To be Argued by:
DAVID M. COOPER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2020-02490

UNITED NATURAL FOODS, INC.,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Defendants-Respondents largely abandon and in some instances contradict the reasoning that Supreme Court relied upon for dismissal. Instead, they put forward alternative bases for dismissal that are legally erroneous and rest on supposed facts outside the Complaint. Indeed, Defendants-Respondents' brief rests on a story of their own good faith and supposed financial headwinds to syndication that is directly at odds with the allegations of the Complaint and that ignores entirely the well-pleaded allegations of Defendants-Respondents' unlawful scheme to manipulate the CDS market.

I. Supreme Court erred in dismissing UNFI's claim for breach of contract for the $40.5 million in Marketing Period Fees. Defendants-Respondents do not even attempt to defend Supreme Court's theory that there could be two Marketing Periods. Instead, Defendants-Respondents argue that there was one Marketing Period beginning on October 15, 2018—in direct conflict with Supreme Court's holding that "[c]learly, UNFI's release of its financials on September 24 triggered 'a Marketing Period,'" R. 23, and the fact that marketing actually started on September 24. Defendants-Respondents' argument distorts the plain language of the Agreements, contravenes the well-pleaded facts, and would lead to absurd results—*e.g.*, the marketing occurred outside the Marketing Period, no marketing occurred during the Marketing Period, the Marketing Period can only be determined after it occurs, and usually there will be no complete Marketing Period at all—all clearly at odds with the parties' intent.

Defendants-Respondents also do not defend Supreme Court's reasoning on UNFI's independent argument as to why they were not entitled to Marketing Period Fees, *i.e.*, they failed to close the syndication in good faith. Supreme Court rejected the argument by presuming that a party cannot act in bad faith if it has a profit motive and no fiduciary duty. UNFI showed this reasoning was legally erroneous, so Defendants-Respondents retreat to the idea—not raised in Supreme Court—that they had no good-faith obligation because the Agreements supposedly did not require them to make any effort to syndicate the Term Loan.[1] But the Agreements expressly state that Defendants-Respondents agree to syndicate and that UNFI will assist them in completing the syndication. Moreover, Defendants-Respondents' argument that the allegations of bad faith do not suffice raises only factual issues (and supposed facts outside the Complaint) that cannot be resolved on the pleadings.

II. Supreme Court erred in dismissing UNFI's claim for breach of the implied covenant of good faith and fair dealing. If dismissal of the breach of contract claim is affirmed, the implied covenant claim cannot be dismissed as

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[1] Capitalized terms in this brief are defined the same way as in UNFI's opening brief.

duplicative under this Court's recent precedent, which Defendants-Respondents improperly ask this Court to ignore as a so-called "outlier." If dismissal of the breach of contract claim is reversed, the implied covenant claim still cannot be dismissed as duplicative because it is for different damages and based on different contractual provisions than the contract claim. Defendants-Respondents do not dispute that Supreme Court made an erroneous assertion that there was a breach of contract claim regarding the Flex Provisions that the implied covenant claim supposedly duplicated, as that contract claim does not exist. Instead, Defendants-Respondents assert that the different damages do not matter, but this contention conflicts with established precedent. Defendants-Respondents also assert that the contractual provisions for the contract and implied covenant claims are the same, which is demonstrably incorrect, as UNFI's claim for the Marketing Period Fees alleges a breach of paragraph (e) on page 2 of the Fee Letter, and the implied covenant claim concerns the Flex Provisions section on page 4 of the Fee Letter.

Defendants-Respondents further claim, without any support, that the implied covenant does not exist here. In doing so, Defendants-Respondents identify no inconsistency between the implied covenant and the contractual obligation to make a "reasonabl[e]" determination regarding the Flex Provisions, and they ignore the cases from the Court of Appeals and this Court directly on point. In addition, Defendants-Respondents' assertion—not raised in Supreme Court—that the allegations of bad faith were insufficient again simply disputes the factual allegations of the Complaint.

III. Supreme Court erred in dismissing UNFI's fraud claim. Defendants-Respondents again abandon Supreme Court's reasoning, which was based on the erroneous assumption that UNFI should have known about investors' participation in the Supervalu CDS market—confusing Supervalu debt (which UNFI knew about) with Supervalu CDS (which UNFI did not and could not know about). Instead, Defendants-Respondents note that there were supposed disclaimers of reliance in the Agreements, but they ignore that the facts here were peculiarly within their knowledge, and thus reliance cannot be disclaimed as a matter of law.

Supreme Court's one-sentence conclusion that the damages were speculative is likewise meritless. As UNFI explained, the damages here are the current, lower value of the Term Loan because Defendants-Respondents misrepresented a feature of the product, *i.e.*, the inclusion of investors with an incentive to force default. Defendants-Respondents invent a new rule whereby fraudulent statements about features of an asset give rise to damages, but fraudulent statements about features of a liability do not. But there is no legal or rational basis for such a distinction.

Finally, Defendants-Respondents put forward alternative arguments that Supreme Court did not accept, challenging the elements of falsity and scienter.

But Defendants-Respondents' arguments on these issues rest entirely on disagreement with and disregard of the factual allegations of the Complaint.

Accordingly, for the reasons stated in UNFI's opening brief and this reply brief, this Court should reverse and order reinstatement of UNFI's claims.

ARGUMENT

I. SUPREME COURT ERRED IN DISMISSING UNFI'S CLAIM FOR BREACH OF CONTRACT AS TO THE $40.5 MILLION IN MARKETING PERIOD FEES

A. Defendants-Respondents Abandon Supreme Court's Two-Marketing-Period Theory And Fail To Refute Supreme Court's Holding That A Marketing Period Began On September 24, 2018

As Defendants-Respondents recognize (Br. 16), there is a breach of contract as to the $40.5 million in Marketing Period Fees unless the Acquisition closed before the conclusion of the Marketing Period. Defendants-Respondents do not defend Supreme Court's reasoning that there were two Marketing Periods. Nor do Defendants-Respondents dispute that if there were two Marketing Periods, then the condition for imposing the Marketing Period Fees was not satisfied because one of the Marketing Periods (but not the other) concluded before the Acquisition closed. UNFI Br. 25-26. Thus, Defendants-Respondents can prevail on appeal only if this Court concludes that Supreme Court was wrong both in recognizing two Marketing Periods and in holding that there was a Marketing Period that began on September 24, 2018 (and concluded on October 15, 2018).

Supreme Court correctly held that there was a Marketing Period beginning on September 24. R. 23. It also correctly found that the actual marketing occurred during the September 24 Marketing Period, and no marketing meetings occurred during the other supposed Marketing Period beginning on October 15—despite UNFI and Supervalu offering to market afterwards. R. 182-83 ¶¶ 45-47. Defendants-Respondents assert (Br. 21-22) that the time when marketing is done is irrelevant in determining the "Marketing Period," but the plain language and overall intent of the parties are relevant in interpreting an agreement. *See Kass v. Kass*, 91 N.Y.2d 554, 567 (1998). While Defendants-Respondents contend (Br. 20-21) that this constitutes impermissible extrinsic evidence, they confuse the relevance of the marketing beginning on September 24: it does not change the meaning of "Marketing Period," but it shows how to undertake the necessary step of applying the term to the facts.

The text confirms Supreme Court's recognition that a Marketing Period began on September 24 because UNFI provided all financial statements that existed on September 24 and because Defendants-Respondents requested that marketing commence that day. Defendants-Respondents nonetheless argue (Br. 17-18) that this could not be the Marketing Period because Supervalu later released its quarterly statement on October 15. However, the "Marketing Period" is defined not simply in terms of the release of financial statements, but in terms of UNFI's "commercially reasonable efforts to provide" a Marketing Period, R. 310, and Defendants-Respondents directed UNFI to employ those commercially reasonable efforts starting on September 24 and for the 15 days thereafter.

Moreover, Defendants-Respondents' theory would permit them to retroactively deny a Marketing Period, after directing UNFI to satisfy all of the requirements for one, if Supervalu (which UNFI did not control) provides a financial statement after UNFI satisfied all of the requirements of a Marketing Period. UNFI Br. 29-30. Defendants-Respondents do not deny that determining what constitutes a Marketing Period after the fact would be nonsensical and inconsistent with the Agreements because UNFI has certain obligations during the Marketing Period. Instead, Defendants-Respondents assert (Br. 17 n.6) that there is no retroactivity because the only Marketing Period supposedly began on October 15, but this misses the point: the determination that the period beginning on September 24 was not a Marketing Period could only be made after the fact, *i.e.*, after UNFI satisfied the requirements necessary for a Marketing Period. Indeed, Defendants-Respondents later concede (Br. 19 n.8) that "the determination necessarily is made with hindsight as of the actual Closing Date."[2] Since

[2] Defendants-Respondents argue (Br. 17-18) that the parties could have anticipated it would not be a Marketing Period given the expected timing of the release of the Supervalu financial statement and the expected closing date. But there is nothing in the Agreements to suggest that UNFI should have to guess about whether Defendants-Respondents are not going to credit UNFI's satisfaction

Defendants-Respondents control the initiation of the marketing, this would grant them license to engage in a $40.5 million rope-a-dope where they initiate marketing, and UNFI assists (as required under the Agreements) in the belief that it was a Marketing Period, only for Defendants-Respondents to decide later that was not a Marketing Period and charge UNFI $40.5 million in fees.

Defendants-Respondents also erroneously disregard the allegations establishing that if Defendants-Respondents' interpretation were correct, the Marketing Period could almost never be complete prior to closing and only at Defendants-Respondents' whim. *See* UNFI Br. 30 & n.4. Defendants-Respondents contend (Br. 22-23) that any restriction on the Marketing Period made sense given the need for the market to consider the financial statements, but they ignore Feldgoise's admission that Supervalu's "second quarter financial statements would have '*no impact*' on the syndication," R. 195 ¶ 72 (emphasis in original), and that Defendants-Respondents rejected Supervalu and UNFI's offer to continue to market and specifically discuss Supervalu's October 15 financial statements, *id.*

At a minimum, there is an ambiguity in the Agreements as to whether—as Defendants-Respondents' theory suggests—the time without marketing is the

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of the Marketing Period requirements based on future events. Indeed, Defendants-Respondents concede (Br. 19 n.9) that if the closing were pushed up to October 15, 16, or 17, the September 24 period would have been a Marketing Period.

Marketing Period; UNFI could have withheld commercially reasonable efforts during all of the marketing meetings because the September 24 Marketing Period became retroactively invalid; and a full Marketing Period almost never will occur.

B. Defendants-Respondents Fail To Refute That They Had An Obligation To Act In Good Faith To Complete A Successful Syndication And Failed To Do So

1. Defendants-Respondents' New Argument That They Had No Obligation To Make Any Effort To Syndicate Conflicts With The Plain Language Of The Contracts

As UNFI explained (Br. 31-38), Defendants-Respondents were not entitled to the Marketing Period Fees for the independent reason that they did not act in good faith to complete a successful syndication. Defendants-Respondents' principal response (Br. 25-30) is that they did not have to act in good faith. Defendants-Respondents concede (Br. 26 n.13) that they did not raise this argument in Supreme Court, and Supreme Court recognized (R. 25) a good-faith limitation.

Defendants-Respondents criticize (Br. 26-27) UNFI for not expressly treating this claim as one for breach of the implied covenant in the Complaint, but this criticism is baseless. The Complaint alleges that "Goldman Sachs failed to use good faith efforts to close the syndication prior to the Acquisition's close." R. 203 ¶ 99. And a Complaint must be read to include any claim supported by the alleged facts. *See Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 228 (1st Dep't 2002)

("The court's role is simply to determine whether the facts, as alleged, fit into any valid legal theory."). That is especially true here, given that Defendants-Respondents did not dispute the applicability of a good-faith requirement or complain about the lack of the words "implied covenant" with respect to this claim, which could have easily been cured by amendment of the Complaint.

Defendants-Respondents also have no legal basis for their argument that the requirement of good faith does not apply here. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). Defendants-Respondents' only argument (Br. 27-30) for avoiding the good-faith requirement here is that supposedly they had no obligation to undertake any effort to syndicate the Term Loan. But this argument defies the plain language of the Commitment Letter: "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. 313. Defendants-Respondents assert (Br. 28 n.14) that the "agreements to syndicate" simply reference back to other parts of the contract. But "agreements" is not capitalized or a defined term, and there is no reason to apply anything other than the ordinary meaning, *i.e.*, Lead Arrangers were agreeing to syndicate the Term Loan.

Regardless, the other provisions confirm the agreement to syndicate. The Commitment Letter states that UNFI must "agree to use [its] commercially reasonable efforts to assist the Lead Arrangers (and use [its] commercially reasonable efforts to cause the Target to assist) in completing syndications reasonably satisfactory to the Lead Arrangers and you …." R. 309. UNFI could not assist the Lead Arrangers "in completing syndications" if the Lead Arrangers themselves were not actually attempting to complete syndications. More generally, Defendants-Respondents took on the role of "lead arranger" (and were paid $5.375 million for doing so) with all of the "rights and responsibilities customarily associated with" that role, R. 308, which is unquestionably to syndicate the loan, *id*. Indeed, the theory that Defendants-Respondents could make no effort to syndicate is blatantly inconsistent with Defendants-Respondents' invocation of the Flex Provisions, costing UNFI an additional $180 million, on the theory that doing so was necessary for a successful syndication. *See infra* Part II. There is no necessity if there is no contractual goal of a successful syndication in the first place.

The sole contractual language Defendants-Respondents rely upon (Br. 28) is that they supposedly only "reserved the right" to syndicate. But the full sentence shows that the right being reserved is to syndicate to any investor (except those reasonably rejected by UNFI), not whether to attempt to syndicate at all. R. 308

("The Lead Arrangers reserve the right … to syndicate all or a portion of the Initial Lenders' commitments hereunder to one or more banks, financial institutions or other institutional lenders and investors reasonably acceptable to you (such acceptance not to be unreasonably withheld or delayed) …."). Regardless, reserving the right to syndicate is not inconsistent with the exercise of good faith in deciding how the syndication is performed. And in the absence of an inconsistency, the implied covenant applies. *See Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995).

2. Defendants-Respondents Abandon Supreme Court's Reasoning Regarding The Allegations Of Bad Faith And Instead Improperly Challenge Those Allegations As A Factual Matter

Defendants-Respondents fail to support Supreme Court's holding that the Complaint did not contain sufficient allegations of bad faith. Defendants-Respondents do not defend (Br. 36-37) Supreme Court's rationale—that Defendants-Respondents' motive was not improper simply because they were seeking profit and had disclaimed a fiduciary duty to UNFI—which is erroneous for the reasons UNFI explained (UNFI Br. 32-35).

Instead, Defendants-Respondents contest (Br. 30-36) as a factual matter whether they acted in bad faith, but Defendants-Respondents ignore this Court's holding that "good faith is not appropriately decided on a motion to dismiss." *African Diaspora Mar. Corp. v. Golden Gate Yacht Club*, 109 A.D.3d

204, 213 (1st Dep't 2013); *see also, e.g.*, *Peacock v. Herald Square Loft Corp.*, 67 A.D.3d 442, 443 (1st Dep't 2009). And while they assert (Br. 38) that the allegations in those cases were not conclusory, nor are the allegations here. Moreover, the only New York state case Defendants-Respondents cite (Br. 32) supposedly dismissing on this ground in fact did not deny that the defendant acted in bad faith, but rather rejected the claim based on an "inconsistency between the claim and the negotiated terms of the contract." *Phoenix Capital Invs. LLC v. Ellington Mgmt. Grp., L.L.C.*, 51 A.D.3d 549, 550 (1st Dep't 2008). As discussed above, there is no inconsistency here.

Moreover, while Defendants-Respondents assert (Br. 30) that "UNFI pleads no facts suggesting that Goldman Bank failed to act in good faith," there are myriad facts in the Complaint supporting bad faith. As UNFI detailed (Br. 35-38): Defendants-Respondents set a October 15 deadline for investors, even though they now assert that October 15 was the start of a Marketing Period; Defendants-Respondents claimed that the October 15 financial statement was important to investors, and yet directed Supervalu not to issue it sooner and conducted no marketing afterwards; Defendants-Respondents refused to move back the October 22 closing date to allow time to address the October 15 financial statement with investors; and Defendants-Respondents syndicated all but 3% of the Term Loan, which was a sufficient shortfall to aid Defendants-Respondents' fraudulent CDS scheme and their exercise of the Flex Provisions at minimal cost.

Defendants-Respondents dispute these allegations, but again these are factual disputes, and regardless, their assertions are meritless. *First*, Defendants-Respondents assert (Br. 35) that the October 15 deadline for investors made syndication faster, but the question was completion, which plainly would not be aided by a cut-off a week in advance of closing and without giving investors an opportunity to see Supervalu's October 15 financial statement. *Second*, UNFI speculates (Br. 35-36 & n.19) that even if the closing had been pushed back, it might not have mattered to syndication (and they had a good reason not to push it back), but it is UNFI—not Defendants-Respondents—that is entitled to "every possible favorable inference." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334 (2013). *Third*, Defendants-Respondents assert (Br. 33-34) that the nearly complete syndication shows their good faith, but as UNFI explained (Br. 36), falling just short allowed them to offload nearly all of their risk while allowing them to take the Marketing Period Fees.[3] *Fourth*, Defendants-Respondents state

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[3] Defendants-Respondents assert (Br. 31, 33-34), with no factual basis in the Complaint, that the Term Loan never traded above 97% of par, but even assuming *arguendo* that were true, it would not show that Defendants-Respondents tried to fully syndicate before closing. Similarly, there is nothing in the Complaint suggesting, as Defendants-Respondents assert (Br. 33), that Defendants-Respondents spent their own money to discount the Term Loan. Defendants-Respondents also note (Br. 32-33 & n.17) that they did not obtain all of the

(Br. 34 n.18) that failing to syndicate would not help the CDS scheme, but they ignore the point that it gave them more time to line up Supervalu as a co-borrower and take on investors who were short-sellers of Supervalu CDS. R. 193 ¶ 67 n.18.

II. SUPREME COURT ERRED IN DISMISSING UNFI'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Defendants-Respondents Fail To Confront The Precedent Establishing That The Implied Covenant Claim Does Not Duplicate The Breach Of Contract Claim

This Court's recent precedent confirms that the implied covenant claim cannot be dismissed as duplicative if the dismissal of the breach of contract claim is affirmed. *Punch Fashion, LLC v. Merch. Factors Corp.*, 180 A.D.3d 520, 523 (1st Dep't 2020), *motion for reargument or leave to appeal denied*, No. M-1397, 2020 WL 4359771 (1st Dep't July 30, 2020). Defendants-Respondents do not dispute that *Punch Fashion* is directly on point and requires rejection of Supreme Court's ruling on this issue. Instead, they simply characterize (Br. 41 n.21) *Punch Fashion* as an "outlier." But this Court's binding precedent cannot be so blithely disregarded. *See U.S. Bank N.A. v. UBS Real Estate Sec., Inc.*, 177 A.D.3d 493, 494 (1st Dep't 2019) ("Our decision could not have been clearer, and that decision is still good law and binding upon us under principles of stare decisis.") (quotation

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Marketing Period Fees or additional interest payments from the Flex Provisions, but they still received millions, and the rest went to investors with whom Defendants-Respondents very likely have long-term, mutually beneficial relationships, including in the CDS scheme here.

marks omitted). Moreover, in contrast to *Punch Fashion*, the cases Defendants-Respondents cite did not actually consider the issue, instead just dismissing without discussion implied covenant claims along with contract claims. *See 2520 Jerome Ave., LLC v. Corp. of Rector*, 185 A.D.3d 439 (1st Dep't 2020); *Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347 (1st Dep't 2005); *Empire State Bldg. Assocs. v. Trump*, 247 A.D.2d 214, 214 (1st Dep't 1998). Such cases therefore cannot overcome this Court's clear resolution of this issue in *Punch Fashion*. *See People v. Hill*, 150 A.D.3d 627, 640 (1st Dep't 2017) ("A case is precedent only as to those questions presented, considered and squarely decided.") (quotation marks and ellipses omitted).

If this Court reverses the dismissal of the breach of contract claim, the implied covenant claim still cannot be dismissed as duplicative. Defendants-Respondents do not dispute that if the claims concern different provisions of the Agreements, they are not duplicative. And that is exactly the situation here: the Marketing Period Fees concern the breach of paragraph (e) on page 2 of the Fee Letter, *see* R. 378 ¶ (e) (setting forth requirements for imposing Marketing Period Fees), and the implied covenant claim concerns the fourth full paragraph (before the (a)) on page 4 of the Fee Letter, *see* R. 380 (setting forth requirements for exercise of Flex Provisions). Defendants-Respondents do not attempt to defend Supreme Court's reasoning on this issue, which incorrectly assumed that there was a breach of contract claim concerning the Flex Provisions. *See* UNFI Br. 41-42. Instead, Defendants-Respondents suggest (Br. 41-42) that some other alleged breaches of the implied covenant (not concerning the Flex Provisions) duplicated the contract claims. But even assuming that these other alleged breaches of the implied covenant were duplicative, they are not at issue in this appeal because UNFI is appealing only the dismissal of the implied covenant claim as to the exercise of the Flex Provisions. *See* UNFI Br. 14 n.1. And there is no legal or rational basis to dismiss this implied covenant claim—which is based on contractual provisions that are entirely separate from the provisions at issue for the contract claims—because other implied covenant claims, that UNFI does not now assert, are supposedly duplicative.

Defendants-Respondents also err in asserting (Br. 42-43) that the claim for $36 million of the Marketing Period Fees is based on the same language on page 4 of the Fee Letter that is the basis for the implied covenant claim regarding the Flex Provisions. As UNFI explained (Br. 42 n.8), there are two conditions that Defendants-Respondents must meet to claim the $36 million. One is that the Flex Provisions language is satisfied. But the second necessary condition, which is not required to invoke the Flex Provisions, is that the Marketing Period Fees language discussed *supra* Part I.A (including that the Acquisition closed before the conclusion of the Marketing Period) is satisfied. It is solely the failure to satisfy the second condition that is the basis for the breach of contract claim. Thus, the claims are unquestionably based on different provisions of the Fee Letter with different requirements that necessitate different factual inquiries.

In any event, it is undisputed that the $36 million in damages is entirely separate from and in addition to the $180 million at issue in the implied covenant claim. *See* UNFI Br. 42 n.8. Nor do Defendants-Respondents dispute that claims are not duplicative as a matter of law when they seek distinct damages. *See id.* 43-44. Instead, Defendants-Respondents suggest (Br. 40-41) that UNFI cannot choose to split up damages among different claims. But they have no support for this proposition, which subverts the purpose of the inquiry into duplicativeness: to prevent plaintiffs from using an implied covenant claim to recover the same damages at issue in their contract claim.

B. Defendants-Respondents Fail To Identify Any Inconsistency Between The Implied Covenant And The Terms Of The Agreements

Supreme Court also erred as a matter of law in holding that the terms of the Fee Letter supplanted the implied covenant. R. 32. Defendants-Respondents do not defend Supreme Court's reasoning that because the exercise of the Flex Provisions was discretionary, there is no implied covenant. As UNFI explained (Br. 44-46), that reasoning directly conflicts with this Court's precedents.

Instead, Defendants-Respondents take the opposite tack and say (Br. 44-45) that because the Fee Letter does restrict their discretion with the phrase "reasonably determine," reasonableness supplants the implied covenant to act in good faith. However, as UNFI explained (Br. 46), the Court of Appeals and this Court have held that the implied covenant applies where very similar language was used to restrict the exercise of discretion. *See Dalton*, 87 N.Y.2d at 390; *Pleiades Publ'g, Inc. v. Springer Sci. + Bus. Media LLC*, 117 A.D.3d 636, 637 (1st Dep't 2014). Defendants-Respondents do not attempt to and cannot distinguish this binding precedent.[4] The lone case Defendants-Respondents cite in support of their argument to the contrary (Br. 44) is a Supreme Court case that in turn cited nothing and certainly cannot override the precedents discussed above. *See ProSource Techs., LLC v. Hous. Trust Fund Corp.*, No. 5972-14, 2015 WL 5797028, at *11-12 (Sup. Ct. Oct. 2, 2015). Indeed, Defendants-Respondents ignore the fundamental point: the contract supplants the implied covenant only where there is an inconsistency between the two, *see, e.g., Dalton*, 87 N.Y.2d at 389, and there is nothing inconsistent about requiring a party to act both reasonably and in good faith.

[4] Defendants-Respondents mention (Br. 29-30) these cases only in the context of the breach of contract claim, and there only for the proposition that the defendants had "discretion over how to discharge th[e] obligation," which is equally true for the exercise of the Flex Provisions.

Furthermore, Defendants-Respondents raise a new argument not raised in Supreme Court, arguing (Br. 39-40) that even if they do not meet the first requirement for exercising the Flex Provisions (*i.e.*, "reasonably determine[d] that (i) [the Flex Provisions were] necessary to ensure a Successful Syndication," R. 380), they meet the second requirement (*i.e.*, "reasonably determine[d] that … (ii) such Successful Syndication has not … be[en] achieved by the Closing Date," *id.*). However, as UNFI explained (Br. 43 n.9) and Defendants-Respondents ignore, Defendants-Respondents invoked the Flex Provisions on the theory that doing so was necessary to ensure a successful syndication, not on the second ground that a successful syndication had not been achieved by closing. *See* R. 184 ¶ 49. Moreover, Defendants-Respondents could not invoke the second ground because they exercised the Flex Provisions before the closing and thus could not have made a determination (let alone a reasonable determination) that a successful syndication had not occurred.[5]

[5] Defendants-Respondents suggest (Br. 40) that "it is unnecessary to examine the state of play on the date of exercise" of the Flex Provisions, but without a "reasonabl[e] determin[ation]" that one of the two criteria is satisfied, the Flex Provisions could not be exercised. And it was impossible on October 12 (when the Flex Provisions were exercised, ten days before closing) for Defendants-Respondents to make a determination, let alone a reasonable determination, that a Successful Syndication has not been achieved by the Closing Date. Defendants-Respondents do not even attempt to argue that they made a reasonable determination that a successful syndication could not have been achieved by the Closing Date.

Defendants-Respondents also suggest (Br. 47) that there was no implied covenant because UNFI could not expect Defendants-Respondents to attempt to syndicate in the first place. As discussed *supra* Part I.B.1, this argument conflicts with the plain language of the Agreements. Regardless, it has no bearing on the implied covenant claim here because the Fee Letter specified a reasonableness restraint on the exercise of the Flex Provisions, and UNFI had every reason to expect Defendants-Respondents to act in good faith in making the reasonableness determination.

C. Defendants-Respondents' New Argument That The Allegations Of Bad Faith Are Insufficient Improperly Disputes The Factual Allegations Of The Complaint

In Supreme Court, Defendants-Respondents did not dispute that the Complaint sufficiently alleges bad faith in exercising the Flex Provisions. Nonetheless, Defendants-Respondents now argue (Br. 45-47) that the allegations do not suffice "particularly in light of the indisputably difficult market realities the parties faced at the time." However, Defendants-Respondents' assertions about those supposed market realities are based entirely on purported facts outside the Complaint that cannot be considered on a motion to dismiss.

Moreover, Defendants-Respondents ignore the factual allegations supporting bad faith. In particular, the Complaint alleges that exercise of the Flex Provisions was not necessary. R. 206 ¶ 118. The reason why Defendants-Respondents did not make a good-faith, reasonable determination that it was necessary is simple: Defendants-Respondents were not actually attempting to fully syndicate the Term Loan and were using the syndication as a means to benefit themselves and their clients, including by manipulating the CDS market. *See id*. In any event, these are factual issues that cannot be resolved on a motion to dismiss.

Finally, Defendants-Respondents also argue (Br. 47-48) that UNFI received the fruits of the Agreements because the Acquisition was completed, but this argument misses the point: by acting in bad faith and making UNFI pay an additional $180 million, Defendants-Respondents deprived UNFI of money it was entitled to under the Agreements and the implied covenant. In contrast, in the case Defendants-Respondents cite, the plaintiff alleged no such monetary harm. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 22-23 (2005).

III. SUPREME COURT ERRED IN DISMISSING UNFI'S CLAIM FOR FRAUD

A. Defendants-Respondents Improperly Dispute The Alleged Facts Establishing Justifiable Reliance

Supreme Court erred in holding that UNFI did not allege justifiable reliance. Defendants-Respondents do not dispute that this is a factual issue generally not decided on the pleadings, nor do they provide any legal basis for resolving it on the pleadings here. Indeed, they do not defend Supreme Court's reasoning that UNFI should have known about the investors in Supervalu debt, which was based on a simple misunderstanding, as the issue here concerns investors in Supervalu CDS, which is undisputedly a private market known to Defendants-Respondents and not to UNFI. *See* UNFI Br. 48-49; *see also* Defendants-Respondents' Br. 50 (characterizing Supreme Court's misunderstanding of the key issue in deciding reliance as a "quibble[]").

Defendants-Respondents' alternative arguments against justifiable reliance are meritless. First, Defendants-Respondents rely (Br. 49-50) on supposed disclaimers of reliance, but they ignore UNFI's point (Br. 49) that, as a matter of law, a party cannot disclaim reliance on facts peculiarly within the other party's knowledge. *See Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 137-38 (1st Dep't 2014). And the CDS interests of the lenders are peculiarly within Defendants-Respondents' knowledge. R. 187 ¶ 57.

Second, Defendants-Respondents posit (Br. 49) that the final list of investors might have been the same as the prior lists UNFI received, but there is nothing in the Complaint to support that speculation. Regardless, the list still would not have revealed the investors' CDS positions, and thus would not have alerted UNFI to the fraud. R. 187 ¶ 57. And any question about whether the information was peculiarly within the knowledge of Defendants-Respondents is a question of fact that cannot be decided on the pleadings. *See Century 21, Inc. v. F.W. Woolworth Co.*, 181 A.D.2d 620, 625 (1st Dep't 1992).

Third, Defendants-Respondents argue (Br. 49-50) that UNFI could have asked about investors' CDS positions, but there was no reason for UNFI to suspect that Defendants-Respondents were engaging in a fraudulent scheme to manipulate the CDS market. The case Defendants-Respondents rely upon (Br. 50 n.24) recognizes a duty to investigate only where there are "hints of [ ] falsity." *Norcast S.ar.l. v. Castle Harlan, Inc.*, 147 A.D.3d 666, 667 (1st Dep't 2017) ("Plaintiffs did not press defendant … for direct answers to their questions on this subject, despite their awareness of defendant's close relationship with their competitor and suspicions regarding its involvement."). Defendants-Respondents identify no hints of falsity here that would have required investigation and no duty for UNFI to presume that Goldman was perpetrating a fraud based on the opaque CDS market. *See Levy v. Am. Beverage Corp.*, 265 A.D. 208, 219 (1st Dep't 1942). Moreover, there was certainly no duty here given that UNFI effectively had to proceed with the transaction and thus had no leverage to demand more detailed answers about the investors. *See* UNFI Br. 51. Defendants-Respondents claim (Br. 51) that UNFI did have leverage, which is plainly a factual issue that cannot be resolved on the pleadings. Regardless, the Complaint's account must be credited, which clearly alleges that UNFI could not risk blowing up the transaction, and that the leverage belonged to Defendants-Respondents, as evidenced by UNFI's agreement to some of Defendants-Respondents' demands to change the terms of the deal based on their threats that "things would get ugly" if UNFI did not accede. R. 167 ¶ 4; R. 185 ¶ 52; R. 188 ¶ 58; R. 202 ¶ 89.

B. Defendants-Respondents Have No Legal Basis For Their Argument That There Are No Damages For Misrepresentations About The Features Of A Loan

Supreme Court erred in its conclusory sentence stating that the damages for fraud were speculative. *See* UNFI Br. 52-55. Defendants-Respondents concede (Br. 53) that damages need not be pled with particularity and that the amount of damages need not be pled at all. Nor do they dispute that the existence of damages is generally not decided on the pleadings. Nonetheless, Defendants-Respondents argue (Br. 51) that the fraud claim does not sufficiently plead damages because it "is premised on a speculative parade of future horribles." But this argument misconstrues the injury alleged, which is not the possibility of future debt activism but the current, lower value of the Term Loan because Defendants-Respondents misrepresented a feature of the product, *i.e.*, the inclusion of investors with an incentive to force default.

This form of injury is a well-established basis for a fraud claim. UNFI Br. 53-54 (citing cases). Defendants-Respondents' only basis (Br. 52) for distinguishing this overwhelming case law is that "they all involved salable *assets*

… —not *liabilities* like the Term Loan."[6] But Defendants-Respondents cite no case ever recognizing such a distinction. Nor does it make logical sense: the Term Loan is a product that UNFI paid for, and just like any other product, it can be worth less if UNFI was misled about the terms of the deal. Indeed, Defendants-Respondents' assertion that the value of the Term Loan constitutes only the money UNFI received to fund the Acquisition ignores that the Term Loan has other features that affect its value, including the bargained-for feature regarding the identity of investors, which significantly affects the risk—and therefore the value—of the Term Loan. Thus, Defendants-Respondents' dispute really concerns the factual issue of whether including the CDS short sellers as investors made the Term Loan worth less, which again cannot be decided on the pleadings.

C. Defendants-Respondents' Alternative Bases For Dismissal, Not Accepted By Supreme Court, Are Meritless

1. The Complaint Alleges False Statements And Omissions

The Complaint alleges false statements and omissions because Defendants-Respondents falsely stated that the impact of adding Supervalu as a co-borrower would be "muted" and misleadingly stated that the co-borrower provision was

[6] Defendants-Respondents also suggest (Br. 52) that "in those cases, the allegedly concealed risks had already materialized," but they had only materialized to the same extent as the risk here: the product's value was diminished because a feature was misrepresented, regardless of whether that feature had yet affected the performance of the product. *See, e.g.*, *Wyle Inc. v. ITT Corp.*, No. 653465/2011, 2013 WL 5716120, at *5 (Sup. Ct. N.Y. Cty. Oct. 21, 2013), *aff'd*, 130 A.D.3d 438 (1st Dep't 2015).

important to “select accounts,” without disclosing that those select accounts were CDS short sellers with an incentive to force default. R. 207 ¶¶ 123-24. Defendants-Respondents argue (Br. 53-55) that these allegations do not suffice simply by disputing the facts as alleged.

In particular, Defendants-Respondents suggest (Br. 53) that the impact was “muted,” but the Complaint alleges the contrary. R. 186 ¶ 54; R. 190 ¶ 61; R. 207 ¶ 123. The Complaint explains precisely why it was not muted: UNFI 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.” R. 208 ¶ 127.

Similarly, Defendants-Respondents err in arguing (Br. 54) that the statement regarding “select accounts” did not contain a misleading omission in failing to inform UNFI of lenders that would have interests adverse to UNFI. R. 207 ¶ 124. Defendants-Respondents contend (Br. 54) that the statement was literally true. However, a partial disclosure—even if literally true—creates a duty to tell the full truth rather than render that partial disclosure substantially misleading. *See, e.g.*, *Brass v. Am. Film Techs. Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (“[O]nce a party has undertaken to mention a relevant fact to the other party it cannot give only half of the truth.”). In any event, Defendants-Respondents had a duty to disclose based on their superior knowledge regarding the CDS scheme: “a duty to disclose arises where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 327 (1st Dep't 1996) (quotation marks omitted). The unfairness here is clear given that the short sellers' participation was part of a *quid pro quo* with Defendants. R. 186 ¶ 54; R. 207 ¶ 123. At a minimum, these are again factual questions that cannot be resolved on a motion to dismiss. *See, e.g.*, *Barrett v. Freifeld*, 64 A.D.3d 736, 738 (2d Dep't 2009).[7]

2. The Complaint Alleges Scienter

The Complaint more than adequately alleges scienter. "All that is required to defeat a motion to dismiss a fraud claim for lack of scienter is a rational inference of actual knowledge." *IKB Int'l S.A. v. Morgan Stanley*, 142 A.D.3d 447, 450 (1st Dep't 2016) (quotation marks omitted). Here, the Complaint alleges that "Defendants knew that the addition of [Supervalu] as a co-borrower would not have a 'muted' impact on UNFI" because they knew it would subject UNFI to lenders with a strong incentive to force a default. R. 207-08 ¶¶ 123-25. While Defendants-Respondents claim (Br. 56) that "UNFI concedes that the trading operations of non-party broker-dealer Goldman Advisory were walled off from Respondent's lending division," in fact the Complaint alleges that Goldman Sachs

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[7] Defendants-Respondents assert (Br. 55) that they did not know the investors' CDS positions, but the Complaint alleges they did. R. 187 ¶ 57. Defendants-Respondents also suggest (Br. 55) that UNFI did not investigate, but provides no rationale or legal basis for holding that a duty to disclose facts uniquely known to one party does not exist if the other party does not sufficiently investigate.

"breach[ed] the wall between its CDS market-making desk and its lending division." R. 187 ¶ 57. Indeed, Goldman's use of Feldgoise here simultaneously as advisor to UNFI and as representative of Goldman Sachs in its role as lender and syndicator—despite the conflict of interest—shows that the supposed walls between the Goldman divisions were illusory. R. 179-80 ¶ 38.

Defendants-Respondents argue (Br. 56) that the Complaint does not detail precisely which employee knew about the CDS positions of investors, but that would be an absurd requirement at the pleading stage and is not required for an allegation of scienter. *See, e.g., DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 78 A.D.3d 442, 444 (1st Dep't 2010). It more than suffices to allege, as the Complaint does, *see* R. 186-87 ¶¶ 54, 57, that Defendants-Respondents had knowledge because the investors were Goldman Sachs' hedge-fund clients that Goldman Sachs had solicited in its capacity as left lead arranger, and that Goldman Sachs is a substantial market maker in Supervalu CDS. *See id.*; *Houbigant, Inc. v. Deloitte & Touche, LLP*, 303 A.D.2d 92, 98 (1st Dep't 2003) (holding that scienter is adequately pleaded if "the complaint contains some rational basis for inferring that the alleged misrepresentation was knowingly made"). Defendants-Respondents also err in suggesting (Br. 56) that all of the scienter allegations are on "information and belief"; in fact, the allegations of Defendants-Respondents' knowledge are made directly. R. 207-08 ¶ 125. Regardless, allegations on "information and belief" would suffice given the Complaint's clear explanation for how and why Goldman Sachs would have the knowledge at issue here. *See DDJ Mgmt.*, 78 A.D.3d at 443.

Finally, Defendants-Respondents argue (Br. 56-57) that the Complaint did not sufficiently differentiate among Defendants-Respondents. However, the Complaint alleges that "Goldman Sachs" (defined as Goldman Sachs Group) made the false and misleading statement and omission about the "muted impact" and "select accounts." R. 167-68 ¶ 5. The Complaint also details the roles of the other Defendants-Respondents. To the extent the Complaint at the end describes Defendants-Respondents collectively in outlining the fraud claim, that is unexceptional and clearly permissible where (as here) the defendants are related entities that worked in concert for the fraud. *See, e.g.*, *Unique Goals Int'l, Ltd. v. Finskiy*, No. 655692/2017, 2018 WL 5634326, at *5 (Sup. Ct. N.Y. Cty. Oct. 31, 2018).

CONCLUSION

Supreme Court's Decision should be reversed.

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Respectfully Submitted,

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