

To Be Argued By:

Mark G. Hanchet

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New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT



OFSI FUND II, LLC, ORCHARD FIRST SOURCE ASSET
MANAGEMENT, LLC and ORCHARD FIRST SOURCE CAPITAL, INC.,
Plaintiffs-Appellants,
against

CANADIAN IMPERIAL BANK OF COMMERCE, Individually, as Administrative
Agent and as Collateral Agent, CIBC, INC., BEAR STEARNS
INVESTMENT PRODUCTS, INC., BEAR, STEARNS & CO., INC.,
JP MORGAN CHASE & CO., BAYSIDE CAPITAL, INC.
a/k/a BAYSIDE CAPITAL, LLC, BAYSIDE RECOVERY 2004, INC.,
BAYSIDE RECOVERY 2004-B, INC., BAYSIDE RECOVERY 2004-C, INC.
and BAYSIDE RECOVERY I, INC.,
Defendants-Respondents.

**BRIEF FOR DEFENDANTS-RESPONDENTS
CANADIAN IMPERIAL BANK OF COMMERCE
AND CIBC, INC.**

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QUESTIONS PRESENTED

1. Did the trial court err in concluding that the Agreements are unambiguous and its interpretation of them? *Answer below: No.*
2. Can evidence outside the four corners of a contract create an ambiguity in or be used to interpret an otherwise unambiguous contract? *Answer below: No.*
3. On a C.P.L.R. 3211(a)(1) motion, does a defendant bear the burden of proving that it complied with contract provisions that plaintiffs do not allege were breached? *Answer below: No.*
4. Do allegations that a contract party negligently or willfully breached a contract state a claim in tort? *Answer below: No.*
5. Does Delaware law allow a creditor to bring a direct claim against a corporate director for breach of fiduciary duty? *Answer below: No.*
6. Would amendment of the pleadings to add individual directors as defendants cure the defect identified in Question 5 above? *Answer below: No.*

PRELIMINARY STATEMENT

This case arises out of a secured lending transaction. According to the Amended Complaint, the defendants, representing over 87% of the debt, consented to the borrower's plan to liquidate its assets and transfer the proceeds to the lenders. The plaintiff, holding less than 10% claims that CIBC, as Agent for the lenders, improperly released the lien on those assets, even though they concede, as they must, that CIBC, like all lenders, received precisely its pro rata share of the sale proceeds.

In granting CIBC's motion to dismiss all claims against it, the trial court found, after extensive briefing and a hearing that went on for well over two hours, that the agreements provide (1) that a simple majority of lenders can approve a sale of assets and (2) that when the borrower seeks to sell assets and immediately hand the proceeds over to the lenders, no further lender consent is necessary to release the lien. Plaintiffs' opposing argument utterly ignores a key exception to an otherwise unanimous-consent provision. And more broadly, plaintiffs criticize the court below, because CIBC's motion supposedly did not address the various new factual allegations and legal theories raised for the first time in a reargument motion and on appeal. The appeal has no merit and the lower court's rulings all should be confirmed.

STATEMENT OF THE CASE

Factual Background¹

This case arises out of a minority lender's attempt to garner preferential terms in a corporate reorganization. Each of the parties was a secured lender to Protocol Services Inc. ("Protocol" or "Borrower"). Prior to the sale that is the subject of this action, the defendants—CIBC, Bear Stearns, and Bayside—collectively held just over 87% of the debt and 47.3% of Protocol's equity. R-137 ¶ 30. CIBC held over 30% of the debt. *Id.* Plaintiffs ("Orchard"²) held only 9.33% of the debt and 5.41% of the equity. R-138 ¶ 32.

Each of the parties was party to a Credit Agreement and a Subordinated Note Agreement (the "Agreements"³) that governed the relationship between the Borrower and the lenders. R-321-27, R-448-53. CIBC⁴ served as Administrative Agent and Collateral Agent (collectively, "Agent") under both Agreements. R-168, 328. The Agreements contain detailed provisions authorizing the Agent to act on behalf of all lenders. *E.g.*, R-301. Section 10.6, in addition allows a simple

¹ The factual background is derived from the Amended Complaint (R-131-61) and the operative documents presented to the Supreme Court (R-168-453). CIBC disputes many of the allegations contained in the Amended Complaint, but they are accepted as true for the purposes of plaintiffs' appeal.

² One of the plaintiffs is sometimes referred to in other papers as "OFS" or "OFSI."

³ The two Agreements are parallel for relevant purposes. For simplicity, we quote the Credit Agreement, but unless otherwise noted "Section" references apply to both Agreements.

⁴ Defendants Canadian Imperial Bank of Commerce, which served as Agent, and CIBC Inc., which was a lender to Protocol, are referred to collectively as "CIBC."

majority of lenders (defined as the “Requisite Lenders” (R-204)) to amend, modify, or waive any provision of the Agreements or the “Notes,”⁵ except for certain specific provisions enumerated in subsections (a) and (b) of Section 10.6. R-310-11.

As Protocol’s condition deteriorated, the defendant lenders worked together with Protocol to salvage value from the company and preserve it as a going concern. R-143-44 ¶¶ 53-57. The Agreements permit a simple majority of lenders to approve a sale of Protocol’s assets, as long as the sale proceeds are distributed to the lenders. Ultimately, a sale of Protocol’s assets was approved. R-140-41 ¶¶ 43-44. In connection with this sale, plaintiffs allege that the Consent Regarding Asset Sale, dated March 13, 2008, was executed by the Requisite Lenders. R-153 ¶ 103. Also, as provided by Section 10.14 of the Agreements, CIBC, as Agent, released the lien on Protocol’s assets. R-150 ¶ 87. From the purchase price, “approximately \$32.1 million was used to pay down a portion of the outstanding senior debt.” R-151 ¶ 91. “The purchase price was insufficient to pay all senior debt [under the Credit Agreement] in full or to make any payments in respect of the subordinated debt [under the Subordinated Note Agreement].” *Id.* ¶ 89. Each lender, including Orchard, received its pro rata share of the sales proceeds. CIBC received “approximately \$9 million on its senior debt.” *Id.* ¶ 91.

⁵ Section 10.6 of the Note Agreement refers to amendments, modifications, and waivers of “Subordinated Notes,” whereas Section 10.6 of the Credit agreement refers to “Notes.”

As a percentage of the purchase price, that figure corresponds to CIBC's 30.158% share of the senior debt. R-137 ¶ 30.⁶ In other words, CIBC, like each of the other lenders, including Orchard, received exactly its pro rata share of the "insufficient" sale proceeds.

The Causes of Action in the Amended Complaint

Plaintiffs' first cause of action alleged that CIBC breached Section 10.6 of the Agreements by releasing the lien without unanimous lender consent. R-154-55 ¶¶ 106-115. Since filing their Amended Complaint, plaintiffs have improperly tried to advance other breach of contract theories, but the Amended Complaint identified just a single theory of breach. *See* R-140 ¶ 43 ("in derogation of Section 10.6"), R-149 ¶ 84 ("in direct contravention of CIBC's obligations under Section 10.6"), R-150 ¶ 88 ("This violated the express provisions of Section 10.6"), R-154 ¶¶ 109, 110 ("Section 10.6 of the [Agreements] specifically prohibits CIBC" from releasing liens without unanimous consent); *id.* ¶ 112 ("Section 10.6 of the Credit Agreement and Section 10.6 of the Subordinated Note Agreement precluded the Agent from thereafter releasing the Collateral").

Plaintiffs' second count, for "Gross Negligence/Willful Misconduct" (R-155-56 ¶¶ 116-122), alleged that CIBC's breach of Section 10.6 was, alternatively, negligent or willful.

⁶ The rounded numbers in the Amended Complaint work out to slightly less: \$9 million is only 28% of \$32.1 million.

Their third count for breach of fiduciary duty (R-156-58 ¶¶ 123-135) asserted that the CIBC appointed director to the Protocol board “advance[d] the interests of Bayside over other creditors” (presumably including CIBC itself). R-157 ¶ 128. This count also relied on the idea that CIBC itself somehow incurred a fiduciary duty to Protocol’s creditors by appointing a director. R-156 ¶ 124. For the first time, on appeal, plaintiffs argue that the claim was based on their status as a small shareholder. Yet the only stakeholders that plaintiffs mention in the Amended Complaint are Protocol’s “creditors” (R-157-58 ¶¶ 124, 126, 127, 128, 134), the only harm is Protocol’s inability to repay its “outstanding indebtedness” (*id.* ¶¶ 128, 129, 130, 131), and the only damages are “the unpaid portion of its senior debt” and “the unpaid portion of its subordinated debt.” R-158 ¶ 133.

The remaining counts were not asserted against CIBC.

Proceedings Below

The Motions to Dismiss

CIBC moved to dismiss under C.P.L.R. 3211(a)(1) and (a)(7), arguing that (1) Section 10.6 did not apply to the lien release here, which was expressly permitted by Section 10.14, (2) the negligence and “willful misconduct” claim merely restates the breach of contract, and (3) under Delaware law, corporate directors do not have fiduciary duties to creditors. Plaintiffs cross-moved to amend the Amended Complaint. SR-122-142. In a ruling dated September 22, 2009,

Justice Ramos granted CIBC's motion, finding, among other things, that the Agreements unambiguously permitted the lien release, and denied plaintiffs' cross-motion to amend the Amended Complaint to add a claim for breach of fiduciary duty against certain defendants. R-19-21, 26-27. He also granted a motion by Bear Stearns to dismiss all claims against it and granted in part Bayside's motion to dismiss, leaving intact only a claim for fraudulent conveyance and a claim for unjust enrichment. R-22-26.

The Motion for Reargument, Renewal, and Sanctions

The motion to dismiss was argued on June 4, 2009. R-951-1074. At the conclusion of the hearing, the court authorized discovery by plaintiffs to proceed, and plaintiffs served discovery requests on, inter alia, CIBC. R-1049-50. CIBC produced documents on a rolling basis, making its first two productions on August 28 and September 24, 2009. Supposedly based on those documents, on November 30, 2009, plaintiffs moved for reargument, renewal, and sanctions.

Plaintiffs' motion for reargument largely repeated their opposition to CIBC's motion to dismiss and was summarily denied. R-68. The motion for renewal that plaintiffs noticed and the parties briefed was based on the argument that certain emails that CIBC produced in discovery created an "ambiguity" in the Agreements. SR-263-93. At oral argument before Justice Ramos on March 23, 2010 (R-65-86), however, plaintiffs argued a completely different theory, one that

they had never raised on their original motion to dismiss nor in their renewal papers: namely that CIBC's motion to dismiss had been defective because it had not attached certain documents (lender consent forms and officer's certificates by the Borrower). R-68-82. As the court noted, that was no basis for a motion for renewal, because "[i]f they haven't submitted the officer's certificate at this point, they certainly didn't do it back when the motion was" filed; "What's new is not what you didn't argu[e] before, what's new is that something you didn't know before and you have a good reason for not knowing it." R-69. The court also realized that this new argument had not even been mentioned in plaintiffs' written renewal motion papers, and denied the motion. R-84.

Plaintiffs' motion for sanctions was based on the idea that CIBC had "misled" the court by failing to submit the supposedly unhelpful parol evidence with its motion to dismiss—that is, before plaintiffs even served document requests. R-943. Plaintiffs also argued that because they were right about the meaning of the Agreements and CIBC was wrong, CIBC's counsel had not been "truthful and honest in their representations to the Court" by advancing the interpretation that the court adopted. R-948. That motion was denied, too, and Justice Ramos warned that "you're lucky I'm not granting sanctions against the plaintiff." R-84.

Plaintiffs now appeal from: the Decision and Order granting CIBC's motion to dismiss, the Judgment dismissing CIBC from the case, and two Orders and a So

Ordered Transcript denying plaintiffs’ motion for reargument, renewal, and sanctions (though plaintiffs do not appeal the denial of reargument or sanctions). All should be affirmed.

SUMMARY OF ARGUMENT

On appeal, plaintiffs advance arguments that they never pleaded or raised below. This Court should not consider those arguments. In particular, it should not consider theories of liability that CIBC could have refuted in its moving papers had it received notice of them.

Justice Ramos interpreted the Agreements correctly. The unanimous consent requirement of Section 10.6, on which plaintiffs rely, is limited on its face to lien releases that are not provided for elsewhere in the contracts—that is, lien releases that require lenders to waive contract terms. Lien releases in furtherance of sales of assets are expressly permitted by Section 10.14, rendering the unanimous-consent requirement inapplicable. These provisions are not ambiguous and plaintiffs’ legally irrelevant parol evidence should be disregarded.

The negligence and “willful misconduct” claims literally restate the contract claim. If CIBC did not breach the contract, these claims fail on their own terms. Even if CIBC did breach the contract, these claims do not even hint at any duty based in tort.

The fiduciary-duty claim is governed by Delaware law, which does not recognize fiduciary duties for the benefit of creditors like Orchard.

ARGUMENT

I. Plaintiffs Now Rely Heavily on Theories of Liability That They Waived Below.

A large portion of plaintiffs' brief consists of arguments that were never raised in opposition to CIBC's motion to dismiss. Some are raised for the first time on appeal, and others Justice Ramos properly found were waived below because plaintiffs improperly raised them for the first time at the hearing on their motion for reargument and renewal. Like Justice Ramos, this Court need not address them.

Several principles of waiver apply here. First, a party may not "advance for the first time on appeal a theory not presented to the motion court." *Ta-Chatoni v. Doubleclick, Inc.*, 276 A.D.2d 313, 313 (1st Dep't 2000); *see also, e.g., Tortorello v. Carlin*, 260 A.D.2d 201, 205 (1st Dep't 1999) ("Absent any submission by plaintiff in opposition to the motion to dismiss the complaint, there is no theory of recovery before this Court for review").

Had the Amended Complaint alleged that the officer's certificates or consents did not exist, CIBC could have included those documents with its motion; those documents are precisely the sort of "documentary evidence" that establishes a defense, as C.P.L.R. 3211(a)(1) contemplates. This Court previously has held that

“where an issue might have been obviated by the submission of documentary evidence, it may not be raised for the first time on appeal.” *Ta-Chatoni*, 276 A.D.2d at 313; *see also Vogel v. Blade Contracting, Inc.*, 293 A.D.2d 376, 376 (1st Dep’t 2002) (argument waived because “the issue could have been obviated by a supplemental submission by [opposing party] in the motion court”); *Ciensi v. Town of Aurora*, 202 A.D.2d 984, 985 (4th Dep’t 1994) (“It is well settled that [a]n appellate court should not, and will not, consider different theories or new questions if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance.”) (internal quotation marks omitted) (alteration in original).

Second, if a non-moving party has facts or arguments in opposition to a motion, the time to raise them is in opposition to the motion, not on reargument or appeal. *Cf. Cadlerock Joint Venture, L.P. v. Remillard*, 56 A.D.3d 1095, 1096 (1st Dep’t 2008) (“New York law precludes the granting of summary judgment on a ground other than that raised by a moving party in its motion”). A motion for renewal must “contain reasonable justification for the failure to present such facts on the prior motion” (C.P.L.R. 2221(e)(3)), and a motion for reargument “shall not include any matters of fact not offered on the prior motion” (C.P.L.R. 2221(d)(2)). As Justice Ramos observed, “you don’t get another bite at the apple every time you come up with a new theory.” R-79.

Third, plaintiffs cannot rely on theories of liability that they never pleaded. *See Hassan v. Bellmarc Prop. Mgmt. Servs., Inc.*, 12 A.D.3d 197, 198 (1st Dep’t 2004) (“The theory of liability . . . was never advanced in the complaint, and thus should not have been upheld on defendants’ motion for summary judgment.”); *Araujo v. Brooklyn Martial Arts Acad.*, 304 A.D.2d 779, 780 (2d Dep’t 2003) (reversing because “Supreme Court improperly considered [a] contention” that was first alleged in opposition to motion). In Justice Ramos’s words, “[t]hey can’t make a 3211 motion to dismiss a claim you haven’t asserted.” R-77. That is especially so where, as explained below, plaintiffs *cannot* plead those claims because they lack any good-faith basis for making the necessary allegations.

Plaintiffs now have come up with yet more new theories, and on this appeal they rely heavily on arguments that CIBC never had the opportunity to refute, and Justice Ramos never had occasion to consider, below:

1. Their lead argument is that CIBC’s documentary evidence failed to prove that the Borrower had submitted officer’s certificates and that Requisite Lenders had consented to the sale. Br. 18–23 (addressed *infra* at II.C.). This issue was waived for three independent reasons. First, plaintiffs raised this “objection” for the first time not in their Amended Complaint and not on the motion to dismiss, but at oral argument on their renewal motion. A motion for renewal must “contain reasonable justification for the failure to present such facts on the prior motion.”

C.P.L.R. 2221(e)(3). As Justice Ramos pointed out, “[i]f [defendants] haven’t submitted the officer’s certificate at this point, they certainly didn’t do it back when the motion was” filed, and so there was no justification for plaintiffs’ failure to raise the issue then. R–69.

Second, plaintiffs did not even raise the issue in their papers supporting their motion for reargument:

THE COURT: I’ve got a simple question for you, it’s a yes or no. Is there any place in these documents that you submitted to me [on the reargument motion] where you state in support of your argument for reargument, that I made a mistake when I said that OFS concedes that the requisite lenders did approve the asset sale?

MS. WERTHER: Precisely that, no, sir. But there is nothing in the record--

R–84. Justice Ramos’s rules provide that “[f]ailure to submit memos of law may result in the denial of the motion” (Part 53 Practice Rule 5); the logical corollary is that a memorandum of law is insufficient when it describes a basis for relief completely different from that which the movant pursues at the hearing.

Third, the Amended Complaint does not allege these theories. This point is especially critical here, because the only basis for plaintiffs’ supposed belief that the officer’s certificates and lender consents do not exist was that, as of the date of the reargument motion, CIBC had not yet produced them. R–75–76. But now,

CIBC has.⁷ Plaintiffs have no good-faith basis for alleging such breaches in any new complaint.

2. Plaintiffs now argue that, in addition to releasing the lenders' lien on Protocol's assets, CIBC improperly released Protocol's guarantors. Br. 33–34. This is an entirely new breach of contract theory which they: (a) never pleaded (see R–154–55 ¶¶ 106–115; R–80:7–8), (b) never raised in their papers in opposition to the motion to dismiss (SR–92–100) or at the two-hour oral argument on the dismissal motion (R–951–1052), and (c) never raised in their papers supporting their reargument application (SR–263–311) or at oral argument on that motion (R–65–86). Relatedly, to assert this new theory, plaintiffs would need leave to file yet another amended complaint (C.P.L.R. 3025); but they never sought leave below to add this claim, and they cannot do so on appeal.

3. Plaintiffs rely on alleged breaches of implied duties arising out of agency law. Br. 39–40. This is yet another theory that was never pleaded, never argued, and never passed on below, and plaintiffs never sought leave to add it. The Amended Complaint alleges only that CIBC “assumed fiduciary obligations of

⁷ The relevant documents are the Consent Regarding Asset Sale (Bayside, Bear Stearns, CIBC, Inc., First Dominion) #1 (CIBCOFSI00061238–41); Consent Regarding Asset Sale (Bayside, Bear Stearns, CIBC, Inc., First Dominion) #2 (CIBCOFSI00061242–45); Officer's Certificate (Note Agreement) (CIBCOFSI-00060325–486); Officer's Certificate (Credit Agreement) (CIBCOFSI-00060487–648).

loyalty and care,” not by acting as Agent under the Agreements, but by “instructing [its] employees to accept directorships on the board.” R-156 ¶ 124.

4. The same goes for the theory that plaintiffs were owed fiduciary duties as shareholders. Br. 48, 56. The Amended Complaint repeatedly and expressly limits the fiduciary-duty claim to plaintiffs’ role as a creditor. *See* R-157-58 ¶¶ 124, 126, 127, 128, 134 (alleging duties to Protocol’s “creditors”); *id.* ¶¶ 128, 129, 130, 131 (alleging damages from Protocol’s inability to repay “outstanding indebtedness”); R-158 ¶ 133 (calculating Orchard’s damages as “the unpaid portion of its senior [and subordinated] debt”). Plaintiffs also did not raise this notion in opposition to the motion to dismiss⁸ or on reargument, nor did they seek leave to amend on this basis.

5. Plaintiffs also now seek leave to replead their fiduciary-duty claim as a derivative claim. Br. 58. They did not seek that leave below.

To paraphrase Justice Ramos, plaintiffs are trying to use this appeal to take yet “another bite at the apple” by postulating new theories that CIBC and the court below never had a chance to address. The only issues properly on appeal are

⁸ At the hearing on the motion to dismiss, plaintiffs’ counsel briefly mentioned that “We are also shareholders.” R-1016. The court noted, however, that “the interest that you’re seeking to protect here is not as a shareholder.” *Id.* Plaintiffs’ only response was that “they released our lien,” to which the court properly recognized that it was “[n]ot the shareholders’ lien; [it was] the creditors’ lien.” *Id.*

whether Justice Ramos erred by granting CIBC's motion to dismiss and by denying plaintiffs' motion to renew. This Court need not reach any other issues.

II. Supreme Court Correctly Dismissed the Contract Claim.

Citing the principle that contracts that are "clear, unequivocal, and unambiguous" should be interpreted by their own language (R-19), the trial court permitted the lien release that plaintiffs challenge. It did so after extensive briefing and after devoting well over two hours to oral argument. R-1051. That decision was correct. Plaintiffs offer no persuasive reason to overturn the trial court's reading of the Agreements. They rely heavily on parol evidence, including a purported "expert" affidavit from their own managing director; but New York law is crystal clear, that parol evidence is irrelevant when the parties' written contract is unambiguous, as here.⁹

Plaintiffs also maintain that CIBC's motion to dismiss lacked adequate evidentiary support. As shown already, these arguments were waived when plaintiffs failed to raise them below. In any event, the documents filed with the motion, together with the Amended Complaint, conclusively established the invalidity of the breach of contract claim.

⁹ The Agreements specify that New York law governs. R-314.

A. The Contract Does Not Require Lender Consent to a Lien Release in Connection With an Approved Asset Sale.

Plaintiffs' breach of contract claim incorrectly assumes that Section 10.6 of the Agreements requires the unanimous consent of lenders before the Agent may release any lien on more than 25% of the Borrower's collateral. But that is not what Section 10.6 actually says. Section 10.6 governs only amendments and waivers of the Agreements' terms; the provision addressing lien releases, therefore, applies only to lien releases that require such a modification—in the words of Section 10.6, lien releases that are “other than in accordance with the terms of the Loan Documents.” R-311. The Loan Documents expressly provide that the approval of a sale of assets requires the consent of only a majority of lenders, not unanimous consent. They further provide that upon an approved sale, the Agent is not only authorized (Section 9.6(A)) but *required* (Section 10.14) to release the lien on the relevant assets, “without further written consent or authorization from Lenders.” As a result, the lien release required no amendment or waiver, and Section 10.6 did not apply.

1. The Agreement required the lien release.
 - a. Section 9.6(A) authorizes the Agent to release liens in connection with sales of assets, without lender consent.

Section 9.6(A) enumerates the powers of the Agent. It states that:

[1] Each Lender (which term shall include, for purposes of this subsection 9.6, any Swap Counterparty) hereby further authorizes Collateral Agent, on behalf of and for the benefit of Lenders, to enter

into each Collateral Document as secured party and to be the agent for and representative of Lenders under each of the Guaranties and to enter into the Intercreditor Agreement, and each Lender agrees to be bound by the terms of each Collateral Document, each of the Guaranties and the Intercreditor Agreement;

[2] provided that Collateral Agent shall not

(i) enter into or consent to any material amendment, modification, termination or waiver of any provision contained in any Collateral Document, any of the Guaranties or the Intercreditor Agreement or

(ii) [not relevant here],

in each case without the prior consent of Requisite Lenders (or, if required pursuant to subsection 10.6, all Lenders);

[3] provided further, however, that, *without further written consent or authorization from Lenders, Collateral Agent may* execute any documents or instruments necessary to

(a) release any Lien encumbering any item of Collateral that is the subject of a sale or other disposition of assets permitted by this Agreement or to which Requisite Lenders have otherwise consented,

or (b) . . . or (c) . . . [neither relevant here]

[4] provided that, in the case of a sale of such item of Collateral referred to in subclause (a) or (b), the requirements of subsection 10.14 are satisfied.

R-301 (emphasis, line breaks, and bracketed numbers added).

Part 1 (“Each Lender . . .”) authorizes the Agent to enter into Collateral Documents¹⁰ on behalf of all Lenders. Part 2 (“provided . . .”) states that any modification by the Agent of the Collateral Documents is subject to the consent requirement—either majority or unanimous—in Section 10.6. Part 3 (“provided

¹⁰ “Collateral Documents” includes documents supporting the Liens. R-183.

further, however, . . .”) carves out an exception to Part 2, stating that “without further written consent or authorization from Lenders” the Agent may release Liens on Collateral that is subject to a permitted sale—either a sale that the Agreement itself allows, or a sale “to which *Requisite Lenders* have otherwise¹¹ consented.” (Plaintiffs skip Part 3. Br. 27.) Part 4 then imposes an additional requirement that Section 10.14 be satisfied before the Agent releases liens as described in Part 3.

Section 9.6(A) is the first of two sections that address the precise situation here. It provides that (1) CIBC may enter into the Collateral Documents (2) but may not modify them without lender consent, (3) *except* as to a lien release in connection with a sale of assets to which Requisite Lenders have consented, (4) so long as Section 10.14 is satisfied. As explained below, the plaintiffs alleged that Requisite Lenders consented to the sale of assets here (R-153 ¶ 103), and they never alleged that Section 10.14 was not satisfied. Accordingly, the lien release was proper under Section 9.6(A).

- b. Section 10.14 requires the Agent to release liens in connection with sales of assets.

Section 10.14 addresses “Release of Security.” It states that:

¹¹ That is, other than by signing the Agreements. The Agreements allow the Borrower (without any lender consent) to conduct certain types of sales, such as sales of surplus or obsolete equipment. *See* R-288 (Section 7.7(ii)-(v)).

[1] *Upon the proposed sale or other disposition of any Collateral that is permitted by this Agreement or to which Requisite Lenders have otherwise consented, . . . for which a Loan Party desires to obtain a security interest release . . . ,*

[2] such Loan Party shall deliver an Officer's Certificate (i) stating that the Collateral . . . subject to such disposition is being sold or otherwise disposed of in compliance with the terms hereof and (ii) specifying the Collateral . . . being sold or otherwise disposed of in the proposed transaction.

[3] Upon the receipt of such Officer's Certificate, *Collateral Agent shall*, at such Loan Party's expense, so long as Collateral Agent (a) has no reason to believe that the facts stated in such Officer's Certificate are not true and correct, and (b) if the sale or other disposition of such item of Collateral . . . constitutes an Asset Sale, shall have received evidence satisfactory to it that arrangements satisfactory to it have been made for delivery of the Net Asset Sale Proceeds if and as required by subsection 2.4, *execute and deliver such releases of its security interest in such Collateral . . . ,* as may be reasonably requested by such Loan Party.

R-314 (emphasis, line breaks and bracketed numbers inserted).¹²

Part 1 sets the scope of the section: it applies when a Loan Party (the Borrower or one of its affiliates (R-196)) seeks a lien release for a sale of assets that is permitted either because the Agreement says so (*e.g.*, R-288 (Section 7.7)) or because Requisite Lenders have consented to it pursuant to Section 10.6. This language reinforces Section 9.6(A)—Requisite Lender consent, not unanimous consent, is sufficient to approve a sale that is not already permitted by the Agreement.

¹² Each of the ellipses contains parallel language relating to the sale of Capital Stock in the Borrower's subsidiaries.

Part 2 requires the Loan Parties to deliver officer’s certificates stating that the proposed sale is consistent with the Agreements and that the Borrower will distribute the net sale proceeds to lenders. The certification is necessary because the Agreements allow sales, if, for example, equipment is “obsolete, worn out or surplus” or the sale is for less than \$500,000 and for “fair market value” (R–288 (Section 7.7(iii) and (iv)))—the Agent will need to rely on the Borrower for that information. Part 3 states that as long as the Agent “has no reason to believe that the facts” in the certificates are false and satisfies *itself* that the sale proceeds will be distributed as required by Section 2.4, the “Collateral Agent *shall* . . . execute and deliver such releases of its security interest in such Collateral.” (emphasis added).

The purported unanimous-consent requirement is notable for its absence. Section 10.14 begins with a sale approved by Requisite Lenders and ends with a requirement that the Agent release the liens. *See Metro. W. Asset Mgmt. v. Shenkman Capital Mgmt.*, 2005 WL 1963943, at *8 (S.D.N.Y. 2005) (“shall” provision “mandates” the result). It does not leave open the possibility of further lender consent.¹³

¹³ On appeal, plaintiffs speculate that the Loan Parties may have breached their duty under this section to deliver Officer’s Certificates. That claim, which is not alleged in the Amended Complaint, is addressed in sections II.C.1. and II.C.3. below.

Thus, Requisite Lenders having consented to the asset sale, Section 9.6(A) permitted—“without further written consent or authorization from Lenders”—and Section 10.14 required, CIBC to release the liens. That is precisely what happened, and Justice Ramos correctly concluded that CIBC did not breach the operative agreement.

2. Section 10.6 allows Requisite Lenders to consent to a sale and does not apply to related lien releases.

Section 10.6 governs “Amendments and Waivers” and begins by stating that:

No amendment, modification, termination or waiver of any provision of this Agreement or of the Notes, and no consent to any departure by Borrower therefrom, shall in any event be effective without the written concurrence of *Requisite Lenders*; . . .

R-310 (emphasis added). As its title indicates, this section governs *departures* from the terms of the Loan Documents; it does not impose additional preconditions to duties that are specified elsewhere. And it allows Requisite Lenders (“more than 50%” (R-204)), to effect any such change, except as stated in subsections 10.6(a) and (b). As the *Chrysler* bankruptcy court recently noted, majority control (as opposed to unanimity) “avoids chaos and prevents a single lender from being preferred over others,” such as by holding out as Orchard has done here. *In re Chrysler LLC*, 405 B.R. 84, 103 (Bankr. S.D.N.Y. 2009) (citing cases addressing majority control), *aff’d*, 576 F.3d 108 (2d Cir. 2009).

Following that general rule, Section 10.6 enumerates exceptions:

... provided that no such amendment, modification, termination, waiver or consent shall, without the consent of:

(a) each Lender with Obligations directly affected (whose consent shall be required for any such amendment, modification, termination or waiver in addition to that of Requisite Lenders) [effect any of eight changes not relevant here].

(b) each Lender, ... (4) release any Lien granted in favor of Collateral Agent with respect to 25% or more in aggregate fair market value of the Collateral or release Holdings [the Borrower's parent] from its obligations under the Holdings Guaranty or release any Subsidiary Guarantor from its obligations under the Subsidiary Guaranty or the Canadian Subsidiary Guaranty, as applicable, in each case other than in accordance with the terms of the Loan Documents

R-310-11.

Two points bear emphasis as to the proviso. First, subsections (a) and (b) contain exceptions to the general rule of majority consent and are limited to the specific listed acts. The sale of assets is not listed, meaning that if the Borrower wishes to sell assets in a manner not permitted by the contracts, Requisite Lenders can approve the sale. Section 10.6 is therefore consistent with the references in both Sections 9.6(A) and 10.14 to sales "to which Requisite Lenders [not "all Lenders"] have otherwise consented."

Second, even Section 10.6(b)(4), on which plaintiffs base their entire breach of contract claim, is consistent with these other sections. Subsection (b)(4) applies only to lien releases "other than in accordance with the terms of the Loan Documents"; "other than" must be read as an exception. The "other than" clause

here is necessary because, without it, Section 10.6(b)(4) could be read to require unanimous consent for acts that Section 9.6(A) and Section 10.14 permit or require without any consent at all. *See G & B Photography, Inc. v. Greenberg*, 209 A.D.2d 579, 581 (2d Dep’t 1994) (rejecting “attempt[] to create an irrational conflict between two provisions that can reasonably be reconciled”).

3. Plaintiffs’ mishmash of responses is inconsistent with the contractual text.

Plaintiffs dispute the reading of the Agreements set forth above and adopted by the trial court, but their alternative reading is inconsistent with the plain language of the Agreements.

a. Section 9.6(A)

Plaintiffs argue that the mere mention of Section 10.6 in Part 2 of Section 9.6(A) means that that section supersedes Section 9.6(A). Br. 27. That is incorrect. The first three words, “provided further, however,” indicate that the Part 3 is an exception to Part 2.¹⁴ So does the rest of Part 3, which addresses specific scenarios in which the Agent may act “*without* further written consent or authorization from Lenders.” Misinterpreting Section 10.6 to require consent would directly contradict that language.

¹⁴ *See Friedman v. Conn. Gen. Life Ins. Co.*, 9 N.Y.3d 105, 114 (2007) (“The purpose of a proviso is to restrain the enacting clause, to except something which would otherwise have been within it, or in some measure to modify it.”) (quoting McKinney’s Statutes § 212); BLACK’S LAW DICT. (8th ed. 2004) (defining “proviso” as “a provision that begins with the words *provided that* and supplies a condition, exception, or addition.”).

The rest of plaintiffs' discussion of Section 9.6(A) consists of misstatements.

Plaintiffs assert that:

Section 9.6 also expressly states that the consent of "each Lender" was required to release the lien on 25% or more of the collateral.

Br. 27. No it doesn't. The phrase "each Lender" appears three times in Section 9.6, and none refers to lien releases.¹⁵ And Section 9.6 says nothing at all about "25% or more of the collateral"—that is simply a fabrication. Plaintiffs go on to contend that:

Sections 9.6, 10.6 and 10.14 apply to all dispositions of collateral and none of those provisions contains a stated exception to the unanimous consent rule for asset sales.

Id. Wrong again. As seen above, Part 3 of Section 9.6(A) contains just such an exception. It permits the Agent, without further consent, to release liens on collateral that is subject to a sale to which "Requisite Lenders" have consented.

b. Section 10.6

Plaintiffs have no explanation for the "other than" clause in Section 10.6(b)(4). They criticize the lower court for relying "solely on th[at] phrase" and try to dodge the issue by arguing that "[n]owhere in Section 10.14 is there any language stating that it modifies Section 10.6, nor does Section 10.14 say that the unanimous consent rule does not apply to asset sales." Br. 26. But Section 10.14 does not

¹⁵ In the first line of Section 9.6(A), "Each Lender" authorizes the Agent to enter into Collateral Documents; in the fifth line, "each Lender agrees to be bound by the terms of" those documents; and thirteen lines from the end of Section 9.6(A) "each Lender" agrees to limit its rights to foreclose on the Collateral. *See* R-301.

need to “modify” Section 10.6, because Section 10.6(b)(4) by its own terms is limited to lien releases “*other than* in accordance with the terms of the Loan Documents.” Because a lien release that is mandated by Section 10.14 is “*in accordance* with the terms of the Loan Documents,” Section 10.6(b)(4) does not apply.

Moreover, plaintiffs’ erroneous appeal to Section 10.6 should not distract from their inability to explain what the “other than” clause actually means. They repeatedly assert merely that subsection (b)(4) applies to *all* lien releases exceeding 25% of the Collateral. *E.g.*, Br. 27, 37. Of course, that would render the “other than” exception meaningless, violating the “cardinal rule of contract construction [that] [c]ourts should construe a contract so as to give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract.” *Helmsley-Spear, Inc. v. N.Y. Blood Center*, 257 A.D.2d 64, 68–69 (1st Dep’t 1999).

Plaintiffs also devote several pages to a misguided discussion of *Edgewater, Growth Capital Partners, L.P. v. Allied Capital Corp.* Br. 31–34 (citing 75 A.D.3d 458 (1st Dep’t 2010)). In *Edgewater*, this Court first held that

The court properly dismissed plaintiff’s first cause of action alleging that defendants breached section 15.12 of the credit agreement by releasing all or substantially all of the liens on collateral securing loans the parties funded.

75 A.D.3d at 459. The dismissed claim repeats Orchard’s claim almost verbatim. *Compare* R-155 ¶ 114 (“CIBC, as [Agent], breached the [Agreements] . . . by . . . releasing the lien on all or substantially all of the Collateral, without the consent of OFS.”). The *Edgewater* opinion also gave effect to an “other than” clause, noting that a requirement of consent “before releasing any lien, ‘other than as permitted by Section 15.12’” applied only to “liens that [the agent] could not otherwise release under 15.12.” *Id.*¹⁶ Here, Orchard argues that nearly identical language in Section 10.6 applies to any lien releases, regardless of whether another section permits it. Br. 30–31.

Plaintiffs rely on the second holding in *Edgewater*, declining to dismiss claims for “reducing or releasing, or agreeing to reduce or release, obligations the borrowers had to the junior lenders.” 75 A.D.3d at 459. Plaintiffs argue that CIBC, in the Lien Release Agreement, released Protocol’s guarantors, which is not permitted “without the consent of ‘all Lenders.’” Br. 34. As shown above, this theory is waived. *See* Part I above. It also is incorrect. Guarantees are treated in parallel with lien releases in both Section 10.6(b) and Section 10.14. The unanimous consent requirement for guaranty releases is subject to exactly the same

¹⁶ Section 15.12 apparently did not permit the release in *Edgewater*, but the court found that the plaintiff had waived its consent right. *Id.* It is not clear where Orchard got the idea that “[t]he language in Section 10.6 in the case at bar is strikingly similar to the language of the loan agreements in *Edgewater*, except here there are no amendments expressly allowing the Agent to release the lien without unanimous consent.” Br. 34. Neither the opinion nor plaintiffs’ brief quotes any substantial part of the relevant sections.

“other than in accordance with the terms of the Loan Documents” clause as lien releases are. R–311. And Section 10.14 provides that upon “the sale or other disposition of all of the Capital Stock of a Subsidiary Guarantor . . . permitted by this Agreement or to which Requisite Lenders have otherwise consented,” the Agent must “execute and deliver such releases of . . . such Subsidiary Guaranty or Canadian Subsidiary Guaranty.” R–314.

c. Section 10.14

As to Section 10.14, plaintiffs mischaracterize both the contract and the decision below. Their assertions that “[t]here is not one word in the Loan Agreements (including Sections 10.6 and 10.14) that expressly states that the 25% rule does not apply to asset sales” and that “*No where [sic] in any of those documents is there any language stating that the unanimous consent rule does not apply to asset sales outside of bankruptcy*” (Br. 26 & n.3) are just wrong. In reality, there is not one word that states that any unanimous-consent rule *does* apply to asset sales, and both Sections 9.6(A) and 10.14 state that only the consent of “Requisite Lenders” is necessary to approve a sale, and that no further consent is needed to approve a lien release in connection with a sale.

Plaintiffs also contend that the court’s interpretation of Section 10.14 leaves Section 10.6(b)(4) meaningless. Br. 28. They reason that the phrase “other disposition of any Collateral” in Section 10.14 covers lien releases. They cite no

authority for the conclusion that releasing a lien “disposes” of collateral, and that conclusion is wrong—if the collateral is not sold, it stays right where it was, in the hands of the Borrower. At a minimum, if necessary to avoid conflict with Section 10.6(b)(4), “disposition” *could* be read as limited to transfers of the Collateral to a new owner. From the lenders’ perspective, as Justice Ramos recognized, a stand-alone lien release (what he called a “release of collateral”) that converts secured debt into unsecured debt is fundamentally different from a sale, which returns cash to lenders by liquidating collateral and involves a lien release only as an intermediate step. R–21. Thus, the Agreements require unanimity for a stand-alone release (*see* Section 10.6(b)(4)) but no consent for a release of liens on assets that the Borrower is selling (*see* Section 10.14 and the “other than” exception in 10.6(b)(4)). This reading is commercially reasonable and gives both terms meaning.

Last, plaintiffs try to make Section 10.14 incorporate, and subordinate itself to, all of the rest of the contract. They argue that Section 10.14 merely “contains the mechanics the Agent must follow before releasing the lien *in compliance with* Section 10.6 and 9.6” (Br. 30), and that “[i]f the Agent determined that 25% or more of the collateral was being sold free of the lien as part of the transaction, then the Agent was required to assure itself that the consent of ‘all Lenders’ had been obtained in compliance with Sections 10.6 and 9.6.” Br. 31.

That is wrong on three levels. First, Section 9.6(A) expressly allows lien releases in connection with sales “without further written consent or authorization from Lenders.” If Section 10.14 simply incorporated the consent requirements of Section 10.6, then the last two provisos in Section 9.6(A) would be unnecessary and would contradict Section 10.6. The first proviso in Section 9.6(A) does reference Section 10.6, and the next two establish different treatment for lien releases in connection with sales. Second, as also shown above, Section 10.6(b)(4) itself contains language—“other than in accordance with the terms of the Loan Documents”—that would be meaningless unless some other provision of the Loan Documents, such as Section 10.14, permitted lien releases.

Third, the language in Section 10.14 on which plaintiffs hang this entire argument—that “the Agent must make a determination, in good faith, whether the sale . . . ‘was in compliance with the terms’ of the Loan Agreements” (Br. 30–31)—does not appear in the contract. Section 10.14 says only that the Agent must release the lien unless it has “*reason to believe* that the *facts* stated in” the officer’s certificate are false. That does not subordinate the lien-release mandate to other legal terms of the Agreements; rather, it allows the Agent to rely on the Borrower for “facts,” unless it has actual knowledge to the contrary. A “good faith determination” would be an odd way to require unanimous consent, as it would allow the Agent to release liens if it had an incorrect, but good faith, belief that that

was permitted. Finally, the officer’s certificate does not even address the step in dispute here—the lien release; it states only whether “the sale” is in compliance with the contracts. That is further proof that, as its title suggests, the “Release of Security” is addressed within Section 10.14 itself.

B. Plaintiffs’ Motion to Renew Was Based on Legally Irrelevant Parol Evidence.

1. Parol Evidence Cannot Create an Ambiguity.

Plaintiffs argue that extrinsic evidence renders the contracts ambiguous. Br. 44–45. New York contract law provides otherwise: “[w]hen a written agreement is clear and unambiguous on its face, ‘extrinsic and parol evidence is not admissible to create an ambiguity.’” *Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 369 (1st Dep’t 2007) (quoting *Intercont’l Planning Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 379 (1969)). Similarly, “the construction of a plain and unambiguous contract is for the court to pass on, and . . . circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself.” *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540 (1969). Thus, (1) if there is no ambiguity within the four corners of the contract, then parol evidence cannot create one; and (2) if the contract is not ambiguous, then it is enforced without regard to parol evidence. Here, dismissal was proper, and the court properly ignored the affidavit of Robert Palmer, Managing Director of one of the plaintiffs (quoted at Br. 37). *See 150 Broadway N.Y. Associates, L.P.*

v. Bodner, 14 A.D.3d 1 (1st Dep’t 2004) (granting C.P.L.R. 3211(a)(1) motion despite affidavit from plaintiff’s president and noting that “extrinsic evidence or self-serving allegations offered by the proponent of the claim” cannot defeat motion where contract is unambiguous).

Plaintiffs argue that certain extrinsic evidence in the form of CIBC emails is “at odds with the lower court’s finding that Section 10.6 of the Credit Agreement was ‘clear, unequivocal and unambiguous.’” Br. 44. That argument runs flat into the rule that “extrinsic and parol evidence is not admissible to create an ambiguity.” *Intercont’l Planning*, 24 N.Y.2d at 379. Plaintiffs’ quotation of *Reiss v. Financial Performance Corp.* (Br. 44) on this point is misleading. That case did not abrogate the parol evidence rule; it enforced it, noting that “the court [below] improperly relied upon certain warrant agreements in the record that, although containing relevant language, were wholly unrelated to the warrants at issue.” 279 A.D.2d 13, 16 (1st Dep’t 2000). This Court mentioned “the true expectations of the parties” only as a guide to interpreting the text—in contrast to “formalistic literalism”—not as an invitation to consider any evidence that might suggest the parties’ intent. *Id.* at 19.

Plaintiffs cite two other cases (Br. 45), neither of which is any help. *Greenfield v. Philles Records, Inc.* began by explaining that “[t]he best evidence of what parties to a written agreement intend is what they say in their writing.” 98 N.Y.2d

562, 569 (2002) (quoting *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992)). This observation neatly demonstrates the compatibility of the parol evidence rule and the “true expectations” principle in *Reiss*. The opinion went on to reiterate that “[e]xtrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous,” a decision that “is an issue of law for the courts to decide.” *Id.*¹⁷ Meanwhile, though *Telerep, LLC v. U.S. International Media, Inc.*, found contracts to be ambiguous, it relied not on parol evidence but on the language of the contracts themselves. 74 A.D.3d 401, 403 (1st Dep’t 2010) (noting that “[t]his language” in the contracts “can be read” one way, while “[o]ther provisions of the contract, however, can reasonably be interpreted as” saying something different) (emphases added). Like all of the other cases, *Telerep* recited the rule that “[a] contract is ambiguous if *on its face* it is reasonably susceptible of more than one interpretation.” *Id.* at 402 (emphasis added; internal quotation marks omitted).

2. The Extrinsic Evidence Is Not Probative.

Even if the emails were relevant as a legal matter, they are not probative. Both are internal emails by the same non-lawyer employee, and neither purports to be CIBC’s “official” interpretation.

¹⁷ A later portion of the *Greenfield* opinion, which did rely on extrinsic evidence, related to a different contract. 98 N.Y.2d at 574. That contract was governed by California law, which, as the Court observed, does not follow the New York parol evidence rule. *Id.*

In the first email, a CIBC employee notes that he will seek the advice of counsel concerning a related issue (R–894). In the renewal motion, plaintiffs asserted that they had never seen, let alone relied on, this document before this lawsuit. SR–269. Plaintiffs contend that the email “did NOT attempt to argue that Section 10.14” applied (Br. 36), but then neither did it attempt to explain the “other than in accordance with the terms of the Loan Documents” clause in Section 10.6 or similar language in Section 9.6(A) or analyze what meaning Section 10.14 does have. This email is, on its face, no more than an off-the-cuff summary of an isolated provision, sent without advice of counsel to an internal audience. It cannot trump the unambiguous language of the contract.

The second email (R–910–11) states that the “transaction” that would require unanimous consent is not the asset sale that actually occurred, but a proposed but never consummated stock sale referred to throughout the Amended Complaint. *See* R–143–48 ¶¶ 53, 56, 59, 64, 65, 70, 71, 73, 74, 77. The first sentence of the email states that “[t]he purpose of this Credit Communication is to recommend CIBC sell its *shares* of Protocol to Bayside Recovery I, Inc.” (Emphasis added.) The stock sale would have required all of Protocol’s shareholders to sell their stock to Bayside, which would then own Protocol and repay the debt at a fraction of face value. Because that sale would not have involved a “sale or other disposition of Collateral” by Protocol—because the assets would have remained within Protocol,

and only the ownership *of* Protocol would have changed—Section 10.14 would not have applied, and a waiver would have been necessary.¹⁸ As the Amended Complaint alleges, plaintiffs blocked the stock sale, which is therefore not the subject of this case. R-148 ¶ 79.

3. The Extrinsic Evidence Is Not Relevant for Any Other Reason.

Plaintiffs also argue that the extrinsic evidence “raise[s] an issue of fact as to CIBC’s good faith in releasing the lien.” Br. 45. The argument seems to be that even if CIBC *acted* in accordance with the contract, emails show that CIBC *thought*, mistakenly, that it was breaching the contract¹⁹; as a result, CIBC could not have acted in “good faith,” and thereby *did* breach the contract. This absurd theory appears nowhere in the Amended Complaint, was raised for the first time in the reargument hearing (R-75) (and not even in plaintiffs’ memorandum of law), and accordingly was waived. *See* Part I above.

In any event, plaintiffs have invented a “good faith determination” requirement, even using quotation marks (Br. 21), that does not appear in Section 10.14. The only reference to the Agent’s state of mind is that it “has no reason to believe” that the certificates are incorrect, and even that language applies only to the “facts” represented by the Borrower, not to the legal determination of what the contract

¹⁸ *See* R-1083 (Section 2.1(a)).

¹⁹ *See* Br. 46 (“he had reason to believe it violated the Loan Agreements.”).

says. R-314. Plaintiffs do not allege that any facts in the officer's certificates were untrue,²⁰ or that the proceeds were distributed improperly.

These pre-qualifications for a lien release merely protect the Lenders against a possible breach by the Borrower. If Orchard, two years later, cannot allege an actual breach, it cannot bootstrap these procedural requirements into a breach—among other things, given that the lien releases actually were permitted, plaintiffs could not allege damages from any bad faith review of the certificates.

C. Plaintiffs' New Arguments About Insufficiency of the Evidence Were Waived and Are Baseless.

Plaintiffs further argue that even if CIBC's interpretation of the contract were correct, its motion papers were insufficient because CIBC did not file officer's certificates required by Section 10.14 and lender consent forms. These arguments are meritless for substantive and procedural reasons. Substantively, CIBC did not need to file those documents because they were not relevant to the breach of contract theory that plaintiffs actually pleaded in their Amended Complaint (R-154-55 ¶¶ 106-115); plaintiffs since have tried to improperly fabricate a new issue through their new breach of contract theories raised for the first time not in their

²⁰ While the validity of some sales depends on factual assertions by the Borrower—for example, Section 7.7 allows the Borrower to sell obsolete equipment, requiring a certification that the equipment actually is obsolete—the sale here was valid because it received Requisite Lender consent.

papers, but at the hearing on reargument. And procedurally, plaintiffs waived both points by failing to raise them below.

1. Both arguments were waived.

Plaintiffs assert that “[t]he lower court simply ignored the fact that there is no documentary evidence of those consents in the record.” Br. 20. The truth is that plaintiffs never raised this issue in their Amended Complaint, in opposition to CIBC’s motion to dismiss, or in their written reargument and renewal motion. *See* Part I above.

2. CIBC did not need to prove majority consent, because plaintiffs alleged it.

Plaintiffs argue that CIBC was required to, but did not, prove that any lenders consented to the asset sale. Br. 19–21. They even had the audacity to tell Justice Ramos when he noted that “OFS concedes that the requisite lenders did approve the asset[] sale”: “that was a mistake.” R–82. They asserted that “we never conceded that they had the effective consents of the requisite lenders. That is not a fact in evidence in any document before Your Honor. *There is no consent.*” *Id.* (emphasis added); *see also* R–79 (“nowhere before do we say that they have the consents”); R–76 (“I never said that they did. . . . They say in their papers things that aren’t true.”). In fact, plaintiffs pleaded Requisite Lender consent.

Paragraph 103 of the Amended Complaint refers to “the Consent Regarding Asset Sale, dated March 13, 2008, *executed by the Requisite Lenders* (including

Bayside, Bear Stearns and CIBC, as lenders)” (R-153 (emphasis added)); and paragraph 44 states that “Defendants Bayside, Bear Stearns, and CIBC . . . directed the Agent to release the liens on all of the collateral sold to Bayside.” R-141 ¶ 44.

A “statement in a pleading constitutes a formal judicial admission which . . . remains evidence of the facts admitted.” *Bogoni v. Friedlander*, 197 A.D.2d 281, 291–92 (1st Dep’t 1994) (citations omitted); *see also, e.g., Casper v. Cushman & Wakefield*, 74 A.D.3d 669 (1st Dep’t 2010) (plaintiff estopped from asserting facts inconsistent with complaint); *Aronitz v. PricewaterhouseCoopers LLP*, 27 A.D.3d 393, 394 (1st Dep’t 2006) (rejecting appellate argument that conflicted with “formal judicial admissions” in pleading). In fact, this Court has reversed trial courts for failing to enforce judicial admissions. *See Bogoni*, 197 A.D.2d at 293; *cf. Penner v. Hoffberg Oberfest Burger & Berger*, 44 A.D.3d 554, 555 (1st Dep’t 2007) (“The affidavit of plaintiff’s new accountant raises an entirely new theory of liability . . . that is not pleaded in the complaint, and indeed contradicts the complaint Accordingly, the merits of the accountant’s affidavit should not be considered.”).²¹

²¹ All of the cases that plaintiffs cite hold only that documentary evidence that is used to *refute* the plaintiffs’ allegations must be conclusive. They do not hold that a C.P.L.R. 3211(a)(1) motion cannot *rely* on the plaintiffs’ allegations. *See Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326–27 (2002) (motion may be granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations”); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002) (“the sponsor’s documentary evidence does not clearly refute these assertions”); *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (denying motion because plaintiff properly alleged assignment; “dismissal is warranted” if defendant disproves “the asserted

In addition, the affidavit of plaintiff's counsel, which listed "Material Factual Disputes Raised in the CIBC Motion" (R-630), never mentioned the supposed lack of majority consent but did refer to "the 'Requisite Lenders' (in this case Bayside, Bear Stearns and CIBC)." R-631 ¶ 16.

Most fundamentally, the notion that CIBC and Bayside refused to consent contradicts plaintiffs' whole theory of the case. According to the Amended Complaint, those two held over 70% of the loans (R-137 ¶ 30), making them Requisite Lenders, even without Bear Stearns. CIBC was the Agent, and as the Southern District recently observed, the notion that an agent "was required to consent to or authorize its own action makes no sense." *Citibank N.A. v. Morgan Stanley & Co. Int'l*, 2010 WL 1948547, at *6 (S.D.N.Y. 2010); *see also* R-548 (plaintiffs' managing director swearing that "Canadian Imperial Bank of Commerce [the Agent] and CIBC, Inc. [the lender] acted in unison"). As for Bayside, the Amended Complaint alleges that the entire sale was for its benefit, and that its "cronies" and "confederates" on the board merely went along with Bayside's wishes. R-141-45 ¶¶ 46, 53, 54, 55, 61. Plaintiffs cannot credibly contend that either CIBC or Bayside withheld consent.

claims"); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976) (noting that although pleadings are read liberally, "there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action") (all cited at Br. 23).

3. CIBC did not need to prove the existence of officer's certificates.

The only breach of contract alleged in the Amended Complaint was that CIBC failed to obtain unanimous consent as supposedly required by Section 10.6.

The Amended Complaint did not allege anywhere an absence of *majority* consent or of officer's certificates, and in 145 paragraphs it did not mention Section 10.14 once.

As shown above, Section 10.6 does not prohibit anything, but merely governs amendments and waivers; its unanimous consent requirement does not apply to sales of assets; and CIBC did not rely on any amendment or waiver for the lien release. The fundamental problem with the contract claim was that a lack of consent to *alter* the Agreement can never be a stand-alone breach of contract: there is no need to alter the Agreement unless the defendant breached in some other manner.

Now, plaintiffs argue that “[i]rrespective of whether unanimous consent or 51% consent was required” (Br. 17)—in other words, irrespective of whether the breach that they alleged even occurred—CIBC is liable because it did not prove that it did not breach a different provision in a different manner. But contrary to their unsupported assertion (Br. 19 (“CIBC cannot conclusively [*sic*] establish its defense”)), a mere denial is not an affirmative defense on which the defendant bears the burden. To avoid dismissal, a plaintiff must identify, in the complaint,

the precise contract provision that was breached. *See, e.g., Sklover & Donath, LLC v. Eber-Schmid*, 71 A.D.3d 497, 498 (1st Dep’t 2010) (affirming order dismissing counterclaims because defendants “were unable to identify the terms of the agreement allegedly breached”); *Gordon v. Curtis*, 68 A.D.3d 549, 550 (1st Dep’t 2009) (“the complaint fails to state a cause of action. The breach of contract cause of action does not identify the express provision that defendants allegedly breached.”); *767 Third Ave. LLC v. Greble & Finger, LLP*, 8 A.D.3d 75, 75 (1st Dep’t 2004) (“Plaintiff’s failure to identify any portion of the lease allegedly breached was fatal to its cause of action for breach of contract.”).

Orbimed Advisors, LLC v. QVT Fund LP is anything but “strikingly similar” to this case. Br. 19 (citing 72 A.D.3d 521 (1st Dep’t 2010)). *Orbimed* did not hold that the defendant has the burden of disproving unpleaded claims. In that case, the plaintiff sought to recover money placed in escrow to cover an indemnity of the defendant. 72 A.D.3d at 521. To recover on the indemnity, the defendant had to make a formal claim notice. *Id.* at 522. This Court found only that “[w]e cannot say as a matter of law that [defendant]’s letter complies with the merger agreement’s requirements that a claim notice contain” an adequate description of the claim. *Id.* at 522. Unlike this case, the “[plaintiff]’s complaint for declaratory relief *allege[d]* that [defendant]’s letter is not compliant with the merger agreement’s requirements of a claim notice or expected claim notice.” *Id.*

(emphasis added). Thus, to prevail on a C.P.L.R. 3211(a)(1) motion, the defendant needed to show that the notice was compliant as a matter of law. That is a far cry from this case, in which plaintiffs fault CIBC for failing to disprove a breach of contract theory that the plaintiffs never alleged.

III. The Negligence and Willful Misconduct Claims Were Derivative of the Contract Claim.

A. The Claims Pleaded in the Amended Complaint Were Duplicative of the Contract Claim.

As to the negligence and “willful misconduct” tort claims, plaintiffs misstate Justice Ramos’s decision by asserting that “[t]he decision below was based on the erroneous view that a claim for gross negligence/willful misconduct is *invariably* duplicative of a breach of contract claim when they arise out of the same transaction.” Br. 39 (emphasis added). What the court held was that the tort claims *in this case* were duplicative. It found that “OFS fails to allege the existence of a duty separate and distinct from the Agreements” and that “the negligence/willful misconduct claim is based on the same alleged conduct as the breach of contract claim, and is duplicative.” R–21.

The court was right. The negligence claim is based on allegations that CIBC “knew or should have known that releasing the lien . . . would damage OFS” (R–155 ¶ 118) and acted “in utter disregard for the rights of OFS under the Credit Agreement and the Subordinated Note Agreement and the damages OFS would

suffer as a result” (R-155-56 ¶ 119). The willful misconduct claim, too, literally restates the contract claim, asserting that CIBC “engaged in willful misconduct in intentionally releasing the lien . . . knowing that it would breach the Credit Agreement and Subordinated Note Agreement.” R-156 ¶ 120.

These claims were properly dismissed for two reasons. First, given that CIBC did not breach the contract, the negligence and misconduct claims fail on their own terms. If OFS had no right to block the lien release, then CIBC did not act “in utter disregard for the right of OFS” by releasing the liens. Second, the fact that these claims are entirely dependent on the success of the contract claim illustrates that plaintiffs have not identified any duty “independent of the contract” and thus have not pleaded viable tort claims. *See Clark-Fitzpatrick Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987). Allegations of scienter do not fix the problem: a negligent or intentional breach of contract is not a tort. *See Megaris Furs, Inc. v. Gimbel Bros., Inc.*, 172 A.D.2d 209, 211 (1st Dep’t 1991) (“negligent performance of the contract [is] a cause of action which simply does not exist.”); *La Fleur v. Montgomery*, 70 A.D.2d 545, 546 (1st Dep’t 1979) (“[T]he mere allegation that such breach [of contract] was maliciously intended does not serve to give them a separate identity as tort claims”). Thus, even if the contract claim survived, plaintiffs’ negligence and willful misconduct claims are not viable.

Plaintiffs cite cases for the proposition that in *some* circumstances, a claim may sound in tort as well as in contract. Br. 39. Those cases confirm the rule that in order to plead a tort claim, a plaintiff must identify a non-contractual duty. As *Bullmore v. Ernst & Young Cayman Islands* (cited at *id.*) explains, “[p]rofessionals such as investment advisors, who owe fiduciary duties to their clients, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties, since in these instances, it is policy, *not the parties’ contract*, that gives rise to a duty of due care.” 45 A.D.3d 461, 463 (1st Dep’t 2007) (emphasis added; internal quotation marks omitted). Plaintiffs identify no such tort-based duty here: the tort claims refer only to CIBC’s “disregard for the rights of OFS under the Credit Agreement and the Subordinated Note Agreement” (R–155–56 ¶ 119) and its alleged knowledge that its acts “would breach the Credit Agreement and Subordinated Note Agreement.” R–156 ¶ 120. Another case cited by plaintiffs, *Sommers v. Federal Signal Corp.*, stressed that “[a] tort may arise from the breach of a legal duty independent of the contract, but merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort.” 79 N.Y.2d 540, 551 (1992) (cited at Br. 39).

B. The New Agency Theory Was Waived and Is Defective.

Plaintiffs now argue, for the first time, that CIBC breached a duty of loyalty imposed by the law of agency. Br. 39–40. As noted above, this theory is waived. *See* Section I. It also is wrong.

“The duties of an agent are defined by the terms of the agreement that gave rise to the agency.” *G.K. Alan Assoc., Inc. v. Lazzari*, 44 A.D.3d 95, 102 (2d Dep’t 2007) (citing RESTATEMENT (SECOND) OF AGENCY § 376 (1958)); *see also Alitalia Linee Aeree Italiane v. Airline Tariff Publ’g Co.*, 580 F. Supp. 2d 285, 294 (S.D.N.Y. 2008) (“[T]he terms of an agency relationship may be defined and limited by contract.”). The contract, therefore, supersedes any duties implied by law. *See Alitalia Linee Aeree Italiane*, 580 F. Supp. 2d at 294 (“A contract may also, in appropriate circumstances, raise or lower the standard of performance to be expected of an agent”) (quoting RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. B (2006)); *Greenwood v. Koven*, 880 F. Supp. 186, 194 (S.D.N.Y. 1995) (“[T]he general duty of undivided loyalty binds an agent only to the extent its duties are not defined by an agreement.”). Plaintiffs’ argument fails for several reasons.

First, in Section 9.2(A) of the Agreements, plaintiffs waived all implied duties:

Administrative Agent and Collateral Agent shall have only those duties and responsibilities that are expressly specified in this Agreement and the other Loan Documents. . . . [A]nd nothing in this Agreement or any of the other Loan Documents, express or implied, is intended to or shall

be so construed as to impose upon Administrative Agent or Collateral Agent any obligations in respect of this Agreement or any of the other Loan Documents except as expressly set forth herein or therein.

R-298. None of the cases cited by plaintiffs (Br. 39-40) involved such disclaimers.

Second, CIBC acted within its powers under Section 9.6(A): “without further written consent or authorization from Lenders, Collateral Agent may . . . release any Lien encumbering any item of Collateral that is the subject of a sale or other disposition of assets permitted by this Agreement or to which Requisite Lenders have otherwise consented,” provided that “the requirements of subsection 10.14 are satisfied.” R-301. Plaintiffs alleged that Requisite Lenders consented to the sale, and they did not allege that Section 10.14 was not satisfied. *See In re Chrysler LLC*, 576 F.3d 108, 120 (2d Cir. 2009) (“if those conditions were met—as they were here—then under the terms of the various agreements, the minority lenders could not object to the trustee’s actions since they had given their authorization in the first place.”).

Third, implied agency duties cannot contradict an express contract. *See Greenwood*, 880 F. Supp. at 195 (“When . . . there is an agreement that such action can be taken, such action does not breach a duty to the principal, even if ‘disloyal’ in the sense that it is contrary to the principal’s interests.”); RESTATEMENT (SECOND) OF AGENCY §§ 387, 389, 391 (1958) (all imposing duties on agent

“[u]nless otherwise agreed . . .”).²² Because Section 10.14 requires the release of liens pursuant to an asset sale to which Requisite Lenders have consented, agency law cannot impliedly require unanimous consent. This point is reinforced by plaintiffs’ concession that an agent may act “as authorized.” Br. 39, 40. In Section 9.2(A), Orchard authorized CIBC to act as provided in the contract:

Each Lender irrevocably authorizes Administrative Agent and Collateral Agent to take such action on such Lender’s behalf and to exercise such powers, rights and remedies hereunder and under the other Loan Documents as are specifically delegated or granted to Administrative Agent and/or Collateral Agent by the terms hereof and thereof, together with such powers, rights and remedies as are reasonably incidental thereto.

R–298. For these reasons, the agency theory is just as dependent on and duplicative of the contract claim as the negligence claim that Justice Ramos dismissed. *See* Part III.A above; *Alitalia Linee Aeree Italiane*, 580 F. Supp. 2d at 294 (“Where a fiduciary duty [based on agency] is based upon a comprehensive written contract between the parties, a claim for breach of fiduciary duty is duplicative of a claim for breach of contract.”).

IV. Plaintiffs Lack Standing to Sue for Breach of Fiduciary Duty.

A. Delaware Law Governs.

The Supreme Court also properly dismissed the claim for breach of fiduciary duty. First, the court found that, under New York choice-of-law rules, the

²² For this reason, *The Limited, Inc. v. McCrory Corp.* (169 A.D.2d 605 (1st Dep’t 1991)), cited by plaintiffs (at 40), is inapposite. The defendants in that case did not argue that their allegedly negligent or willful failure to prepare tax returns was consistent with a contractual agreement.

fiduciary-duty claims are subject to Delaware law. R–25. The court noted that “corporate governance issues are generally governed by the laws of the state of incorporation (known as the internal affairs doctrine), and Protocol is incorporated in Delaware.” *Id.* (citing *Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 184 (1st Dep’t 1987)). Plaintiffs do not dispute this ruling, but they rely heavily on New York cases in challenging the ruling on the merits. Br. 55–56. Because the fiduciary duties of Protocol’s directors are governed only by Delaware law, those cases are irrelevant.

B. Delaware Law Does Not Allow Creditors to Bring Direct Claims for Breach of Fiduciary Duty.

1. The trial court correctly interpreted Delaware law.

Next, the court correctly found that plaintiffs failed to state a claim, because Delaware law does not recognize fiduciary duties running from corporate directors to creditors. It relied on the Delaware Supreme Court’s opinion in *North American Catholic Educational Programming Foundation v. Gheewalla* (930 A.2d 92 (Del. 2007)). R–25–26. The *Gheewalla* court “h[e]ld that individual *creditors* of an *insolvent* corporation have *no right to assert direct* claims for breach of fiduciary duty against corporate directors.” *Id.* at 103. The holding is not limited to technical issues of standing; the court held that creditors could not bring direct claims because corporate directors do not owe them fiduciary duties. *See id.* (“Recognizing that directors of an insolvent corporation owe direct fiduciary duties

to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation.”); Sabin Willett, *Gheewalla and the Director’s Dilemma*, 64 BUS. LAW. 1087, 1089 (Aug. 2009) (“But whether it is a creditor or not, the derivative plaintiff vindicates rights of the corporation, and the court in *Gheewalla* plainly held that the corporation’s directors and officers owe no fiduciary duty to creditors.”).²³

That is entirely consistent with *Production Resources Group, LLC v. NCT Group, Inc.* (863 A.2d 772 (Del. Ch. 2004)), a pre-*Gheewalla* Chancery Court decision that plaintiffs cite. Br. 56. That opinion noted that “the [insolvent] firm’s directors *are said to* owe fiduciary duties to the company’s creditors.” *Id.* at 790–91 (emphasis added). But it clarified that

the fact of insolvency does not change the primary object of the director’s duties, which is the firm itself. The firm’s insolvency simply makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm’s value and logically gives them standing to pursue these claims to rectify that injury. Put simply, when a director of an insolvent corporation, through a breach of fiduciary duty, injures the firm itself, the claim against the director is still one belonging to the corporation.

Id. at 778; *see also id.* at 777 (“The reality that creditors become the residual claimants of a corporation when the equity of the corporation has no value does not

²³ *See also In re Magnesium Corp. of Am.*, 399 B.R. 722, 758–59 (Bankr. S.D.N.Y. 2009) (“Plainly the Trustee’s claims against officers and directors for breaches of fiduciary duty belong to the Debtor estates, and *not to individual creditors* or other third parties. Under Delaware law . . . directors and officers owe their duties to the corporations they serve, even when those corporations become insolvent, or enter the ‘zone of insolvency.’”) (emphasis added).

justify expanding the types of claims that the corporation itself has against its directors.”). *Production Resources* does not endorse direct claims by creditors for breach of fiduciary duty nor does it conflict with *Gheewalla*. And if it did, *Gheewalla* would govern.

2. Plaintiffs’ quotations from a trial court *brief* in *Edgewater* are misleading.

Plaintiffs’ entire response to *Gheewalla* depends on a bench ruling in *Edgewater Growth Capital Partners v. H.I.G. Capital, Inc.*, a Delaware Chancery case—and plaintiffs do not even cite the bench ruling. Most of plaintiffs’ argument consists of paragraph-long quotes from the *Edgewater* plaintiffs’ brief, not from any court decision. Br. 51–53. The decision that they *do* cite says not a word about fiduciary duty or *Gheewalla*. Compare Br. 49 (“In New York, the lower court accepted the argument that [*Gheewalla*] precluded direct claims for breach of fiduciary duty. [A25] That *precise argument* was advanced by defendants in the Delaware *Edgewater* action, but their motion to dismiss was denied.”) (emphasis added) *with* 2010 WL 720150, at *1 (Del. Ch. March 3, 2010) (“This is my opinion on the Director Defendants’ motion to dismiss Counts IV and V for fraudulent transfer.”).

As the court explained in the cited opinion, “I largely denied the Director Defendants’ motion to dismiss in a bench opinion, with the exception of Edgewater’s fraudulent transfer claims (Counts IV and V), because the Director

Defendants had relied upon a great deal of evidence outside of the pleadings.” 2010 WL 720150, at *1. There is no indication that the court adopted every word of the plaintiffs’ briefs, and whatever that bench opinion may say, it surely does not overrule *Gheewalla*.

3. There was no “cash-out.”

Plaintiffs next argue that *Gheewalla* does not apply because they were “cashed-out,” relying on three cases. Br. 54–55. To the extent that these cases differ from the more recent decision in *Gheewalla*, they are no longer good law. But none are even on point. For one thing, all involved claims by shareholders, not creditors. *See Bernstein v. Kelson & Co.*, 231 A.D.2d 314, 318 (1st Dep’t 1997) (“Plaintiff owned shares”); *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1183 (Del. 1988) (addressing “standing and right of a minority shareholder who has dissented from a cash-out merger”); *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 349 (Del. 1988) (considering “consequences of a cash-out merger upon the standing of a shareholder”).

More importantly, each case depended on facts unique to a cash-out merger, in which minority shareholders were forced to sell their shares. Both *Bernstein* and *Cede & Co.* held that “[n]o one would assert that a former owner suing for *loss of property* through deception or fraud has lost standing to right the wrong that arguably caused the owner *to relinquish ownership or possession of the property.*”

Cede & Co., 542 A.2d at 1188 (quoted in *Bernstein*, 231 A.D.2d at 322) (emphasis added). It was thus of critical importance that the claims arose from transactions directly involving the shareholder-plaintiffs, and not from losses to the corporation that harmed the plaintiffs only derivatively.

By contrast (and contrary to plaintiffs' characterization of *Kramer* as "recogniz[ing] that the cashed-out party has standing to sue directly for a breach of fiduciary duty claim" (Br. 54)), the court in *Kramer* dismissed every claim, because the cashed-out plaintiff claimed only a waste of corporate assets and did not challenge the stock sale. It first observed that

to have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege more than an injury resulting from a wrong to the corporation. For a plaintiff to have standing to bring an individual action, he must be injured *directly* or *independently* of the corporation.

546 A.2d at 351 (citations omitted). Then, the court held that a claim that directors wasted corporate assets cannot be brought directly, even by a shareholder:

A claim of mismanagement resulting in corporate waste, if proven, represents a direct wrong to the corporation that is indirectly experienced by all shareholders. Any devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder. Thus, the wrong alleged is entirely derivative in nature.

Id. at 353.

The assertion that "[p]laintiffs have been cashed-out of their stock" (Br. 55) is unpleaded and false. The plaintiffs' stock (like the defendants' stock) is worthless,

but the Amended Complaint admits that plaintiffs never sold their shares. *See* R-148 ¶ 79 (“Bayside abandoned its stock purchase scheme and announced that it would instead pursue an asset purchase.”). That distinguishes this case from *Bernstein* and *Cede & Co.*, in which plaintiffs were forced “to relinquish ownership or possession” of their shares. Orchard claims instead that Protocol “was insolvent or would be rendered insolvent by virtue of that sale transaction, leaving the Company with insufficient funds to repay the Company’s outstanding indebtedness.” R-157 ¶ 129.

This is the archetype of a derivative claim: because the sale undervalued the *company’s* assets, the *company* was unable to pay its debts. *Production Resources* explained that a claim that “self-dealing directors had breached their fiduciary duties by improperly harming the economic value of the firm, to the detriment of the creditors” is a derivative claim:

even in the case of an insolvent firm, poor decisions by directors that lead to a loss of corporate assets and are alleged to be a breaches of equitable fiduciary duties remain harms to the corporate entity itself. Thus, regardless of whether they are brought by creditors when a company is insolvent, these claims remain derivative, with either shareholders or creditors suing to recover for a harm done to the corporation as an economic entity and any recovery logically flows to the corporation and benefits the derivative plaintiffs indirectly to the extent of their claim on the firm’s assets.

863 A.2d at 792 (footnote omitted); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 195 n.75 (Del. Ch. 2006) (“[I]f the directors of an insolvent

firm commit a breach of fiduciary duty reducing the value of the firm, any claim belongs to the entity and . . . creditors would benefit from the recovery derivatively, based on their claim on the firm’s assets.”) (citation omitted).²⁴

C. Amendment Was Futile.

Plaintiffs also challenge the denial of leave to amend. Br. 57–59. The proposed amendment would have named individual directors as defendants and added a claim for aiding and abetting a breach of fiduciary duty by Bayside. Those proposed amendments were futile. If directors owe no fiduciary duties to creditors, then naming the directors as defendants is pointless. And “[t]o state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty,” which these plaintiffs cannot do. *See Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 101 (1st Dep’t 2006). Plaintiffs’ sole support for these amendments is their mischaracterization of *Edgewater*. As noted in Part I., the request to replead the fiduciary-duty claim derivatively was never raised below.

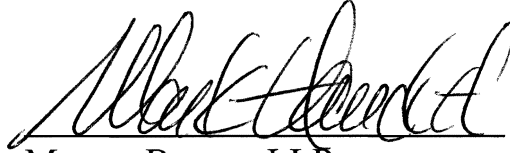
Finally, plaintiffs seek leave to “cure any pleading deficiency identified by the lower court.” Br. 58. If only it were that easy. It is not the trial court’s job to tell plaintiffs how to cure pleading deficiencies, and the problems here go well beyond pleading—the plaintiffs simply have no case.

²⁴ The argument that plaintiffs can sue as shareholders (Br. 48, 56) was waived below. *See* Part I above.

CONCLUSION

The judgment below should be affirmed.

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CERTIFICATE OF COMPLIANCE
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