SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** IAS MOTION 48EFM

Justice

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UNITED NATURAL FOODS, INC.,

Plaintiff,

- v -

GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS BANK USA, GOLDMAN SACHS LENDING PARTNERS, LLC, and STEPHAN FELDGOISE,

Defendant.

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INDEX NO. 652185/2019

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Masley, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 50, 51, 52, 53, 54, 55, 58, 61 were read on this motion to/for DISMISSAL.

In motion sequence number 004, defendants The Goldman Sachs Group, Inc. (GS Group), Goldman Sachs Bank USA (GS Bank), Goldman Sachs Lending Partners LLC (GS Lending) and Stephan J. Feldgoise move to dismiss plaintiff United Natural Foods, Inc.'s (UNFI) complaint pursuant to CPLR 3211 (a) (1) and (7).

Background

The following facts are alleged in the complaint unless noted otherwise, and for purposes of this motion, are accepted as true.

Plaintiff UNFI is the largest publicly traded distributor of natural, organic, specialty, conventional grocery and non-food products in the United States and Canada. (NYSCEF Doc. No. [NYSCEF] 32, Complaint at ¶ 14.) To become the "premier wholesaler of food-related products and services in North America," on July 26, 2018, UNFI announced that it

would acquire nonparty SUPERVALU Enterprises, Inc., (SUPERVALU) for approximately $2.9 billion (the Acquisition). (*Id.* at ¶¶ 19, 21.) The Acquisition was "the single most important undertaking in UNFI's history." (*Id.* at ¶ 21.) UNFI proposed to pay approximately $1.3 billion in cash to SUPERVALU's shareholders and the balance to SUPERVALU's creditors to extinguish most of SUPERVALU's debt. (*Id.* at ¶ 19.)

To navigate all aspects of this "bet-the-company" Acquisition, UNFI engaged nonparty Goldman Sachs & Co., LLC (GS&Co.), a subsidiary of defendant GS Group and an affiliate of defendants GS Bank and GS Lending. (*Id.* at ¶ 22.)[1] UNFI and GS&Co. entered into an Engagement Agreement which provides that GS&Co. would advise UNFI on an array of financial and strategic decisions. (*Id.* at ¶ 20.) Notably, it contains a merger clause. (NYSCEF 34, Engagement Agreement, at p. 7.)[2]

In exchange for GS&Co.'s financial advisory services, UNFI agreed to pay GS&Co. $11.4 million. (NYSCEF 32, Complaint at ¶ 24.) UNFI agreed "to pay the Transaction Fee to [GS& Co.] in cash upon consummation of such acquisition." (NYSCEF 34, Engagement Agreement at p 2.) UNFI alleges that GS&Co., through defendant Feldgoise, GS Group's head of Mergers and Acquisitions, later agreed to a $2 million reduction of that fee. (*Id.* at ¶¶ 18, 24.) UNFI allegedly significantly raised its offer to SUPERVALU from $27 to $32.50 per share as a result of this modest reduction. (*Id.* at ¶ 24.) However, when UNFI requested a writing to memorialize the fee reduction, Feldgoise reneged. (*Id.* at ¶ 83.)

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[1] UNFI also engaged nonparty Foros LLC as a financial advisor and legal counsel. (*Id.* at ¶ 22 n 2; ¶ 70.)

[2] The Engagement Agreement designates Delaware as the forum of choice and directs Delaware law to be applied. (NYSCEF 34, Engagement Agreement, at Annex A, 10.)

In connection with the Acquisition, UNFI also negotiated two agreements with defendant GS Group. (*Id.*, at ¶¶ 31, 27, 94.) Although GS Group allegedly negotiated these agreements, the agreements were only signed by GS Bank and GS Lending. (NYSCEF 36, Commitment Letter; NYSCEF 37, Fee Letter.) In the Commitment Letter, GS Bank agreed to fund 45% of a $2.15 billion[3] Term Loan at a LIBOR plus 2.75% interest rate maturing in seven years. (NYSCEF 32, Complaint at ¶ 26; NYSCEF 36, Commitment Letter ¶1, p 2.)

The Fee Letter sets forth the fees that GS Bank and GS Lending would earn for committing to fund the Term Loan, including a minimum fee of $14.5 million.[4] (*Id.* at ¶ 27.) It also provides that GS Bank and GS Lending had the option to syndicate all or a portion of their commitment to fund the Term Loan to one or more banks, financial institutions, or other institutional lenders. (*Id.* at ¶ 28.) Whether defendants syndicated or not, they remained responsible for funding. (*Id.*) According to UNFI, the reason for the $14.5 million fee was to compensate defendants for taking the risk commensurate with having a contingency free loan. (*Id.* at footnote 11.) The Fee Letter provides that if the syndication was unsuccessful, and defendants did not receive the benefit of a full marketing period, then they could charge Marketing Period Fees, including a $4.5 million Term Loan funding fee and $36 million which would be funded at closing and would be credited to the syndicate investors. (*Id.* at ¶

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[3] Although the deal ended with UNFI borrowing $1.8 million with an interest rate of LIBOR plus 4.25% (2.75+1.5), some fees were calculated using the original amount of $2.15 billion. (*Id.* at ¶¶ 7, 26, footnote 17.)

[4] Calculated as follows: 45% of 1.5% of $2.15 billion. (Complaint ¶ 27.)

33.) While UNFI could veto investors, it was obligated to cooperate with the syndication.[5] (*Id.* at ¶¶ 30, 40; NYSCEF 36, Commitment Letter at 5 ["not to be unreasonably withheld or delayed"].) Because GS Group negotiated these agreements, it "captured" for its subsidiaries, GS Bank, the "lucrative role" of "left lead arranger": the bank responsible for leading the process to syndicate the Term Loan on behalf of the other nonparty banks that committed funding. (*Id.* at ¶ 31.) For these services, UNFI agreed to pay GS Bank a Structuring Fee of $5.375 million pursuant to a third agreement, the Structuring Fee Letter.[6] (*Id.* at ¶ 31, n 5.)

The parties had an "arms-length business relationship." (NYSCEF 36, Commitment Letter, p. 10.) Both documents "are not intended to create a fiduciary relationship among the parties." (*Id.*) Specifically, "[UNFI] will not claim that the Commitment Parties have rendered advisory services of any nature or respect with respect to the debt transactions contemplated hereby" and "are capable of and responsible for evaluating and understanding." (*Id.*) Defendants' interests "involved interests that differ from [UNFI's] interests and that the Commitment Parties and their respective affiliates have no obligation to disclose such interests and transactions." (*Id.*) UNFI agreed not to assert any claim based on "actual or potential conflicts of interest." (*Id.*)

The Commitment Letter and Fee Letter cross reference each other, define certain terms relevant to the syndication, and outline UNFI's payment obligations. (NYSCEF 36,

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[5] However, UNFI did not see the final list of investors until after the closing. (*Id.* at ¶ 61, n14.)

[6] This document is not before the court.

Commitment Letter §4 at p.6; NYSCEF 37, Fee Letter at p 3-4.) The relevant provisions may be divided into three groups: (1) the Term Loan Funding Fee provisions (2) The Flex Provisions and (3) The Three Day Invoice Provision.

The Term Loan Funding Fee provisions entitle GS Bank and GS Lending to a "Term Loan Funding Fee" in certain circumstances. Specifically, the Fee Letter states,

> "[a]s consideration for the Lead Arrangers' agreements to arrange the Facilities and the Initial Lenders' commitments to provide the Facilities under the Commitment Letter, [UNFI] agree[s] to pay (or cause to be paid) the following fees: . . .
>
> (e) A funding fee equal to 0.25% of the aggregate amount of the loans made under the Term Loan Facility on the Closing Date (the "Term Loan Funding Fee"), *which Term Loan Funding Fee will be fully earned and payable on the Closing Date if the Closing Date occurs prior to the completion of the Marketing Period and a Successful Syndication has not occurred.*"

(NYSCEF 37, Fee Letter at 1, 2 [emphasis added].)

The terms "Successful Syndication," "Closing Date", and "Marketing Period" are defined terms in these agreements. Successful Syndication means,

> "(i) with respect to the Term Loan Facility, the Initial Term Loan Lenders hold commitments and loans in respect of the Term Loan Facility of not greater than $0 of the aggregate principal amount of the Term Loan Facility. . . ."

(NYSCEF 37, Fee Letter at 5-6.) With respect to the term "Closing Date," the Commitment Letter provides that,

> "[f]or purposes of the Commitment Letter and the Fee Letter, *'Closing Date' shall mean the date that the loans under the Facilities are funded and, substantially concurrently therewith, the Transaction is consummated.*'"

(NYSCEF 36, Commitment Letter at A-2 [emphasis added].) While there was no deadline to close, the Closing could not occur before 45 days after the Signing Date of July 25, 2018. (*Id.* at 2; D-3.)

Although funding was not contingent on syndication, UNFI agreed to use "commercially reasonable efforts to assist" the syndication until "the earlier of (a) 45 days after the Closing Date and (b) the date on which a "Successful Syndication" (as defined in the Fee Letter). (*Id.*, at 3.) UNFI was to use "commercially reasonable efforts to" accomplish ten tasks, which were conditions precedent to funding, such as ensuring that UNFI's banks cooperate, causing senior UNFI management to be available and participate in meetings with prospective lenders, co-host two meetings with the Lead Arrangers, promptly providing financial information and projections, obtaining a corporate rating, and ensuring that there are no competing offers. (*Id.* at 4.) The definition of "Marketing Period" is found in the ninth condition which provides that UNFI shall use

> "commercially reasonable efforts to provide the Lead Arrangers *a period (the "Marketing Period") of 15 consecutive business days following the delivery of the financial statements necessary to satisfy the conditions set forth in Sections (c) and (d) of Exhibit D attached hereto to syndicate the Term Loan Facility and the ABL Facility*. provided that (i) if the Marketing Period has not ended by August 17, 2018 then the Marketing Period shall not begin before September 4, 2018, (ii) November 21, 2018 and November 23, 2018 shall not be business days for purposes of calculating the Marketing Period and (iii) if the Marketing Period has not ended on or prior to December 21, 2018 then the Marketing Period shall not commence prior to January 2, 2019. . . the Lead Arrangers may decide to commence syndication efforts for each facility promptly after the signing Date."

(NYSCEF 36, Commitment Letter at 4 [emphasis added].)

Exhibit D of the Commitment Letter, entitled "Conditions Precedent to Funding," sets out 12 conditions including receipt by the Lead Arrangers of certain financial documents.

> "[s]ubject, in each case, to the Certain Funds Provision, the initial availability of, and initial funding under, the Facilities on the Closing Date shall be subject solely to the satisfaction or waiver by the Lead Arrangers, as applicable, of the following conditions precedent:
>
> (c) The Lead Arrangers shall have received copies of (A)(i) the audited consolidated balance sheet and related consolidated statements of operations, comprehensive income, change in stockholders' equity and cash flows for the fiscal years of the

> Borrower ended August 1, 2015, July 30, 2016, and July 29, 2017 (it being understood that the Lead Arrangers acknowledges [sic] receipt of such audited financial statements) and for each subsequent fiscal year of the Borrower ended at least 60 days before the Closing Date and (ii) the unaudited consolidated balance sheet and related consolidated statements of operations, comprehensive income, change in stockholders' equity and cash flows for each subsequent fiscal quarter (other than the fourth fiscal quarter of the Borrower's fiscal year) ended at least 40 days before the Closing Date (it being understood that the Lead Arrangers acknowledge receipt of the unaudited consolidated financial statements in respect of the fiscal quarters ended October 28, 2017, January 27, 2018 and April 28, 2018) and *(B)(i) the audited consolidated balance sheet and related consolidated statements of operations, comprehensive income, change in stockholders' equity and cash flows for the fiscal years of the Target ended February 27, 2016, February 25, 2017 and February 24, 2018 (it being understood that the Lead Arrangers acknowledges* [sic] *receipt of such audited financial statements) and for each subsequent fiscal year of the Target ended at least 60 days before the Closing Date and (ii) the unaudited consolidated balance sheet and related consolidated statements of operations, comprehensive income, change in stockholders' equity and cash flows for each subsequent fiscal quarter (other than the fourth fiscal quarter of the Target's fiscal year) ended at least 40 days before the Closing Date.*"

(NYSCEF 36, Exhibit D at D-1, D-2 [emphasis added].) "The 60- and 40-day time periods referenced in the Commitment Letter are drawn from the Securities and Exchange Commission's ("SEC['s]") Large Accelerated Filer Rule, which specifies the time periods in which certain issuers, including UNFI and SUPERVALU at the time, are required to file their annual and quarterly financial statements. That rule is publicly and widely known throughout the industry." (NYSCEF 32, Complaint at n7.)

The Flex Provisions allowed GS Group to increase the interest rate on the Term Loan to make it more attractive to investors. (NYSCEF 32, Complaint at ¶¶ 34, 35.) Because exercising these provisions would make the loan more costly for UNFI, GS Group was permitted to exercise the Flex Provisions only under certain circumstances. (*Id.* at ¶ 34.) The Flex Provisions provide:

> "[t]he Requisite Term Loan Lead Arrangers ... shall be entitled at any time prior to the earlier of (a) the Closing Date and (b) the date of a Successful Syndication ... without your consent ... to make the following changes ... (such changes, the "Flex

> Provisions") to the Term Loan Facility, in each case *so long as the Requisite Term Loan Lead Arrangers reasonably determine that (i) such changes are necessary to ensure a Successful Syndication or (ii) such Successful Syndication has not or cannot be achieved by the Closing Date: . . .*
>
> (a) increase the applicable margin on the Term Loan Facility . . . not more than 125 basis points . . . *provided, that the aggregate amount of such OID and upfront fees (including any OID and upfront fees otherwise described herein or in the Commitment Letter) shall not exceed 2.50% of the Term Loan Facility . . . .*"

(NYSCEF 37, Fee Letter at Exhibit A, 4 [emphasis added].)

The Three-Day Invoice Provision concerns UNFI's payment obligations and states the following:

> "[s]ubject, in each case, to the Certain Funds Provision, the initial availability of, and initial funding under, the Facilities on the Closing Date shall be subject solely to the satisfaction or waiver by the Lead Arrangers, as applicable, of the following conditions precedent:
>
> "(h) All fees required to be paid on the Closing Date pursuant to the Fee Letter and reasonable out-of-pocket expenses required to be paid on the Closing Date pursuant to the Commitment Letter, in each case to the extent invoiced at least three (3) business days prior to the Closing Date, shall have been paid, or shall be paid substantially concurrently with, the initial borrowing under the Facilities (which amounts may be offset against the proceeds of the Facilities)."

(NYSCEF 36, Commitment Letter, Exhibit D at D-2.)

Admittedly, the transaction occurred during a challenging market. "Following the July 25 signing of the Commitment Letter, the S&P 500 dropped nearly 10% over the course of October from peak to trough, coming off record highs [sic] in late September; and yields on ten-year Treasury bonds increased from 2.94% on the signing date to a high of 3.25% in early October." (NYSCEF 32, Complaint at ¶40.)

UNFI filed its year-end financial statements on September 24, 2018, a document on the Commitment Letter's disclosure list that triggers "the Marketing Period." (*Id.* at ¶ 78.)

UNFI alleges that the Marketing Period commenced on September 24, 2018, as evidenced by a defendants' live presentations to banks and potential investors at the Four Seasons Hotel in NYC and concluded on October 15, 2018. (*Id.* at ¶¶ 45, 66, 69.) Defendants issued a 67-page memo analyzing the deal which was distributed to potential investors between September and October, ending on October 15, 2018, the deadline defendants set for investors to commit to participate in the syndication. (*Id.* at ¶ 46.) UNFI agreed to facilitate the syndication, including a full 15-consecutive-business-day "Marketing Period," and it asserts that it did so cooperate, as evidenced by its participation at the September 24, 2018 meeting and a second meeting defendants hosted on October 2, 2018 at the Park Hyatt. (*Id.* at ¶¶ 40, 47.)

SUPERVALU issued financial statements on October 15, 2018 for its second fiscal quarter that ended on September 8, 2018. (*Id.* at ¶ 44; NYSCEF 36, Commitment Letter at D-1 ¶ [c][A][i].)

The Closing Date was October 22, 2018, a date that was agreed upon on September 18, 2018. (NYSCEF 32, Complaint at ¶¶ 42, 66, 97.)

On October 18, 2018 at 11:53 PM, the second-to-last business day before the Closing Date, GS Group sent UNFI a list of the amounts it intended to withhold from the term loan at the closing. (*Id.* at ¶ 65.) The list included for the first time $40.5 million in withholdings including the $4.5 million Term Loan Funding Fee[7] and $36 million from the loan proceeds that would be credited to investors as a result of exercising all of the Flex Provisions. (*Id.* at ¶ 33, 65.) According to UNFI, GS Group immediately justified these

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[7] Calculated as follows: 0.25% of $1.8 billion. (NYSCEF 32, Complaint at ¶ 33.)

withholdings by asserting that a second Marketing Period commenced on October 15, 2018 when SUPERVALU filed its financial statements for its second fiscal quarter with the Securities Exchange Commission. (*Id.* at ¶ 66.) GS Group exercised the Flex Provisions allegedly "under the guise that they were ***necessary*** to syndicate the Term Loan," but UNFI insists that defendants manufactured the necessity improperly "exploiting its reputation, market power and influence over its client" and waiting to the last-minute to exert even more pressure. (*Id.* at ¶¶ 1, 9, 49.) Finally, GS Group allegedly directed GS Bank to withhold these fees at closing. (*Id.* at ¶ 100.)

UNFI alleges that because GS Group unnecessarily exercised all of the Flex Provisions, the Term Loan's interest rate increased by 1.5% amounting to more than $180 million in interest over the life of the Term Loan. (*Id.* at ¶¶ 3, 39, 91,118.) UNFI also alleges that GS Group "did not act in good faith to syndicate the [Term Loan] in order to bolster its invocation of the Flex Provisions and give weight to its threats that its demands were necessary to syndicate the [Term Loan]." (*Id.* at ¶¶ 49.) UNFI acknowledges that "coupling advisory services with the offer to fund a transaction" could influence an investment advisor's recommendations to its client. (*Id.* at ¶ 25.) For example, triggering the flex provisions dramatically increased UNFI's cost, but was financially even more lucrative for defendants. (*Id.* at ¶¶ 49-51.) Indeed, defendants disclaimed a fiduciary duty and UNFI waived any such conflict. (NYSCEF 36, Commitment Letter at 10.)

Defendant also demanded that "UNFI make detrimental concessions it was not obligated to make." (*Id.* at ¶ 118.) The concessions included adding SUPERVALU as a co-borrower to the Term Loan and "inviting creditors with an interest in UNFI's failure to fund the [Term Loan]." (*Id.* at ¶¶ 38, 91.) UNFI characterizes these "concessions" as those "for

which Goldman Sachs [Group] had not bargained." (*Id.* at ¶¶ 3, 52, 91.) UNFI objects that defendants understated the impact of adding SUPERVALU as a co-borrower as "muted" when in reality UNFI "was subjected to Term Loan lenders with a significant incentive to force UNFI and SUPERVALU to default on the Term Loan." (*Id.* at ¶¶ 29, 54, 61, 123, 125.) Also, when UNFI inquired about the purpose of adding SUPERVALU as a co-borrower, defendants represented that the co-borrower provision was important to "select accounts" but omitted that these select accounts were "[credit default swap] short sellers looking to preserve their bet that SUPERVALU would default on its borrowing." (*Id.* at ¶ 124.) Feldgoise claimed that if UNFI did not comply with the "demands," it would "scare off" potential investors and "[t]hings would get ugly." (*Id.* at ¶¶ 50, 63.) UNFI "accepted" these concessions but rejected others, including the demand for "an additional unwarranted interest rate increase." (*Id.* at ¶ 52.)

While UNFI does not allege here a breach of the Engagement Agreement, which is governed by Delaware law and includes a Delaware forum selection clause, it objects to payment of GS&Co's Engagement Agreement fees from the Term Loan Proceeds.[8] UNFI charges that GS Group "directed GS Bank to withhold $11.4 million" "[f]or the benefit" of GS&Co even though it was not included on the October 17, 2018 list of fees to be paid at closing. (*Id.* at ¶¶ 110, 111.) Rather, defendants disclosed that the GS&Co. fee would be deducted on October 18, 2018. (*Id.*)

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[8] The court notes that an action is pending in Delaware: *United Natural Foods, Inc. v Goldman Sachs Group, Inc. et al.*, No 19-01607, in which UNFI "attacks actions taken by Goldman Sachs to protect profits that it, Bank of America, and US Bank made on a loan to finance an acquisition UNFI was making." (NYSCEF 41, letter from Delaware Court; NYSCEF 40, Quinn Emanuel letter to Delaware Court.)

Accordingly, UNFI commenced this action against GS Group, GS Bank, GS Lending, and Feldgoise to recover: (1) the Term Loan Funding Fee in the amount of $4.5 million; (2) $36 million arising from invocation of the Flex Provisions; (3) increased interest expense of $180 million pursuant to the invocation of the Flex Provisions; and (4) $11.4 million in fees that were allegedly owed to nonparty GS&Co. but collected by the defendants. (*Id.* at ¶¶ 90-91.) While UNFI expects "that the Acquisition will yield the benefits that UNFI anticipated" it seeks "to hold Goldman Sachs to account for using its influence and control . . . to protect and increase its profits to the detriment of UNFI and its shareholders." (*Id.* at ¶¶ 11, 21.) UNFI asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud against all defendants.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, pursuant to CPLR 3211 [a] [1][9], factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

[9] The court rejects defendants' citation to UNFI's statements to the press and media clips as beyond the scope of the complaint and not the sort of documentary evidence contemplated by CPLR 3211(a) (7).

A. Count One - Breach of Contract

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009].)

1. The Term Loan Funding Fee

UNFI alleges the formation of a contract with defendants, satisfying the first element. (NYSCEF 32, Complaint at ¶¶ 26, 27, 100, 101.) Although GS Group is not a signatory to the agreements at issue, "a parent company can be held liable as a party to its subsidiary's contract if the parent's conduct manifests an intent to be bound by the contract, which intent is inferable from the parent's participation in the negotiation of the contract." (*Horsehead Indus. v Metallgesellschaft AG.*, 239 AD2d 171, 171-172 [1st Dept 1997], *affd* 14 NY3d 901 [2010].) Here, UNFI alleges that GS Group negotiated the agreements at issue which is satisfactory at this juncture. (NYSCEF 32, Complaint at ¶ 31.) UNFI alleges its own performance. (*Id.* at ¶ 40.) UNFI also alleges damages from defendants' "misappropriation" in the amount of $4.5 million. (*Id.* at ¶¶ 33, 101, 102.) However, UNFI fails to sufficiently allege a breach by defendants.

As to defendants' breach, UNFI challenges the payment of the $4.5 million Term Loan Funding Fee arguing that it was not eamed under the definition of "the Marketing Period." (*Id.* at ¶¶ 33, 95.) The Term Loan Funding Fee is triggered if the Closing Date occurs before the completion of the Marketing Period and a Successful Syndication has not occurred.[10] The Marketing Period is 15 days after defendants receive copies of certain

[10] There is no affirmative statement in the complaint to indicate whether the syndication was successful or not. Rather, UNFI repeatedly accuses defendants of failing to proceed with

financial statements listed in the Commitment Letter. (NYSCEF 36, Commitment Letter at 4, Exhibit D at D-1, D-2.) It is undisputed, that the Closing Date was October 22, 2018. (NYSCEF 43, Memorandum in Support at 11; NYSCEF 32, Complaint at ¶ 42.) It is also clear that the SUPERVALU statement for the quarter ending September 8, 2018 is one of the specific documents listed in the Commitment Letter. (NYSCEF 36, Commitment Letter at D-1, D-2.)

Thus, the issue is whether the Marketing Period concluded before or after the closing date. According to UNFI, there was "a" Marketing Period for 15 days which began on September 24, 2018 and ended on October 15, 2018. (NYSCEF 32, Complaint at ¶¶ 70, 66, 68.) This commencement is evidenced by two live presentations to banks and potential investors in NYC; it then concluded on October 15, 2018 when investors were required to commit to the syndication according to defendants' 67 page memo to potential investors. (*Id.* at ¶¶ 45, 66, 69, 71.) Defendants did not list October 15, 2018, the anticipated date for SUPERVALU's issuance of financial statement, as a "key date" on any calendars issued during the transaction, though the date was known pursuant to SEC rules. (*Id.* ¶ 71.) Feldgoise allegedly told UNFI that SUPERVALU's October 15, 2018 quarterly statement would have "no impact" on the syndication. (*Id.* ¶ 72). In UNFI's view, the conclusion of a Marketing Period precluded another Marketing Period from starting on October 15, just days before the Closing. Finally, UNFI argues that the agreement's use of the term "**a** period (the 'Marketing Period') of 15 consecutive days" means one period. Otherwise, UNFI opines there is an ambiguity that cannot be resolved on a motion to dismiss.

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the syndication in good faith, implying failure. (NYSCEF 32, Complaint at ¶¶ 40, 67, 99, 118.)

UNFI alleges that on October 18, 2018when defendants revealed that they would be charging the Term Loan Funding Fee, defendants initially explained that a second Marketing Period began on October 15, 2018 with the Marketing Period ending on November 5, 2018, after the Closing. (NYSCEF 32, Complaint at ¶ 66.) Defendants now make a different argument. Regardless of the marketing activities that began on September 24, on October 15, 2018, SUPERVALU issued its second quarter financial statements for the quarter ending September 8, 2018, four business days prior to the Closing, which triggered "a Marketing Period" according to defendants. Defendants opine that UNFI is confusing marketing with the "Marketing Period," and thus, reject UNFI's argument that the Marketing Period means when marketing is done.

Alternatively, defendants argue that, if a marketing period began on September 24, 2018, it was extinguished or superseded when SUPERVALU issued its financial statement on October 15, 2018. Defendants insist that by definition of the "Marketing Period," a new Marketing Period begins every time UNFI or SUPERVALU issue new financial statements superceding prior Marketing Periods. Indeed, defendants explain that the 15-day Marketing Period makes commercial sense because the market must have enough time to digest new information contained in financial reports.

Defendants reject UNFI's assertion of ambiguity. Rather, defendants insist the agreements are clear.

Under New York's well-established rules of contract interpretation, "a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (*Matter of Westmoreland Coal Co. v Entech, Inc.,* 100 NY2d 352, 358 [2003] [internal quotation marks

and citation omitted].) "[W]hen parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks, ellipses and citations omitted].) This rule is of particular import "where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.,* 13 NY3d 398, 403 [2009] [internal quotation marks and citation omitted].)

The test for ambiguity is to examine the four corners of the document, not to outside sources. (*W.W.W. Assocs. v Giancontieri,* 77 NY2d 157, 162 [1990].) The court should review "the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." (*Kass v Kass*, 91 NY2d 554, 566 [1998] [internal quotation and citation omitted].) "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face. (*Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379 [1969] [citations omitted]).

On its face, the Commitment Letter clearly provides "a" 15-day Marketing Period following the delivery of each financial statement listed in Exhibit D, sections (c) and (d) of the Commitment Letter within parameters set by the SEC. (*See Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986] [The proper inquiry is "whether the agreement on its face is reasonably susceptible of more than one interpretation"].) UNFI fails to identify any authority

in the documents for its contention that there can be only one "Marketing Period." Were the court to accept UNFI's interpretation, it would be impermissibly rewriting the documents at issue. Courts may not "by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citation omitted].) Use of the terms "a" and "the" to introduce the defined term "Marketing Period" does not limit the Marketing Period to one period. Rather, the 15 days after the release of each designated document triggers the period of 15 days is called the "Marketing Period." Clearly, UNFI's release of its financials on September 24 triggered "a Marketing Period" and SUPERVALU's release of its financial statements on October 15, 2018 also triggered "a Marketing Period." Where the language chosen by the parties has "a definite and precise meaning," there is no ambiguity. (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002] [citation omitted].)

The definition of "Marketing Period" illustrates that multiple Marketing Periods are contemplated: "(i) if the Marketing Period has not ended by August 17, 2018 then the Marketing Period shall not begin before September 4, 2018." If a relevant financial document is released during the period of 15 business days before August 17, the end date in this example, then its Marketing Period shall not begin until September 4.

The court must take account of all of the terms. "A reading of the contract should not render any portion meaningless." (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [citation omitted].) The Commitment Letter allows for "commenc[ing] syndication efforts for each facility promptly after the Signing Date," regardless of whether one of the specified financial statements has issued. However, UNFI's interpretation renders the delivery of the

documents listed in the Commitment Letter meaningless once any one of those documents is delivered. While the closing could not occur before 45 days after the signing date, there was no deadline by which the transaction must close. (NYSCEF 36, Commitment Letter, at D-3.) Under UNFI's interpretation, once UNFI had afforded defendants 15 days after a financial statement is issued, it would have no reason to afford time to review subsequent financial statements issued thereafter, even months or years later. However, the market must have time to digest the new financial information which makes commercial sense. UNFI's allegation that had the closing occurred on October 15, 16 or 17, UNFI could have avoided these fees, demonstrates that UNFI had options; incurring the Term Loan Funding Fee was not solely within defendants' control. (NYSCEF 32, Complaint, ¶ 78, footnote 20.) Indeed, UNFI alleges that the closing date and the date on which SUPERVAL released its second quarter financials were negotiated, albeit within parameters set by the SEC. (*Id.* at ¶ 70.)

UNFI's interpretation is also rejected because it presumes that the syndication ends on the Closing Date. (*Id.* at ¶ 81.) However, the agreements clearly anticipate that the syndication period will continue after the Closing Date, e.g., UNFI was to continue to use commercially reasonable efforts to assist the syndication until "the earlier of (a) 45 days after the Closing Date and (b) the date on which a "Successful Syndication" (as defined in the Fee Letter). (NYSCEF 36, Commitment Letter at 3.)

Next, UNFI contends that defendants did not earn the $4.5 fee because the syndication should have been successful by the Closing Date; the second element necessary for defendants to earn the Term Loan Funding Fee. Had the syndication been successful by the Closing Date, defendants would not have earned the $4.5 million fee.

Though not specifically alleged in the complaint, the syndication was unsuccessful as of the date of the closing. UNFI opines that it was unsuccessful because defendants failed to syndicate in good faith. Here the question is whether defendants took steps to perform the contractual obligation to syndicate the loan or did something to thwart the successful syndication. Implicit in this formula is that Successful Syndication was to occur by the Closing Date, though the agreements contemplate syndication efforts after the Closing Date. (NYSCEF 36, Commitment Letter at 3.)

At the pleading stage, plaintiff must allege that defendants acted, or failed to act, for improper motives and without good cause. (*Goodstein Const. Corp. v. City of New York*, 67 NY2d 990, 992 [1986] [plaintiff stated a claim for breach of defendants' contractual obligation of good faith where it alleged that "defendant acted without cause and for improper motives"].) UNFI alleges that defendants' handsome fees if the syndication failed as of the Closing Date incentivized defendants to do just that --fail. (NYSCEF 32, Complaint at ¶ 99.) While UNFI has alleged motive, it has not alleged an improper motive to fail to syndicate by the Closing Date. Rather, defendants' goal of maximizing its own profit is repeated throughout the documents: disclaiming fiduciary duty; requiring UNFI to waive any conflict; and reiterating that the parties were involved in an arm's length transaction. (see e.g., NYSCEF 36, Commitment Letter at 10.)

As to the absence of good cause to act or fail to act, the complaint also abounds with defendants' alleged acts to syndicate the loan. (NYSCEF 32, Complaint at ¶¶ 40, 45, 46, 47, 66, 69.) Indeed, UNFI complains that these numerous activities "lulled" UNFI into believing that the Marketing Period had begun and concluded. (NYSCEF 32, Complaint at ¶¶ 45-47; NYSCEF 49, Plaintiff's Memo of Law in Opposition at 13.) In the absence of acts

that would thwart syndication by the Closing Date, UNFI alleges that defendants' control of the marketing and syndication is sufficient to allege failure to act without good cause. (*Id.* at ¶ 98.) However, UNFI fails to connect how defendants used their control to reign in the syndication to ensure its failure at the Closing Date. That defendants could exert such improper control does not mean that they actually did; UNFI must allege something that defendants did or could have done to destroy the syndication.

Finally, as to Feldgoise, UNFI fails to state a breach of contract claim concerning the $4.5 million withholding. The complaint is bereft of any allegation concerning the formation of a contract between UNFI and Feldgoise.

Count I is dismissed against all defendants as to the $4.5 million Term Loan Funding Fee.

2. The Flex Provisions

UNFI asserts that GS Group breached the agreements by withholding $36 million from the Term Loan proceeds at the closing allegedly pursuant to the Flex Provisions. (NYSCEF 32, Complaint at ¶ 33, 34.) Here, UNFI asserts bad faith in invoking all of the Flex Provisions "under the guise that they were necessary to syndicate the Term Loan" and, again, failing to act in good faith to syndicate the Term Loan by the Closing Date. (*Id.* at ¶¶ 49, 99.) For the reasons stated above, the court rejects UNFI's argument about defendants' failure to act in good faith to syndicate by the Closing Date. Indeed, these two claims are inconsistent since, by definition, the Flex Provisions were created to induce syndication; it gave defendants room to negotiate with potential investors. However, defendants' alleged bad faith exercise of the Flex Provisions must be addressed separately.

Defendants assert that the Flex Provisions could not be exercised without the other nonparty banks' consent. This argument, premised on the documentary evidence, does not conclusively establish this defense as a matter of law. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].) "Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 601 [2017] [internal quotation marks and citations omitted].)

Again, at the pleading stage, plaintiff must allege that defendants acted, or failed to act, for improper motives and without good cause. (*Goodstein Const. Corp., 67 NY2d at* 992.) As explained above, defendants' profit seeking motive is not improper. Moreover, by definition, exercising the Flex Provisions brought syndication closer to conclusion. It made the Term Loan more attractive to investors, admittedly at great expense to UNFI. Triggering the Flex Provisions did not thwart the syndication; it promoted the syndication at a higher cost to UNFI. This higher cost was anticipated and baked into the agreements.

To the extent this claim relies on the definition of the "Marketing Period," it is rejected for the same reasons as explained above. (*Id.* at ¶ 39; NYSCEF 37, Fee Letter at Exhibit A, 4, § [a] [iv].)

Likewise, the claim is dismissed against Feldgoise because there is no allegation of formation of a contract between him and UNFI.

3. The Three-Day Invoice Provision

Next, UNFI alleges that GS Group breached the Commitment Letter when it failed to invoice certain fees at "least three business days before closing." (NYSCEF 32, Complaint at ¶¶ 33, 75, 78, 96.) Whether a violation of this provision gives rise to a breach of contract

claim entitling UNFI to damages depends on whether this provision is a promise or a condition. (*See generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 [1984].) In distinguishing these two concepts, the Court of Appeals has stated that,

> "[a] promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made. A condition, by comparison, is 'an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.'"

(*Merritt Hill Vineyards*, 61 NY2d at 112 [citation omitted].) Accordingly, the provision at issue here is a condition, not a promise. The Commitment Letter explicitly refers to these requirements as "conditions precedent." (*Compare Merritt Hill Vineyards*, 61 NY2d at 113 ["The requirements are contained in a section of the agreement entitled 'Conditions Precedent.'"].) The Commitment Letter further provides that funding on the Closing Date is "[s]ubject to" the fulfillment of these requirements including the payment of fees to the extent invoiced at least 3 business days before the Closing Date. (*Compare Id.* at 113 [noting that the conditions precedent section provides that plaintiff's obligation to pay is "subject to" fulfillment of certain requirements].) This provision is not a promise to invoice fees three days before collecting payment but a condition precedent by which the defendants could decline funding on the Closing Date insofar as their fees to the extent invoiced three days prior were not paid. Indeed, "no words of promise are employed" with respect to this invoicing provision. (*Id.* at 113.) It is true that "[a] provision may be both a condition and a promise, if the parties additionally promise to perform a condition as part of their bargain." (*Id.* at 113 n *.) But no such promise is here, and UNFI does not argue otherwise. This portion of Count I concerning the Three-Day Invoicing Provision is therefore dismissed against GS Group.

For the same reasons, it is also dismissed as to GS Bank and GS Lending.

Again, with respect to Feldgoise, there is no allegation of formation of a contract with him, and accordingly, the claim is dismissed as to him for this reason as well.

Count I is dismissed.

B. Count II - Breach of Contract

UNFI alleges that defendants breached their agreements by withholding the $11.4 million earned by nonparty GS&Co. under the Engagement Agreement because "[n]o provision in the Commitment, Fee or Structuring Fee Letters allows GS Bank to withhold fees for the benefit of third parties." (NYSCEF 32, Complaint at ¶¶ 107, 108.)

The Engagement Agreement provides that GS&Co. was entitled to be paid "[i]f 50% or more of the outstanding stock of SUPERVALU...is acquired." UNFI does not address whether GS&Co. was entitled to payment,[11] but disputes the mechanism of payment to GS&Co. at the closing out of the loan proceeds. The Engagement Agreement clearly provides that GS&Co. is to be paid "in cash upon consummation of such acquisition" – the closing.

UNFI opines that if GS&Co. had not been paid the $11.4 million at the closing, GS&Co. would have sued UNFI for payment in full, forcing a court to resolve the dispute over the oral agreement to a $2 million reduction. Implicitly, the court would rule in UNFI's

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[11] Failure to address defendants' argument that there was no breach of the Engagement Agreement and GS&Co was entitled to be paid, indicates an intention to abandon this additional allegation of breach as a basis for liability. (*Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Cook v North Country Academy Exec. LLC*, 65 Misc3d 1220[A], *6, 2019 NY Slip Op 51768[U], *9 [Sup Ct, Washington Cty 2019] ["By not offering any argument on this issue in its opposition, plaintiffs have abandoned this claim as a basis for liability."].)

favor. Defendants' premature payment robbed UNFI of that leverage. Such speculation is not sufficient to save this claim. Moreover, UNFI does not have a legitimate interest in willfully breaching the Engagement Letter, so the alleged injury, being robbed of the opportunity to hold up the $11.5 million payment as leverage, is not compensable. (*See Lexington 360 Assoc. v First Union Nat. Bank of North Carolina*, 234 AD2d 187, 190-92 [1st Dept 1996]).

Clearly, UNFI's actual dispute is with GS&Co. over the $2 million reduction allegedly promised by Feldgoise. The Engagement Agreement contains a forum selection clause designating Delaware and directing application of Delaware law which has a higher standard of proof for enforcement of oral waiver. However, UNFI cannot avoid that higher standard of proof by going through defendants in New York to reach GS&Co., not a party to this action. Nevertheless, issues arising in connection with the Engagement Letter are to be adjudicated in the U.S. District Court of Delaware under Delaware law. (NYSCEF 34, Engagement Agreement at Annex A, 10.) UNFI's claim for breach of contract against GS Group, GS Bank, and GS Lending for withholding GS&Co's fee of $11.4 million is dismissed.

Further, as previously discussed, UNFI fails to allege a formation of a contract with Feldgoise.

Count II is dismissed.

C. Count III - Breach of the Implied Covenant of Good Faith and Fair Dealing

UNFI alleges that defendants "unnecessarily exercised" the Flex Provisions and increased the cost of the financing to UNFI by more than $180 million" in violation of the implied covenant of good faith and fair dealing. (NYSCEF 32, Complaint at ¶ 118.)

"The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Moran v Erk*, 11 NY3d 452, 456 [2008] [internal quotation marks and citation omitted].) "While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [1st Dept 2003].) Moreover, "[w]here a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014].) "The conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts." (*Id.* at 104-105.) Moreover, a good faith and fair dealing claim cannot be maintained where it is "intrinsically tied to the damages allegedly resulting from a breach of the contract." (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011] [internal quotation marks and citations omitted].)

Here, UNFI's breach of contract claim concerning the Flex Provisions arises from the same operative facts as those underlying this claim for breach of the implied covenant of good faith and fair dealing: defendants' exercised the Flex Provisions, (whether unnecessarily or under the guise that they were necessary), and failed to syndicate the Term Loan in good faith. (NYSCEF 32, Complaint at ¶¶ 5, 7, 34, 36, 49, 91, 99, 118.) Moreover, the damages allegedly resulting from this good faith and fair dealing claim are intrinsically tied to those damages allegedly arising from the breach of contract claim because both concern the money UNFI allegedly had to pay as a result of the defendants

exercising the Flex Provisions. Whether damages sought for breach of the covenant of good faith and fair dealing duplicates the damages sought for breach of contract is but one factor for the court to consider. Here, separating the alleged damages caused by exercising the flex provision from the damages sought for breach of contract does not transform them into good faith and fair dealing damages and it does not save this claim.

Lastly, UNFI's position concerning the implied covenant of good faith and fair dealing construes the covenant so broadly as to nullify the express terms of the Flex Provisions and create independent contractual obligations. A plain reading of the Flex Provisions indicates that the Lead Arrangers, without UNFI's consent, had the authority to exercise the Flex Provisions so long as they reasonably determined that such changes were necessary for a Successful Syndication or that such Successful Syndication had not or could not occur by the Closing Date. (*Fesseha*, 305 AD2d at 268; *see also Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23 [1st Dept 2017].) This is not denying plaintiff the fruit of the contract; this is precisely what plaintiff bargained for. (See, *Moran v Erk*, 11 NY3d 452 [2008].)

Insofar as UNFI alleges that the defendants breached the implied covenant of good faith and fair dealing because they "baselessly withheld $11.4 million for Goldman Advisory over UNFI's objection and without invoicing it at least three business days in advance of the Acquisition's close," a claim is not stated. (NYSCEF 32, Complaint at ¶ 118.) This claim is duplicative of the breach of contract claim in Count II because both claims arise from the same facts: defendants withheld $11.4 million for nonparty GS&Co.

UNFI's allegation that defendants breached the implied covenant of good faith and fair dealing because they "demanded that UNFI make detrimental concessions it was not

obligated to make" similarly fails to state a claim. (NYSCEF 32, Complaint at ¶ 118.) The crux of this claim is that defendants demanded that UNFI make certain concessions in the form of adding SUPERVALU as a co-borrower to the Term Loan or "inviting creditors with an interest in UNFI's failure to fund the [Term Loan]." (NYSCEF 32, Complaint at ¶¶ 3, 91.) UNFI allegedly accepted these concessions but sustained "significant and unexpected additional costs." (*Id.* at ¶¶ 52, 91.) A breach of the implied covenant of good faith and fair dealing may occur when a party "communicates its intent to perform only upon the satisfaction of extracontractual [sic] conditions." (*Fonda v First Pioneer Farm Credit, ACA*, 86 AD3d 693, 695 [3d Dept 2011] [internal quotation marks and citations omitted].) But no such conduct is alleged anywhere by UNFI in its 44-page complaint. Indeed, the complaint is bereft of any allegation that defendants communicated their intent not to perform unless UNFI satisfied extra contractual conditions such as agreeing to SUPERVALU as a co-borrower or inviting other creditors to fund the Term Loan. UNFI's allegations that it was informed that if it failed to comply with these demands, it would "scare off" potential investors (NYSCEF 32, Complaint at ¶ 50) or that Feldgoise said "[t]hings would get ugly" are insufficient, without more, to state a cognizable claim for breach of the implied covenant of good faith and fair dealing on such a theory. (*Id.* at ¶ 63.) Simply stating potential market consequences to UNFI's decision is not sufficient.

Without a contract between UNFI and Feldgoise, there cannot be a breach of the implied covenant.

Count III is dismissed.

D. Count IV - Fraud

UNFI fails to state a fraud claim against the defendants. UNFI's fraud claim is premised on two alleged misrepresentations. The first is that the defendants informed UNFI that the impact of adding SUPERVALU as a co-borrower would be "muted" when in reality UNFI "was subjected to Term Loan lenders with a significant incentive to force UNFI and SUPERVALU to default on the Term Loan." (NYSCEF 32, Complaint at ¶ 123.) The second is that defendants represented that adding SUPERVALU as the co-borrower was important to "select accounts" but omitted that these select accounts were "[credit default swap] short sellers looking to preserve their bet that SUPERVALU would default on its borrowing." (*Id.* at ¶ 124.) According to UNFI, "these perverse incentives give rise to a significant risk of net-short debt activism, which materially reduces the value of the Term Loan to UNFI." (*Id.* at ¶ 123.) Net-short debt activism is when an investor buys corporate debt with the intent to assert defaults under the contracts setting in motion events such as acceleration of payments or litigation that ultimately benefit this investor who has amassed a larger short position than his or her long position in the company's debt. (*See* NYSCEF 32, Complaint at ¶ 60 n 15.) Indeed, UNFI alleges that it "was damaged by the reduction of the value in the Term Loan caused by the inclusion of net-short debt activist hedge funds in the lender syndicate." (*Id.* at ¶ 127.)

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) With respect to the element of justifiable reliance,

> "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary

> intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations."

(*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194 [1st Dept 2012] [internal quotation marks and citations omitted].) For instance, "a party's financial condition is a matter that can be readily explored through a due diligence investigation" especially as it concerns the party's debt. (*Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 224 [1st Dept 2007].) Accordingly, when a plaintiff fails to "undertake an independent appraisal of the risk" it assumes, recovery is precluded because the plaintiff assumes the "risk of loss that a proper investigation would have been likely to disclose." (*Lambert v Mahoney, Cohen & Co.*, 218 AD2d 580, 583 [1st Dept 1995].) Moreover, "[w]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required and it cannot reasonably rely on such representations without making additional inquiry to determine their accuracy." (*Norcast S.a.r.l. v Castle Harlan, Inc.*, 147 AD3d 666, 667 [1st Dept 2017] [internal quotation marks and citations omitted].)

Here, UNFI had the means available to it of knowing by the exercise of ordinary intelligence the truth or real quality of whether adding SUPERVALU as a co-borrower would have a "muted" effect. Indeed, SUPERVALU was the target of UNFI's acquisition, and therefore, UNFI was in an excellent position to explore SUPERVALU's debt through due diligence. (See *Adelaide Prods., Inc.*, 38 AD3d at 224.) UNFI was also in position to undertake an "independent appraisal of the risk" associated with adding UNFI's target as a co-borrower for what UNFI describes as the "most important undertaking in [its] history." (Lambert, 218 AD2d at 583; NYSCEF 32, Complaint at ¶ 21.) Yet, UNFI admits to failing to demand the list of investors before the Closing; UNFI did not learn the identities of the

investors until after the closing. Nevertheless, UNFI failed to engage in a due diligence investigation or independently appraise this risk. Therefore, and in spite of UNFI's theories of liability, these allegations of justifiable reliance are untenable. UNFI even admits in a footnote in the complaint that it had "another financial advisor on the transaction, Foros LLC" and legal counsel available to it for consultation. (NYSCEF 32, Complaint at ¶ 22 n 2.)

With respect to defendants' "select accounts" representation, UNFI admits in the complaint that this was the answer it received "in response" when UNFI inquired as to the purpose of adding SUPERVALU to the Term Loan. (*Id.* at ¶ 124.) Nevertheless, UNFI did not exercise its veto power despite GS&Co.'s repeated denunciations of any fiduciary duty and declaration that the funding of the Term Loan was an arm's length transaction between defendants and UNFI. (*Id.* at 30; *See also Norcast S.a.r.l. v Castle Harlan, Inc.*, 147 AD3d at 667 [plaintiff "did not press defendant for a contractual warranty regarding the [select accounts'] identity, or even for direct answers to [its] questions on this subject"] [citation omitted].) Accordingly, UNFI fails to allege justifiable reliance.

Additionally, UNFI fails to allege damages. UNFI's allegation that there is a significant risk of net-short debt activism that has reduced the value in the Term Loan to UNFI is "impermissibly speculative." (*Norcast S.a.r.l.*, 147 AD3d at 667.)

Count IV is dismissed against all defendants.

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that the action is dismissed in its entirety with costs and disbursements to defendant as taxed by the County Clerk, and the Clerk is directed to enter judgment.

5/5/2020
DATE

ANDREA MASLEY, J.S.C.

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