

**Citibank, N.A. v N/A**

2023 NY Slip Op 30559(U)

February 23, 2023

Supreme Court, New York County

Docket Number: Index No. 652233/2022

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

CITIBANK, N.A.,	<b>INDEX NO.</b>	<u>652233/2022</u>
Petitioner,	<b>MOTION DATE</b>	<u>N/A</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>006</u>
N/A,		
Respondent.	<b>DECISION + ORDER ON MOTION</b>	

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (2.23.23), OWS Administration, LLC's (**OWS**) motion for summary judgment must be denied and the Co-Issuers' cross-motion for summary judgment must be granted.

In relevant part, the Indenture (NYSCEF Doc. No. 2) provides:

Section 4.1 Reports and Instructions to Trustee.

(a) Monthly Manager's Certificate. By 4:30 p.m. (New York City time) on the second Business Day prior to each Monthly Allocation Date, ***Brand Holdings II shall furnish, or cause the Manager to furnish***, to the Trustee and the Servicer a certificate substantially in the form of Exhibit A specifying the allocation of Collections on the following Monthly Allocation Date (each a "Monthly Manager's Certificate"); provided that such Monthly Manager's Certificate shall be considered confidential nonpublic information by such recipients and shall not be disclosed to the Noteholders, Note Owners or any other Person without the prior written consent of Brand Holdings II.

(b) [Reserved].

- (c) Quarterly Noteholders' Statement. On or before the third Business Day prior to each Quarterly Payment Date, ***Brand Holdings II shall furnish, or cause the Manager to furnish***, a statement substantially in the form of Exhibit B with respect to each Series of Notes (each, a "Quarterly Noteholders' Statement") to the Trustee, the Servicer and each Paying Agent with a copy to the Rating Agencies and the Back-Up Manager.
- (d) Quarterly Compliance Certificates. On or before the third Business Day prior to each Quarterly Payment Date, ***Brand Holdings II shall deliver, or cause the Manager to deliver***, to the Trustee and the Rating Agencies (with a copy to each of the Servicer, the Manager and the Back-Up Manager) an Officer's Certificate (each, a "Quarterly Compliance Certificate") to the effect that, to the knowledge of the officer providing such Officer's Certificate, except as provided in a notice delivered pursuant to Section 8.8, no Potential Rapid Amortization Event, Rapid Amortization Event, Default or Event of Default has occurred or is continuing.
- (e) Scheduled Principal Payments Deficiency Notices. On the Accounting Date with respect to any Quarterly Collection Period, ***Brand Holdings II shall furnish, or cause the Manager to furnish***, to the Trustee and the Rating Agencies (with a copy to each of the Servicer, the Manager and the Back-Up Manager) written notice of any Scheduled Principal Payments Deficiency Event with respect to any Class or Series of Notes (any such notice, a "Scheduled Principal Prepayments Deficiency Notice").
- (f) Annual Accountants' Reports. Within ninety (90) days after the end of each fiscal year, ***Brand Holdings II shall furnish, or cause to be furnished, to the Trustee***, the Servicer and the Rating Agencies the reports of the Independent Accountants or the Back-Up Manager required to be delivered to Brand Holdings II by the Manager pursuant to Section 3.3 of the Management Agreement.
- (g) [Reserved].
- (h) Iconix Financial Statements. ***The Manager on behalf of Brand Holdings II shall provide*** to the Trustee, the Servicer, the Back-Up Manager and the Rating Agencies with respect to each Series of Notes Outstanding the following financial statements:
- (i) as soon as available and in any event no later than the date Iconix is required to file its financial statements with the SEC pursuant to the Exchange Act with respect to each of the first three quarters of each fiscal year, an unaudited consolidated balance sheet of Iconix as of the end of each of the first three quarters of each fiscal year and unaudited consolidated statements of income, changes in shareholders' equity and cash flows of Iconix for such quarter and for the period commencing at the end of the previous fiscal year and ending with the end of such quarter; and

(ii) as soon as available and in any event no later than the date Iconix is required to file its financial statements with the SEC pursuant to the Exchange Act with respect to the end of its fiscal year, an audited consolidated balance sheet of Iconix as of the end of each fiscal year and audited consolidated statements of income, changes in shareholders' equity and cash flows of Iconix for such fiscal year, setting forth in comparative form the figures for the previous fiscal year, prepared in accordance with GAAP and accompanied by an opinion thereon of independent public accountants of recognized national standing stating such audited consolidated financial statements present fairly, in all material respects, the financial position of the companies being reported on and their results of operations and have been prepared in accordance with GAAP.

(i) Additional Information. ***Brand Holdings II will furnish, or cause to be furnished***, from time to time such additional information regarding the financial position, results of operations or business of Iconix, any other Iconix Entity or any Securitization Entity as the Trustee, the Servicer, the Manager or the Back-Up Manager may reasonably request, subject to Requirements of Law and to the confidentiality provisions of the Related Documents to which such recipient is a party.

(j) Instructions as to Withdrawals and Payments. ***Brand Holdings II will furnish, or cause to be furnished***, to the Trustee or the Paying Agent, as applicable (with a copy to each of the Servicer, the Manager and the Back-Up Manager), written instructions to make withdrawals and payments from the Collection Account and any other Base Indenture Account or Series Account, as contemplated herein and in any Series Supplement; provided that such written instructions (other than those contained in Quarterly Noteholders' Statements) shall be considered confidential nonpublic information by such recipients and shall not be disclosed to any other Person without the prior written consent of Brand Holdings II; and provided further that such written instructions shall be subject in all respects to the confidentiality provisions of any Related Documents to which such recipient is a party. The Trustee and the Paying Agent shall promptly follow any such written instructions.

(k) Copies to Rating Agencies. ***Brand Holdings II shall deliver, or shall cause the Manager to deliver***, a copy of each report, certificate or instruction, as applicable, described in this Section 4.1 to each Rating Agency at its address as listed in or otherwise designated pursuant to Section 14.1 or in the applicable Series Supplement, including any e-mail address.

...

Section 9.2 Events of Default.

If any one of the following events shall occur (each an “Event of Default”):

...

(d) any Securitization Entity fails to comply with any of its other agreements or covenants in, or provisions of, the Indenture or any other Related Document (other than those covered by clause (a) or (b) above or with respect to any provision of the Charter Documents covered by clause (i) below) to which it is a party and the failure continues unremedied for a period of thirty (30) or more days after the earlier of (i) the date on which any Securitization Entity obtains knowledge thereof or (ii) the date on which written notice of such failure, requiring the same to be remedied, is given to any Securitization Entity by the Trustee or to any Securitization Entity and the Trustee by the Control Party (at the direction of the Controlling Class Representative), the Back-Up Manager or any Noteholder;

(*id.*, Section 4.1, Section 9.2).

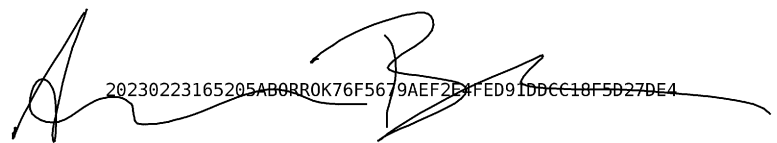
OWS argues that it is entitled to summary judgment because it is undisputed that Brand Holdings II did not provide the financial statements required by Section 4.1(h) and thus a default occurred under Section 9.2 of the Indenture. The argument fails.

Although OWS is correct that the language in Section 4.1(h) does not terminate the obligations set forth in Section 4.1(h) if Iconix were to go private (as it did) and merely provides that the delivery of the financial statements required by Section 4.1 were as soon as they were available but in no event later than the date Iconix was required to file its financial statements with the SEC (*i.e.*, that this is an expression of when the financial statements required under Section 4.1 had to be delivered), they are simply not correct that this was an obligation of Brand Holdings II. Section 4.1 carefully delineates responsibilities between Brand Holdings II and the Manager and provides where Brand Holdings II obligated itself to make certain deliveries, or cause certain deliveries to be made. Unlike the other sections in Section 4.1, the obligations in Section 4.1(h)

are not those of Brand Holdings II. They did not agree to provide this information or to cause the Manager to provide it. The Manager agreed to provide it. For the reasons set forth on the record, *G.D. Searle & Co. v Medicore Communications, Inc.*, 843 FSupp 895 (SD NY 1994) and *Shephard v Friedlander*, 195 AD3d 1191 (3d Dept 2021) do not suggest a different result. The Court must give full meaning to the entire contract and can not reform it to provide that Brand Holdings II was to deliver or cause to deliver the items in Section 4.1(h) because the parties did not agree as such (*Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008] [“[a] court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties”]). And, if the Manager breached this obligation, presumably it could or should have been terminated by the Trustee. This however is not the predicate default that is the subject of this motion or the petition. Thus, the motion must be denied and the cross-motion granted.

It is hereby ORDERED that OWS’ motion for summary judgment is denied and the Co-Issuers’ cross-motion for summary judgment is granted; and it is further

ORDERED that the Co-Issuers shall submit judgment on notice.



20230223165205AB0RROK76F5679AEF2EAFED91DCC10F5D27DE4

2/23/2023  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE