

**Life Ins. Fund Elite, LLC. v Hamburg Commercial
Bank AG**

2025 NY Slip Op 32683(U)

July 29, 2025

Supreme Court, New York County

Docket Number: Index No. 153100/2023

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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INDEX NO. 153100/2023

LIFE INSURANCE FUND ELITE, LLC.,

MOTION DATE 10/25/2024

Plaintiff,

MOTION SEQ. NO. 006

- v -

HAMBURG COMMERCIAL BANK AG, CERBERUS
EUROPEAN CAPITAL ADVISORS, LLP., PROMONTORIA
HOLDING 260 BV,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is

BACKGROUND

Defendants Hamburg Commercial Bank AG (HCOB) and Promontoria Holding 260 BV (Promontoria) move for summary judgment dismissing counts one, two, four, and five in the complaint and Promontoria from the action. Plaintiff Life Insurance Fund Elite LLC (LIFE) complains that defendants failed to dispose of collateral in a commercially reasonable manner.

Plaintiff is a private equity fund that invested in life insurance policies. The policies were held by the Life Insurance Fund Elite Trust (the Trust) (NYSCEF 88, complaint, ¶ 17). In 2007, HSH Nordbank, HCOB's predecessor (from now on, "HCOB" will mean itself and/or HSH Nordbank), made a \$150 million line of credit available to plaintiff, pursuant to a Loan Security

Agreement (loan agreement) between plaintiff, HCOB, and plaintiff's subsidiary, nonparty ISM Insurance Agency, LLC (ISM) (*id.*, ¶ 20; NYSCEF 92, loan agreement). The collateral securing the loan consisted of the portfolio of life insurance policies and other assets held by the Trust (NYSCEF 88, ¶¶ 21-25).

Plaintiff encountered financial difficulties due to “the liquidity squeeze prompted by the 2008 financial crisis” (*Life Ins. Fund Elite LLC v Hamburg Com. Bank AG*, 545 F Supp 3d 86, 89 [SD NY 2021]).¹ On January 23, 2013, LIFE and HCOB entered into the Standstill Agreement, to pause the loan payments to HCOB, who was allowed to take control of the collateral in the event of LIFE's default or failure to locate new investors that would enable it to repay the loan (NYSCEF 94, Recitals § D). On February 1, 2013, LIFE defaulted and voluntarily released the Trust and the collateral the Trust held to HCOB (*Life*, 545 F Supp 3d at 89; NYSCEF 88, ¶¶ 26, 28).

The Standstill Agreement states that plaintiff owes HCOB an amount not less than \$55 million, plus interest and other charges (NYSCEF 94, Recitals § C). Plaintiff stresses that the Standstill Agreement did not transfer ownership of the collateral to HCOB. Rather, it granted HCOB, as the secured creditor, the right to control the Trust upon plaintiff's default (NYSCEF 88, ¶¶ 26, 28). The Trust held the insurance policies and other assets that were collateral for the loan. When HCOB took control of the Trust, the policies were worth \$70 million (*id.* ¶ 30). The Trust also held a \$62 million accounts receivable from nonparty Avon Capital LLC (Avon), a former defaulting member of plaintiff. Allegedly, the receivable and the policies brought the total value of collateral to \$132 million (*id.*, ¶¶ 32-36).

¹ LIFE brought this federal case in October 2020. It was dismissed for lack of diversity jurisdiction.

HCOB sent plaintiff quarterly cash and collateral statements that purportedly showed the amount of death benefits HCOB was receiving from the insurance policies and the loan balance (NYSCEF 88, ¶ 43). Plaintiff alleges that these statements falsely conveyed that plaintiff and HCOB had an ongoing borrower lender relationship (*id.*, ¶ 60). In reality, unbeknownst to plaintiff, the lender-borrower relationship had ended and HCOB had taken ownership of the collateral (*id.*, ¶ 46). Starting in 2013, HCOB's financial and regulatory disclosures stated that it controlled the Trust, LIFE, and ISM, that a business combination had been created such that those entities had become fully consolidated subsidiaries of HCOB, and that the loan balance was the consideration for the acquisition of the Trust, LIFE, and ISM (*id.*, ¶¶ 47-48, 57). HCOB's internal records show that HCOB terminated the loan in exchange for LIFE's assets in 2013, and that HCOB reaped substantial economic benefit from the purported merger with the LIFE entities (*id.*, ¶ 64).

HCOB pursued the Trust's claim for the account receivable against Avon in a 2016 arbitration, obtaining a judgment for the Trust of over \$86 million (NYSCEF 88, ¶ 71). Plaintiff alleges that HCOB failed to notify plaintiff about the award, took no steps to collect it, and used it as leverage to settle a different lawsuit with Avon (*id.*). HCOB did not use the Avon award to satisfy the amount that LIFE owed on the loan.

Defendant Cerberus European Capital Advisors, LLP (Cerberus European) is a subsidiary of nonparty Cerberus Capital Management LP (Cerberus Capital) and the investment manager for Promontoria. In February 2018, a consortium of private equity investors headed by Cerberus Capital purchased HCOB (NYSCEF 88, ¶ 75). "As an integral component of the sale," HCOB sold a portfolio of loans and assets, that included the LIFE loan, to defendant Promontoria, also

headed by Cerberus Capital (*id.*, ¶¶ 76, 78; NYSCEF 23, Loan Sale and Purchase Agreement [LSPA]).

Under the loan agreement between HCOB and plaintiff LIFE, HCOB could sell its rights in the loan only to a “Qualified Purchasing Lender,” defined as a financial institution with a long-term unsecured senior debt rating of least A and A (NYSCEF 92 at 16). The complaint alleges that Promontoria was not such a lender and hence could not step into the shoes of HCOB with respect to the loan (NYSCEF 88, ¶ 79). Plaintiff alleges that HCOB wrongly profited from its loan to plaintiff. HCOB’s internal accounting records show that HCOB booked tens of millions of profit in euros in 2018 when it sold LIFE’s assets to Promontoria.

In 2019, defendant Cerberus European initiated a process to sell the portfolio of LIFE insurance policies on Promontoria's behalf (NYSCEF 88, ¶¶ 90-91). LIFE informed HCOB that it was prepared to make a bid for the portfolio (*id.*, ¶ 114). Two days later, HCOB informed LIFE that a different bidder had purchased the portfolio (*id.*). HCOB refused to provide LIFE with any details of the sale, including how much the bidder had paid (*id.*, ¶ 115). It was in the Southern District litigation, referred to above, that LIFE discovered the policies sold for approximately \$31.5 million, an allegedly unreasonably low price (*id.*, ¶ 116). LIFE claims that it would have paid more for the policies had it been allowed to bid.

The complaint states that HCOB, as a secured lender, had an obligation to (i) take reasonable care in preservation of the collateral (UCC 9-207 [a]); (ii) apply monies received from the collateral to reduce the loan balance (UCC 9-207 [c]); and (iii) dispose of the collateral in a commercially reasonable fashion (UCC 9-610) (NYSCEF 88, ¶ 42). LIFE asserts that HCOB failed in all three regards. Plaintiff also claims HCOB took too long to bring the arbitration proceeding against Avon concerning Avon’s account receivables. It did not collect

the arbitration award, it did not conduct the auction of loan in a commercially reasonable fashion, and it failed to apply the award against Avon and the proceeds of the auction to the loan balance.

The complaint alleges causes of action for breach of the duty of commercial reasonableness based on the 2013 disposition of collateral (count I), breach of the duty of commercial reasonableness based on the disposition of the Avon arbitration award (count II), breach of fiduciary duty (count III), breach of contract (count IV), breach of the duty of commercial reasonableness based on HCOB's and/or Promontoria's 2019 auction of the policies (count V), and civil conspiracy (count VI). The last count seeks an accounting (count VII).

Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), (7), and (8). At oral argument on September 12, 2023, the court dismissed the third, sixth, and seventh causes of action, denied dismissal of the first cause of action, and reserved decision on the remainder (Tr at 46, ¶¶ 12-20, 49, 18-20, 49, ¶¶ 23-25, 50, ¶¶ 1-4). In the subsequent written decision, the court denied dismissal of the remainder of the complaint (*Life Ins. Fund Elite, LLC v Hamburg Comm. Bank AG, Cerberus European Capital Advisors, LLP., and Promontoria Holding 260 BV*, 2024 NY Slip Op 30014[U] [Sup Ct, NY County 2024]).

HCOB's and Promontoria's current motion seeks summary judgment dismissing counts one, two, four, and five and the dismissal of Promontoria.

DISCUSSION

The test on a motion for summary judgment is whether the pleadings raise a triable issue of fact (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171 [1973]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Summary judgment should not be granted

where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (*Glick*, 22 NY2d at 441).

COUNT I - 2013 Breach of the Duty of Commercial Reasonableness - HCOB

After taking control of the collateral in 2013, HCOB claimed that it had merged with LIFE, ISM, and the Trust and reported the income from the life insurance policies as part of its “other operating income” (NYSCEF 88, ¶¶ 5, 62-65). HCOB’s financial and regulatory disclosures stated that LIFE, the Trust, and ISM had become fully consolidated subsidiaries of HCOB, that the loan relationship had ended, and that HCOB and LIFE were in a “business combination” brought about by HCOB’s “bail-out purchase” of LIFE (NYSCEF 154, ¶ 28; NYSCEF 88, ¶¶ 7, 47, 130). LIFE contends that, while HCOB was entitled to control the collateral, it was not entitled to make itself owner of the collateral. LIFE claims that this behavior constituted a commercially unreasonable disposition of the collateral.

HCOB argues that count I should be dismissed on the ground of untimeliness. A breach of the duty of commercial unreasonableness is a contract claim (*Beninati v F.D.I.C.*, 55 F Supp 2d 141, 147 [ED NY 1999]). Like contracts, claims of commercial unreasonableness are subject to a six-year statute of limitations (*id.*; see *Life Ins. Fund*, 545 F Supp 3d at 92; *In re Winer*, 39 BR 504, 509 [Bankr SD NY 1984]). A breach of contract claim accrues at the time of the breach, even if the plaintiff does not suffer damages until later and does not know about the breach when it occurs (*Ely–Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403 [1993]; see *ACE Sec. Corp. v DB Structured Products, Inc.*, 25 NY3d 581, 593-594 [2015]).

The statute of limitations on count I accrued in October 2013 when HCOB allegedly took ownership of the collateral. The claim lapsed six years later in 2019. This case commenced on April 4, 2023, more than six years after claim accrual.

Plaintiff argues that defendant should be equitably estopped from asserting the statute of limitations. After HCOB took possession of the collateral it sent LIFE quarterly cash and collateral reports, stating that LIFE owed HCOB the outstanding balance of the loan. Allegedly, these reports indicating that the parties still had a borrower-lender relationship were “fictitious” because said relationship ended when HCOB took ownership of LIFE, the Trust, and ISM (NYSCEF 88, ¶ 46).

HCOB denies that the quarterly cash and collateral reports were false in not revealing that LIFE and its affiliates had become HCOB subsidiaries. HCOB claims that it was not required to report that information in those quarterly reports. Moreover, HCOB reported that information in HCOB’s 2013 Interim Report and 2013 Annual Report, as required under the International Financial Reporting Standards (IFRS) and under the German Generally Accepted Accounting Principles (GAAP) (NYSCEF 97, Holger Claessen tr at 47-48; NYSCEF 96, Alexander Demuth expert report, ¶¶ 3, 13, 60-69). Claessen is HCOB’s senior vice president in charge of collateral.

HCOB asserts that LIFE knew about the disposition of the collateral in 2013 or knew enough to be placed under a duty to investigate the disposition, and that LIFE should have discovered the facts before the statute of limitations ran out. HCOB refers to the post-default 2013 email exchange between Zoran Fotak, LIFE’s owner, and Claessen.

On October 22, 2013, HCOB emailed LIFE, “Since HSH has taken over control of the [Trust], HSH consolidates Life Elite on its balance sheet “(NYSCEF 133). On October 28, LIFE replied,

“There is no bias [*sic*] to consolidate the Fund other than in one situation . . . Where you are the Managing Member and the sole Common Member. You are neither. I am. You've seized the assets/collateral. Not the legal entities. And so you must show the collateral on your books. IFRS is pretty clear on this. Now you may have other reasons you may wish to consolidate the Trust and the assets so we should discuss this. At this stage you should pass on to your auditors that

we do not agree with this financial statement presentation. Substantively they are the same almost. Except that you are ignoring our residual interest in the assets which reverts once your loan is repaid. And we have not consented to the transfer of same to the bank. If you want the residual interest, make us an offer”

(NYSCEF 133, at 6113-6114).

On November 1, 2023, HCOB replied,

“The requirement for consolidation is based on IAS [International Accounting Standards] 27.13(b). Control also exists when the parent owns half or less of the voting power of an entity when there is: (b) power to govern the financial and operating policies of the entity under a statute or an agreement. Since HCOB has full control over the Fund's assets, the power to govern the financial and operating policies of the Fund lies with HSH. We are not ignoring your residual interest [in LIFE]. You still have the voting rights, but the control over the assets, and consequently the control over the Fund (in the sense of IAS 27.13[b]) has been withdrawn from you”

(NYSCEF 133 at 6110-6111).

LIFE emailed,

“There is no basis to consolidate the legal entities. . . You do not control ISM or the Fund. You are in possession of the policies via the trust. The trust is not a reporting entity ... Just the legal holder as custodian of the assets ... And you are now the sole beneficial owner of the assets. You control all the bank accounts”

(NYSCEF 133 at 6108).

Fotak states that HCOB’s balance sheet concerned “a potential accounting consolidation” that did not alert him to the fact that HCOB took ownership of the LIFE group (NYSCEF 154, ¶ 28). Claessen’s statement that HCOB was not ignoring LIFE’s residual interest “assured” Fotak that HCOB was not asserting ownership over the LIFE group (*id.*, ¶ 30). Fotak now says that Claessen’s statement was a misrepresentation because HCOB did take ownership of the LIFE group. The misrepresentation was repeated quarterly for six years in the cash and collateral statements, falsely indicating that the parties continued to have a borrower-lender relationship (*id.*, ¶ 27).

To equitably estop a defendant from using the statute of limitations as a defense, a plaintiff must establish that it did not file its claim before the statute of limitations lapsed because it was prevented from doing so by defendant's fraud, misrepresentation, or deception, and that plaintiff reasonably relied on defendant's misleading and wrongful actions (*In re State St. Assocs., L.P.*, 323 BR 544, 556 [Bankr ND NY 2005]; *Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]). The plaintiff seeking estoppel must establish that the defendant took specific and affirmative steps after the accrual of the claim to prevent plaintiff from timely bringing suit (*Putter*, 7 NY3d at 552; *Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). It is not enough that a defendant failed to disclose the basis for potential claims (*Twersky v Yeshiva Univ.*, 993 F Supp 2d 429, 442 [SD NY 2014]).

"Furthermore, plaintiffs must demonstrate their due diligence in ascertaining the facts and in commencing the action in order to seek" equitable estoppel (*MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept 2017]). Plaintiff must also act with due diligence in bringing the claim once the conduct relied upon as the basis for equitable estoppel ceases (*Putter*, 7 NY3d at 553) or within a reasonable time after learning about the wrongful conduct (*Dowe v Leeds Brown L., P.C.*, 419 F Supp 3d 748, 762 [SD NY 2019], *aff'd* 2023 WL 3986373 [2d Cir 2023]).

Fotak knew that HCOB was contemplating "a potential accounting consolidation" (NYSCEF 154, ¶ 28). That knowledge put him under a duty to find out more about HCOB's treatment of the collateral. The emails show that HCOB informed LIFE that it consolidated or planned to consolidate HCOB with the LIFE group. The emails also show that Fotak was afraid that LIFE would lose its right to any surplus that remained after defendant disposed of the collateral. Thus, LIFE had good reason to make further inquiry about HCOB's treatment of the

collateral. LIFE says that it did not investigate because the quarterly cash and collateral statements gave the impression that LIFE and HSH were in the same position as before the default. But the fact that the quarterly statements seemed to contradict Claessen's email communication about a consolidation of the collateral should have made Fotak investigate the actual disposition of the collateral.

Equitable estoppel does not apply where a plaintiff possesses "timely knowledge sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations" (*Gleason v Spota*, 194 AD2d 764, 765 [2d Dept 1993] [internal citation and quotation marks omitted]; see *Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008]). Plaintiff had this knowledge and failed to act with due diligence to find out more. In addition, plaintiff does not allege any specific and affirmative actions directed at preventing it from bringing suit.

To the extent that LIFE alleges that defendants concealed their disposition of the collateral, equitable estoppel will not apply unless plaintiff can "demonstrate a fiduciary relationship which gave the defendant an obligation to inform him or her of facts underlying the claim" (*Zumpano*, 6 NY3d at 666). The claim for breach of fiduciary duty was dismissed in the previous decision (*LIFE*, 2024 NY Slip Op 30014[U], *8).

On a summary judgment motion, statements made by the party opposing the motion are accepted as true (*Jiminez v Cummings*, 226 AD2d 112, 113 [1st Dept 1996]). Therefore, even assuming that LIFE is correct that the quarterly reports misrepresented HCOB's treatment of the collateral, the first cause of action is dismissed.

**COUNT II – Breach of the Duty of Commercial Reasonableness,
Avon Arbitration Award – HCOB**

Plaintiff claims that HCOB behaved in a commercially unreasonable fashion by failing to attempt to collect the judgment against Avon. HCOB contends that it acted in a commercially reasonable manner by not trying to recover an unrecoverable asset.

In the accounts receivables context, the commercial reasonableness standard is applicable only where the creditor has possession and control over the accounts receivable, where the creditor has taken "action that removes the debtor's ability or wherewithal to make its own collection efforts" (*Federal Deposit Inc. Corp. v Wrapwell Corp.*, 2002 WL 14365, *3, 2002 U.S. Dist. LEXIS 76, *9 [SD NY 2002]; *quoted in Wells Fargo Bank, N.A. v Bivona & Cohen, P.C.*, 2015 WL 5752595, *13, 2015 US Dist LEXIS 133468, *36-37 [SD NY 2015]; *Daiwa Special Asset Corp. v Desnick*, 2002 WL 1997922, *19, 2002 US Dist LEXIS 16164, *59 [SD NY 2002]). Both sides acknowledge that HCOB had possession and control of the collateral.

A creditor is not obligated to take any step "with regard to collateral that has no realizable value" (*Warnaco, Inc. v Farkas*, 872 F2d 539, 545 [2d Cir 1989]). The *Warnaco* decision is about the Connecticut UCC laws that are substantially similar to New York's UCC laws (*KLS Diversified Master Fund, L.P. v McDevitt*, 532 F Supp 3d 126, 134 [SD NY 2021], *aff'd* 2022 WL 2759055 [2d Cir 2022]). HCOB cites *Warnaco* and *In re Emergency Beacon Corp.* (48 BR 341, 349 [Bankr SD NY 1985]) to support its argument that it had no duty to attempt to collect the Avon judgment, because no recovery was possible.

In *Warnaco*, the Court decided that the amount the debtor owed was uncertain because the value of the collateral was in dispute. The Court denied summary judgment and remanded the case for a hearing to determine the value of the collateral (*Warnaco*, 872 F2d at 545). In the other case, *Emergency Beacon*, the Court found that the secured creditor had obtained "distressed accounts receivable" of disputed value and that "[T]he worthless state of this

security” was evident in that the secured creditor’s expenses in reducing the receivables to cash exceeded the collected amount (*Emergency*, 48 BR at 349). In *Emergency Beacon*, the secured creditor proved that the collateral had no value. HCOB’s situation differs from the creditors in the cases it cites. Here, HCOB has not made any attempts to collect and did not investigate the value of the collateral.

At Avon’s deposition, its representative testified that Avon had no assets by September 2016 and that a creditor had been unable to collect any portion of a \$6.7 million judgment against Avon despite ten years of trying (NYSCEF 110, Avon deposition tr at 18, 25-26). Avon did not conduct any business in 2015. As of September 2016, it had no employees and no bank accounts (*id.* at 29).

This is the only evidence HCOB produces to show that there was no point in trying to collect on the arbitration award because Avon had no assets. The unsupported testimony of the representative is not enough to eliminate all factual questions as to whether Avon had assets or not. Avon’s representative also testified that neither the Trust, nor HCOB, had been in touch with him about collecting the award (NYSCEF 186, tr at 67-68).

Commercial reasonableness “hing[es] on the totality of the circumstances, including the good faith efforts of the creditor” (*Wrapwell Corp.*, 2002 WL 14365, *9, 2002 US Dist LEXIS 76, *28). HCOB’s evidence does not demonstrate a good faith attempt to dispose of the receivables to plaintiff’s as well as HCOB’s benefit. HCOB does not show that its failure to apply the award to the loan was commercially reasonable (*see Life*, 2024 NY Slip Op 30014[U], * 5). As the court stated in the earlier decision, whether a disposition of collateral is commercially reasonable is generally a factual issue (*id.* at *9). Plaintiff also alleges that HCOB failed to act in a commercially reasonable manner by failing to seek pre-judgment security

against Avon and waiting until April 2014 to commence an arbitration against Avon. Plaintiff claims that HCOB should have realized that the delay could jeopardize the value of the claim. These allegations involve issues of fact. Therefore, summary judgment on count II is denied.

COUNT IV - 2019 Breach of Contract - HCOB

Count IV is not dismissed as explained in this section. Plaintiff alleges that HCOB breached the loan agreement when it sold the loan to Promontoria in 2018, because the latter was not a “Qualified Purchasing Lender” as defined in the agreement (NYSCEF 92, ¶ 11.14 [a]). Defendants argue that plaintiff cannot sue for breach of the loan agreement, because plaintiff breached first by defaulting on the loan in 2013.

A material breach of contract excuses the performance of the nonbreaching party (*Apple Mortg. Corp. v Barenblatt*, 162 F Supp 3d 270, 288 [SD NY 2016]; *NAS Elecs., Inc. v Transtech Elecs. PTE Ltd.*, 262 F Supp 2d 134, 145 [SD NY 2003]). Generally, the party in default cannot sue for breach even if the other party subsequently breaches the contract, since a party cannot benefit from its own breach (*Guardian Music Corp. v. James W. Guercio Enters., Inc.*, 459 F Supp 2d 216, 223 [SD NY 2006], *affd* 271 Fed Appx 119 [2d Cir 2008]; *ASKL Enters., Inc. v NYNEX Long Distance Co.*, 7 AD3d 424, 425 [1st Dept 2004]).

A material breach is “so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract” (*Smolev v Carole Hochman Design Grp., Inc.*, 79 AD3d 540, 541 [1st Dept 2010] [internal citation and quotation marks omitted]). A failure to tender payment can be a material breach (*PDL Biopharma, Inc. v Wohlstadter*, 2016 WL 4063063, *7, 2016 NY Misc LEXIS 6394, *18 [Sup Ct, NY County 2016], *affd as mod* 147 AD3d 494 [1st Dept 2017], citing *Jafari v Wally Findlay Galleries*, 741 F Supp 64, 67 [SD NY 1990]; see *Wechsler v Hunt Health Sys., Ltd.*, 330 F Supp 2d 383, 417 [SD NY 2004]).

Nonetheless, even if LIFE's default was material, it cannot be said as a matter of law that LIFE's default excused HCOB's sale of the loan to an allegedly unqualified buyer. According to Fotak, the requirement that only a qualified purchasing lender could buy the loan was intended to protect LIFE's interests, particularly in the event of a default, by ensuring that any creditor in possession of LIFE's assets was itself creditworthy (NYSCEF 154, ¶ 35). Defendants have not eliminated all issues of fact as to whether LSA section 11.14 survives plaintiff's default.

HCOB next argues that transferring the loan to Promontoria did not breach the loan agreement, because the loan was not sold. It claims that HCOB remained the legal owner of the loan while assigning Promontoria the economic interest or the commercial title in the loan. The court's earlier decision found that the relevant evidence pointed in both directions. Thus, the court determined, there was a question of fact whether the transfer to Promontoria of the collateral/loan was a transfer of only commercial title, or, whether that transfer was, in fact, a sale of all rights associated with the collateral (*Life*, 2024 NY Slip Op 30014[U], *6).

On this motion, HCOB's evidence that it only transferred commercial title is the deposition testimony of HCOB and Promontoria. HCOB does not adequately address the evidence discussed in the previous decision. Thus, it fails to eliminate issues of fact on this question. For these reasons, the court denies summary judgment dismissing the fourth cause of action.

**COUNT V – Breach of Duty of Commercial Reasonableness in 2019 –
HCOB and Promontoria**

Defendant Cerberus European retained Houlihan Lokey, Inc. (Houlihan), an investment bank, to launch sales and marketing for the 54 remaining life insurance policies in the portfolio, that according to LIFE, had a net death benefit of about \$119 million (NYSCEF 88, ¶ 91). The policies sold for approximately \$31.5 million (*id.*, ¶ 116). Plaintiff claims that the portfolio sold

for less than fair value due to HCOB's failure to update life expectancy data, reinstate lapsed policies, and allow Fotak to bid. Plaintiff alleges that it would have outbid the market.

A disposition is commercially reasonable if it is made: "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (UCC 9-627 [b]; *CCO Condo Portfolio (AZ) Junior Mezzanine, LLC v. Feldman*, 717 F Supp 3d 331, 341 [SD NY 2024]). "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable" (UCC 9-610 [b]; *Life Insurance Fund Elite LLC v. Hamburg Commercial Bank AG*, 545 F Supp 3d 86, 91 [SD NY 2021]). The disposition of the debtor's collateral should be viewed according to the "aggregate of circumstances in each case" and the "manner, method, time, place and terms are to be viewed as necessary and interrelated parts of the whole transaction" (*In re Zsa Zsa Ltd.*, 352 F Supp 665, 670 [SD NY 1972], *affd* 475 F2d 1393 [2d Cir 1973]). Where the plaintiff claims that the sale proceeds are evidence of commercial unreasonableness, a low price by itself does not establish a violation of code requirements, but it does suggest that the court should carefully review all aspects of the disposition (Official Comment 2 to UCC § 9-627; *Coxall v Clover Com. Corp.*, 4 Misc 3d 654, 662 [Civ Ct, Kings County 2004]).

Commonly employed business practices may be used as a guide to what is commercially reasonable (*Bankers Tr. Co. v Dowler & Co.*, 47 NY2d 128, 134 [1979]). The "procedures employed," i.e., the method used to invite bids to optimize auction price, may be used as a "barometer for measuring commercial reasonableness." (*Dougherty v 425 Dev. Assocs.*, 93 AD2d 438, 447 [1st Dept 1983]).

For the reasons discussed below, defendants establish their prima facie entitlement to summary judgment dismissing Count V.

HCOB refers to the deposition testimony of Houlihan, the handler of the auction. Houlihan testified that it marketed the policies to serious life settlement investors (NYSCEF 130 at 90-91). Houlihan then followed its standard two-round process for selling life settlement portfolios, concluding with a sale at a price higher than any of the second-round bids (*id.* at 85-86, 166-167).

Corwin Zass, HCOB's expert, opines on the fair market value of the 54 policies in the LIFE portfolio and on the auction process and sale (NYSCEF 130, ¶¶ 5, 6). Zass concluded that the fair market value of the policies was between \$29.65 million and \$34.76 million from May 31 through September 30, 2019 (*id.*, ¶ 20).

Zass also reviewed Houlihan's management of the sales process, including the bidding and the information provided to bidders (*id.*, ¶ 25). "I am familiar with Houlihan and its auction process for selling portfolios of life settlements" (*id.*, ¶ 26). Based on his experience in the life settlements market, Zass states, "Houlihan acts in a very professional manner in its pursuit of sophisticated bidders for life insurance portfolios" (*id.*, ¶ 26). The bidders on LIFE's portfolio were "substantially more sophisticated than the average one-off purchaser of small lots of policies. The final group of bidders, for example, were, at the time of the sale, all large holders of life settlements portfolios" (*id.*). The Houlihan auction materials used by the bidders were "more than adequate to solicit interest in the LIFE Portfolio" (*id.*, ¶ 27). The final \$30.70 million final purchase price is consistent with Zass's independent \$29.65 million to \$34.76 million valuation of the portfolio (*id.*, ¶ 28). Zass further notes that HCOB engaged in efforts to update

the medical records and life expectancy reports available to the bidders, helping to ensure that bidders had the most recent information (*id.*, ¶ 27).

Plaintiff does not raise an issue of fact with respect to Houlihan's methods for informing and obtaining bidders or its marketing or to the auction process. Plaintiff asserts that defendants "unreasonably excluded Mr. Fotak from bidding on the policies," but defendants were not required to include him or plaintiff in the bidding process. Moreover, even if the court credits plaintiff's contention that it was not given notice and an opportunity to bid, this fact alone does not render the sale unreasonable or raise a triable issue of fact where there otherwise is none.

In addition, plaintiff fails to raise a triable issue of fact as to whether defendants so undervalued the policy portfolios that the sale was commercially unreasonable. Although plaintiff's expert's report uses a different methodology and discount rate for the active and lapsed policies, and opines that the portfolio's value could have been \$42.25 million (NYSCEF 151, 159 [Justin McClean report and rebuttal report]), McClean does not address the portfolio's fair market value when the portfolio was marketed and sold in 2019 (*id.*). McClean states that the sale was commercially unreasonable for the following reasons:

"Inconsistent with maximizing proceeds to the Trust, I understand that a bid was not solicited from Mr. Fotak, a potential buyer that may have been willing to pay more than other potential buyers. In addition, to the extent that policies with stale life expectancy data were sold, proceeds to the Trust would likely have been maximized by continuing to hold these policies, rather than selling them. These actions, or lack of actions, taken individually and collectively, were not commercially reasonable"

(Doc 151, para 56).

In his rebuttal report, McClean states that "assets may be incorrectly undervalued by an uninformed potential buyer," i.e., a buyer other than Fotek and plaintiff (Doc 159, para 19). This does not raise a triable issue of material fact. Indeed, LIFE waived the right to

notification in the 2013 Agreement, section 2.1 [b] [“Borrower and Guarantor hereby waive all of their respective rights to notification or otherwise (i) under Section 9-611 of the UCC as to the sale or other disposition by Collateral Agent of the Collateral, including any such sale or other disposition under Section 9-610 of the UCC.”]).

Likewise, McClean’s conclusion that HCOB should have held the policies through maturity to maximize the portfolio’s value does not render the sale commercially unreasonable. McClean states that “proceeds to the Trust would likely have been maximized by continuing to hold policies with stale life expectancy data, as had been done for the previous six years, rather than selling them” (*id.*, para 64).

However, plaintiff does raise an issue of fact as to whether the sale was commercially unreasonable because HCOB failed to update life expectancy data for some policies. Plaintiff’s expert states “to the extent that policies were sold without life expectancy data from two issuers issued within the last 12-18 months, this was not commercially reasonable” (*id.*).

When HCOB took control of the collateral in 2013, a number of policies were lapsed, but capable of being reinstated. As of December 6, 2013, HCOB had reinstated five policies. HCOB asserts that almost all of the 79 lapsed policies lapsed under LIFE’s control, before HCOB took possession of the portfolio on February 1, 2013. HCOB had every incentive to increase the value of the portfolio in order to recover as much of the funds owed to it as possible. Only five policies lapsed in early February in the wake of HCOB gaining control of the collateral. HCOB stabilized the collateral as early as February 10, 2013, after which no more policies lapsed. By early May 2013, HCOB had made significant progress in understanding the LIFE portfolio and making decisions about reinstatement, including determining that some policies were not worth reinstating from a value perspective. From February through April of

2013, continuing into 2014, the Bank worked expeditiously and prudently to reinstate the policies where it made economic sense. HCOB stresses that reinstatement is a difficult time-consuming process. HCOB would need to locate each insured, obtain their consent, and uncover the information requested by each carrier.

It seems that HCOB decided that most of the lapsed policies were not worth reinstating. However, whether HCOB acted in commercially reasonable manner with respect to the life expectancy data in 2019 remains an issue of fact. Specifically, LIFE contends that HCOB's sale of policies with stale life-expectancy data was commercially unreasonable (McClellan ¶¶ 62-64). Houlihan warned HCOB that buyers would assume a worst-case mortality scenario in regard to a portfolio without two life-expectancy estimates from within the previous year and that buyers might assume that inadequate life expectancy data signaled uncooperative insureds (NYSCEF 151, ¶¶ 62-64).

HCOB's expert states that HCOB took commercially reasonable actions to refresh the portfolio life expectancies prior to the sale. To reach the conclusion that HCOB provided outdated life expectancy data to potential bidders, LIFE's expert relies on data from July 2019, before any bids were solicited from potential purchasers and before HCOB completed refreshing life expectancy data. HCOB claims that, from March 2019 through October of 2019, it ordered updated life expectancy reports. By July 15, 2019, 37 of the 54 policies, representing 74.6% of the net death benefits, had a life expectancy within six months. This highly recent data for most of the policies would be attractive for potential bidders. By the sale date in October 2019, only 10 of 54 policies were missing two life expectancies within the prior 18 months, which is an 81.5% success rate (NYSCEF 111, Paul Noring report, ¶¶ 80-90).

The court concludes that HCOB fails to eliminate an issue of fact whether the life expectancy data of policies offered at the auction was outdated. HCOB does not present sufficient evidence to define the parameters of commercial reasonableness of updating life expectancies. The expert does not allege that HCOB acted within industry standards (*see MBI Ins. Corp. v Patriarch Partners VIII, LLC*, 950 F Supp 2d 568, 617 [SD NY 2013]). To establish standards, he cites to Houlihan and another company HCOB hired, named Maple, rather than companies unrelated to this transaction. Because “the experts’ dispute raises a material issue of fact for trial” on this narrow issue [allegedly stale life expectancy data], the court denies summary judgment dismissing that part of Count V (*Lehman Bros. Intl. (Europe) v AG Fin. Products, Inc.*, 60 Misc 3d 1214(A) [Sup Ct 2018]).

VI. Whether Promontoria should be Dismissed from this action

The fifth cause of action [as limited above], based on commercial unreasonableness in the 2019 sale of the collateral, is the only claim left involving Promontoria. Defendants seek the dismissal of Promontoria on the ground that it was not involved in the 2019 auction. In February 2018, HCOB sold the LIFE loan to Promontoria (NYSCEF 23, 116, LSPA). According to the contract, Promontoria would pay the purchase price to HCOB and then Promontoria and HCOB would enter into a sub-participation agreement (*id.* at 4533, § 4.7[a][i]-[ii]). In November 2018, Promontoria, another Cerberus Capital controlled entity, Promontoria North, and HCOB became sub-participants in the loan (NYSCEF 117, Master Fund Sub-participation and Trust Agreement [MFSPA]; NYSCEF 88, ¶ 80). On the same day, Promontoria assigned its interests to Promontoria North via an amendment to the LSPA (NYSCEF 118 at 10072). The amendment states that Promontoria and HCOB shall be released from further obligations towards one

another, “it being understood that [Promontoria] shall continue to be liable for the full Purchase Price” (*id.* at 1071).

Defendants claim that, after Promontoria assigned its interest to Promontoria North in 2018, the former had no more interest in the loan and the collateral. Whether this was the case is not clear, because Promontoria retained the obligation to pay for the collateral. Therefore, the court declines to dismiss Promontoria from this action.


VII. Conclusion

The court has considered the parties’ remaining contentions and finds them unavailing. Accordingly, it is

ORDERED that the court grants in part the motion for summary judgment and dismisses count I and part of count V [as set forth in this decision and order]. The remainder of the motion is denied;

ORDERED THAT the parties are to appear for a pre trial conference on August 26, 2025, at 11:00 am over Microsoft teams.

7/29/2025
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input 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