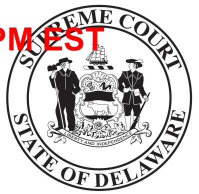
EFiled: Dec 14 2012 05:49PM EST
Filing ID 48443239
Case Number 579,2012D



IN THE SUPREME COURT OF THE STATE OF DELAWARE

FORT BENNING FAMILY COMMUNITIES LLC, FORT BELVOIR RESIDENTIAL COMMUNITIES LLC, CALIFORNIA MILITARY COMMUNITIES LLC, PACIFIC BEACON LLC, MONTEREY BAY MILITARY HOUSING, LLC, OHANA MILITARY COMMUNITIES, LLC, PACIFIC NORTHWEST COMMUNITIES, LLC and MIDWEST FAMILY HOUSING, LLC,	)	No. 579,2012
	)	Case Below:
Plaintiffs-Below/Appellants,	)	Superior Court of New Castle County Civil Action No. N11C-08-259-FSS [CCLD]
v.	)	
AIG MATCHED FUNDING CORP. and AMERICAN INTERNATIONAL GROUP, INC.,	)	
Defendants-Below/Appellees.	)	

CORRECTED APPELLANTS' OPENING BRIEF

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Dated: December 14, 2012

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NATURE OF PROCEEDINGS

Plaintiffs appeal from an order of the Superior Court, dated September 27, 2012, dismissing Plaintiffs' First Amended and Supplemental Complaint ("Complaint").

Plaintiffs are the owner entities responsible for the development, construction, and operation of privatized military housing on United States military bases throughout the country. Plaintiffs each entered into several guaranteed investment contracts ("Investment Agreements") with Defendants, through which Plaintiffs invested hundreds of millions of dollars. In return, Defendants committed to pay fixed rates of return for periods ranging from ten to forty-five years. The guaranteed investment returns were a critical source of funding for the ongoing development, construction, and maintenance of the housing at each project.

Plaintiffs commenced this action to recover damages suffered after Defendants prematurely returned their investments in 2008, in the wake of American International Group's ("AIG") near-collapse. Plaintiffs have been unable to reinvest these funds at the same rates of return that were guaranteed by Defendants. Defendants, however, profited by over $60 million from their premature repayment of these and other investment agreements.

The Complaint sought two alternative forms of relief. First, it sought damages for Defendants' premature return of funds, measured as the difference between what the Investment Agreements would have paid and what Plaintiffs were able to obtain after Defendants returned their investments. Plaintiffs sought through these causes of action to put themselves back into the position they would have been in had Defendants lived up to their contractual obligations. The Superior Court held that such damages amounted solely to "unearned interest" and found that New York law prohibiting recovery of "unearned interest" after acceleration of a debt barred those claims. Second, and in the alternative, Plaintiffs sought damages based upon Defendants' failure to accept additional investments tendered by Plaintiffs in 2012, as allowed by the Investment Agreements. Plaintiffs sought through these causes of action to further mitigate the losses sustained as a result of the Defendants' premature return of funds. The Superior Court also dismissed those claims, finding that Defendants'

premature return of principal terminated the contracts; in the alternative, the Superior Court found that Plaintiffs' acceptance of the returned funds barred these claims. Plaintiffs filed their notice of appeal on October 26, 2012.

SUMMARY OF ARGUMENT

A. The Superior Court erred when it dismissed Plaintiffs' claims based on their attempt to reinvest in 2012.

1. The plain language of the Investment Agreements allows for Plaintiffs to invest additional funds after making their initial investments. Nothing in those agreements provides that this right to reinvest terminated because Defendants prematurely returned funds invested earlier.

2. Contrary to the Superior Court's determination, Section 3.2 is not an acceleration clause; it does not accelerate or make "due and payable immediately" any debt, and it is not mentioned in Section 5.2, the Investment Agreements' actual acceleration clause. Even if Section 3.2 were an acceleration clause, which it is not, acceleration only advances the date of maturity. Acceleration does not alter other contractual terms. Thus, even if Section 3.2 advances the maturity date, it does not alter Plaintiffs' right to make additional investments.

3. The Superior Court also erred when it determined that Plaintiffs' acceptance of the returned funds justified dismissal. Nothing in the Investment Agreements indicates that Plaintiffs' acceptance of a Section 3.2 repayment terminates the agreements.

B. The Superior Court erred when it dismissed Plaintiffs' claims based on Defendants' premature return of funds.

1. New York law that prohibits parties from recovering future interest payments after acceleration does not bar expectation damages. The unearned interest rule evolved in order to prevent a lender from receiving a return of its principal, redeploying the sum, and then earning interest on the same money twice. It has not been, and should not be, interpreted to bar expectation damages.

2. Even if the unearned interest rule is interpreted to generally preclude expectation damages, Plaintiffs may nevertheless recover such damages in the present case. The rule previously has been applied to debt instruments; it should not be applied to investment instruments like the Investment Agreements. Moreover, New York law allows parties to modify the consequences of acceleration. Because Section 5.3 of the Investment Agreements can be reasonably interpreted to allow Plaintiffs to collect damages after acceleration, the Superior Court erred in dismissing Plaintiffs' claims.

3. Additionally, not all of the damages Plaintiffs seek can be characterized as "unearned interest." As Defendants were aware, the Investment Agreements provided a guaranteed income stream that was critical to Plaintiffs' housing projects because it would allow them the ongoing ability to develop, construct, and manage housing for military residents consistent with the scope of each project as approved by the military. As a direct result of the loss of that income stream, Plaintiffs have been unable to carry out the full intended scope of the housing projects, resulting in additional losses.

STATEMENT OF FACTS

I. Background

In the mid-1990s, the Department of Defense conducted an evaluation of the housing it provided to the men and women of America's armed services. (A53–54, Am. and Suppl. Compl. ("Compl.") ¶ 4.) The evaluation led to a disheartening conclusion: nearly two-thirds of available military housing needed to be repaired, completely rehabilitated, or replaced. (*Id.*) Congress passed the Military Housing Privatization Initiative ("MHPI") in 1996 to remedy this situation. (*Id.*)

The MHPI called for the Department of Defense's housing to be rehabilitated through joint efforts of private-sector companies and the military branches. (A54, Compl. ¶ 5.) Private companies submitted competing proposals to the military branches for developing, constructing, and managing housing on one or more active military bases. (*Id.*) Plaintiffs are joint ventures between private companies and the military branches formed pursuant to proposals selected for implementation by the military. (*Id.* ¶¶ 6–7.) Plaintiffs were formed for the sole purpose of developing, constructing, and managing housing on military bases. (*Id.*)

To finance their projects, Plaintiffs entered into long-term contracts with the military branches. (A60, Compl. ¶ 36.) Those contracts required Plaintiffs to demolish or repair existing homes, and construct new homes, during initial development periods that ranged from three to ten years. (*Id.* ¶ 37.) After the initial development periods, Plaintiffs continued to be responsible for renting, maintaining, and repairing the homes. (*Id.*) In return, Plaintiffs would receive rent generated by the housing. (*Id.*)

Plaintiffs anticipated that, in the long term, housing rents would cover expenses, but Plaintiffs needed significant up front capital to fund construction expenditures during the initial development period. (A60–61, Compl. ¶ 38.) Each of the Plaintiffs raised funds from private capital markets through a bond offering. (A61, Compl. ¶ 39.) Plaintiffs did not immediately need all of the funds raised through those offerings and thus planned to invest the excess funds until they were needed. (*Id.*) As a result, and given that the timing of development and construction expenditures

was very difficult to predict, Plaintiffs sought an investment vehicle that allowed for flexible withdrawals.

Plaintiffs' bond indentures allowed Plaintiffs to invest only in certain instruments. (A54, Compl. ¶ 7.) After thorough due diligence, Plaintiffs ultimately determined that guaranteed investment contracts issued by AIG Matched Funding Corp. ("AIGMFC") and guaranteed by AIG were the most suitable among the permitted investments. (A61, Compl. ¶ 40.) Plaintiffs negotiated those contracts extensively with AIG and AIGMFC. (A61–62, Compl. ¶¶ 40–42.) The agreements, described in more detail below, generally promise Plaintiffs fixed rates of return over long time periods—up to forty-five years. (A63, Compl. ¶ 46; A65, Compl. ¶ 52.) Critically, the agreements also provide Plaintiffs with the flexibility to withdraw funds as necessary to fund construction and other expenses and to make new investments after their initial investment. (A61–62, Compl. ¶ 42.)

Discussions with Defendants over the terms of the investment agreements were part of comprehensive negotiations regarding the financing of the projects between Plaintiffs, Defendants, underwriters, rating agencies, and potential investors. (A62, Compl. ¶ 44.) Indeed, the agreements between Plaintiffs and Defendants were executed on the same day that Plaintiffs' bonds were issued. (A64, Compl. ¶ 50.) The negotiations between Plaintiffs and Defendants were critical to other terms of the financing as well. For example, the returns Defendants guaranteed were included in pro forma financial statements that Plaintiffs presented to underwriters and bond agencies as part of the revenue sources that would fund development. (A63, Compl. ¶ 46.) Defendants' commitment to provide a constant rate of return over a long period was relied upon by Plaintiffs, bond purchasers, underwriters, and rating agencies. (*Id.*) The constant rate of return was also relied upon by the military in determining the scope of repair and replacement at the projects. (A61, Compl. ¶ 39.)

II. Terms of the Investment Agreements

Each of the Plaintiffs entered into one or more Investment Agreements with AIGMFC. (A56, Compl. ¶ 13.) AIG guaranteed those

contracts.[1] (*Id.*) The terms of the Investment Agreements differ slightly, but they are identical in all aspects relevant to this appeal.

A. Deposits and Returns

The Investment Agreements call for Plaintiffs to deposit all of the proceeds of their bond offerings with AIGMFC. (A11, Fort Benning Investment Agreement ("Fort Benning Agreement") at 1.) Plaintiffs invested massive sums pursuant to these agreements. For example, Plaintiff Fort Benning Military Communities ("Fort Benning") deposited over $400 million with AIGMFC. (A18–29, Fort Benning Agreement § 2.)

The Investment Agreements, like the bond indentures, divide Plaintiffs' initial investments into several different accounts or funds. (*Id.*) For each account, the Investment Agreement specifies the amount of the initial investment (*see* A18–19, Fort Benning Agreement § 2.1(a)), the rate of return that AIGMFC is required to pay on the investment (*see, e.g.*, A19, Fort Benning Agreement § 2.1(b)), the purposes for which Plaintiffs are permitted to withdraw funds from the account (A19–20, Fort Benning Agreement § 2.1(c)), and the date upon which AIGMFC is required to return any remaining funds (*id.*). For example, the Fort Benning Construction Fund Investment, one of several funds specified in the agreement, calls for an initial investment of approximately $380 million. (A18, Fort Benning Agreement § 2.1(a).) The agreement requires AIGMFC to pay a 4.655% annual rate of return on the investment. (A19, Fort Benning Agreement § 2.1(b).) Plaintiffs are allowed to withdraw funds from the Construction Fund Investment only to pay for certain project costs, and the agreement specifies January 14, 2016 for AIGMFC to return any funds remaining in the Construction Fund Investment. (A19–20, Fort Benning Agreement § 2.1(c).)

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[1] Strictly speaking, AIGMFC entered into the Investment Agreements with certain counterparties—trustees, escrow agents, or servicers—each acting on behalf of a Plaintiff. The bond documents appointed these counterparties to, among other things, manage bond proceeds and investments. Plaintiffs brought this suit as third-party beneficiaries of the Investment Agreements. For ease of reference, this brief refers to Plaintiffs rather than the trustees, escrow agents, and servicers.

The Investment Agreements also allow Plaintiffs, at their option, to make subsequent, additional investments into certain funds. For example, Fort Benning's Construction Fund Investment calls for later investments totaling $91 million and also permits investment of other funds received "for deposit in the Construction Fund pursuant to the Indenture." (A18–19, Fort Benning Agreement § 2.1(a).) The Fort Benning Agreement also specifies, among other things, that Plaintiffs can make four additional investments per month; additional investments must be at least $5,000, and the total balance under the contract can never exceed $415 billion. (A29–30, Fort Benning Agreement §2.11.)

B. Provisions for the Return of Investments

The Investment Agreements contain two provisions designed to protect Plaintiffs' investments. One provision relates to rating agency downgrades; the other relates to catastrophic insolvency events.

1. Ratings Events: Section 3.2

The Investment Agreements contain provisions protecting against transient disruptions in AIG's financial condition. All of the Investment Agreements set a threshold for the ratings for AIG's long-term unsecured, unsubordinated debt. (A33–34, Fort Benning Agreement § 3.2.) In the event AIG's debt rating drops below that threshold (a "Ratings Event"), the Investment Agreements require AIGMFC to provide additional security in one of three ways. AIGMFC is allowed to (x) deliver additional collateral, (y) assign its rights and obligations to another entity acceptable to Plaintiffs, or (z) "repay the principal of and accrued but unpaid interest on the Investments." (*Id.*) AIGMFC is free to choose any of these options. (*Id.*).

Unlike Section 5.2, which deals with imminent catastrophic threats to AIG's financial well-being, Section 3.2 contains no provision making principal and interest "immediately due and payable" upon a Ratings Event. Notably, the ratings thresholds set forth in Section 3.2 are only slightly below AIG's ratings at the time the Investment Agreements were executed. (A67, Compl. ¶ 57.) Thus, a Ratings Event under Section 3.2

can occur without the financial catastrophe necessary to trigger an insolvency default pursuant to Section 5.1(d).

Nothing in Section 3.2 allows either party to terminate the contracts after a Ratings Event. Indeed, the Investment Agreements forbid the parties from changing, waiving, discharging, or terminating the Investment Agreements or their obligations except through a writing signed by both parties. (A40–41, Fort Benning Agreement § 6.4.)

2. Insolvency Events: Sections 5.1(d), 5.2, and 5.3 of the Investment Agreements

The Investment Agreements include five clauses identifying Events of Default. (A36–37, Fort Benning Agreement § 5.1.) Section 5.1(d) specifies Events of Default related to insolvency. As relevant here, an Event of Default occurs if either AIGMFC or AIG

- "is dissolved (other than pursuant to a consolidation, amalgamation, or merger)" (A36, Fort Benning Agreement § 5.1(d)(1));
- "becomes insolvent or is unable to pay its debts . . . or admits in writing its inability generally to pay its debts as they become due" (A36–37, Fort Benning Agreement § 5.1(d)(2));
- "institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy" (A37, Fort Benning Agreement § 5.1(d)(4));
- "has a resolution passed for its winding up, official management or liquidation" (*id.* § 5.1(d)(5));
- "seeks or becomes subject to the appointment of [a]. . . trustee . . . or other similar official for it or for all or substantially all of its assets" (*id.* § 5.1(d)(6));
- "causes or is subject to any event . . . [which] has an analogous effect" to any of the above-specified events (*id.* § 5.1(d)(8)); or

- "takes any action in furtherance of . . . the foregoing acts" (*id.* § 5.1(d)(9)).

Sections 5.2 and 5.3 set forth remedies for an Event of Default. Section 5.2 specifies that, upon the occurrence of any Event of Default other than those listed in Section 5.1(d), Plaintiffs can elect to "declare the principal of and accrued but unpaid interest on the Investments to be due and payable immediately." (A38, Fort Benning Agreement § 5.2.) For the insolvency defaults specified in Section 5.1(d), however, Plaintiffs have no choice: principal and interest "automatically become due and payable immediately." (*Id.*)

Acceleration is not the exclusive remedy for an Event of Default. Section 5.3 expressly states that, "If any Event of Default shall occur and be continuing, [Plaintiffs] may exercise any of the rights and remedies available to [them] at law or in equity." (*Id.* § 5.3.)

III. Defendants' Financial Collapse

In September 2008, AIG acknowledged that it was on the brink of bankruptcy. (A67–68, Compl. ¶ 60.) AIG's public recognition of its financial difficulties shocked many outsiders, but the company had sown the seeds of its own destruction much earlier. For years, AIG had reported increasing profits, largely through financial chicanery. The company invested in billions of dollars of credit default swaps, many of which were tied to the performance of residential home loans that had themselves been repackaged into collateralized debt obligations. These derivatives were so opaque that the financial community did not question the enviable financial results AIG reported from insuring those instruments. (*See* A68, Compl. ¶ 63.)

AIG's scheme unraveled in 2008. At the end of the first quarter, AIG reported a $7.8 billion loss. (A68, Compl. ¶ 62.) The company posted a loss of $5.36 billion the next quarter. (*Id.*) By early September, counterparties had made large collateral demands on AIG, and the company faced significant liquidity concerns. (A69, Compl. ¶ 67.)

By Friday, September 12, 2008, AIG had become unable to pay its debts as they became due, an Event of Default pursuant to Section 5.1(d) of the Investment Agreements. (A69–70, Compl. ¶ 68.) That day, AIG officers showed a private equity investor spreadsheets indicating that the company faced a $6 billion cash shortfall by the following Wednesday. (A70, Compl. ¶ 69.) AIG projected that shortfall to increase to $25 billion the next week, and $39 billion the following week. (*Id.*) The very next day, AIG determined that those estimates were far too optimistic—it had underestimated its immediate cash needs by $20 billion. (*Id.* ¶ 72.)

On Saturday, September 13, AIG's CEO pleaded for a public bailout. (A71, Compl. ¶ 73.) Initially rebuffed, the company directed its attorneys to begin drafting bankruptcy papers. (*Id.* ¶ 76.)

Even as it requested public assistance, AIG continued to upwardly revise the amount it needed to avoid bankruptcy. By Monday, September 15, it was seeking $75 billion to repair the gaping hole in its balance sheet. (A72, Compl. ¶ 78.) By September 16, AIG was in its death throes, drawing down the revolving credit facilities of its subsidiaries in a last desperate attempt to avoid bankruptcy. (A74, Compl. ¶¶ 86–87.)

In the end, the United States government came to AIG's rescue. Concluding that AIG's misdeeds were on the brink of causing a global financial meltdown, the government authorized an $85 billion credit facility for the company. (A75, Compl. ¶ 92.) But $85 billion ultimately would prove far too little to ensure AIG's viability. Over the next six months, government assistance to AIG totaled $182.5 billion. (A81, Compl. ¶ 108.)

IV. AIG's Return of Plaintiffs' Investments

On September 15, 2008, after Defendants' Section 5.1(d) default, credit agencies downgraded AIG's debt rating, moving it below the threshold set by Section 3.2 of the Investment Agreements. (A72, Compl. ¶ 80.) AIG's long-term debt rating was downgraded three notches by S&P (from AA- to A-) and two notches by Fitch and Moody's (to A and A2, respectively). (*Id.*) Although these ratings fell below the Section 3.2 threshold, they remained well above investment grade. (A67, Compl. ¶ 57.)

Two weeks later, on September 29, AIGMFC elected to return the principal and accrued but unpaid interest on Plaintiffs' investments, stating that it was returning those funds pursuant to Section 3.2 of the Investment Agreements. (A93, Compl. ¶ 155.) Plaintiffs reinvested the funds elsewhere but were unable to obtain the rates of return guaranteed by the Investment Agreements in the wake of the financial calamity wrought, in large part, by AIG. (A96, Compl. ¶ 172.) The failure to receive the guaranteed investment returns has had severe consequences for Plaintiffs and their joint venture partners—the military branches. Plaintiffs have suffered substantial monetary losses and have been unable to build and rehabilitate as many homes as initially planned. (A95–96, Compl. ¶¶ 169–70.)

Just days after repaying Plaintiffs' investments, AIG announced a $60 million profit from the early repayment of investment agreements. (A93, Compl. ¶ 155.) The company thus brought the country to the brink of financial ruin, obtained a $182.5 billion government bailout to avoid such a catastrophe (A81, Compl. ¶ 108), and then reneged on its contractual obligations (A93, Compl. ¶ 155), recording a $60 million profit in the process (*id.*).

V. Plaintiffs' Attempt to Reinvest

Defendants argued in their motion to dismiss Plaintiffs' original complaint that no Event of Default had ever taken place. Subsequently, in March and April 2012, Plaintiffs sought to invest additional funds with AIGMFC, as expressly allowed by the Investment Agreements. (A93–95, Compl. ¶¶ 157–68.) Defendants refused to accept the additional investments. (A94, Compl. ¶ 163; A95, Compl. ¶ 168.)

VI. Plaintiffs' Claims

Plaintiffs' First Amended and Supplemental Complaint alleged two sets of alternative claims. Counts I and II (the "Insolvency Default Claims") sought breach of contract damages. Plaintiffs alleged that Defendants became insolvent prior to repaying Plaintiffs' investments, rendering Defendants in default of the Investment Agreements pursuant to Section 5.1 of the Investment Agreements. Plaintiffs were damaged by

Defendants' failure to pay the bargained-for rate of return over the life of the Investment Agreements.[2] Through the Insolvency Default Claims, Plaintiffs sought to be returned to the position they would have been in had Defendants performed their contractual obligations—the difference between what they would have received under the Investment Agreements and what they actually received by reinvesting the funds returned by AIGMFC.

In the alternative, Plaintiffs alleged in Counts III through V (the "Reinvestment Claims") that Defendants breached the Investment Agreements by refusing to allow Plaintiffs to reinvest during 2012.[3] Through the Reinvestment Claims, Plaintiffs sought (a) damages in the amounts they would have received had they been allowed to reinvest and (b) a declaration that AIGMFC is required to accept additional investments pursuant to the terms of the Investment Agreements.

VII. Proceedings Below

Plaintiffs filed their initial complaint on August 30, 2012. The Superior Court dismissed that complaint on February 17, 2012 but gave Plaintiffs leave to replead. Plaintiffs submitted their First Amended and Supplemental Complaint on April 2, 2012, and the Superior Court granted leave for it to be filed on May 2, 2012. Defendants again moved to dismiss the Complaint, and the Superior Court issued a written order granting Defendants' motion on September 27, 2012. (*See* A140–50, Order.) The Court granted AIG's motion to dismiss without the benefit of oral argument.

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[2] Count I seeks recovery from AIGMFC based upon its breach of the Investment Agreements, while Count II seeks recovery from AIG based upon its failure to honor its guarantee of those agreements.

[3] Count III seeks recovery from AIGMFC based upon its breach of the Investment Agreements while Count IV seeks recovery from AIG based upon its failure to honor its guarantees. Count V seeks a declaration that Defendants are required to accept additional investments.

In dismissing the Insolvency Default Claims, the Superior Court found that, upon default, Section 5.2 of the Investment Agreements accelerated the obligations owed by Defendants to Plaintiffs. Relying principally on two federal bankruptcy cases rather than decisions of New York courts, the Court determined that New York law precludes Plaintiffs from obtaining damages after acceleration. (A148, Order at 9 & nn.14–15.) In two paragraphs containing no citation to case law or the contracts, the Superior Court dismissed the Reinvestment Claims, determining that Section 3.2, like Section 5.2, is an acceleration clause. (A149, Order at 10.) The Superior Court then determined that acceleration divested Plaintiffs of their right to reinvest. (*Id.*) In the alternative, the Superior Court concluded that Plaintiffs' acceptance of funds returned pursuant to Section 3.2 barred their claims. (A149–50, Order at 10–11.)

ARGUMENT

I. The Court erred in dismissing Plaintiffs' Reinvestment Claims.

A. Question Presented

Did the Court err in dismissing Plaintiffs' Reinvestment Claims where (1) the plain language of the Investment Agreements allow for reinvestment, (2) acceleration does not result in termination of a contact, and (3) acceptance of repayment provided for in the Investment Agreements did not vitiate the other terms of the contracts? (A121–33, Ans. Br. at 12–24.)

B. Scope of Review

The Superior Court's decision to dismiss Plaintiffs' Reinvestment Claims, as well as its interpretation of the Investment Agreements, is subject to *de novo* review. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) ("We review trial court rulings granting motions to dismiss *de novo*. We also review *de novo* the [trial court's] interpretation of written agreements."); *AT&T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d 409, 415 (Del. 2007) ("Because the dispute involves the Superior Court's grant of a motion to dismiss and its interpretation of insurance policy language, our review is *de novo* . . . ." (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

C. Merits of Argument

In two conclusory paragraphs, and with no citation to authority, the Superior Court dismissed Plaintiffs' Reinvestment Claims and held that (a) Section 3.2 of the Investment Agreements is an acceleration clause that terminated the contracts or (b) Plaintiffs' acceptance of repayment bars their claims. Both findings are in error.

As a threshold matter, and as Defendants concede, the plain language of the Investment Agreements allows Plaintiffs to make additional investments beyond the original amount of principal. Defendants' option pursuant to Section 3.2 to prematurely return principal invested to date along with unpaid interest did not alter or eliminate Plaintiffs' right to reinvest. The court's determination that Section 3.2 is

an acceleration clause is both (a) irrelevant to determining whether the parties intended to allow for reinvestment and (b) incorrect as a matter of law. Plaintiffs' acceptance of the funds returned by Defendants—the court's alternative ground for dismissal—likewise has no bearing on Plaintiffs' right to make additional investments of principal under the Investment Agreements.

1. The plain language of the Investment Agreements allows for reinvestment.

Defendants interpret Section 3.2 of the Investment Agreements to terminate the contracts upon a return of funds pursuant to that section. As set forth below, this interpretation is not supported by the plain language of the agreements. Plaintiffs, relying on the plain language of the contracts, allege that return of principal and interest under Section 3.2 did not terminate the Investment Agreements or eliminate Plaintiffs' contractual rights subsequently to invest *additional* principal. Because Defendants' contrary interpretation is not reasonable, let alone the only reasonable interpretation of the contracts, dismissal was in error.

a. Dismissal is in error when a contract is susceptible to more than one interpretation.

When parties disagree about the meaning of contractual provisions, the court may dismiss "only if the defendants' interpretation is the *only* reasonable construction as a matter of law." *Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). When the provisions at issue are "susceptible to more than one reasonable interpretation . . . their meaning must be construed in the light most favorable to the non-moving party," and the court may not dismiss the complaint. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894 (Del. 2002)). "Even if the Superior Court consider[s] the defendants' interpretation more reasonable than the plaintiffs', on a Rule 12(b)(6) motion it [i]s error to select the 'more reasonable' interpretation as legally

controlling." *Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007).[4]

b. The plain language of the Investment Agreements contemplates additional investments.

The Investment Agreements explicitly contemplate the investment of additional amounts of principal. (A29–30, Fort Benning Agreement §2.11.) They place limitations on the time, frequency, and minimum amounts of such investments and specify what notice is to be provided to AIGMFC before such investments are made. (*Id.*) The agreements also limit the aggregate amounts that can be invested at any time, limiting the total amount of interest AIGMFC is required to pay. (*Id.*)

Provisions establishing certain defined accounts further reflect the parties' desire to allow for additional investments. For example, Section 2.1(a) of the Fort Benning Investment Agreement, which establishes the Construction Fund Investment, allows for later investment of "all funds received . . . from and after the Closing Date for deposit in the Construction Fund." (A18–19.) Section 2.3, which establishes the Class I Debt Service Account Investment, likewise allows for the investment of "all funds received . . . from and after the Closing Date for deposit in the Class I Debt Service Account." (A21.) Sections 2.4, 2.5, 2.6, and 2.7 contain similar language allowing for additional investments. (A22–26.)

It is not surprising that the Investment Agreements allow for later investments. Plaintiffs, along with the bond underwriters, negotiated the Investment Agreements as part of a comprehensive financing of the projects. (A61, Compl. ¶ 39.) If future investments were not permitted,

[4] New York law also prohibits dismissal where a contract is susceptible to more than one interpretation. *See Telerep, LLC v. U.S. Int'l Media, LLC*, 903 N.Y.S.2d 14, 16 (N.Y. App. Div. 2010) ("Because we find that the contracts here are reasonably susceptible of more than one interpretation and thus are ambiguous, the complaint should not have been dismissed pre-answer before the development of a full factual record as to the parties' intent.").

Plaintiffs would have been required to seek new investment vehicles, reducing the efficiency of the Investment Agreements.

c. It is reasonable to interpret the Investment Agreements to allow additional investments after repayment pursuant to Section 3.2.

Nothing in Section 3.2 or elsewhere in the Investment Agreements suggests that the right to make additional investments terminates upon a repayment pursuant to Section 3.2 (regardless of whether Section 3.2 is considered an acceleration clause (*see infra* I.C.2.b)). Neither Section 2.11, which places limitations on reinvestment, nor any of the account-specific provisions in Article 2 evidence the parties' intent to extinguish the right to make additional investments upon prepayment as a result of a ratings event (Section 3.2) or in the event of acceleration (Section 5.2). Likewise, nothing in Section 3.2 indicates that return of principal and accrued but unpaid interest terminates the contract. Section 3.2, in relevant part, states as follows:

> Section 3.2 Ratings Event. If the long-term unsecured, unsubordinated debt obligations issued by [AIG] are at any time rated below "AA-", in the case of S&P, or "Aa3", in the case of Moody's, AIGMFC, within ten (10) Business Days, shall at its option (x) deliver Collateral to the Collateral Agent, the aggregate Collateral Value of which shall be equal to or greater than the then current Collateral Requirement, (y) assign its rights and obligations hereunder to another entity (which shall assume all liabilities of AIGMFC under this Agreement), subject to the consent of the [Plaintiff] (such consent not to be unreasonably withheld), or (z) repay the principal of and accrued but unpaid interest on the Investments; provided, however, that the [Plaintiff], by written notice to AIGMFC, may, upon its receipt of Rating Agency Confirmation and at the direction of the Bondholder Representative in its sole discretion, waive the requirement that AIGMFC repay the amounts described in clause (z) even if AIGMFC fails to deliver Collateral pursuant to clause (x) above or assign this Agreement pursuant to clause (y) above.

(A33–34, Fort Benning Agreement § 3.2.)

The plain language of this provision indicates that the parties did not intend for a Section 3.2 repayment to terminate the contract. But as set forth above, Plaintiffs need not prove that their interpretation of Section 3.2 is correct at the pleadings stage. So long as Section 3.2 can reasonably be interpreted not to terminate the contract, dismissal was improper. *Vanderbilt Income & Growth Assocs.*, 691 A.2d at 613.

2. The Superior Court's erroneous determination that Section 3.2 is an acceleration clause provides no basis for dismissal.

The Superior Court determined, with no analysis and no citation to case law, that Section 3.2 is an acceleration clause that, when triggered, terminates the contract. This decision was wrong in two respects. First, Section 3.2 is not an acceleration clause. Second, even if Section 3.2 were an acceleration clause, acceleration merely advances the maturity date of the agreement, making payments that were due at some point in the future automatically due and payable immediately. *NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 491 (N.Y. 2011). Acceleration has no effect on other contractual terms and does not impact the contractual provisions that allow Plaintiffs, at their option, to make additional principal investments under the Investment Agreements.

a. Section 3.2 is not an acceleration clause.

The Court erred in holding that Section 3.2 is an acceleration clause. It is not. Acceleration clauses make the entire debt "due immediately." *See id.* at 486–87. The Investment Agreements themselves contemplate events where acceleration was appropriate and provide an example of such an acceleration clause. Section 5.2, which is titled "Acceleration," states as follows:

> Upon the occurrence of an Event of Default specified in paragraph (d) of Section 5.1, the principal of and accrued but unpaid interest on the Investments *shall automatically become due and payable immediately*. Upon the occurrence and continuance of any other Event of Default specified in

> Section 5.1, the Trustee may declare the principal of and accrued but unpaid interest on the Investments *to be due and payable immediately.*

(A38, Fort Benning Agreement § 5.2 (emphasis added).) Both the clause automatically accelerating the debt (upon an insolvency default) and the clause accelerating the debt at Plaintiffs' option (for any other default) make the debt "due and payable immediately" and afford no option to Defendants to pay in full or not to pay. Section 3.2, in contrast, was drafted without such "due and payable immediately" language. Instead, the parties drafted Section 3.2 to state only that upon a "Ratings Event" (defined as a drop in AIGMFC's ratings) AIGMFC *can choose*, as one of three enumerated options, to "repay the principal of and accrued but unpaid interest on the Investments." (A33–34, Fort Benning Agreement § 3.2.) Even in the event AIGMFC chooses to prepay the principal and unpaid interest, Section 3.2 does not require it to do so immediately, and contains no language that makes payment of the debt "due and payable immediately." Section 3.2 thus does not operate as an acceleration clause.

The absence of the word "acceleration" from Section 3.2, and the use of that term elsewhere in the contract, provide further evidence that the provision was not intended to be an acceleration clause. The parties' use of "Acceleration" to title Section 5.2 indicates that they knew how to draft an acceleration clause that made payment due immediately, and when they did so, they titled it appropriately. Yet the parties do not refer to the payment called for under Section 3.2 as acceleration, do not make any reference to Section 3.2 in Section 5.2 (which is titled "Acceleration"), and do not indicate in any other way that Section 3.2 is to be construed as an acceleration clause.

The plain language of the contracts demonstrates that the parties did not intend for Section 3.2 to operate as an acceleration clause. But even if the Superior Court determined that Defendants' interpretation of the contract is more likely than Plaintiffs' (which Plaintiffs contend is inconsistent with its plain terms), the Court erred as a matter of law in electing between two competing contractual interpretations on a motion to dismiss. *VLIW Tech.*, 840 A.2d at 614–15. As explained above, where

there are two reasonable interpretations of a contract, the motion to dismiss must be denied. *Appriva S'holder Litig*, 937 A.2d at 1292.

b. Whether Section 3.2 is an acceleration clause has no bearing on whether Plaintiffs may make additional investments.

The Court should reverse even if it determines that Section 3.2 is an acceleration clause. Settled law holds that acceleration simply operates to advance the due date of payments, making payment of principal and unpaid interest due and payable immediately. It does not vitiate the parties' contract. Other contractual clauses continue to govern the parties' obligations *after acceleration*. *NML Capital*, 952 N.E.2d at 491–93.

In *NML,* decided by New York's Court of Appeals on certified questions from the Second Circuit Court of Appeals, Argentina had issued bonds containing an acceleration clause. *Id.* The bonds also contained an obligation to make interest payments "'until the principal hereof is paid or made available for payment.'" *Id.* at 486. Bondholders accelerated the debt, and Argentina argued, among other things, that its obligation to make such payments ended when the debt matured and thus, after acceleration, it was not required to continue to make interest payments. *Id.* at 486–87. The Court of Appeals held to the contrary, noting that acceleration merely advances the maturity date, making payment of the debt due immediately:

> [A]cceleration of a repayment obligation in a note or bond changes the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract. In the context of a loan, this is the very definition of "acceleration" (*see* Black's Law Dictionary 12 [9th ed. 2009] [defining acceleration as "the advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately"]).

Id. at 491 (alterations in original). The court then held that acceleration does not eviscerate other contract terms:

> [I]n New York, the consequences of acceleration of the debt depend on the language chosen by the parties in the pertinent loan agreement. While it is understood that acceleration advances the maturity date of the debt, *we are unaware of any rule of New York law declaring that other terms of the contract not necessarily impacted by the acceleration . . . automatically cease to be enforceable after acceleration.*

Id. at 492 (emphasis added). The Court of Appeals found that Argentina had failed to point to any language in the contract indicating that the parties intended for acceleration to terminate the contract's other provisions, and held that Argentina was required to make interest payments post-acceleration, consistent with the terms of the contract (and thus until principal was repaid in full). *Id.*

New York's highest court has rejected a central tenet of the Superior Court's decision—that acceleration resulted in automatic termination of the Investment Agreements. To the contrary, acceleration only advances maturity on then-invested funds; it does not impact other provisions of the agreement. *Id.* at 491–92. The Superior Court thus erred when it dismissed Plaintiffs' Reinvestment Claims based on its determination that Section 3.2 is an acceleration clause that terminated all of Plaintiffs' rights, including the right to reinvest.

3. Plaintiffs' acceptance of Defendants' repayment has no bearing on Plaintiffs' ability to make additional investments.

In a single paragraph, again with no citation to authority, the Superior Court found, in the alternative, that Plaintiffs' claims should be dismissed because Plaintiffs accepted Defendants' return of funds pursuant to Section 3.2. But as set forth above, nothing in the Investment Agreements indicates that such repayment terminates the contract.[5] A

[5] In the court below, Defendants raised several affirmative defenses: accord and satisfaction, reformation of contract, mutual abandonment, and prior breach. Defendants attached several materials outside the pleadings to their briefs to support these arguments. The Superior

reasonable construction, and indeed the construction compelled by the plain terms of the Investment Agreements, is that Defendants are permitted to return funds after a Ratings Event, after which time Plaintiffs can make additional investments as permitted by the agreements. Because a court may not grant a motion to dismiss where a reasonable interpretation of the contract would allow for recovery, *Vanderbilt Income & Growth Assocs.*, 691 A.2d at 613, the Superior Court erred in dismissing Plaintiffs' Reinvestment Claims.

Court's opinion does not indicate that it relied upon facts outside the pleadings or considered Defendants' affirmative defenses in reaching its conclusion, including its determination that Plaintiffs forfeited their claims by accepting Defendants' return of funds. (*See* A149–50, Order at 10–11.) Relying on facts outside the complaint, however, is error on a motion to dismiss, *King Constr., Inc. v. Plaza Four Reality, LLC,* 976 A.2d 145, 155 (Del. 2009), as is ruling on affirmative defenses, *Stewart v. Dep't of Corr.*, 2002 WL 31045233, at *2 (Del. Super. Ct. Aug. 8, 2002) ("[A]ffirmative defenses may not be raised in a motion to dismiss or to strike.").

II. The Superior Court erred in dismissing Plaintiffs' Insolvency Default Claims.

A. Question Presented

Did the Superior Court err in dismissing Plaintiffs' Insolvency Default Claims by (1) incorrectly concluding that New York's unearned interest rule bars expectation damages; (2) determining that the Investment Agreements do not allow for recovery of such damages; and (3) concluding that the only damages sought by Plaintiffs are properly characterized as unearned interest? (A133–37, Ans. Br. at 24–28.)

B. Scope of Review

The Superior Court's decision to dismiss the Insolvency Default Claims, as well as its interpretation of the Investment Agreements, is subject to *de novo* review. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) ("We review trial court rulings granting motions to dismiss *de novo.* We also review *de novo* the [trial court's] interpretation of written agreements."); *AT&T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d 409, 415 (Del. 2007) ("Because the dispute involves the Superior Court's grant of a motion to dismiss and its interpretation of insurance policy language, our review is *de novo . . . .*" (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

C. Merits of Argument

The Superior Court erroneously concluded that New York law prohibiting the recovery of unearned interest bars Plaintiffs' Insolvency Default Claims. New York law does not bar Plaintiffs' claims. First, the rule generally forbidding collection of future interest payments after acceleration (the "unearned interest rule") evolved to prevent double recoveries; it does not bar expectation damages. Second, even if interpreted to bar expectation damages, dismissal was inappropriate because (a) the rule does not apply to instruments like the Investment Agreements, (b) parties may contract around the default rule, as the parties did here, and (c)

Plaintiffs suffered damages in addition to lost investment income—as a direct result of Defendants' actions, Plaintiffs have been unable to carry out the full scope of the housing projects as approved by the military.

1. The unearned interest rule arose to prevent windfalls, not to deprive a plaintiff of expectation damages.

Through their alternative Insolvency Default Claims, Plaintiffs seek the difference between the income stream they would have received under the Investment Agreements and what they were able to obtain after AIG's breach. Plaintiffs seek nothing more than expectation damages, designed to place them in the position they would have been in had Defendants honored their contractual obligations. Expectation damages are the hornbook remedy for breach of contract; they have evolved over centuries to insure that a party harmed by a breach is returned to the position it would have been in but for the breach. *See Murray on Contracts* ¶ 117(D)(2) (4th ed. 2001).

Expectation damages seek to insure not only that a party is *adequately* compensated for a breach, but also that the party is not *over*compensated. New York's unearned interest rule arose to prevent such double recoveries. *See Bostwick-Westbury Corp. v. Commercial Trading Co.*, 404 N.Y.S.2d 968 (N.Y. Civ. Ct. 1978). After a borrower prematurely returns funds to a lender, the lender is able to loan those funds to others. If interest rates have remained steady, or risen, the lender can lend the money to another borrower at the same, or better, rate as it was originally lent. If a court allowed that lender to recover future interest payments as damages, the lender would receive a windfall by collecting interest from two parties on the same amount of principal. New York law prohibiting unearned interest arose to prevent just such a windfall.

The rule, however, did not evolve to prevent a party from obtaining damages in the case where interest rates decline. When interest rates decline, the lender cannot re-loan prematurely-returned funds at the original rate. The lender thus suffers damages

measured by the difference between what it was to receive under its contract, and what it could receive at the time of the breach.

Such expectation damages are precisely what Plaintiffs seek to recover. Had Plaintiffs been able to reinvest the returned funds at the rate promised by Defendants, they would not have been damaged.[6] But Plaintiffs were damaged, and Defendants should not be allowed to avoid compensating Plaintiffs for that damage by invoking New York's unearned interest rule.

a. New York's prohibition of the recovery of unearned interest does not bar expectation damages.

New York law confirms that the prohibition on recovering unearned interest arose to prevent double recovery. The rule was first invoked in New York in *Franklin Nat'l Bank of Long Island v. Capobianco*, 272 N.Y.S.2d 519 (N.Y. Sup. Ct. 1966). In *Capobianco*, the defendant signed a note with a fifteen-month term, paying all interest at the time the loan was made. *Id.* at 521. The lender accelerated the loan three months later. *Id.* at 520. In its opinion, the court sought to determine whether it should credit the defendant for interest that the plaintiff had not "earned" due to the early acceleration of the note. *Id.* at 521. The court found "no case in point in [New York]" and turned to *Illinois Steel Co. v. O'Donnell*, 41 N.E. 185 (Ill. 1895). *Capobianco*, 272 N.Y.S.2d at 521–22. Following *O'Donnell*, the *Capobianco* court deducted interest that would have accrued after recovery. *Id.* at 522. By doing so, it prevented a double recovery. Nothing in *Capobianco* can be read to suggest that the court intended to bar the plaintiff from seeking expectation damages.

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[6] Of course, the declining market that caused Plaintiffs' damages resulted, in part, from Defendants' own financial misdeeds. (A67–68, Compl. ¶ 60; A68–69, Compl. ¶¶ 63–64; A86–87, Compl. ¶ 123.)

The Illinois Supreme Court's ruling in *O'Donnell* likewise indicates that the unearned interest rule arose to prevent double recovery. As in *Capobianco*, the Illinois Supreme Court determined that, where a borrower prepaid interest, there should be a deduction for that portion of the interest that was unearned. The court held that, by doing so, it eliminated an "element of double and unlawful interest." *O'Donnell*, 41 N.E. at 186. A later Illinois case further confirmed the rule's purpose. In *Puritan Fin. Corp. v. Vest*, the court, analyzing unearned interest cases, stated, "It is evident that the cases cited above stand for the proposition that lenders may not charge borrowers unearned interest *because it is inequitable and constitutes a penalty*." 504 N.E.2d 913, 915 (Ill. App. Ct. 1987) (emphasis added). "To allow a lender to reap a double benefit by charging a defaulted borrower for interest on money he no longer has and charging interest on that same principal to another borrower is clearly an unjust enrichment." *Id.* Like the *Capobianco* court, neither the *O'Donnell* nor the *Puritan Finance* courts indicated any intent to preclude expectation damages like those sought by Plaintiffs.

More recent cases have consistently found that the prohibition on recovery of unearned interest was meant to prevent double recoveries. In *Bostwick-Westbury Corp.*, the court held that "[e]xcess [unearned] interest is in the nature of a penalty and cannot be retained." 404 N.Y.S.2d at 972. In *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289 (2d Cir. 2009), the Second Circuit found that "future interest payments are 'unearned' because the creditor is no longer loaning the debtor the principal." 552 F.3d at 296. It denied a claim for future interest, stating "[t]o hold otherwise would allow [plaintiff] to recover interest twice on the same principal." *Id.* at 297. In *Chaifetz v. Schreiber*, 2003 WL 21738599 (E.D.N.Y. June 10, 2003), the court invalidated a provision that would have required a borrower to pay unearned interest, finding that it was an unenforceable penalty. *Id.* at *2. None of these cases in any way indicated that the rule precludes a borrower from seeking expectation damages after a market downturn reduces available interest rates.

New York courts have not interpreted the unearned interest rule to bar expectation damages. Indeed, neither of the two New York state decisions cited in the Superior Court's Opinion even address expectation damages. *See Atlas Fin. Corp. v. Ezrine*, 345 N.Y.S.2d 36 (N.Y. App. Div. 1973); *Nw. Mut. Life Ins. Co. v. Uniondale Realty Assocs.*, 816 N.Y.S.2d 831 (N.Y. Sup. Ct. 2006). In *Northwestern Mutual*, the court was evaluating whether a plaintiff was entitled to a prepayment fee after acceleration. *Id.* In *Atlas Financial*, the court, following New York authority cited above, found that if the plaintiff were to retain future interest, it would be improperly "collecting interest upon interest." 345 N.Y.S.2d at 257.

New York law makes clear that the unearned interest rule was not meant to preclude expectation damages. Where, as here, a defendant breaches a contract and the plaintiff is unable to replace its income stream by loaning the money elsewhere at the same interest rate, expectation damages are properly awarded.

b. The bankruptcy opinions relied upon by the Superior Court do not justify precluding expectation damages.

The Superior Court's determination that the unearned interest rule precludes expectation damages rested on two bankruptcy opinions: *HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, 2010 WL 3835200 (S.D.N.Y. Sept. 10, 2010) ("*Calpine*") and *In re Solutia, Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007). Although, based on the specific provisions at issue in those cases, both the *Calpine* court and the *Solutia* court rejected creditors' requests for expectation damages, the Superior Court erred in relying on those cases to dismiss Plaintiffs' claims under the Investment Agreements.

As a threshold matter, both *Calpine* and *Solutia* are decisions of federal courts hearing bankruptcy cases. They are not binding authority on matters of New York law. *See Hartnett v. New York City Transit Auth.*, 612 N.Y.S.2d 613 (N.Y. App. Div. 1994), *aff'd*, 657 N.E.2d 773 (N.Y. 1995) ("A Federal decision

contrary in principle is not binding upon a State court in respect of a State statute or of a domestic doctrine not involving a Federal question." (quoting *Marsich v. Eastman Kodak Co.*, 279 N.Y.S. 140 (N.Y. App. Div. 1935), *aff'd*, 200 N.E. 27 (N.Y. 1936))). Moreover, neither of those cases was decided on a motion to dismiss. *See Calpine*, 2010 WL 3835200, at *1; *In re Solutia*, 379 B.R. at 476.

More importantly, neither *Calpine* nor *Solutia* analyzed or addressed the purpose of the unearned interest rule. Had either court done so, they would have determined that no New York court has precluded expectation damages based on the rule. The *Calpine* and *Solutia* courts extended New York law—in a manner not adopted by any New York court—and held, with no analysis, that the rule bars expectation damages. The courts of Delaware should not rely on *Calpine* and *Solutia's* extension of the New York unearned interest rule, given that no New York court has held that expectation damages are improper under the circumstances here. This is particularly true because, as discussed in Section II.C.2 below, the indentures at issue in *Calpine* and *Solutia* did not contain the broad reservation of rights set forth in Section 5.3 of the Investment Agreements.

Finally, in extending the reach of the unearned interest rule, both the *Calpine* and *Solutia* courts relied on a bankruptcy statute that prevents recovery of expectation damages, perhaps explaining why neither court analyzed the issue under New York law. The *Calpine* court found that the trustee's claims were barred by Section 502(b)(2) of the Bankruptcy Code. 2010 WL 3835200 at *5. The *Solutia* court similarly found that Section 502(b)(2) of the Bankruptcy Code compelled it to reject the creditors' damages claims. 379 B.R. at 486. The provisions of the Bankruptcy Code that drove the decisions in *Calpine* and *Solutia* are inapplicable here.

2. The unearned interest rule does not apply to the Investment Agreements.

Even if the Court determines that the unearned interest rule should be extended to bar expectation damages, the Superior Court nevertheless erred in dismissing Plaintiffs' Insolvency Default Claims. Parties may contract around the rule, and Section 5.3 of the Investment Agreements preserves Plaintiffs' ability to seek expectation damages. Moreover, the rule does not apply to contracts like those at issue here.

New York law allows parties to specify the consequences of acceleration. *See NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 492 (N.Y. 2011) ("[T]he consequences of acceleration of the debt depend on the language chosen by the parties in the pertinent loan agreement."). In the Investment Agreements, the parties clearly indicate an intent to preserve Plaintiffs' right to seek damages in Section 5.3, which states: "If any Event of Default shall occur and be continuing, [Plaintiffs] may exercise any of the rights and remedies available to [them] at law or in equity." (A38, Fort Benning Agreement § 5.3.)

The Superior Court found that Section 5.3 "merely preserves rights; it does not create them." (A149, Order at 10.) The Superior Court's construction, however, would render Section 5.3 meaningless. Because there is nothing indicating that an Event of Default waives Plaintiffs' rights, a provision merely "preserving rights" is unnecessary. Such a provision would serve no purpose at all. The Court should not interpret a contract in a way that would render one of its provisions meaningless. *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 472 N.E.2d 315, 318 (N.Y. 1984). Thus, the Court should have adopted the more natural reading: that the parties intended for Section 5.3 to allow Plaintiffs to seek damages. The placement of the provision, in the article dealing with Events of Default, and immediately after Section 5.2's acceleration clause, further indicates that the parties intended to allow for the recovery of damages.

In reaching this conclusion, the Superior Court cited to the *Calpine* and *Solutia* decisions. (A148, Order at 9 nn.14–15.) But Section 5.3 is considerably broader than the remedies provisions before the *Calpine* and *Solutia* courts. The Calpine indentures provided as follows:

> If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy by proceeding at law or in equity to collect the payment of principal of, or premium, if any, and interest on the Notes or to enforce the performance of any provision of the Notes or this Indenture and may take any necessary action requested of it as Trustee to settle, compromise, adjust or otherwise conclude any proceedings to which it is a party.

See Notice of Debtor's Mot. for Order, Ex. D (Indenture Excerpts), § 6.03, Jan. 26, 2007, *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y.), E.C.F. No. 3481-4. The *Solutia* indentures were almost identical. *See* Memo. Support Joint Mot., Ex. A, § 6.03, Sept. 21, 2007, *In re Solutia*, No. 03-17949 (Bankr. S.D.N.Y.), E.C.F. No. 4211-2. The *Calpine* and *Solutia* indentures thus limited the plaintiffs to pursuing "principal" and "interest." Section 5.3 of the Investment Agreements contains no such limitation: "If any Event of Default shall occur and be continuing, [Plaintiffs] may exercise any of the rights and remedies available to [them] at law or in equity." (A38, Fort Benning Agreement § 5.3.) Because the indentures at issue in *Calpine* and *Solutia* contained much narrower restrictions on the ability to recover upon default, those decisions provide no basis for the Superior Court's determination that Section 5.3 is not meant to allow Plaintiffs to seek damages after an insolvency default.

As set forth above, Section 5.3 clearly indicates the parties' intent to allow Plaintiffs to recover damages after a breach. But even though the Superior Court incorrectly determined that Defendants' interpretation of the contract was more likely, it still should not have dismissed the Complaint. At the very least,

Section 5.3 is amenable to differing reasonable interpretations. The trial court may not weigh differing reasonable interpretations on a motion to dismiss. *Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

In addition, the Delaware courts should not extend New York's unearned interest rule to contracts like the Investment Agreements. *See Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 105 (Del. Ch. 2009) (a Delaware court applying New York precedent should not "make innovative extensions of New York law"). All of the cases cited by Defendants involve debt instruments: loan agreements, promissory notes, and bonds. *See, e.g.*, *Calpine*, 2010 WL 3835200; *Solutia*, 379 B.R. 473. The Investment Agreements are not debt instruments; they are investment contracts. The concerns noted in the cited authorities, and the rationale for applying the unearned interest rule, thus do not apply. Unlike loans or bonds, the Investment Agreements do not call for a set payment amount over a set schedule. Instead, they call for interest to be paid on existing balances, which can be altered by both withdrawals and additional investments. (*See, e.g.*, A29–30, Fort Benning Agreement § 2.11; A30–31, Fort Benning Agreement § 2.13.) The Investment Agreements also differ markedly from debt instruments because, as discussed above, they allow Plaintiffs to make additional investments.

Further, Plaintiffs bear no resemblance to traditional lenders. In fact, Plaintiffs are not allowed to be lenders; they are only allowed to *invest* in certain kinds of instruments to finance their operations. (A53, Compl. ¶ 2.) The unearned interest rule should not be extended to apply to the Investment Agreements. In doing so, the Superior Court again improperly expanded the reach of New York law beyond the boundaries defined by that state's courts. *See Viking Pump*, 2 A.3d at 104.

3. Plaintiffs seek damages that are not properly considered "unearned interest."

Finally, the Superior Court erred in dismissing Plaintiffs' Insolvency Default Claims because not all of the damages

Plaintiffs seek can properly be considered "unearned interest." Plaintiffs were selected by the military based on specific proposals for the development, construction and management of housing on military bases. (A54, Compl. ¶ 6.) As Defendants were aware, the Investment Agreements were critically important to the overall financing and ongoing operations of the housing projects. (A64, Compl. ¶ 51.) When Defendants repaid Plaintiffs' investments in September 2008, Plaintiffs lost the guaranteed income they were relying on and were left to try to service their debt and fund ongoing development, construction, and operating expenses with significantly less revenue. (A95, Compl. ¶ 169.) As a direct result, several joint ventures had to revise the scope of their development, resulting in fewer new military homes and amenities being built and maintained than according to the proposals approved by the military, causing Plaintiffs to suffer consequential losses. (A96, Compl. ¶ 171.)

These damages cannot conceivably be considered "unearned interest." Thus, even if the Superior Court properly determined that the unearned interest rule applies to Plaintiffs' claims, it should not have dismissed the claims in their entirety.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's dismissal of Plaintiffs' claims and remand for further proceedings.

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Dated: December 14, 2012

1086741

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