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New York Supreme Court

Appellate Division – First Department

UNITED NATURAL FOODS, INC.,

Plaintiff-Appellant,

Appellate Case No.: 2020-02490

v.

GOLDMAN SACHS GROUP, INC.; GOLDMAN SACHS BANK USA; GOLDMAN SACHS LENDING PARTNERS, LLC; AND STEPHAN J. FELDGOISE,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

Michael A. Paskin
Michael T. Reynolds
Lauren A. Moskowitz
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
mpaskin@cravath.com
mreynolds@cravath.com
lmoskowitz@cravath.com

Attorneys for Defendants-Respondents

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does Appellant state a claim for breach of contract where both of the contractual prerequisites to Appellant's obligation to pay the disputed Marketing Period Fees were satisfied according to the contract's unambiguous terms?

Answer below: No. The contractual prerequisites to payment were satisfied, and the Motion Court properly dismissed Appellant's breach of contract claim.

2. Does Appellant state a claim for breach of the implied covenant of good faith and fair dealing where (a) it is based on the same contractual provision and operative facts as a breach of contract claim, (b) it seeks to supplant the express contractual standard prescribed for Respondents, and (c) Appellant indisputably received the intended fruits of the relevant contracts.

Answer below: No. The Motion Court properly dismissed Appellant's implied covenant claim.

3. Does Appellant state a claim for fraud where (a) as a matter of law, the statements at issue were complete and truthful, (b) allegations of scienter are based entirely on unspecified information and belief, (c) Appellant and its sophisticated counsel and independent financial advisor used none of the tools at their disposal to investigate the information Appellant claims was critical, and

(d) Appellant’s claimed injury is based entirely on a speculative prospect of future harm.

Answer below: No. The Motion Court properly dismissed Appellant’s fraud claim.

PRELIMINARY STATEMENT

This appeal concerns a multi-billion dollar financing transaction between sophisticated counterparties represented by capable counsel that is governed in all relevant respects by unambiguous contracts. Plaintiff-Appellant United Natural Foods, Inc. ("UNFI") continues to ignore the clear contractual provisions to which it agreed and which properly required dismissal of its claims by the Motion Court. UNFI's brief is littered with innuendo and bare conclusions that both lack support in well-pled factual allegations in the Complaint and fly in the face of the contracts that UNFI (a NYSE-listed company) signed with the assistance of its then-counsel, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). The Motion Court's dismissal of UNFI's Complaint should be affirmed.

Specifically, UNFI obtained commitments from Respondent Goldman Sachs Bank USA ("Goldman Bank"), and non-parties Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, and U.S. Bank National Association (collectively with Goldman Bank, "Arrangers") to finance a $2.9 billion acquisition ("Acquisition") of another public company, SUPERVALU INC. ("Supervalu"), which UNFI touted as "strategically critical". (R. 172, ¶ 20.) Under the Commitment Papers (defined below), Arrangers agreed to fund a senior secured term loan facility ("Term Loan"), reserved the right—but had no

obligation—to syndicate the Term Loan to investors and obtained protections against the risk of incomplete syndication. UNFI acknowledged in those contracts that its relationship with Arrangers was "an arm's length business" relationship, not a fiduciary one. (R. 316.)

After signing, financing market conditions deteriorated, UNFI and Supervalu missed earnings, UNFI's stock plunged and the debt's credit ratings were unfavorable. Unsurprisingly, syndication proved difficult, and Arrangers exercised various contractual rights, including to invoke "Flex Provisions" to make the Term Loan more appealing to investors—*inter alia*, by providing original issue discount ("Flex OID") at issuance and increasing the interest rate UNFI would pay to investors/lenders over the life of the loan—and to recover certain fees at closing. UNFI does not allege any facts indicating that the Term Loan could have been syndicated without the Flex Provisions—which stands to reason, since the purpose of the Flex Provisions was to increase investor interest, and even with the Flex Provisions, syndication was incomplete at closing.

On October 22, 2018 ("Closing Date"), the Acquisition closed and UNFI received the agreed-upon financing, which was not contingent on Arrangers' syndication efforts. UNFI admits it will "fully realize[]" "all of the benefits UNFI anticipated, and more" of "the single most important undertaking in [its] history". (R. 172, ¶ 21.)

UNFI's claims center on whether Arrangers properly invoked their contractual rights. Having received the benefits of its bargain, UNFI cannot rewrite the contracts, recapture the fees paid, shift to Respondents the alleged increased borrowing costs investors demanded or make Respondents guarantors against speculative future harm. The Motion Court correctly dismissed the Complaint and this Court should affirm.

First, UNFI seeks return of $40.5 million of closing costs it calls "Marketing Period Fees" charged by Arrangers in alleged breach of the Commitment Papers (Count I). That sum—the vast majority of which was credited to investors in the syndicate, not Arrangers—could be withheld by Arrangers if the "Closing Date occur[red] prior to the completion of the Marketing Period and a Successful Syndication ha[d] not occurred". (R. 378, ¶ (e); *see also* R. 380, ¶ (a)(iv).) Both conditions were satisfied according to the unambiguous contract terms. While UNFI urges that the "Marketing Period" should be read colloquially to mean "when marketing occurred", it was actually a specifically-defined time period determined in hindsight as of the Closing Date to ensure Arrangers had sufficient time to attempt to syndicate the loan with the benefit of up-to-date financials. There is no question the Closing Date occurred prior to the Marketing Period's completion. As to the second condition, it is undisputed that syndication was not completed by the Closing Date, which is the end of the required analysis.

UNFI cannot now impose on Arrangers—either based on the express contract terms or the implied covenant—an obligation to exercise a specific level of effort in syndicating the loan when the Commitment Papers made clear the decision to syndicate (and the timing thereof) was an option granted to Arrangers, not an obligation owed to UNFI. In any event, UNFI alleges no facts suggesting Arrangers acted in bad faith—instead, the Complaint "abounds" with evidence of diligent syndication efforts. (Section I.)

Second, UNFI invokes the implied covenant of good faith and fair dealing in seeking return of $180 million in additional interest it will pay to investors—again, not to Arrangers—over the life of the Term Loan that resulted from Arrangers' exercise of the Flex Provisions to facilitate syndication (Count III). But the contract's plain terms—to which UNFI, with the advice of its sophisticated counsel, agreed—authorized Arrangers to exercise the Flex Provisions because syndication indisputably was not completed by closing, rendering UNFI's implied covenant arguments irrelevant. Even if UNFI somehow could get past that hurdle, its implied covenant claim fails because it (a) is impermissibly duplicative of its contract claim, (b) seeks to supplant the express contractual standard with one of UNFI's own creation, and (c) is otherwise unsupported by UNFI's conclusory allegations. (Section II.)

Third, UNFI's assertion of fraud in a contract dispute (Count IV) is gratuitous and should be rejected. Contrary to UNFI's conclusory allegations regarding "Goldman Sachs' . . . promise to act as a guardian of UNFI's interest[s]" (R. 173, ¶ 24), the parties expressly disclaimed any fiduciary, advisory or agency relationship in this multi-billion dollar financing transaction between sophisticated counterparties represented by capable counsel (and, in UNFI's case, an independent financial advisor). UNFI nonetheless claims that during syndication, Goldman Bank passed along an investor request to add Supervalu as a co-borrower on the Term Loan and told UNFI that doing so would have only a "[m]uted impact on [UNFI]". (R. 167-68, ¶ 5.) The Motion Court correctly concluded that UNFI did not use the tools available to it to investigate the issue about which it now claims to have been concerned, and its damages claim is based entirely on a speculative prospect of future harm—not any actual injury incurred. In addition, the Motion Court's decision should be affirmed on the independent bases that the alleged statements by Respondents were not false and UNFI's scienter allegations are impermissibly non-specific and conclusory. (Section III.)

COUNTERSTATEMENT OF THE NATURE OF THE CASE

A. Goldman Advisory Enabled UNFI's "Most Significant Transaction".

In 2018, UNFI began to pursue an acquisition of Supervalu. (R. 173, ¶ 22.) Contemplating the "most significant transaction in [its] history"

(R. 166, ¶ 1; R. 172, ¶ 21), UNFI retained non-party Goldman Sachs & Co., LLC ("Goldman Advisory") and Foros Securities LLC ("Foros") as co-financial advisors, and Skadden as legal counsel (R. 173, ¶ 22 & n.2; R. 1078). UNFI agreed in the Engagement Letter to pay Goldman Advisory a fee upon consummation of the Acquisition.[1] (R. 215.)

B. Arrangers Agreed to Finance the Acquisition.

On July 26, 2018, UNFI announced its Agreement and Plan of Merger to acquire Supervalu for $2.9 billion ("Acquisition Agreement"), and that Respondents Goldman Bank and Goldman Sachs Lending Partners LLC ("Goldman Lending Partners") had committed to provide the $2.15 billion Term Loan and additional financing under a $2 billion asset-based revolving credit facility (the "ABL Facility"). (R. 172, ¶ 19; R. 175, ¶ 26 & n.4.) By August 8, 2018, the other Arrangers had committed to join Goldman Bank in funding the Term Loan (leaving Goldman Bank with 45% of the total commitment). (R. 308, § 1.)

UNFI, Arrangers and Goldman Lending Partners (among others) entered into the Commitment Letter and the Fee Letter, and UNFI, Goldman Bank and Goldman Lending Partners entered into a structuring fee letter (collectively,

[1] UNFI originally sought recovery of that advisory fee in Count II, but did not appeal dismissal of that claim. (*See* Brief for Plaintiff Appellant, dated July 13, 2020 ("Br.") 14 n.1.)

the “Commitment Papers”). In the Commitment Letter, Arrangers “commit[ted]” “severally and not jointly” to fund the Term Loan (R. 308, § 1), and “reserve[d] the right . . . to syndicate all or a portion” to other investors “prior to or after the Closing Date” (R. 308, § 2), while UNFI “agree[d] to use [its] commercially reasonable efforts to assist” (R. 309-310). UNFI agreed that the parties had “an arm’s-length business relationship” and “no fiduciary, advisory or agency relationship”; that “[Arrangers and their] affiliates . . . may have conflicting interests”; and that it “understand[s] and accept[s], the terms, risks and conditions of the transactions contemplated”. (R. 316.) The Fee Letter clearly detailed the fees and other charges potentially payable by UNFI on the “Closing Date”. (R. 377-81; R. 328, ¶ (c).)

Recognizing that corporate acquisition financing is not risk free, the Commitment Papers provided for certain fees and rights if Arrangers faced difficulties with syndication. *First*, UNFI agreed to pay “[a] funding fee equal to 0.25% of . . . the Term Loan . . . (the ‘Term Loan Funding Fee’) . . . on the Closing Date if the Closing Date occurs prior to the completion of the Marketing Period and a Successful Syndication has not occurred”. (R. 378, ¶ (e).) The “Marketing Period” was defined as “15 consecutive business days following the delivery of [certain] financial statements” (R. 310), which included specified financials for *both* UNFI *and* Supervalu. (R. 363-64, ¶ (c) (emphasis added)). “Successful

Syndication" was defined as a circumstance where Arrangers "hold commitments and loans in respect of the Term Loan . . . of not greater than $0". (R. 381-82.)

Second, the Fee Letter also included the Flex Provisions, which in certain circumstances permitted Arrangers to, among other things: increase the interest rate on the Term Loan "by not more than 125 basis points" (R. 380, ¶ (a)); plus another 25 basis points if UNFI's credit ratings fell below a certain threshold (R. 380, ¶ (a)(iii)); and "credit[] to the investors in the Term Loan syndicate" (R. 177, ¶ 33) up to 2% of the Term Loan (50 basis points multiplied by an assumed four year life to maturity) as Flex OID (R. 380, ¶ (a)(iv)).[2] As specified in the Fee Letter, the "Requisite Term Loan Lead Arrangers"—defined as Arrangers "holding . . . at least a majority of the commitments in respect of the Term Loan" (R. 382)—"[were] entitled . . . without [UNFI's] consent" to invoke these Flex Provisions if they "reasonably determine[d] that (i) [the Flex Provisions were] necessary to ensure a Successful Syndication *or* (ii) such Successful Syndication has not *or* cannot be achieved by the Closing Date" (R. 380 (emphasis added)). Notably,

[2] The right to credit the Flex OID to investors in the syndicate was available "if a Successful Syndication has not occurred by [the Closing Date] and the Marketing Period has not concluded by such date". (R. 380, ¶ (a)(iv).)

since Goldman Bank's share of the commitment obligation was only 45%, it could not exercise the Flex Provisions on its own.[3]

By decreasing the amount an investor would pay upfront to fund a portion of the commitments (*i.e.*, Flex OID) and increasing the payments an investor would receive over the life of the loan (*i.e.*, higher interest rate), the Flex Provisions made the Term Loan more attractive to investors and therefore facilitated Arrangers' syndication efforts. (R. 178-79, ¶¶ 34-35.)

C. Despite Challenges, Goldman Bank More Than Lived Up to Its Contractual Obligations, Enabling UNFI's Acquisition of Supervalu.

After signing, strong headwinds challenged the financing. "[T]he S&P 500 dropped nearly 10% over the course of October from peak to trough, coming off record-highs 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". (R. 184, ¶ 48 n.11.) Developments specific to UNFI and Supervalu did not help matters. The Acquisition was not well received in the market, with UNFI's stock dropping more than 40% between announcement and closing. On September 24, 2018, UNFI released its annual financial statements, which missed

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[3] UNFI initially sued all of the Arrangers, but subsequently withdrew those actions (which had been removed to federal court) and decided for strategic reasons to sue only Respondents. (*See generally* R. 1121-25.)

consensus estimates. On October 15, 2018, just a week before closing, Supervalu surprised the market with its own financial underperformance. Moreover, "UNFI combined with SUPERVALU . . . received lower credit ratings" than anticipated. (*Id*.)

Despite these adverse conditions, UNFI's own allegations acknowledge that Goldman Bank and the other Arrangers worked hard to syndicate the Term Loan by, among other things, meeting with investors, preparing marketing materials, proposing solutions and passing along investor proposals—many of which UNFI rejected. (*See* R. 182-84 ¶¶ 45 & n.10, 46-47, 49 n.11; R. 186, ¶ 53; R. 191, ¶ 63 & n.17.) With difficulty syndicating, Arrangers—not just Goldman Bank—exercised the Flex Provisions to encourage investor participation. (R. 380; R. 382; *cf.* R. 184, ¶ 49.) Specifically, Arrangers "credited to the investors in the Term Loan syndicate" $36 million in Flex OID and increased the interest rate by 1.5%, which, according to UNFI, will result in $180 million in additional interest payments going to the Term Loan investors—not to Arrangers. (R. 177-78 ¶ 33; R. 185, ¶ 51; R. 202, ¶¶ 90-91.)

UNFI does not allege facts suggesting the Term Loan would have been fully syndicated without the Flex Provisions. To the contrary, even after Arrangers properly exercised the Flex Provisions, they still could not fully syndicate the Term Loan. Indeed, Arrangers discounted the Term Loan another

0.5% beyond the 2.5% discount allowed to be charged to UNFI under the Fee Letter (including the 2.0% permitted as Flex OID), a direct expense of $9 million for Arrangers that cost UNFI nothing. (*See* R. 1126 (indicating issue price of 97.00, *i.e.*, a 3% discount to par); R. 380, ¶ (a) ("OID [paid for by UNFI] . . . shall not exceed 2.50% of the Term Loan").) Arrangers had no reason to take that action—to their own financial detriment—had there been sufficient demand from investors. Moreover, Arrangers took additional steps they were not obligated to take to help lower UNFI's cost of capital, saving UNFI millions in the process.[4] UNFI challenges none of that in its brief.

During the syndication process, Goldman Bank passed along an investor request that UNFI add Supervalu as a co-borrower on the Term Loan. (*See* R. 186, ¶ 53.) Supervalu was already to become a co-borrower on the ABL Facility. (*See* R. 389; R. 526-27, § 10.1.9.) Respondents, although none in particular is specified, allegedly stated that adding Supervalu as a borrower would have a "[m]uted impact on [UNFI], but [was] meaningful to some select accounts".

[4] For example, as is plain from the face of the Complaint and the operative contracts, Arrangers: provided a "one-year $150 million [bridge] loan" (R. 191, ¶ 63 n.17), with a *lower* interest rate than the Term Loan, saving UNFI $3.375 million (R. 867; R. 933-34, § 2.08(a)); *waived* certain bridge loan fees, saving UNFI over $4 million (R. 378, ¶ (e); R. 380, ¶ (a)(iv); R. 178, ¶ 33 n.6; R. 185, ¶ 51; R. 191, ¶ 63 n.17; R. 202, ¶ 90); increased the ABL Facility—also a *lower* rate loan—by $100 million, saving UNFI roughly $3 million annually (R. 398; R. 477, § 3.1.1(a)(iii); R. 760-61, § 3; R. 867; R. 933-34, § 2.08(a)); and increased the draw limit on the ABL Facility at closing by $275 million (R. 797, § 2.1.3).

(R. 186, ¶ 53.) UNFI has not identified any impact to date; instead, it continues to speculate about potential future harm. Goldman Bank provided UNFI with several versions of a list identifying the investors in the Term Loan. (*See* R. 189, ¶ 60 n.14.) UNFI did not raise concerns regarding the identities of the investors or investigate them. Nor does UNFI identify any entity that it did not consent to have as a lender, even though it had the right to reject any lender. (R. 308-09.)

On October 18, 2018, Goldman Bank told UNFI that Arrangers were entitled to withhold $4.5 million as the Term Loan Funding Fee and $36 million in Flex OID. (*See* R. 177, ¶ 33; R. 192, ¶ 65.) The next day, Arrangers all explained to UNFI that they had each independently determined they were entitled to withhold both amounts. (R. 1221; R. 1278, ¶ 88; R. 1328, ¶ 83.) On October 22, 2018 the Acquisition closed, and Arrangers funded the Term Loan, withholding the noticed amounts. (R. 201, ¶ 87.) Still, the Term Loan was not fully syndicated at closing, despite exercise of the Flex Provisions, and up through the filing of the motion to dismiss below, never closed at or above the issue price in public trading. (R. 1126; R. 1137-40.)

D. The Motion Below.

Respondents moved to dismiss on May 6, 2019, and the court heard lengthy oral arguments on July 11, 2019. On May 5, 2020, the Supreme Court

granted the motion pursuant to its Decision and Order, dismissing the Complaint in its entirety. (R. 7-37.)

LEGAL STANDARD

On a motion to dismiss, "all allegations in the complaint are deemed to be true, and all reasonable inferences which can be drawn therefrom shall be resolved in favor of the plaintiff". *Rhodes v. Herz*, 84 A.D.3d 1, 3 n.1 (1st Dep't 2011). "[B]are legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true". *JFK Holding Co. v. City of New York*, 68 A.D.3d 477, 477 (1st Dep't 2009). The Motion Court's grant of a C.P.L.R. 3211 motion to dismiss is reviewed *de novo*. *See Morgenthow & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74, 77-82 (1st Dep't 2003); *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 279 (1st Dep't 2004) (*de novo* standard applies to questions of law, without deference to lower court decision).

ARGUMENT

I. THE MOTION COURT PROPERLY DISMISSED UNFI'S BREACH OF CONTRACT CLAIM RELATING TO $40.5 MILLION IN "MARKETING PERIOD FEES" (COUNT I).

The Motion Court correctly dismissed UNFI's breach of contract claim relating to the $4.5 million Term Loan Funding Fee and $36 million Flex OID (Count I), which UNFI refers to as "Marketing Period Fees". The Fee Letter

unambiguously required UNFI to pay those amounts "on the Closing Date if the Closing Date occurs prior to the completion of the Marketing Period and a Successful Syndication has not occurred". (R. 378, ¶ (e); *see also* R. 380, ¶ (a)(iv).) Both conditions were satisfied.[5]

A. The Closing Date Occurred Prior to Completion of the "Marketing Period".

i. <u>The Marketing Period commenced on October 15, 2018, and UNFI's interpretation is directly refuted by the plain terms of the Commitment Letter.</u>

The Commitment Letter defines the Marketing Period as "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" to the Commitment Letter. (R. 310, ¶ (ix).) Those conditions included delivery of, among other things, both UNFI's *and* Supervalu's annual financial statements for their fiscal years ended at least 60 days before the Closing Date and quarterly financial statements for their fiscal quarters ended at least 40 days before the Closing Date. (*See* R. 363-64, ¶ (c) (using "and" to connect all relevant requirements).)

[5] Counts I and III were properly dismissed against Respondent Stephen Feldgoise for the additional reason that he was not a party to any of the Commitment Papers.

UNFI filed its last relevant financial statements on September 24, and Supervalu filed its last relevant financial statements on October 15, 2018. (R. 197-98, ¶ 78.) The Marketing Period thus began on October 15, 2018. Because the Closing Date was October 22, 2018 (R. 182, ¶ 44), it occurred "prior to the completion of the Marketing Period" (R. 378, ¶ (e); *see also* R. 380, ¶ (a)(iv)). Therefore, the first condition to UNFI's obligation to pay the $4.5 million Term Loan Funding Fee and $36 million Flex OID at Closing was satisfied.[6]

UNFI disagrees with that objective analysis, arguing that the Marketing Period began on September 24, 2018. (Br. 21.) UNFI is wrong.

First, the Marketing Period is triggered by "delivery of the financial statements necessary to *satisfy the conditions*" set forth in Section (c) and (d) of Exhibit D to the Commitment Letter—not just *one* condition or *any* condition—and while the last required UNFI financial statement was provided on September 24, 2018, the last required Supervalu financial statement was not provided until three weeks later. (R. 310, ¶ (ix).) UNFI counters that, "if the parties believed a Marketing Period had to wait for the issuance of a certain financial statement, the

[6] Contrary to UNFI's contention (Br. 29), Respondents' position does not depend on the notion that the filing of Supervalu's quarterly statement on October 15, 2018, "retroactively invalidated the Marketing Period that began on September 24". Respondents' position is that the only Marketing Period that met the terms defined in the agreement commenced on October 15, 2018.

Agreements would have said so". (Br. 30.) But that is exactly what the Commitment Letter did say—it identified a series of financial statements of both UNFI and Supervalu, the delivery of all of which (not just one of which) was a condition precedent both to the obligation to fund the Term Loan and to the start of the Marketing Period. (R. 310, ¶ (ix); R. 363-64, ¶ (c).) Until Supervalu's delivery of its last relevant financial statement on October 15, 2018, UNFI could no sooner deem the Marketing Period to have commenced than it could demand the Term Loan proceeds.[7]

Second, UNFI argues that, as of September 24, 2018, the conditions had been satisfied because the Supervalu financials delivered on October 15, 2018, did not yet exist. (Br. 29-30.) This misses the point entirely. As of September 24, 2018, the Closing Date had already been set for October 22, 2018. (R. 181-82, ¶ 42.) Supervalu's then most recent fiscal quarter had ended on September 8, 2018 (R. 182, ¶ 44), making it a "fiscal quarter[] ended at least 40 days before the Closing Date" (R. 363-64, ¶ (c)). Accordingly, by September 8, 2018, there was already an *obligation* to deliver that quarterly financial statement as a condition

[7] UNFI's interpretation would require the same conditions in Exhibit D to be interpreted one way for purposes of determining the obligation to fund the Term Loan, and a different way for determining the commencement of the Marketing Period. That makes no sense. Even UNFI presumably would concede that, if Supervalu had failed to deliver the financial statements for its fiscal quarter ending September 8, 2018 (R. 135, ¶ 44)—a condition precedent to funding—Arrangers would have had no obligation to fund the loan at closing.

precedent both to the funding of the Term Loan and the running of the Marketing Period, and that condition was not satisfied as of September 24, 2018.[8]

Indeed, none of this should have surprised UNFI since it was all expressly spelled out in the heavily negotiated contract. UNFI had the means to determine, easily and definitively, as of September 24, 2018, that if the Closing Date did not occur prior to October 18, 2018 (the date at least 40 days from the end of Supervalu's fiscal quarter ended September 8, 2018), then the subsequent delivery of Supervalu's financials for that quarter would be required to start the Marketing Period. (*See* R. 310, ¶ (ix); R. 363-64, ¶ (c); *see also* R. 197-98, ¶ 78.) That Supervalu's financials had not yet been prepared on September 24, 2018, is beside the point.[9]

Third, UNFI contends Respondents' position is inconsistent with "the Agreements as a whole" because UNFI purportedly had "certain obligations during the Marketing Period" and could not possibly have known when those obligations

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[8] Moreover, because determining whether a particular financial statement had to be provided is based on the length of time from the end of the fiscal year or quarter to the Closing Date, the determination necessarily is made with hindsight as of the actual Closing Date. UNFI identifies no basis in the text of the Commitment Papers to evaluate satisfaction of conditions precedent as of any point in time other than the Closing Date, when Arrangers' entitlement to impose the Marketing Period Fees is clearly measured. (R. 378, ¶ (e); R. 380, ¶ (a)(iv).)

[9] Conversely, the Marketing Period *could* have started on September 24, 2018 if UNFI and Supervalu had selected an earlier Closing Date (for example, October 15, 16 or 17). In that case, September 8, 2018 would have been *fewer* than 40 days before the Closing Date, and delivery of that quarter's financials would not have been a condition precedent to commencement of the Marketing Period. But that is not what occurred.

had been triggered "if the determination of the Marketing Period could happen only after the fact". (Br. 29.) That is wrong and disingenuous. As explained above, UNFI admits it knew, by September 18, 2018, that the Closing Date would be October 22, 2018. (R. 181-82, ¶ 42.) Equipped with that information, all UNFI needed to do was read the contract (or ask its lawyers at Skadden) to know the Marketing Period would commence when Supervalu subsequently delivered its required quarterly financial statements, and not when UNFI delivered its required financials on September 24, 2018.

Moreover, UNFI does not specify to what "obligations during the Marketing Period" it even refers. The paragraph it cites (*see* Br. 29 (citing to R. 363-64, ¶ (c)) identifies the financial statements that needed to be delivered as conditions precedent to commencement of the Marketing Period, not obligations *during* the Marketing Period. And if UNFI instead meant to refer to its obligation to assist with Arrangers' syndication efforts, that obligation was not limited just to the Marketing Period—it expressly extended "until the date that is the earlier of (a) 45 days after the Closing Date and (b) the date on which a 'Successful Syndication' . . . is achieved". (*See* R. 309.) UNFI's argument should be rejected.

ii. <u>Extrinsic evidence cannot override the unambiguous terms of the Commitment Letter.</u>

Since the text of the Commitment Papers "is unambiguous, [UNFI] may not resort to extrinsic evidence, such as the parties' course of performance".

Chelsea Piers L.P. v. Hudson River Park Tr., 106 A.D.3d 410, 412 (1st Dep't 2013); *see also Int'l Techs. Mktg., Inc. v. Verint Sys., Ltd.*, 157 F. Supp. 3d 352, 364-65 (S.D.N.Y. 2016) (same for commercial reasonableness). In any event, UNFI's extra-contractual arguments are unavailing.

First, UNFI argues the Marketing Period should be deemed to begin on September 24, 2018, because that is when, it claims, Arrangers "actually marketed" syndication of the Term Loan. (Br. 28.) If the parties intended to define "Marketing Period" as "when marketing was done", they could have done so. Instead, it was clearly defined in the Commitment Letter as a specific period following the delivery of a specific set of financial statements. That definition reflected the importance of ensuring that potential investors would have sufficient time to digest new information prior to closing in determining whether to commit—not, as UNFI suggests (*see* Br. at 27), ensuring that Arrangers would have a total of 15 days to perform marketing, untethered from the potentially consequential release of new information and bearing no relationship to the Closing Date.[10]

[10] Imagine, for example, a scenario in which delays in obtaining regulatory approvals had pushed the closing by multiple quarters into mid-2019. Under UNFI's interpretation, the fact that Arrangers had 15 days to attempt to syndicate the deal in September and October of 2018 would have discharged UNFI's contractual obligation to provide a "Marketing Period". Such a result would be nonsensical and illustrates how meritless UNFI's position is.

Indeed, UNFI continues to ignore that it expressly acknowledged in the Commitment Letter that "marketing" and the "Marketing Period" are distinct concepts, since syndication (*i.e.*, marketing) efforts could occur at any time after signing: "[UNFI] understand[s] that . . . Arrangers may decide to commence syndication efforts for [the Term Loan] promptly after the Signing Date", without regard to whether the financial statements that trigger commencement of the Marketing Period had been delivered.[11] Nothing in the case upon which UNFI relies, *Kass v. Kass*, 91 N.Y.2d 554 (1998), changes the fact that extrinsic evidence cannot override the unambiguous terms of a contract. *Id.* at 568.

Second, UNFI summarily offers that any interpretation other than its own is untenable because: (1) "the Marketing Period could almost never be complete prior to closing"; and (2) "this would occur only at Defendant-Respondents' whim". (Br. 30.) Not so.

A full 15-day Marketing Period was indeed possible under the text of the Commitment Letter, as UNFI concedes. (*See* R. 197-98, ¶ 78 (recognizing potential Closing Dates in October 2018 (October 15, 16 and 17) that would have allowed a full Marketing Period).) The text again reflects common sense, as

[11] UNFI's suggestion that exercising the Flex Provisions prior to commencement of the Marketing Period is indicative of bad faith (Br. 28 n.2) is premised on the same flawed assumption—that marketing must or may only occur during the Marketing Period.

investors may need time to digest new financials before deciding whether to commit. Even if Supervalu's financials did not ultimately impact syndication, that does not make the parties' allocation of risk in the Commitment Letter unreasonable. And the fact that UNFI had to pay more than it preferred in no way renders the agreement "absurd". (*See* Br. 31.)[12] The inescapable reality for UNFI is that it cost more to finance a significant acquisition that was not well received by investors, in the midst of overall market turmoil and disappointing financial performance by both UNFI and Supervalu.

Likewise, UNFI's assertion that the timing of the closing of its acquisition of Supervalu was somehow "not under UNFI's control, but rather the control of Goldman Sachs" (Br. 30-31 n.4) is unsupported and demonstrably wrong. The Closing Date was determined by the Acquisition Agreement (which Respondents are not parties to), which provided the Closing Date was to occur on "the second Business Day after the satisfaction or waiver . . . of the [closing] conditions" thereunder. (R. 233, § 1.2.) UNFI does not explain how Respondents controlled those conditions, which included Supervalu shareholder approval and

[12] Of course, if market conditions had been conducive enough to allow for Successful Syndication, UNFI could have closed the acquisition at *any* time without incurring Marketing Period Fees, regardless of the length of the Marketing Period. (*See* R. 378, ¶ (e); R. 380, ¶ (a)(iv).) The Commitment Letter reasonably allocated risk such that, where, as here, market conditions were difficult, Arrangers would have a full 15 days with current financials to attempt to syndicate the loan.

expiration of the antitrust waiting period (R. 273, § 6.1) completely out of Respondents' control.

Similarly, UNFI's suggestion, unsupported by any actual facts, that "Goldman Sachs delayed Supervalu's release of the financial statements from October 12 until October 15" (Br. 25) is meritless and merely shows that UNFI is grasping at straws. Respondents did not even advise Supervalu on the Acquisition, let alone control Supervalu. Moreover, October 12, 2018, is still fewer than 15 business days before the October 22, 2018, Closing Date.

Thus, this case is nothing like the case that UNFI cites. *Luver Plumbing & Heating, Inc. v. Mo's Plumbing & Heating*, 144 A.D.3d 587, 588 (1st Dep't 2016) (interpreting contract between two plumbers to avoid conclusion that one could "void [contract] any time they chose" by refusing to make payments owed to other under contract).

iii. <u>The Appellate Division can affirm the decision below based on its own independent reading of the unambiguous contracts.</u>

UNFI criticizes at length the specific reasoning it believes the Motion Court utilized in dismissing its breach of contract claim. (Br. 21-27.) Ultimately, whether the Motion Court believed there were multiple "marketing periods" or not, it correctly read the unambiguous contract terms in concluding the only "Marketing Period" that mattered began on October 15, 2018.

Moreover, it is black letter law that the Appellate Division "need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision". *Am. Dental Co-op., Inc. v. Atty. Gen. of State of N.Y.*, 127 A.D.2d 274, 279 n.3 (1st Dep't 1987). This Court is perfectly capable of determining for itself what the unambiguous provisions of the Commitment Papers require. *See Gulf Ins.*, 13 A.D.3d at 279 ("de novo standard of review applies because the IAS court interpreted a contract provision . . . as a matter of law").

B. "Successful Syndication" Did Not Occur By the Closing Date.

Under the Fee Letter, the second requirement for UNFI's obligation to pay the Marketing Period Fees was met if Successful Syndication had not occurred by the Closing Date. (R. 378, ¶ (e); *see also* R. 380, ¶ (a)(iv).) Since it is undisputed that Successful Syndication did not occur by closing (*see* Br. 37), that should end the analysis. UNFI's apparent (but not pleaded) reliance on the implied covenant of good faith cannot rewrite the contract.

i. Under the Commitment Papers' plain terms, Successful Syndication does not depend on the extent of Arrangers' syndication efforts.

The Fee Letter defines "Successful Syndication" as a circumstance in which Arrangers "hold commitments and loans in respect of the Term Loan . . . of not greater than $0". (R. 381-82.) In other words, it means Arrangers in fact sold 100% of the loan commitments to investors, which UNFI concedes did not happen

by the Closing Date. (*See* Br. 37 (stating that, at closing, Arrangers "syndicated approximately 97% of the Term Loan").) That is the end of the required analysis, and the second condition to UNFI's obligation to pay the $40.5 million in Marketing Period Fees therefore was satisfied.

Since it cannot contest the lack of Successful Syndication, UNFI argues for a standard not articulated in the contracts—that if Respondents "did not act in good faith to complete the syndication, then the syndication cannot be deemed unsuccessful".[13] (Br. 31.) But the Fee Letter requires only a simple, objective determination—whether or not Successful Syndication occurred by the Closing Date. (R. 378, ¶ (e); *see also* R. 380, ¶ (a)(iv).) Nothing in those provisions conditions that determination on Arrangers' good faith, nor does UNFI identify any other provision that required Arrangers to exercise any specific level of effort—or any effort at all—to syndicate the Term Loan. The Court need look no further to affirm that the second condition was met.

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[13] UNFI is incorrect that Respondents "do not dispute . . . that if [they] did not act in good faith to complete the syndication, then the syndication cannot be deemed unsuccessful". (Br. 31.) Respondents said no such thing. That Respondents addressed an allegation on a motion to dismiss on a ground that was dispositive of an issue does not mean that Respondents agree with UNFI on the applicable law. In any event, "[o]n appeal, a respondent may proffer in support of affirmance any legal argument that may be resolved on the record, regardless of whether it has been argued previously". *Sega v. State*, 60 N.Y.2d 183, 190 n.2 (1983); *see also Carlyle CIM Agent, L.L.C. v. Trey Resources I, LLC*, 148 A.D.3d 562, 565 (1st Dep't 2017).

ii. To the extent UNFI relies on the implied covenant in an attempt to distort the clear contractual requirement, its claim still fails.

To the extent UNFI's argument purports to be premised on the implied covenant of good faith and fair dealing, UNFI never expressly pled such a claim for Count I, unlike for Count III. (*See* R. 203-04.) Therefore, its claim is limited to the express terms of the agreement, which, as explained above, do not make the determination of Successful Syndication contingent on a showing of good faith efforts to syndicate. In any event, any implied covenant argument by UNFI with respect to Count I fails.

(a) The implied covenant cannot override the plain terms of the Commitment Papers, which did not require Arrangers to syndicate the Term Loan at all, much less do so to some required standard of care.

Even if UNFI had pled an implied covenant claim with respect to Count I, UNFI's argument that the Successful Syndication determination depends on a showing of good faith fails because, while Arrangers had an incentive to syndicate the Term Loan for their own benefit, they owed UNFI no contractual obligation to do so. Arrangers' only duty to UNFI was to *fund* the Term Loan at closing, which they did. The fact that the success or failure of syndication by closing would have incidental effects on UNFI's obligation to pay certain costs does not change that.

The implied covenant of good faith and fair dealing encompasses "promises which a reasonable person in the position of the promisee would be justified in understanding were included". *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008). But UNFI identifies no basis in the Commitment Papers for its claimed expectation that Arrangers would guarantee some level of effort to attempt to syndicate 100% of the Term Loan on a specific schedule (*i.e.*, by closing).

To the contrary, in the Commitment Letter the Arrangers "reserve[d] the right" to syndicate "all or a portion of" the Term Loan to investors. (R. 308.) And it expressly allowed syndication "prior to or after the Closing Date".[14] (*Id.*) That makes perfect sense, since syndication is something Arrangers had an incentive to do for their own benefit—to mitigate credit, market and balance sheet risk associated with their commitment to fund the Term Loan—not an obligation owed to UNFI. Those express contract terms refute the notion that UNFI was entitled to any reasonable expectation that Arrangers would exercise a specific level of effort to syndicate the loan or guarantee complete syndication by closing—

[14] UNFI may point to a statement in a separate section of the Commitment Letter titled "Fees" that reads: "As consideration for the Initial Lenders' commitments hereunder and the Lead Arrangers' agreements to syndicate the Facilities, you agree to pay (or to cause to be paid) the nonrefundable . . . fees as set forth in the Fee Letter". (R. 312-13.) But that provision does not purport to impose an obligation on Arrangers, it simply refers to "agreements" memorialized elsewhere in the Commitment Letter, the nature of which is spelled out in the section actually titled "Syndication", which makes clear that Arrangers only "reserve[d] the right" to syndicate. (R. 308.)

such that the contracts could be interpreted to *mandate* those efforts. *See, e.g.*, *3839 Holdings LLC v. Farnsworth*, No. 654463/2016, 2017 WL 5649812, at *5 (Sup. Ct. Nov. 24, 2017) ("The implied covenant cannot be construed so broadly as to nullify the express terms of a contract").[15]

Accordingly, this is nothing like the cases UNFI cites in which a party unquestionably has a contractual duty to act, but is granted discretion over how to discharge that obligation. (Br. 45-46.) *See Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.*, 41 A.D.3d 269, 270 (1st Dep't 2007) (contract to supply watches to retailer, but timing and acceptance of individual orders subject to Rolex's discretion); *Pleiades Publ'g, Inc. v. Springer Sci. + Bus. Media LLC*, 117 A.D.3d 636, 637 (1st Dep't 2014) (contract to distribute publisher's scientific texts, but discretion regarding how to promote and market them); *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 303 (1st Dep't 2003) (alleged agreement to use best efforts to launch IPO, but defendant shareholder granted discretion to veto certain corporate transactions); *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 387 (1995) (obligation to administer and release test

[15] UNFI misrepresents the contracts in contending that "the Commitment Letter never remotely suggested that Goldman Sachs could claim the syndication was unsuccessful even if it made no good-faith effort to complete the syndication". (Br. 33.) But that is precisely what the Commitment Letter provided when it stated that Arrangers "reserve[d] the right", but did not take on any obligation, to syndicate. (R. 308.) That UNFI may have taken comfort from the fact that Arrangers had an *incentive* to syndicate the Term Loan does not mean Arrangers had an *obligation* to do so.

scores, but defendant administrator granted discretion to cancel scores if it found reason to question their validity).

Here, by contrast, Arrangers owed no contractual duty to UNFI to syndicate the Term Loan (or, if they chose to do so, to complete syndication by closing), even if, as a practical matter, it was in Arrangers' economic interest to do so. Thus, the implied covenant cannot be used to impose requirements on Arrangers that are inconsistent with the Commitment Letter's plain terms.[16]

(b) In any event, UNFI fails to plead a single fact suggestive of bad faith.

Even if the second condition to payment of the Marketing Period Fees did require good faith efforts to syndicate, and even if UNFI had pled an implied covenant claim in Count I—neither of which is true—UNFI pleads no facts suggesting that Goldman Bank failed to act in good faith. As the Motion Court held, the mere conclusory allegation that Arrangers purportedly controlled the marketing and syndication effort was insufficient because UNFI "fail[ed] to

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[16] That Marketing Period Fees were tied in part to whether complete syndication occurred by closing changes nothing. That is the bargain UNFI struck with well-versed counsel at its side. In exchange for the risk Arrangers took on by committing to lend billions to UNFI with no guarantee of syndication, UNFI agreed to pay the Marketing Period Fees if Successful Syndication did not occur by closing (and Arrangers were not afforded a full Marketing Period), whether based on Arrangers' choice, or, as in this case, the realities of market conditions at the time that necessitated additional consideration be made available to incentivize potential investors to commit.

connect how defendants used their control to reign [sic] in the syndication to ensure its failure at the Closing Date". (R. 26.)

First, the Complaint does not allege a single action Arrangers purportedly took to *thwart* syndication or a single action Arrangers *failed* to take to aid syndication. To the contrary, as the Motion Court noted, "the complaint . . . abounds with defendants' alleged acts to syndicate the loan". (R. 25.) Even with those efforts, the Term Loan was not fully syndicated and, in the months thereafter, never closed at or above the issue price (which was discounted 3% to par) in public trading (R. 1126; R. 1137-40), clearly demonstrating the lack of investor demand, and belying UNFI's conclusory accusation that the lack of a Successful Syndication was the result of bad faith.

In response, UNFI doubles down on its conclusory pleading, arguing that it "need *only* 'allege that defendants acted, or failed to act, for improper motives and without good cause'", and citing the Motion Court and the Court of Appeals' decision in *Goodstein Constr. Corp. v. City of New York*, 67 N.Y.2d 990 (1986). (Br. 31-32 (emphasis added).) But, as explained above, the Motion Court properly rejected the notion that pleading improper motive alone is sufficient. And *Goodstein* is of no avail to UNFI, as, unlike here, the defendant in *Goodstein* was alleged to have taken a specific action—de-designating plaintiff as an eligible developer for a city project without apparent cause—in bad faith. *Goodstein*, 67

N.Y.2d at 992. Thus, even if UNFI could pursue a claim premised on a breach of an obligation to use good faith efforts, it had to allege facts, not just conclusions, showing Respondents undermined the contract's requirements. *See, e.g.*, *Phoenix Capital Invs. LLC v. Ellington Mgt. Grp., LLC*, 51 A.D.3d 549, 550 (1st Dep't 2008) (rejecting "conclusory claim that defendant contrived with [an investor] to delay its investment . . . so as to avoid paying plaintiff its fee"); *Int'l Techs. Mktg.*, 157 F. Supp. 3d at 368 (rejecting efforts claim); *All. Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 764 (Del. Ch.), *aff'd*, 976 A.2d 170 (Del. 2009) (same).

Second, even if a mere articulation of motive were sufficient to plead bad faith—and it is not—UNFI's fanciful theory of motive collapses under its own weight. UNFI asserts that Respondents "wanted to syndicate most of the Term Loan . . . [but] did not want a full syndication because then they would lose the opportunity to take the Marketing Period Fees". (Br. 36.) Thus, according to UNFI, Arrangers purportedly "threaded the needle perfectly" to ensure that just less than the full amount of the loan was syndicated. (Br. 37.)

UNFI's characterization finds no factual footing in the Complaint, and cannot be reconciled with the deal's undisputed economics.

While UNFI's theory implies the Marketing Period Fees were retained by Arrangers, it is undisputed that most of the $40.5 million in question did not go

to Arrangers. Rather, while the $4.5 million Term Loan Funding Fee (only 45% of which, or $2.025 million, went to Respondent Goldman Bank) compensated Arrangers for funding the unsyndicated portion of the Term Loan (without a full Marketing Period), the $36 million Flex OID was, as UNFI concedes, "credited *to the investors* in the Term Loan syndicate".[17] (R. 177, ¶ 33 (emphasis added).) Arrangers then discounted the Term Loan another 0.5% beyond the 2.5% contemplated by the Fee Letter—an expense of $9 million for Arrangers (45% funded by Goldman Bank). (*See* R. 1126 (issue price of 97.00, *i.e.* 3% discount); R. 380, ¶ (a) ("OID [paid for by UNFI] . . . shall not exceed 2.50% of the Term Loan").) Thus, Arrangers were at least $4.5 million *worse off* than if there had been a Successful Syndication at par (even leaving aside other ways in which Arrangers benefited UNFI in ways not required by the Commitment Papers (*see* Counterstatement of the Nature of the Case § C, *supra*)).

Moreover, UNFI's contention that Arrangers somehow thwarted a Successful Syndication is belied by the trading history that UNFI acknowledges. Had there been market demand that Arrangers failed to tap, one would have expected the Term Loan to trade up after closing, as investors rushed to buy in the

[17] For the same reason, Arrangers would have no motive to thwart or delay syndication in order to "bolster [their] contention . . . that exercising the Flex Provisions was necessary". (Br. 36.) Increasing the interest rate pursuant to the Flex Provisions would increase payments to the lender syndicate over the life of the loan, not to Arrangers.

secondary market. Instead, from closing to at least the filing of the motion to dismiss below, the Term Loan never traded at or above the syndication price. (R. 1126; R. 1137-40.) The notion that Respondents would be motivated to sabotage a high-profile syndication is not supported by UNFI's factual allegations and defies common sense.[18]

Third, apart from its conclusory and misplaced allegation of motive, UNFI also argues that the Complaint "specifically alleges that Defendants-Respondents 'failed to use good faith efforts to close the syndication prior to the Acquisition's close'". (*See* Br. 35 (citing Complaint ¶¶ 99, 118).) But those paragraphs of the Complaint epitomize unsupported conclusory allegations as they say nothing more about Respondents' syndication efforts than the exact same language quoted above. Again, UNFI does not allege that Arrangers failed to host marketing meetings, turned away qualified investors, or failed to respond to investors' indications of interest, or that a rush of investors materialized after closing, or anything else to support its fanciful theory that Arrangers deliberately thwarted syndication just enough, but not too much, to ensure that they would be

[18] UNFI also states repeatedly in its brief that Respondents' purported efforts to thwart complete syndication were motivated in part by a desire to "aid their fraudulent CDS scheme" or to "allow time [for their] CDS scheme to unfold". (Br. 18, 36, 37). But UNFI does not explain, nor could it, how failing to complete syndication could have any bearing at all on the alleged CDS "scheme", which, in UNFI's own telling, turns on the addition of Supervalu as a co-borrower, not anything to do with the extent or timing of syndication or anything that required time to "unfold".

mostly successful, but not 100% successful. Indeed, UNFI begrudgingly admits that Respondents "took some actions that aided some syndication", but suggests that those efforts simply threw the Motion Court off the scent of Respondents' purported secret scheme. (Br. 36.) As the Motion Court recognized, UNFI's imagination is no substitute for well pleaded facts. (R. 25-26.)

Fourth, the only two alleged "specific acts" UNFI does identify in its brief do nothing to support its theory. First, UNFI argues that Respondents set a deadline of October 15 for lenders to commit to invest in the Term Loan. (Br. 38.) But announcing a deadline in order to generate interest from investors could only speed syndication, not slow it down, and UNFI admits that Respondents "continued marketing" the Term Loan after that date (R. 196, ¶ 74). Second, UNFI states "Defendants-Respondents refused to move back the closing date of October 22". (Br 38.) But that is a red herring because, even if closing had occurred on UNFI's "preferred" October 29, 2018, date (*see* R. 182, ¶ 42 n.9), that still would have been only ten business days after delivery of Supervalu's financials (hence, still prior to completion of the Marketing Period), and UNFI has not pled any facts to suggest that a few extra days would have made any difference to the parties' syndication efforts.[19]

[19] Moreover, the Acquisition Agreement—to which Respondents were not parties—governed the Closing Date. (R. 233, § 1.2.) UNFI alleges Supervalu was "willing to accommodate" a later closing if "Goldman Sachs waived the ability to avoid closing the

Finally, UNFI complains it would be impossible to allege more than it has "because the specific facts surrounding Defendants-Respondents' supposed attempts to complete the syndication are within Defendants-Respondents' control and have not been shared with UNFI". (Br. 37.) But that contention is belied by UNFI's own alleged involvement during syndication (*see, e.g.*, R. 182-84, ¶¶ 45, 47, 48 & n.11; R. 189, ¶ 60 n.14) pursuant to its contractual obligation to make its senior management available and otherwise assist in Arrangers' syndication efforts (R. 309-10).

(c) UNFI's remaining arguments regarding the Motion Court's decision fail.

First, UNFI attacks the Opinion below, suggesting the Motion Court erroneously held the implied covenant of good faith arises only where the defendant owes the plaintiff a fiduciary duty (Br. 32),[20] or that a "profit motive"

Acquisition due to a material adverse effect [for an] additional week". (R. 182, ¶ 42 n.9.) This proposal required Arrangers to bear additional market risk, which was particularly acute at this time (*see* Counterstatement of the Nature of the Case § C, *supra*), as further evidenced by UNFI's apparent concern that Arrangers might declare a material adverse effect. UNFI does not allege that it or Supervalu offered anything to Arrangers as consideration. Although UNFI may have "preferred" a later Closing Date (R. 182, ¶ 42 n.9), Arrangers were not obligated to incur this risk for no consideration.

[20] Though it is unclear how this is relevant to any of its arguments, UNFI also states that "Goldman Advisory did promise loyalty and to act in UNFI's best interests, and that obligation likewise applied to Respondent Goldman Sachs Group, Inc. ("Goldman Sachs Group") because the two related businesses acted together in providing advice to UNFI through the same person". (Br. 33.) Goldman Advisory is not a defendant here, and UNFI specifically agreed that there was no "fiduciary duty or . . . relationship between [Goldman Advisory] and [UNFI]" (R. 218), so the case UNFI cites is inapposite. Moreover, even if Goldman Advisory somehow owed UNFI an extra-contractual duty—and it plainly did not—UNFI offers no support for its assertion

totally "immunizes [a defendant] from a claim based on an allegation of bad faith" (Br. 34). None of Respondents' positions is premised on those propositions, and the Motion Court simply pointed to the undisputed arm's length nature of the parties' relationship in support of its conclusion that there were no facts pled to suggest Respondents' motives were "improper". (R. 10; R. 16; R. 25; R. 27.) Moreover, the cases UNFI cites as purported examples of bad faith claims against defendants with a profit motive (Br. 34) are inapposite, since none suggests such a claim can survive in the absence of actual factual allegations demonstrating bad faith.

Second, UNFI argues the Motion Court "erred as a matter of law in holding that Defendants-Respondents acted with 'good cause' because 'the complaint also abounds with defendants' alleged acts to syndicate the loan'". (Br. 35.) The Motion Court made no such affirmative finding because it was not called upon to do so. Instead, it simply rejected UNFI's insufficient pleading of bad faith and pointed to the abundant allegations evidencing Respondents' good faith to highlight UNFI's failure to allege facts to the contrary. (R. 25-26.)

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that a common employee between Goldman Advisory and Goldman Sachs Group could somehow impose on Goldman Sachs Group obligations purportedly held by non-party Goldman Advisory.

The two cases UNFI cites for the proposition that good faith cannot be decided on a motion to dismiss (Br. 35) do not support its position here. In those cases, courts ruled that whether a challenged decision was made in good faith presented a factual question. The issue UNFI raises here is different—whether appropriate steps were taken to syndicate the Term Loan. Moreover, neither case suggests that mere conclusory allegations of bad faith, without any factual support, are sufficient. *See African Diaspora Mar. Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 213 (1st Dep't 2013) (sustaining claim where plaintiff "allege[d] facts sufficient to raise the question whether [defendant] acted in bad faith"); *Peacock v. Herald Sq. Loft Corp.*, 67 A.D.3d 442, 443 (1st Dep't 2009) (sustaining implied covenant claim based on alleged fact that co-op board wrongfully denied permission for proposed construction project).

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For all the above reasons, Successful Syndication had not occurred as of the Closing Date, and UNFI's arguments to the contrary should be rejected. Accordingly, both conditions to UNFI's obligation to pay the Marketing Period Fees were satisfied, and this Court should affirm dismissal of Count I.

II. THE MOTION COURT PROPERLY DISMISSED UNFI'S IMPLIED COVENANT CLAIM RELATING TO ARRANGERS' EXERCISE OF THE FLEX PROVISIONS (COUNT III).

A. UNFI Misreads the Relevant Provision of the Fee Letter.

In articulating the relevant question as whether Arrangers reasonably determined that exercising the Flex Provisions was "necessary", UNFI misconstrues the relevant contractual prerequisite. (Br. 43 n.9.) The Fee Letter clearly states that Arrangers had the right to exercise the Flex Provisions if they "reasonably determine[d]" that: (i) doing so was "necessary to ensure a Successful Syndication *or* (ii) such Successful Syndication has not *or* cannot be achieved by the Closing Date". (R. 380 (emphases added).) As written, satisfying any *one* of those three disjunctive conditions would justify use of the Flex Provisions. The concept of whether the Flex Provisions were "necessary" applies to the first of those conditions, but not the second or third.

As explained in Section I.B.i above, Successful Syndication "ha[d] not . . . be[en] achieved by the Closing Date". (R. 380.) That objective fact alone permits exercise of the Flex Provisions and is fatal to UNFI's implied covenant claim. The Court need not even consider whether the Flex Provisions were reasonably determined to be necessary, which is the entire premise of UNFI's implied covenant claim.

UNFI argues that, because "the Flex Provisions were exercised before closing, the 'has not . . . be[en] achieved' language" is inapplicable. (Br. 43 n.9.) UNFI is wrong. The relevant provision is written disjunctively to deal with a situation where the Flex Provisions are exercised before closing, and Successful Syndication subsequently *does* occur by the Closing Date. In that scenario, the relevant question would be whether the Flex Provisions were "reasonably determine[d]" to be "necessary" when they were exercised. (R. 380.) But in a scenario like the one at issue here, where the Flex Provisions are exercised but Successful Syndication *still* does not occur by the Closing Date despite those efforts, it is unnecessary to examine the state of play on the date of exercise, because it is objectively clear that, even with the Flex Provisions, Successful Syndication "ha[d] not . . . be[en] achieved by the Closing Date". (*Id.*)

B. The Implied Covenant Claim Duplicates the Contract Claim.

Alternatively, the Motion Court correctly dismissed UNFI's implied covenant claim as duplicative of its contract claims (Counts I and II). (R. 31-32.) UNFI does not dispute that an implied covenant claim should be dismissed as duplicative where it arises from the same facts and seeks the same damages as a breach of contract claim. *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010). As the Motion Court noted, "[t]he 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." (R. 31 (citing *Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 104-105 (1st Dep't 2014)).) Where, as here, the claims stem from the same contract provisions and the same alleged conduct, a plaintiff's attempt to split its asserted damages over the two claims does not render them distinct. *Bath & Twenty, LLC v. Fed. Sav. Bank*, No. 514138/2017, 2017 WL 6025518, at *3-4 (Sup. Ct. Dec. 5, 2017).[21]

First, regardless of how UNFI seeks to scale back its implied covenant claim for purposes of appeal, as pled in the Complaint, Count III indisputably sought damages that directly overlapped with those sought in UNFI's contract claims (Counts I and II). (*Compare* R. 205, ¶ 113 *with* R. 206, ¶ 118 (seeking return of same $11.4 million advisory fee in Counts II and III); *compare* R. 203, ¶ 99 *with* R. 206, ¶ 118 (asserting same factual premise in Count III that

[21] Moreover, it is well-established that a duplicative implied covenant claim must be dismissed even if the underlying breach of contract claim itself is dismissed. *See, e.g.*, *Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347 (1st Dep't 2005) ("The cause of action for breach of the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the insufficient breach of contract claim."); *Empire State Bldg. Assocs. v. Trump*, 247 A.D.2d 214, 214 (1st Dep't 1998) (same). UNFI's reliance on a single recent outlier, *Punch Fashion, LLC v. Merch. Factors Corp.*, 180 A.D.3d 520 (1st Dep't 2020), to suggest that an implied covenant claim cannot be dismissed as duplicative when the underlying breach of contract claim is itself dismissed (Br. 40) is misplaced. The one case the *Punch Fashion* court cites in support of that proposition actually establishes the opposite. *See Punch Fashion*, 180 A.D.3d at 523 (citing *Richbell Info. Servs. v. Jupiter Partners*, 309 A.D.2d 288, 305 (1st Dep't 2003), which itself dismissed an implied covenant claim because it "amount[ed] to a mere rehashing of plaintiffs' inadequate claims" for breach of contract). In any event, the First Department has since reaffirmed that Respondents' statement of the law is correct. *See 2520 Jerome Ave., LLC v. Corp. of Rector*, No. 11772, 2020 WL 3851945, at *1 (1st Dep't July 9, 2020).

UNFI argues justifies recovery of the $40.5 million in Marketing Period Fees in Count I—that Respondents purportedly "failed to use good faith efforts to close the syndication prior to the Acquisition's close").) On this appeal, UNFI strategically disavowed the most blatantly duplicative aspects of its implied covenant claim (*i.e.*, the overlapping $40.5 million and $11.4 million damages claims) in a misleading attempt to paint Count III as distinct. (*See* Br. 40 n.7 (not appealing any claim for $11.4 million in advisory fees); Br. 43-44 (disavowing that Count III seeks the $40.5 million in Marketing Period Fees).) UNFI's strategic choice to now divide its damages claims across the breach of contract and implied covenant claims so as to make them appear distinct (*see* Br. 15, 43-44) does not change that the implied covenant claim must be dismissed as duplicative. *See Bath*, 2017 WL 6025518, at *3-4; *see also* R. 32.

Second, UNFI attempts to avoid the obvious, insisting its implied covenant claim "concerns entirely different provisions of the Fee Letter" than its contract claim. (Br. 40.) This is simply false, as most of the $40.5 million sought in Count I—*i.e.*, the $36 million Flex OID—arises from the very same paragraph on page 4 of the Fee Letter containing the Flex Provisions that are the basis of Count III. (Br. 42 n.8; *see also* Br. 8, 41.) In fact, the $36 million in Flex OID is itself one of the "Flex Provisions", as the Fee Letter defines that term. (R. 380.) But UNFI omits this fact when it purports to summarize the contractual basis for

Count I on page 40 of its brief, where it misleadingly points only to the $4.5 Term Loan Funding Fee described on a different page of the Fee Letter. (Br. 40; *see also* R. 378, ¶ (e).)

Moreover, both claims arise from the same operative factual premise: that Respondents "failed to use good faith efforts to close the syndication prior to the Acquisition's close". (R. 203, ¶ 99; R. 206, ¶ 118.) Despite those allegations straight from its own Complaint, UNFI resists this characterization of its implied covenant claim on appeal, arguing that it "is based not on whether Defendants-Respondents thwarted the syndication, but on whether they acted in bad faith in supposedly determining that the Flex Provisions were necessary for a successful syndication". (Br. 39 n.6.) That distinction, however, is not a difference: the implicit premise in UNFI's assertion that the exercise of the Flex Provisions was "unnecessary" is that if Respondents had exercised "good faith" and done more—without specifying what—they could have completed syndication by the Closing Date without needing to invoke the Flex Provisions. (*See* Br. 11 ("The exercise of the Flex Provisions was not necessary and Goldman Sachs did not act in good faith to syndicate the Term Loan.").)

C. The Implied Covenant Claim Impermissibly Seeks to Displace the Express Terms of the Contract.

Dismissal of UNFI's implied covenant claim related to exercise of the Flex Provisions should be affirmed for the additional reason that, as the Motion

Court noted, it seeks to displace the express requirements of the Fee Letter. (R. 32.) *See, e.g.*, *3839 Holdings*, 2017 WL 5649812, at *5 ("The implied covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights."); *Phoenix Capital*, 51 A.D.3d at 550 (same).

Here, the Fee Letter itself provided the relevant, bargained-for contractual standard by which Arrangers' decision to exercise the Flex Provisions would be evaluated—namely, they had to "reasonably determine that" one of several conditions was met. (R. 380.) Thus, unlike the cases UNFI cites in which the relevant contracts did not specify a standard by which to judge a challenged exercise of discretion (Br. 45-46), there is no need here to resort to the implied covenant to supply the applicable standard for performance.

As discussed above in Section II.A, UNFI misconstrues the conditions precedent to the exercise of the Flex Provisions. (Br. 41 (citing R. 380); Br. 43 n.9.) Even accepting, *arguendo*, UNFI's misreading of the contract, if UNFI believed that hypothetical contractual standard was not met—*i.e.*, that Arrangers unreasonably determined that exercise of the Flex Provisions was necessary to ensure a Successful Syndication—it presumably would have brought a breach of contract claim on that basis, not an implied covenant claim. *See ProSource Techs., LLC v. Housing Trust Fund Corp.*, No. 5972-14, 2015 WL 5797028, at *11-12

(Sup. Ct. Oct. 2, 2015) (express contractual promise to exercise "reasonable discretion" in withholding funds did not give rise to a claim for breach of the implied covenant). UNFI has not specifically articulated what, if anything, the implied covenant purportedly required of Arrangers that was not already encompassed in their contractual obligation to "reasonably determine" whether the requisite conditions were met. But UNFI's choice to bring this claim under the implied covenant means it must seek to replace the expressly prescribed "reasonably determine" standard with something else. That would impermissibly supplant the express contract standard. *Phoenix Capital*, 51 A.D.3d at 550.

D. The Implied Covenant Claim Is Otherwise Substantively Deficient.

Even if UNFI's implied covenant claim did not depend on a misreading of the Fee Letter, was not duplicative and did not seek to supplant express contract terms, it independently would fail for at least two additional reasons.

First, UNFI alleges no facts to support its conclusory allegation that the decision to exercise the Flex Provisions was unreasonable, particularly in light of the indisputably difficult market realities the parties faced at the time. (*See* Counterstatement of the Nature of the Case § C, *supra*.) UNFI's mere say-so "that the Complaint sufficiently alleges bad faith in exercising the Flex Provisions" (Br. 39) is insufficient. And as discussed in Section I.B.ii.b above, UNFI's theory that

Arrangers exercised the Flex Provisions in bad faith makes no sense, since the additional "interest payments over the life of the Term Loan" (Br. 44), would go to investors holding commitments to the loan after closing, not to Arrangers. The only rational motive to exercise the Flex Provisions was to make Successful Syndication more likely, not less.[22]

Second, the circumstances UNFI alleges simply do not rise to the level of an implied covenant breach. The Court of Appeals has stated that the "implied covenant of good faith and fair dealing encompasses 'promises which a reasonable person in the position of the promisee would be justified in understanding were included'". *Moran*, 11 N.Y.3d at 457. Moreover, the implied covenant is meant to protect parties from actions that, while perhaps not explicitly prohibited by contractual terms, would "have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* at 456. UNFI's Complaint does not meet this bar.

As discussed above in Section I.B.ii.a, even though the record amply demonstrates Arrangers' diligent syndication efforts, Arrangers had no obligation under the Commitment Letter to syndicate the loan at all. (R. 308.) Therefore,

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[22] Moreover, according to the logic of UNFI's fraud claim (addressed in Section III below), UNFI purportedly would have vetoed certain unidentified investors in the syndicate if it knew more information about them, which would have made it even *more* necessary to exercise the Flex Provisions to promote syndication.

UNFI had no reasonable expectation that Arrangers would engage in any level of effort to do that which they were not required to do. Because the ability to exercise the Flex Provisions was tied to the outcome and timing of any syndication efforts—efforts which were optional for Arrangers' benefit—UNFI likewise had no reasonable expectation or guarantee that it would avoid the resulting costs. That is the bargain UNFI struck, and the implied covenant cannot be applied to force Arrangers to do something that the contract specifically provided they need not do.

Moreover, UNFI plainly "receive[d] the fruits of the contract". UNFI received the loan proceeds to which it was entitled, acquired Supervalu, and subsequently reported about the Acquisition that "every indication is that all of the benefits UNFI anticipated, and more, will be fully realized". (R. 125-26, ¶ 21.) The fact that UNFI had to pay a higher interest rate than it hoped on a portion of its financing changes none of that, and does not give rise to an implied covenant claim. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 22-23 (2005) (dismissing implied covenant claim that defendant priced IPO too low to enrich itself at plaintiff's expense, where plaintiff achieved each of the principal purposes of its public offering—to increase working capital, create a public market for its stock, facilitate future access to public markets, and increase visibility); *see also*

Breakaway Sols., Inc. v. Morgan Stanley & Co., No. CIV.A. 19522-NC, 2005 WL 3488497, *1 (Del. Ch. Dec. 8, 2005) (applying New York law).

III. THE MOTION COURT PROPERLY DISMISSED UNFI'S FRAUD CLAIM (COUNT IV).

UNFI's fraud claim is premised on two alleged misrepresentations: (1) that Respondents told UNFI the impact of adding Supervalu as a co-borrower on the Term Loan would be "muted" (R. 207, ¶ 123); and (2) that Respondents answered UNFI's question about the reason for adding Supervalu as a co-borrower by saying doing so was important to "select accounts" (R. 207, ¶ 124). Fraud requires (1) a material misrepresentation or omission; (2) scienter; (3) inducement; (4) justifiable reliance; and (5) injury. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009); *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996). Fraud claims must be "stated in detail". C.P.L.R. 3016(b). The Motion Court's dismissal of Count IV, which was premised on UNFI's failure to plead justifiable reliance and injury, should be affirmed. In addition, UNFI fails adequately to allege the required elements of an actionable misstatement or omission and scienter.[23]

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[23] UNFI argues the Motion Court "did not dispute that the first two elements were adequately alleged". (Br. 47.) To the contrary, the Motion Court did not address those elements because it dismissed the fraud claim on justifiable reliance and damages grounds. (R. 34-36.)

A. Any Claimed Reliance by UNFI Was Unjustified as a Matter of Law.

The Motion Court correctly held any reliance by UNFI on the supposed misrepresentations was unjustified because UNFI failed to take steps within its power to obtain information it now claims was significant, including through its contractual rights to veto proposed Term Loan investors. (R. 34-36.)

UNFI was represented by sophisticated corporate counsel, Skadden, and an independent financial advisor, Foros. The Commitment Papers contained explicit disclaimers that Respondents and their affiliates engaged in a broad range of transactions that involved differing interests from UNFI's and that Respondents had no obligation to disclose such interests and transactions. (R. 316; *see also* R. 1019-20, § 10.23.) Moreover, despite UNFI's misleading claim that it did not receive a "final list" of Term Loan investors at closing (Br. 49-50), there is no question that UNFI received investor lists prior to closing (R. 189, ¶ 60 n.14), and UNFI does not allege that any investor on the final list was not on the multiple non-final lists it did receive. If UNFI was concerned about the risk of net-short debt activism as it claims, it could have utilized the leverage conferred by its veto power (R. 308-09) to demand information about prospective investors' CDS holdings or representations and warranties that they did not hold positions of concern to UNFI. But UNFI did none of that, and its failure to investigate, ask questions or make its alleged investor preferences known is dispositive. *See HSH*

Nordbank AG v. UBS AG, 95 A.D.3d 185, 193-208 (1st Dep't 2012) (rejecting fraud claim for lack of justifiable reliance based on disclaimers); *Pacella v. RSA Consultants, Inc.*, 164 A.D.3d 806, 809 (2d Dep't 2018) (same based on failure to inquire). Indeed, in UNFI's cited case, *DDJ Mgmt., LLC v. Rhone Grp., LLC*, 15 N.Y.3d 147, 147-48 (2010), "plaintiffs made a significant effort to protect themselves against the possibility of false financial statements: they obtained representations and warranties", and the Court of Appeals thus ruled that "[w]hether plaintiffs were required to do more . . . was a question to be resolved by the trier of fact". *Id.* at 148. That is not the situation here, where UNFI made no effort to investigate its purported concern about the identity of syndicate investors—either on its own or through its sophisticated, independent advisors.[24]

On appeal, UNFI quibbles that the Motion Court misunderstood or used the wrong terminology to describe the financial information to which UNFI had access. (Br. 48-49.) But none of that changes the fundamental premise of the Motion Court's decision, that UNFI failed to use any tools available to it to obtain, or even attempt to obtain, information UNFI now claims was critically important. (R. 36.) And, as explained above, UNFI's veto power over prospective investors

[24] UNFI's contention that a duty to inquire in the exercise of reasonable diligence *only* arises where a plaintiff has "hints of [a representation's] falsity" is not the law. *See Norcast S.ar.l. v. Castle Harlan, Inc.*, 147 A.D.3d 666, 667 (1st Dep't 2017) (requiring a *heightened* degree of diligence in that circumstance); *see also Pacella*, 164 A.D.3d at 809.

gave it the leverage to request any information or representations it deemed important to have in exercising that discretion.

UNFI's related argument, that it was unable to ask questions about prospective investors lest it risk jeopardizing the bet-the-company transaction (Br. 51), makes no sense. At the time the alleged misrepresentations took place, the commitments to fund the acquisition had already been obtained and there is no allegation that even remotely suggests Arrangers would not satisfy their funding obligation. Moreover, UNFI's purported timidity rings hollow in light of the examples in its own Complaint in which it refused measures proposed by Arrangers in aid of their syndication efforts. (R. 191-92, ¶ 63 & n.17.)

B. UNFI Has Not Alleged a Legally Cognizable Injury.

Fraud requires "actual pecuniary loss sustained as the direct result of the wrong". *Lama*, 88 N.Y.2d at 421. Claims for "undeterminable and speculative" damages, such as "the loss of an alternative contractual bargain", must be dismissed. *See id.* at 422. UNFI's alleged harm is premised on a speculative parade of future horribles: that an investor potentially having a net short position on Supervalu debt *may* have acquired a stake in the Term Loan, that UNFI *may* default on the Term Loan, that an investor *may* somehow engage in conduct to hasten an event of default, and that such an investor *may* present a *risk* of net-short debt activism. (*See* R. 121, ¶ 6; R. 142-143, ¶ 60; R. 160, ¶ 123.) But UNFI does

not allege that any of those things actually happened—its claim of injury is irredeemably speculative. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 144 (2017) (rejecting fraud claim for lack of damages); *Starr Found. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25, 30-32 (1st Dep't 2010) (same); *HCFA Assocs. Corp. v. Grosman*, 960 F. Supp. 581, 585-586 (E.D.N.Y. 1997) (same); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994) (same for fraud predicate of RICO claim).

Cognizant of this deficiency, UNFI argues that its claim is "not based on an assumption that this harm will occur in the future", but rather the notion that the Term Loan "is worth less now because of the greater risks of the lenders forcing default or restructuring". (Br. 52-53.) But the cases on which it relies are readily distinguishable, because they all involved salable *assets* (*e.g.*, commercial real estate, a corporation, a hair product)—not *liabilities* like the Term Loan—and in those cases, the allegedly concealed risks had already materialized. (Br. 53-54.) Here, the risks remain inherently speculative, and UNFI's attempt to discuss the "value" of the Term Loan as if it were a product that it could sell makes no sense. The "value" to UNFI of the Term Loan consists of the proceeds it received to fund the Acquisition, and it received every penny to which it was entitled on the Closing Date.

Finally, UNFI argues that "[a] plaintiff is 'not required to plead its damages with particularity; CPLR 3016(b) requires only that . . . the circumstances constituting the wrong shall be stated in detail'". (Br. 52 (quoting *Solomon Capital, LLC v. Lion Biotechnologies, Inc.*, 171 A.D.3d 467, 469 (1st Dep't 2019).) That does not absolve UNFI of the need to plead a cognizable injury. While the *amount* of damages need not be specified, the *existence* of damages must still be adequately alleged. "There is no requirement that the measure of damages be stated in the complaint so long as facts are alleged from which damages may properly be inferred". *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 383 (1957) (cited in *Solomon Capital*, 171 A.D.3d at 469). No such inference is permissible here, as UNFI's claimed injury is nothing more than paranoia that its lenders might give UNFI a hard time at some point in the future.

C. There Was No Actionable Misrepresentation or Omission and No Duty for Respondents to Say More.

First, there was nothing misleading about Respondents' alleged statement that the impact of adding Supervalu as a borrower "would be 'muted'". (R. 160, ¶ 123.) UNFI points to no facts that suggest any impact, let alone one that is greater than "muted". UNFI does not allege that a single investor has done anything to harm it, so there is no factual issue to be resolved. Further, even if the alleged statement were false in hindsight (which it is not), it was a nonactionable opinion "honestly held at the time [it] w[as] expressed". *FMC Corp. v. Fleet Bank*,

226 A.D.2d 225, 225 (1st Dep't 1996); *see Pacnet Network Ltd. v. KDDI Corp.*, 78 A.D.3d 478, 479 (1st Dep't 2010) (rejecting opinion claim). The Complaint fails to allege facts showing that Respondents did not believe this statement to be true. After all, Supervalu was already to become a co-borrower on the ABL Facility. (*See* R. 389; R. 526-527, § 10.1.9.)

Second, Respondents' alleged statement that adding Supervalu as a borrower would be meaningful to "select accounts" is not a "partial disclosure". (R. 160, ¶ 124.) "The duty to speak arises" when there is an "erroneous impression created by the ambiguous representation". *Innovative Design & Bldg. Servs., LLC v. Arch Ins. Co.*, No. 12-cv-5474 (AJN), 2014 WL 4770098, at *8 (S.D.N.Y. Sept. 23, 2014). According to the Complaint, the statement was true—adding Supervalu as a borrower *was* meaningful to select accounts, and Respondents did not purport to communicate anything more than that. *See Manley v. AmBase Corp.*, 126 F. Supp. 2d 743, 756 (S.D.N.Y. 2001) (rejecting partial disclosure claim). If UNFI felt it needed to understand *why* adding Supervalu was meaningful to select accounts, it would have asked—and it did not.

Third, UNFI does not adequately allege a misrepresentation by omission. Such a claim requires a duty to disclose the withheld information. *Barrett v. Freifeld*, 77 A.D.3d 600, 601-02 (2d Dep't 2010). "A duty to disclose may arise where there is a fiduciary or confidential relationship, or one party's

superior knowledge of essential facts renders nondisclosure inherently unfair". *Id.* Accepting the facts in the Complaint as true, neither circumstance was present here. *First*, there was no special relationship between the parties. UNFI concedes that Respondents were not its fiduciaries (Br. 17), and the Commitment Letter cautioned that Arrangers "and their respective affiliates are engaged in a broad range of transactions that may involve interests that differ from [UNFI's] interests and . . . have no obligation to disclose such interests and transactions to [UNFI]". (R. 316.) "A special relationship does not arise out of an ordinary arm's length business transaction between two parties . . . and an arm's length borrower-lender relationship is not of a confidential or fiduciary nature". *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 960 (2d Dep't 2011). *Second*, there was no duty to speak under the special facts doctrine because UNFI does not allege facts showing (i) that any employee of Respondents involved in the syndication effort was in a position to know the Term Loan investors' CDS positions (*see* Section III.D below), or (ii) any effort by UNFI to investigate. *See Pls.' State & Sec. Law Settlement Class Counsel v. Bank of N.Y. Mellon*, 43 Misc. 3d 887, 901-02 (Sup. Ct. 2014); *CM Collections, Inc. v. ASL Holdings LLC*, No. 651563/2016, 2018 WL 984849, at *5 (Sup. Ct. Feb. 20, 2018).

D. The Scienter Allegations Do Not Satisfy the Heightened Pleading Standard.

Despite acknowledging that a potential investor asked that Supervalu be added as a borrower—a request Respondents passed on to UNFI during syndication—UNFI imagines a scheme by Respondents to benefit hedge fund clients at its expense. But UNFI's speculation does not follow from the facts it alleges. UNFI concedes that the trading operations of non-party broker-dealer Goldman Advisory were walled off from Respondent's lending division (R. 187, ¶ 57), and fails to plead that any employee of any Respondent who mediated between the Term Loan investors and UNFI knew (or was in any position to know) what CDS positions any firm held—let alone plead when or where or which of these individuals accessed information to which they were not permitted. UNFI's scienter allegations impermissibly rely solely "on information and belief" (R. 168, ¶ 6; R. 187-90, ¶¶ 57, 59, 61), without "provid[ing] any facts upon which the belief is based". *Bd. of Managers of Beacon Tower Condo. v. 85 Adams St., LLC*, 136 A.D.3d 680, 686 (2d Dep't 2016); *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 612 n.1, 615 (1st Dep't 2015).

Nor can UNFI purport to aggregate the supposed knowledge of every employee of every subsidiary of Goldman Sachs Group by simply asserting that "Defendants" made certain allegedly false statements that "Defendants knew" were false. (R. 159-160, ¶¶ 122-25.) Such "group pleading" is insufficient. *See Abdale*

v. N. Shore Long Island Jewish Health Sys., Inc., 49 Misc. 3d 1027, 1043 (Sup. Ct. 2015) (dismissing fraud claim for failing to make "specific and separate allegations for each defendant").

CONCLUSION

For all the reasons set forth above, Respondents respectfully request that this Court affirm the Motion Court's dismissal of the Complaint with prejudice.

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Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

by

Michael A. Paskin
Michael T. Reynolds
Lauren A. Moskowitz
Members of the Firm

Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
mpaskin@cravath.com
mreynolds@cravath.com
lmoskowitz@cravath.com

Attorneys for Defendants-Respondents The Goldman Sachs Group, Inc.; Goldman Sachs Bank USA; Goldman Sachs Lending Partners, LLC; and Stephan J. Feldgoise

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Michael A. Paskin