3d 470 [1st Dept 2015] [applying Delaware law]). Delaware Chancery Court Rule 23.1 governs derivative actions brought by shareholders; the rule requires the

shareholder to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." The shareholder must comply with this rule before commencing a derivative suit unless a pre-suit demand would have been futile (*McElrath*, 224 A3d at 990).

Delaware employs two tests to determine whether a demand may be excused. The first test articulated in *Aronson v Lewis* (473 A2d 805 [Del 1984], *overruled in part on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]) provides that a "demand is excused as futile if the complaint alleges particularized facts that raise a reasonable doubt that '(1) the directors are disinterested and independent[,] [or] (2) the challenged transaction was otherwise the product of a valid business judgment'" (*United Food & Commercial Workers Union v Zuckerberg*, — A3d —, 2021 WL 4344361, *7, 2021 Del LEXIS 298, *20 [Del 2021] [citation omitted]). The *Aronson* test applies "where the underlying contested transaction is the result of a board decision" (*Security Police & Fire Professionals of Am. Retirement Fund v Mack*, 93 AD3d 562, 563 [1st Dept 2012], citing *Wood v Baum*, 953 A2d 136, 140 [Del 2008]; *Rales v Blasband*, 634 A2d 927, 933 [Del 1993] [stating that "[t]he essential predicate for the Aronson test is the fact that a decision of the board of directors is being challenged in the derivative suit"]). The second test articulated in *Rales* (634 A2d at 934]) provides that a "demand is excused as futile if the complaint alleges particularized facts creating a 'reasonable doubt that, as of the time the complaint is filed,' a majority of the demand board 'could have properly exercised its independent and disinterested business judgment in responding to a demand'" (*United Food & Commercial Workers Union*, 2021 WL 4344361, *7, 2021 Del LEXIS 298, *21 [citation omitted]). The *Rales* test "applies where the subject of a derivative suit is not a business decision of the Board but rather a violation of the Board's oversight

duties" (*Wood*, 953 A2d at 140). Delaware's Supreme Court has stated that "the *Aronson* test is best understood as a special application of the *Rales* test" (*United Food & Commercial Workers Union*, 2021 WL 4344361, *7, 2021 Del LEXIS 298, *21). "To satisfy either test, a plaintiff must 'comply with stringent requirements of factual particularity' of Court of Chancery Rule 23.1" (*Wood*, 953 A2d at 140).

Because plaintiffs challenge the actions taken by Brecker, the sole director on Archway's board, in breach of his fiduciary duties, the *Aronson* test applies because the same board would have considered plaintiffs' demand (*see Rales*, 634 A3d at 933-934). "Disinterested" for purposes of the first prong of the *Aronson* test "means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally" (*Aronson*, 473 A2d at 812). To establish whether a director is interested, the plaintiff may demonstrate that the director received a personal benefit or detriment from the decision, which requires looking at "whether the director is disinterested in the underlying transaction and, even if disinterested, whether the director is otherwise independent" (*Beam v Stewart*, 845 A2d 1040, 1049 [Del 2004]). "Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences" (*Aronson*, 473 A2d at 816). A director's lack of independence may be established where the facts as pled cast a "reasonable doubt that a director is not so 'beholden' to an interested director … that his or her 'discretion would be sterilized'" (*Beam*, 845 A2d at 1050 [citation omitted]). As to the second prong of the *Aronson* test, the plaintiff must "plead particularized facts sufficient to raise a reason to doubt that (1) the action was taken honestly and in good faith or (2) the board was adequately informed in making the decision" (*see Asbestos Workers Phila. Pension Fund v Bell*, 137 AD3d

680, 683 [1st Dept 2016] [applying Delaware law]). The two prongs are disjunctive such that is either is satisfied, a pre-suit demand is excused (*id.* at 682).

In this action, plaintiffs challenge Brecker's disinterest and independence on the ground that he had been appointed by Field Point, but this conclusory allegation, without more, does not show that he lacked independence (*see Blaustein v Lord Baltimore Capital Corp.*, 84 A3d 954, 958-959 [Del 2014]; *Emerald Partners v Berlin*, 1993 WL 545409, *4, 1993 Del Ch LEXIS 273, *10 [Del Ch, Dec. 23, 1993, C.A. No. 9700] [stating that "[t]he proper focus is the care, skill and diligence used by the directors in making the challenged decision rather than upon the way in which the directors obtained their seats in the boardroom"]; *Vaughan v Standard Gen. L.P.*, 2016 NY Slip Op 31657[U], *12-13 [Sup Ct, NY County 2016], *affd* 154 AD3d 581 [1st Dept 2017], quoting *Edgewater Growth Capital Partners LP v H.I.G. Capital, Inc.*, 68 A3d 197, 230 [Del Ch 2013] [stating that "[t]he manner in which someone is nominated to the board is not evidence of their lack of independence"]). Reasonable doubt for purposes of the *Aronson* test "can be said to mean there is a reason to doubt" (*In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, *33, 2016 Del Ch LEXIS 14, *108 [Del Ch, Feb. 23, 2016, C.A. No. 9962-VCL], *appeal refused* 133 A3d 560 [Del 2016] [internal quotation marks and citation omitted]). In this instance, the complaint pleads that Brecker was beholden to Marblegate or Field Point, but otherwise it is entirely devoid of specific, particularized facts sufficient to create a reasonable doubt that Brecker could have objectively considered a pre-suit demand. The complaint does not allege that Brecker received a personal gain from the subject transaction or that, in determining whether to sue himself, there was a substantial likelihood that he would be held personally liable (*see Asbestos Workers Phila. Pension Fund*, 137 AD3d at 682 [stating that the substantial

likelihood of liability is lessened where a corporation's charter exculpates a director from liability]).

The complaint also fails to satisfy the second prong of the *Aronson* test. "The presumption of the business judgment rule can be rebutted if the particularized facts raise a reasonable doubt 'that the informational component of the directors' decisionmaking process, *measured by concepts of gross negligence*, included consideration of all material reasonably available'" (*Ryan v Gursahaney*, 2015 WL 1915911, *9, 2015 Del Ch LEXIS 123, *30 [April 28, 2015, C.A. No. 9992-VCP], *affd* 128 A3d 991 [Del 2015], quoting *Brehm*, 746 A2d at 259). "To establish gross negligence, a plaintiff must plead and prove that the defendant was 'recklessly uninformed' or acted 'outside the bounds of reason.'" (*In re Synutra Intl. Inc. Stockholder Litig.*, 2018 WL 705702, *5, 2018 Del Ch LEXIS 266, *15 [Feb. 2, 2018, C.A. No. 2017-0032-VCL], *affd* 195 A3d 754 [Del 2018]). The complaint does not plead any facts alleging that Brecker was recklessly uninformed at the time he allegedly approved of the Restructuring Transaction. Accordingly, the thirteenth cause of action is dismissed.

L. A Judgment Declaring the Liabilities of Field Point and Marblegate are Not Subject to Indemnification or Reimbursement

The fourteenth cause of action alleges that Field Point and Marblegate intend to seek reimbursement under section 8.8(b) of the Credit Agreement for expenses and liabilities incurred on the Restructuring Transaction, including their costs in defending the present action (NYSCEF Doc No. 158, ¶ 165). Plaintiffs seek a "[d]eclaration as to Field Point and Marblegate that any liabilities relating to their conduct in connection with the Restructuring Transaction arise from gross negligence and/or willful misconduct and are not subject to indemnification or reimbursement" (*id.*, ¶ 169).

Defendants argue that the declaratory judgment cause of action is really one for breach of contract, but New York does not recognize gross negligence or willful misconduct in connection with a breach of contract. Plaintiffs, in opposition, allege that they seek a declaration that the actions of both Field Point and Marblegate rise to the level of gross negligence and willful misconduct, such that plaintiffs are not required to indemnify them for damages stemming from their wrongdoing. Thus, plaintiffs posit that they seek the declaration to prevent Field Point and Marblegate from enforcing other provisions in the Credit Agreement.

Section 8.8, titled "Expenses; Indemnities; Withholding," of the Credit Agreement states, in part, that:

> "(b) Each Lender further agrees to indemnify Agent and each of its Related Persons … severally and ratably, from and against Liabilities … that may be imposed on, incurred by or asserted against Agent or any of its Related Persons in any matter relating to or arising out of, in connection with or as a result of any Loan Document, any Related Document or any other act, event or transaction related, contemplated in or attendant to any such document, or, in each case, any action taken or omitted to be taken by Agent or any of its Related Persons under or with respect to any of the foregoing; provided, however, that no Lender shall be liable to Agent or any of its Related Persons to the extent such liability has resulted primarily from the gross negligence or willful misconduct of Agent or, as the case may be, such Related Person, as determined by a court of competent jurisdiction in a final non-appealable judgment or order"[8]

(NYSCEF Doc No. 59 at 119). Under this provision, each lender shall indemnify Field Point and "Related Persons" for damages related to the Loan Documents except in cases of gross negligence and willful misconduct.

[8] "'Related Persons' means, with respect to any Person, each Affiliate of such Person and each director, officer, employee, agent … and other consultants and agents of or to such Person or any of its Affiliates" (NYSCEF Doc No. 59 at 175).

As set forth above, CPLR 3001 requires the existence of a justiciable controversy before a declaratory judgment may issue (*see Long Is. Light. Co.*, 35 AD3d at 253). The controversy must "involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*American Ins. Assn. v Chu*, 64 NY2d 379, 383 [1985]). From the pleadings, plaintiffs have yet to identify one. The complaint alleges that "Field Point intends to seek reimbursement" (NYSCEF Doc No. 158, ¶ 166), not that Field Point has sought reimbursement. Moreover, indemnification is available only after "a court of competent jurisdiction in a final non-appealable judgment or order" has determined that the indemnitee's liability stems from gross negligence or willful misconduct on the part of the agent or the Related Person. No such determination has been made. As such, the cause of action for a declaratory judgment is premature (*see New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). Because the complaint fails to plead the existence of a present, justiciable controversy (*see Touro Coll.*, 146 AD3d at 680), the fourteenth cause of action is dismissed.

M. Indemnification against the Archway Defendants

The fifteenth cause of action pleads a claim for contractual indemnification as against the Archway Defendants under Section 9.6(a) of the Credit Agreement (NYSCEF Doc No. 158, ¶ 171). Defendants posit that the subject indemnification provision applies solely to claims brought by third parties, and not claims between plaintiffs and the Archway Defendants.

A contractual indemnification provision that is "clear and unambiguous on its on its face must be enforced according to the plain meaning of its terms without consideration of extrinsic and parol evidence" (*Omansky v Whitacre*, 55 AD3d 373, 373 [1st Dept 2008], citing *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Indemnification provisions "'will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous'" (*Matter of Part 60*

RMBS Put-Back Litig., 195 AD3d 40, 56 [1st Dept 2021] [citation omitted]). The provisions "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *Williams v 100 Church Fee Owner, LLC*, — AD3d —, 2021 NY Slip Op 05843, *1 [1st Dept 2021] [same]). That said, "courts have routinely held that where the indemnification is broad, in the absence of limiting language, both intra-party and third party claims are covered" (*Matter of Part 60 RMBS Put-Back Litig.*, 195 AD3d at 56 [collecting cases]).

Section 9.6(a) of the Credit Agreement provides that:

> "(a) Each Credit Party agrees to indemnify, hold harmless and defend Agent, each Lender … and each of their respective Related Persons (each such Person in such capacity being an 'Indemnitee') from and against all Liabilities that may be imposed on, incurred by or asserted against any such Indemnitee in any matter relating to or arising out of, in connection with or as a result of (i) any Loan Document, any Related Agreement (but with respect to Related Agreements, only in such Person's capacity as Agent, Lender … or their Related Persons acting for such Persons in such capacity), any Obligation (or the repayment thereof) … (iii) any actual or prospective investigation, litigation or other proceeding, whether or not brought by any such Indemnitee or any of its Related Persons, any holders of securities or creditors (and including attorneys' fees in any case), whether or not any such Indemnitee, Related Person, holder or creditor is a party thereto, and whether or not based on any securities or commercial law or regulation or any other Requirement of Law or theory thereof, including common law, equity, contract, tort or otherwise or (iv) any other act, event or transaction related, contemplated in or attendant to any of the foregoing (collectively, the 'Indemnified Matters') …"

(NYSCEF Doc No. 59 at 131). The agreement defines "Liabilities" as "all claims, actions, suits, judgments, damages, losses, liability, obligations, responsibilities, fines, penalties, sanctions, costs, fees, taxes, commissions, charges, disbursements and expenses … in each case of any kind or nature … whether joint or several, whether or not indirect, contingent, consequential, actual, punitive, treble or otherwise" (NYSCEF Doc No. 59 at 169 [§11.1]).

Here, the complaint adequately pleads a cause of action for contractual indemnification. First, the provision does not explicitly limit indemnification to third-party claims (*see Crown Wisteria, Inc. v Chobani*, 178 AD3d 524, 525 [1st Dept 2019]). More importantly, the provision does not explicitly exclude intra-party claims from indemnification. The provision is exceedingly broad and applies to all "Liabilities" that may be incurred by an indemnitee in any matter related to any Loan Document or any litigation whether or not the litigation is brought by that indemnitee. As such, it does not exclude indemnity for intra-party claims (*see Shah v 20 E. 64th St., LLC*, 198 AD3d 23, 43 [1st Dept 2021]; *Crossroads ABL, LLC v Canares Capital Mgt., LLC*, 35 Misc 3d 1238[A], 2012 NY Slip Op 51042[U], *3 [Sup Ct, NY County 2012], *affd* 105 AD3d 645 [1st Dept 2013] [concluding that the subject indemnification was "extremely broad" as it did "not include an exhaustive list of the actions for which indemnification is required"]; *see also Mid-Hudson Catskill Rural Migrant Ministry, Inc. v Fine Host Corp.*, 418 F3d 168, 178-179 [2d Cir 2005 [reasoning that "the parties intended for the second [indemnification] provision to apply to 'actions of any kind or nature,' including actions between the parties"]). The motion insofar as it seeks dismissal of the fifteenth cause of action is denied.

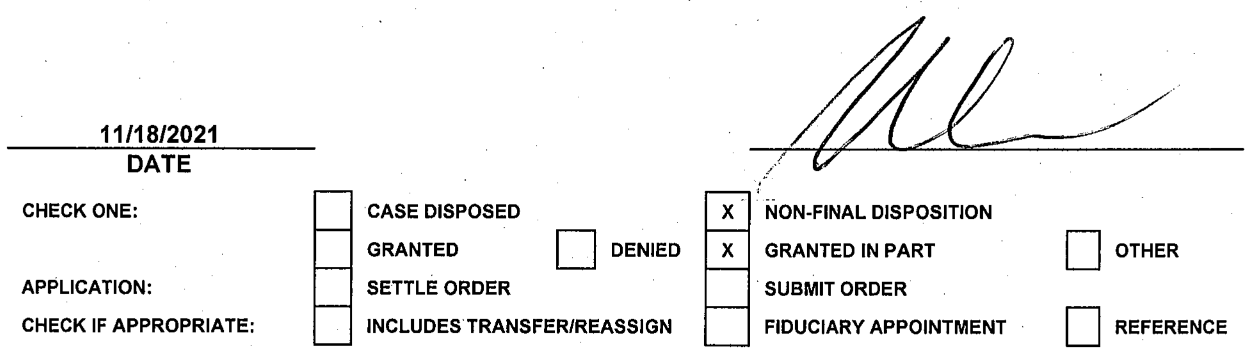
Accordingly, it is

ORDERED that the motion brought by defendants Marblegate Asset Management, LLC, Marblegate Special Opportunities Master Fund L.P., P. Marblegate Ltd., Marblegate Strategic Opportunities Master Fund I, L.P., Marblegate Partners Master Fund I, L.P., New Teraco, Inc., Field Point Agency Services, Inc., AWM Holdings, Inc., Archway Marketing Holdings, Inc., Archway Marketing Services, Inc., Corporate Services, Inc. and John Brecker to dismiss the complaint is granted to the extent of dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth causes of action, and the first, second,

third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that all defendants are directed to serve an answer to the second amended complaint, as limited herein, within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be held remotely via Microsoft Teams on December 17, 2021 at noon.



11/18/2021
DATE

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
APPLICATION:	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE