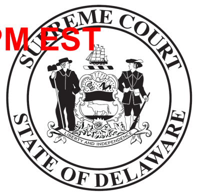
EFiled: Jan 09 2013 05:37PM EST
Filing ID 48840300
Case Number 579,2012D



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 HOUSING, LLC, PACIFIC NORTHWEST COMMUNITIES, LLC and MIDWEST FAMILY HOUSING LLC,	)	C.A. 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.	)	

ANSWERING BRIEF OF APPELLEES-DEFENDANTS BELOW AIG MATCHED FUNDING CORP. AND <u>AMERICAN INTERNATIONAL GROUP, INC.</u>

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January 9, 2013

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NATURE OF THE PROCEEDINGS

This case was initiated by Appellants, plaintiffs below, 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 (collectively, "Plaintiffs") on August 30, 2011. Between 2005 and 2007, Plaintiffs entered into Guaranteed Investment Contracts ("GICs") with Appellee, defendant below, AIG Matched Funding Corp. ("AIGMFC"), which were guaranteed by Appellee, defendant below, American International Group, Inc. ("AIG") (together, "Defendants"). Pursuant to the GICs, Plaintiffs were required to invest certain funds with AIGMFC, and AIGMFC was to pay certain specified interest rates on those funds.

The GICs expressly contemplated that AIG might encounter financial difficulty, and contained provisions that protected Plaintiffs' investments by specifying what was to occur if, for example, AIG's debt ratings were downgraded (a "Ratings Event"). In that circumstance, AIGMFC was required to elect one of three remedies—post additional collateral, assign its rights and obligations to another entity, or repay the principal and accrued but unpaid interest—to be performed within ten business days. It is undisputed that a Ratings Event occurred, that AIGMFC elected to repay Plaintiffs' principal and accrued interest, and that AIG did so—all in accordance with the express terms of the GICs. Moreover, this is precisely the same outcome that would have resulted if, as Plaintiffs allege, an Event of Default had occurred prior to that Ratings Event; the GICs commanded that, if an Event of Default were to occur, AIGMFC would repay Plaintiffs' principal and accrued but unpaid interest.

Plaintiffs nonetheless instituted this action, seeking (in their initial complaint) expectation damages for the interest payments that they would have received had AIG not suffered a Ratings Event and not repaid the principal and accrued interest as provided by the GICs. Following oral argument on Defendants' motion to dismiss, the Court below indicated its intent to dismiss Plaintiffs' claim, but granted Plaintiffs' request to amend their complaint. B16, Tr. at 61-64. Nearly a month later, shortly before filing their amended complaint, Plaintiffs contacted AIGMFC to indicate that, notwithstanding the acceleration of the GICs more than three years earlier (and although they had acted in all ways as though the GICs had terminated since that time), they intended to make additional investments under the GICs. AIGMFC refused to accept the investments on the grounds that the GICs had accelerated and terminated in 2008. Plaintiffs filed an amended complaint reiterating their original claims and

adding claims arising out of AIGMFC's refusal to accept their additional investments.

Following additional briefing, on September 27, 2012, the Court below entered an Order granting Defendants' motion to dismiss the amended complaint. The Court held that Plaintiffs could not recover the lost interest they sought because the "normal consequence" of acceleration is that future interest is no longer due, and the GICs did "not contemplate post-acceleration damages." Op. at 9-10. The Court further held that the GICs were repaid pursuant to an express acceleration clause, and were thereby terminated. *Id.* at 10. In the alternative, the Court below noted that the GICs terminated when Plaintiffs "accepted AIG's repayment, got out clean, and attempted to reinvest elsewhere." *Id.* at 10-11. The Court thus concluded that Plaintiffs had no right to make additional investments, holding that, now that the financial crisis that led to the GICs' acceleration had abated, "Fort Benning may not force itself on AIG." *Id.* at 11. Plaintiffs appeal that Order.

SUMMARY OF ARGUMENT

A. Denied. As the Court below held, the GICs were fully accelerated and terminated in 2008, and Plaintiffs no longer have the right to make additional investments with AIGMFC.

1. Denied. The GICs terminated by their own terms through the operation of an express acceleration provision; the plain language of sections governing additional investments is no longer relevant and in any event does not permit the additional investments Plaintiffs attempted to make.

2. Denied. The Court below properly held that Section 3.2 is an acceleration clause, which required AIGMFC to repay Plaintiffs their principal and accrued, unpaid interest. Op. at 10. The language of Section 3.2 unambiguously provides for accelerated repayment as a result of a Ratings Event, and mirrors the language of Section 5.2 providing for acceleration upon an Event of Default. It is undisputed that Defendants fully complied with this contractual provision by repaying all principal and accrued interest due to Plaintiffs. As the Court correctly held, the repayment "satisfied Section 3.2 and terminated the contract." *Id.*

3. Denied. Even if acceleration had not already terminated the GICs, they were terminated by mutual abandonment and mutual agreement when Plaintiffs accepted repayment and both parties ceased performance. Moreover, even if the GICs had not already terminated, Plaintiffs breached the GICs by failing to make required investments long before Defendants' refusal to accept additional investments, and Plaintiffs therefore may not recover on their own theory of breach.

B. Denied. Defendants' return of Plaintiffs' principal was not "premature," but rather perfectly in accordance with heavily negotiated contractual provisions.

1. Denied. New York law that prohibits parties from recovering future interest payments after acceleration expressly bars expectation damages. There is simply no authority that supports Plaintiffs' arguments to the contrary.

2. Denied. There is no basis for the arbitrary carve-outs to the rule against post-acceleration interest that Plaintiffs suggest. The Court below correctly found that "[a]cceleration's normal consequence is that

future interest payments, which are [Plaintiffs'] damages, are no longer due because the principal becomes immediately due." Op. at 9. Moreover, "a party cannot claim damages after acceleration unless the contract contains a clause explicitly allowing them," while here, the GICs do "not contemplate post-acceleration damages." *Id.* at 9-10.

3. Denied. There is no damage to Plaintiffs arising out of the facts they have alleged other than expectation damages. Moreover, Plaintiffs have already recovered the sole remedy for which they bargained and to which they are entitled under law: repayment of their principal and accrued interest.

STATEMENT OF FACTS

A. The Parties

Plaintiffs are joint ventures formed between branches of the United States Military and private real estate companies in order to develop and operate military base housing pursuant to the Military Housing Privatization Initiative. Op. at 3; A53 at ¶¶ 3, 4, A58-59 at ¶¶ 25-32. Once formed, the private companies were responsible for managing the operations of the joint ventures on land leased from the military branch or branches with which they had entered into the joint venture. A54 at ¶¶ 5, 6, A60 at ¶ 36.

Appellee, defendant-below, AIGMFC is a financial services corporation that is wholly-owned by AIG Financial Products Corp., a subsidiary of appellee, defendant-below, AIG. A59, ¶¶ 33, 34.

B. The GICs

In order to finance their military housing projects, Plaintiffs issued revenue bonds and invested the proceeds in certain secure investments with a guaranteed rate of return over a long fixed term (*i.e.*, GICs), from which they could make withdrawals as needed to fund phases of their housing development projects. Op. at 3; A54 at ¶¶ 6, 7, A60-61 at ¶¶ 38, 39. Between February 2005 and November 2007, each of the Plaintiffs entered into a GIC with AIGMFC, guaranteed by AIG, pursuant to which Plaintiffs proceeded to invest the proceeds of their bond issuances. Op. at 3; A61 at ¶ 40, A64 at ¶ 48.

The provisions of the eight GICs at issue here are substantially the same. Op. at 3. First, the GICs set forth a structure for investment and interest payments. For example, the GIC entered into on January 31, 2006, between AIGMFC and J.P. Morgan Trust Company, National Association, as Trustee acting for the benefit of Fort Benning Family Communities LLC ("Fort Benning") (the "Fort Benning GIC"), provided for investment by Fort Benning into nine separate investment funds. A18-29 at §§ 2.1-2.9. As to each investment fund, the GICs directed that "the Trustee shall invest with AIGMFC, and AIGMFC shall accept as an investment" certain funds, such as money in a specific amount, or all funds subsequently designated for investment in that fund under the Indenture governing Plaintiffs' bond proceeds. *E.g.*, A18-29 at §§ 2.1(a)-2.9(a). The GICs specified an interest rate that would be earned on each fund and the parameters for Plaintiffs' withdrawal of cash from those funds. *E.g.*, A18-29 at §§ 2.1(b), (c)-2.9(b), (c). The GICs all included "Limitations on Additional Investments," which required that, when a Trustee was making

additional investments to the extent permitted by the funds, it do so according to certain terms (for example, a minimum dollar amount or a maximum number of investments per month). *E.g.*, A29-30 at § 2.11. Although the GICs varied as to the number and precise mix of funds, and the exact terms of those funds, each created a number of similar funds and placed the same limitations on additional investments. *See generally* B21-23 at § 2.1; B47-53 at §§ 2.1-2.6; B82-95 at §§ 2.1-2.12; B127-140 at §§ 2.1-2.12; B173-184 at at §§ 2.1-2.8; B225-236 at §§ 2.1-2.11; B265-276 at §§ 2.1-2.11; B304-311 at §§ 2.1-2.7.

Each GIC also included provisions designed to protect the Plaintiffs from loss of their bond proceeds in the event that AIG faced any financial uncertainty. For example, in the event that AIG's long-term unsecured, unsubordinated debt ratings fell below a certain level, the GICs' Ratings Event provision required that AIGMFC, within ten business days, take one of three steps: (1) post collateral; (2) assign its rights and obligations to another entity; or (3) "repay the principal of and accrued but unpaid interest on the Investments." *E.g.*, A33-34 at § 3.2. Six of the GICs expressly afforded Plaintiffs that were parties to those GICs the opportunity to waive this repayment obligation. A34 at § 3.2; B25 at § 3.2; B57-58 at § 3.2; B188 at § 3.2; B241 at § 3.2; B280-81 at § 3.2; B317 at § 3.2. Thus, for six of the GICs, Plaintiffs had the option to continue to invest with AIG by waiving repayment of their principal and interest.

Likewise, the GICs included a list of events deemed "Events of Default," the occurrence of which would also trigger the acceleration—or immediate repayment of principal and accrued but unpaid interest—of the GICs, whether automatically (in the case of certain "bankruptcy" events of default) or at the Trustees' election (for all other events of default). *E.g.*, A36-38 at §§ 5.1-5.2.

C. September 2008

Each GIC remained in force from the date of its execution until September 15, 2008. On that date, in the midst of a massive liquidity crisis that was wreaking havoc on the entire U.S. financial system, AIG's credit ratings were downgraded by the major financial ratings agencies to levels below those specified in the Ratings Event provision under the GICs. Op. at 4. This downgrade triggered liquidity demands on AIG, and set in motion a series of events that Plaintiffs now claim constitute Events of Default under the GICs.[1]

[1] Defendants assume, for the sake of this appeal only, the truth of the allegations in Plaintiffs' complaint, amended complaint, and supplemental and amended complaint. Defendants further assume, for the sake of this appeal only, that the events alleged by Plaintiffs (Continued . . .)

A85-92 at ¶¶ 119-154. The downgrade also triggered the Ratings Event provision. Op. at 4.

Faced with three options under the GICs, AIGMFC elected to repay the Plaintiffs' principal and accrued interest within ten business days. Op. at 5. Thus, on or about September 24, 2008, AIGMFC sent the trustees for each of the Plaintiffs a written notice indicating that AIGMFC intended to repay principal and accrued interest pursuant to Section 3.2 the GICs on September 29, 2008, unless Plaintiffs elected to waive that repayment. B372-382. The notices stated that, upon repayment on September 29, 2008, each GIC, and the AIG guarantees associated with each GIC, would "terminate and shall be considered for all purposes to be of no further force and effect." *Id.* No Plaintiff waived repayment or objected to the return of funds. Op. at 5. Indeed, at the time, each readily accepted its money back from AIG. On September 29, 2008, AIGMFC repaid Plaintiffs' principal and accrued interest in full. A93 at ¶ 155.[2]

D. Proceedings Below: Round 1

For nearly three years, the Plaintiffs remained silent, and acted in all ways as though the GICs had terminated; no Plaintiff made, or even attempted to make, a deposit under the GIC. Rather, having had their capital returned in full (with interest), Plaintiffs reinvested that capital elsewhere. A96 at ¶ 172. On August 30, 2011—without warning, and without having made any attempt to contact AIGMFC or make any further investment under the GICs—Plaintiffs filed a complaint in the Court below. The complaint alleged that AIG had triggered a number of "bankruptcy" Events of Default under the GICs, and that—notwithstanding that the remedy for such an event of default (acceleration) had occurred nearly three years prior and that Plaintiffs had been repaid all amounts due at the time of the alleged Events of Default, Plaintiffs were injured when

(. . . continued)

constituted Events of Default. Were this case to be reversed and remanded for further proceedings, AIG and AIGMFC would demonstrate conclusively that no Event of Default occurred.

[2] Plaintiffs allege that AIG profited in the amount of $60 million from its repayment of the GICs, OB at 12; A93 at ¶ 155, but it is entirely unclear how this supposed "profit" was computed. In any event, Plaintiffs' allegation, even if taken as true, neglects the substantial burden on AIG of turning over hundreds of millions of dollars in cash to Plaintiffs—in the midst of an historic liquidity crisis—in order to accelerate the GICs and fulfill its contractual obligations.

they subsequently attempted to reinvest capital and could not achieve the same interest rates on those reinvestments that they would have received had their investments in the GICs continued (referred to by Plaintiffs as the "Insolvency Default Claims"). Op. at 5; OB at 12-13.

Defendants moved to dismiss the complaint. Op. at 5. At oral argument on February 17, 2012, the Court below stated its intent to dismiss the complaint, and offered to do so on the record or in a written decision, at the Defendants' option. B16, Tr. at 61-62. Plaintiffs requested an opportunity to amend the complaint and, although the Court cautioned that it would be difficult for the Plaintiffs to demonstrate cognizable damages based on the facts before the Court, it granted Plaintiffs thirty days to amend. B16, Tr. at 62-64.

E. Attempts to Reinvest

On March 15, 2012, four of the Plaintiffs notified AIGMFC that they intended to make additional investments of funds pursuant to their respective GICs. A93-94 at ¶ 160. On March 30, 2012, three additional Plaintiffs notified AIGMFC they also intended to invest funds pursuant to their respective GICs. A94 at ¶ 164. AIGMFC refused to accept these investments on the basis that the GICs had terminated on September 29, 2008—the date that AIGMFC returned the Plaintiffs' principal and unpaid interest in termination of the GICs and the Plaintiffs had accepted those amounts without reservation. A94-95 at ¶¶ 163, 166.

F. Proceedings Below: Round 2

Plaintiffs filed an amended complaint on March 21, 2012, and an amended and supplemental complaint on May 2, 2012. Op. at 5. In addition to maintaining their claims based on AIG's purported Events of Default, Plaintiffs added claims for breach of contract and declaratory judgment, arguing that AIGMFC's failure to accept additional investments was a breach and an anticipatory repudiation of the GICs (referred to by Plaintiffs as the "Reinvestment Claims"). A98-100 at ¶¶ 188-207; OB at 12-13.

In an Order dated September 27, 2012, the Court below dismissed Plaintiffs' amended and supplemental complaint in full. With respect to Plaintiffs' Insolvency Default Claims, the Court found that, because AIG "repaid the accelerated principal and accrued, unpaid interest" due under the GICs, the Plaintiffs "did not lose anything" as a result of any Event of Default other than their "expectation of future income on [their] investment." Op. at 5, 9. The Court found that

> Acceleration's normal consequence is that future interest payments, which are [Plaintiffs'] damages, are no longer due because the principal becomes immediately due, and it has been returned. Acceleration moves the maturity date from the original maturity date to the acceleration date. The future interest payments are "unearned" because the lender's principal has been returned.

Op. at 9 (internal citations omitted). The Court went on to hold that, "[w]hile it is possible to contract for post-acceleration damages, a party cannot claim damages after acceleration unless the contract contains a clause explicitly allowing them." *Id.* (internal citations omitted). The Court considered Section 5.3 of the GICs, which provides that "if an Event of Default occurs and is ongoing, [Plaintiffs] may exercise [their] rights in law or equity," but held that section was "not a post-acceleration damages provision" because "[i]t merely preserves rights; it does not create them." Op. at 9-10; *see also, e.g.*, A38 at § 5.3. Thus, Plaintiffs were not entitled to recovery of the expected future income they sought.

With respect to Plaintiffs' Reinvestment Claims, the Court below found that the Ratings Event provision of the GICs (Section 3.2) was an acceleration clause and that, once AIGMFC had repaid the Plaintiffs their principal and accrued, unpaid interest pursuant to that clause, the contract terminated. Op. at 10. The Court went on to hold, in the alternative, that the Plaintiffs elected to accept repayment of their principal, and thus could not now claim an ongoing entitlement to invest it back with AIGMFC. Op. at 10-11.

ARGUMENT

I. THE COURT BELOW CORRECTLY DETERMINED THAT PLAINTIFFS HAVE ARTICULATED NO DAMAGES ON WHICH THEY MAY LEGALLY RECOVER

A. Question Presented

Did the Court below properly dismiss Plaintiffs' claim for expectation damages when (1) they had been repaid their principal and accrued, unpaid interest pursuant to an acceleration clause; and (2) the GICs did not provide for post-acceleration damages.

B. Scope of Review

The appeal of a Rule 12(b)(6) dismissal raises questions of law that this Court reviews de novo "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011) (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010)); *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 438 (Del. 2005). In reviewing the dismissal, this Court accepts as true plaintiffs' well-pleaded allegations, draws reasonable inferences in plaintiffs' favor, and affirms dismissal of the complaint where plaintiffs are not entitled to relief. *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009). However, the Court does not "blindly accept conclusory allegations unsupported by specific facts, nor [does it] draw unreasonable inferences in the plaintiffs' favor." *Id.* at 704.

C. Merits of Argument

Plaintiffs argue that AIG breached the GICs when, in 2008, pursuant to the plain terms of the GICs, AIGMFC repaid the Plaintiffs their principal and accrued, unpaid interest in full, and that Plaintiffs suffered damage because they were unable to reinvest that principal at a comparable rate of interest. Although the GICs, which Plaintiffs acknowledge were extensively negotiated (OB at 6), contain *two* express acceleration clauses designed to prioritize the security of Plaintiffs' capital over maintenance of a guaranteed interest rate, Plaintiffs now claim that those unambiguous provisions in the GICs are immune to basic principles of New York law. They can cite to no authority in support of their claims, which are unpersuasive.

New York law prohibits recovery of expectation damages for lost interest post-acceleration, unless the contract contains a provision expressly allowing

post-acceleration damages. Notwithstanding the Plaintiffs' efforts to read one into plain vanilla language in the GICs, the GICs in fact contain no such provision. Confronted with the futility of their claims, Plaintiffs claim they have also suffered unspecified "consequential losses." OB at 33. The only losses Plaintiffs have articulated are, by their own admission, a direct result of the lesser rate of interest their capital earned following acceleration. Plaintiffs have thus received the entire remedy for which they bargained—acceleration of their principal and accrued, unpaid interest—and are not entitled to further recovery.[3]

1. The Rule Against Post-Acceleration Interest Bars the Expectation Damages Plaintiffs Seek.

Although the GICs were accelerated following the downgrade of AIG's debt ratings, pursuant to Section 3.2 of the GICs, Plaintiffs allege that they should have been accelerated as a result of AIG triggering a "bankruptcy" event of default pursuant to Section 5.1.[4] Regardless of which section is operative, the

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[3] Not only have Plaintiffs failed to articulate a theory of damages on which they may recover, but they have also failed to allege any actual breach of the GICs. Defendants never breached any obligation to Plaintiffs under the GICs; to the contrary, Defendants performed precisely as specified under the GICs' Rating Event provision upon the downgrade of AIG's debt ratings below the specified threshold. *E.g.*, A33-34 at § 3.2. Even if it is assumed (as Defendants vigorously contest) that an Event of Default in fact occurred pursuant to Section 5.1(d) of the GICs, such that Defendants repaid Plaintiffs' principal and accrued interest pursuant to the Event of Default provision and associated acceleration clause, Defendants did not breach the GICs. The Event of Default provisions of Section 5.1(d) do not create an independent contractual duty *not* to "become insolvent" or *not* to become unable "generally to pay [their] debts as they become due." Rather, they establish conditions, the occurrence of which obligates AIGMFC to repay Plaintiffs the principal and accrued interest on their investments. *See, e.g.*, A36-38 at §§ 5.1-5.2. Defendants did exactly that, and therefore did not breach any provision of the GICs. *See* 13 WILLISTON ON CONTRACTS § 38:1 (stating that a "condition" may include "facts, the existence of which modifies a promise" and that "a condition creates no rights or duties in and of itself, but only limits or modifies rights or duties").

[4] As discussed above, AIG and AIGMFC will assume, for the sake of this motion only, the truth of Plaintiffs' allegations regarding these Events of Default, but would vigorously dispute these allegations should the case move forward.

outcome under the GICs is the same—acceleration of Plaintiffs' principal and accrued, unpaid interest. *E.g.*, A33-34 at § 3.2; A36-38 at §§ 5.1-5.2. Now that Plaintiffs have received back their principal and accrued, unpaid interest in full pursuant to the express terms of the GICs, further recovery is prohibited by black letter law.

a. Acceleration Clauses Require A Trade-Off Between Security And Future Interest Income.

Acceleration clauses—including the ones at issue here, which are by the Plaintiffs' own admission the product of "extensive" negotiations (OB at 6)—are designed as a conservative means of protecting an investment by ensuring that, in the event of economic insecurity, a party's principal will be returned immediately and secured from risk.

However, acceleration clauses require a trade-off: after acceleration, parties may not recover damages for unpaid interest. "By incorporating a provision for automatic acceleration," contracting parties "give up their future income stream in favor of having an immediate right to collect their entire debt." *In re Solutia Inc.*, 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007); *cf. The Edward Andrews Grp., Inc. v. Addressing Servs. Co.*, 2005 WL 3215190, at *5 (S.D.N.Y. Nov. 30, 2005).

The rule against post-acceleration damages is a subset of the general prohibition on unearned interest under New York law. Typically, interest is "earned" by placing capital at risk; once capital has been returned following acceleration, future interest is "unearned," and therefore will not be awarded as damages. *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 296 (2d Cir. 2009); *accord NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 492 (N.Y. 2011) (noting "it is true that 'unearned' interest is generally not awarded as damages in New York" and defining unearned interest as "interest that has not accrued, typically because it is attributable to a period after the loan has been repaid, when the creditor is no longer lending its money but has reacquired it"). Indeed, "New York legislation and judicial pronouncements demonstrate a consistent intent to deny a creditor the right to charge or retain interest that is unearned." *Aardwoolf Corp. v. Nelson Capital Corp.*, 861 F.2d 46, 47 (2d Cir.

1988). If capital is not at risk, the owner of that capital may not be compensated as though it were at risk.[5]

b. The Rule Against Post-Acceleration "Unearned Interest" Expressly Applies To Expectation Damages.

The rule against awards of unearned interest following acceleration applies expressly to prohibit expectation damages. *See HSBC Bank USA, Nat'l Assn. v. Calpine Corp.*, 2010 WL 3835200, at *4 (S.D.N.Y. Sept. 15, 2010); *In re Solutia*, 379 B.R. at 490; *see also In re Chemtura Corp.*, 439 B.R. 561, 596-603 (Bankr. S.D.N.Y. 2010). In *Calpine*, the claimant sought "secured damages equal to the repayment premiums and interest it would have received over the life of the notes [of the debtor] *less the amount [the claimant] could have earned in mitigation*," 2010 WL 3835200, at *2 (emphasis added)—in other words, the claimant's expectation damages. The court rejected the claim, explaining that "[p]arties frequently provide for damages in these situations precisely because acceleration deprives borrowers of the payment streams for which they contracted," but concluding that "[w]ithout such a provision . . . *no damages are recoverable after acceleration*." *Id.* at *4 (emphasis added).

Plaintiffs cite no authority that supports their contention that "New York's unearned interest rule arose to prevent [] double recoveries" and "did not evolve to prevent a party from obtaining damages in the case where interest rates decline," such that the party cannot fully recover lost income by reinvesting its principal (OB at 25), and the holdings in *Calpine* and *Solutia* directly contravene this contention. Plaintiffs' attempt to distinguish these decisions fails. *First*,

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[5] Plaintiffs have not cited a single recent case that supports their claim that the unearned interest rule "did not evolve to prevent a party from obtaining damages in the case where interest rates decline," (OB at 25), and no such limitation can be found in any case—including those cited by Plaintiffs. Plaintiffs' discourse on antiquated case law from New York and Illinois for the proposition that the unearned interest rule is designed *only* to prevent windfalls (OB at 26-28, relying principally on cases from 1895 and 1966 (*Illinois Steel Co. v. O'Donnell*, 41 N.E. 185 (Ill. 1895) and *Franklin Nat'l Bank of Long Island v. Capobianco*, 272 N.Y.S.2d 519 (N.Y. Sup. Ct. 1966))) cannot overcome the recent, persuasive, directly relevant case law that prohibits precisely the recovery Plaintiffs seek.

they ask this Court simply to ignore these precedents because they are "decisions of federal courts hearing bankruptcy cases," and "are not binding authority on matters of New York law." OB at 28. Although these cases might not be binding were they "contrary in principle" to a particular New York state case, *Hartnett v. New York City Transit Auth.*, 612 N.Y.S.2d 613, 616 (N.Y. App. Div. 1994), *aff'd* 657 N.E.2d 773 (N.Y. 1995), Plaintiffs do not, and cannot, cite to a single case in New York holding that expectation damages are in fact permitted post-acceleration absent an express contractual provision allowing them. *Second*, Plaintiffs note that "neither of those cases was decided on a motion to dismiss." OB at 29. This is irrelevant, as the cases are cited for points of law. *Finally*, the decisions were not "driven" by the Bankruptcy Code, as Plaintiffs contend. OB at 29. Each of these cases was based on careful analysis of, and citation to, New York law on unearned interest and post-acceleration damages, and *not* to the Bankruptcy Code, which is analyzed separately in both cases. *See Calpine*, 2010 WL 3835200, at *5-7; *In re Solutia*, 379 B.R. at 485-86. These cases are binding precedent, and Plaintiffs point to no case with a contrary holding.

Moreover, precedent from New York state courts *also* makes clear that the rule *does*, in fact, "prevent a party from obtaining damages in the case where interest rates decline." OB at 25. In *Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates*, 816 N.Y.S.2d 831 (N.Y. Sup. Ct. 2006), the court noted the "current lending trend" of including a "yield maintenance provision" in contracts that is "calculated to cover [a] lender's reinvestment loss when prepaid loans bear above market rates," and held that such premiums will not be enforced after default and acceleration "in the absence of a clause which so states." 816 N.Y.S.2d at 834-36 (alteration in original). Plainly, New York's prohibition on unearned interest contemplates—and expressly applies in—a situation in which the party receiving an early return of capital suffers a loss as a result of a decline in interest rates. The Court below correctly recognized this in holding that "a party cannot claim damages after acceleration unless the contract contains a clause explicitly allowing them." Op. at 9.

Finally, as a logical matter, the rule against post-acceleration interest must apply to the type of expectation damages Plaintiffs seek. Parties are always required to act to mitigate their damages. *See Wilmot v. State*, 297 N.E.2d 90, 92 (N.Y. 1973); *Assouline Ritzl LLC v. Edward I. Mills & Assocs., Architects, PC*, 937 N.Y.S.2d 11, 13-14 (N.Y. App. Div. 2012); *Brzoska v. Olson*, 668 A.2d 1355, 1367 (Del. 1995). Thus, following acceleration, a party is *required* to mitigate its damages through reasonable reinvestment of its capital, and would be prohibited from recovering more than the difference between what it could have earned under the contract and what it earned in mitigation of that loss: its

expectation damages. These are precisely the damages the unearned interest rule is designed to prohibit—and the only damages it *could* prohibit.

c. The Rule Against Post-Acceleration Damages Applies To The GICs.

Plaintiffs argue that the rule against post-acceleration damages does not apply to them because "[a]ll of the cases" cited by AIGMFC in its motions to dismiss in the Court below involved debt instruments such as loan agreements, promissory notes, and bonds, while the GICs "are not debt instruments; they are investment contracts." OB at 32. Plaintiffs are drawing distinctions without difference. They can find no compelling reason to avoid application of straightforward, unambiguous, and clearly pertinent principles of New York contract law.

First, many of the "debt instruments" discussed in New York precedent governing post-acceleration damages are purchased for investment purposes and operate effectively as "investment contracts," not loans—just like the GICs. *See, e.g.*, *Capital Ventures*, 552 F.3d 289 (sovereign bonds); *In re Chemtura Corp.*, 439 B.R. 561 (corporate bonds); *In re Solutia Inc.*, 379 B.R. 473 (trust indenture). The fact that Plaintiffs "bear no resemblance to traditional lenders" is thus irrelevant. The Republic of Argentina is not acting as a "traditional lender" when it issues bonds; nonetheless, the Second Circuit and the New York Court of Appeals held that the rule against post-acceleration interest would apply to its bonds. *NML Capital*, 952 N.E.2d at 263-64 (noting that, though "'unearned' interest is generally not awarded as damages in New York (absent an enforceable agreement to the contrary), the interest-only payments in this case do not involve 'unearned' interest" because the principal had not yet been repaid); *Capital Ventures*, 552 F.3d at 296-97 (holding that the contract governing the bonds "contains nothing to demonstrate that the parties intended to displace the normal meaning of acceleration with a concept of acceleration that allows interest to continue to come due after the principal is accelerated").

Second, the characteristics that Plaintiffs identify to differentiate the GICs from traditional debt instruments—such as repayment on an uncertain schedule and the ability to make withdrawals or additional investments—are irrelevant to the fundamental reason that unearned interest is prohibited: Following acceleration, there is no invested principal at risk, and the investor of that principal is thus no longer owed compensation for taking that risk. Any such compensation would be a windfall. *See Capital Ventures*, 552 F.3d at 296-97 (collecting cases and citing *Atlas Fin. Corp. v. Ezrine*, 345 N.Y.S.2d 36, 38 (N.Y.

App. Div. 1973), for proposition that "by acceleration of payments upon default the principal sum ceased to be at risk some years prior to the time contemplated by the contract").

Under the GICs, Plaintiffs exchanged access to capital for payment of interest over a period of time—exactly as they would through a debt instrument—and elected acceleration as the remedy they preferred to ensure security of that capital in the event of a default or ratings downgrade. *See, e.g.*, *In re Premier Entm't Biloxi LLC*, 445 B.R. 582, 631 (Bankr. S.D. Miss. 2010) ("[B]y *investing* under the Indenture, which included an automatic acceleration provision, the Claimants gave up their expectation to a payment stream in the future." (emphasis added)). As with any other debt instrument or investment, AIGMFC was willing to pay an interest rate to Plaintiffs only because it had access to the funds Plaintiffs invested with it. Once the principal of that investment was returned to Plaintiffs, AIGMFC no longer had access to those funds, and would have to pay interest to someone else if it sought to replace those funds by borrowing elsewhere. Conversely, once the funds constituting Plaintiffs' investment were returned to Plaintiffs, Plaintiffs were free to reinvest those funds elsewhere, and receive interest payments in exchange. Ongoing interest payments from AIGMFC would thereby provide Plaintiffs precisely the double benefit that is prohibited under New York law. No court has circumscribed the operation of the prohibition on post-acceleration interest on the artificial basis that Plaintiffs suggest, and this Court should also decline to do so.

2. The GICs Do Not Allow Post-Acceleration Damages.

Plaintiffs correctly note that "the consequences of acceleration of the debt depend on the language chosen by the parties in the pertinent loan agreement." OB at 30 (quoting *NML Capital*, 952 N.E.2d at 492). However, New York law is crystal clear that damages are not permitted after acceleration unless that prohibition is *affirmatively overriden* by a "clear and unambiguous clause which calls for payment . . . at any time after default." *Nw. Mut. Life Ins. Co.*, 816 N.Y.S.2d at 836 (noting too that "substantial authority [] requires an explicit agreement to allow a premium after acceleration"); *see also Calpine*, 2010 WL 3835200, at *4 (finding that parties "frequently provide for damages [post-acceleration] because acceleration deprives borrowers of the payment streams for which they contracted," but holding that "[w]ithout such a provision . . . no damages are recoverable after acceleration").

The GICs do not provide for post-acceleration damages. Plaintiffs argue that Section 5.3 of the GICs, which provides 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," (A38 at § 5.3), demonstrates an "intent to preserve Plaintiffs' right to seek damages," (OB at 30). Section 5.3 lacks the specificity required to override the prohibition on post-acceleration damages.

In *In re Solutia*, the court reviewed several contractual provisions to which the claimants had pointed "in an effort to obtain 'expectation' damages" following acceleration, including a defeasance provision, a provision finding that the noteholder "shall pay the principal of and interest on the Notes on the dates and in the manner provided in the Notes and this 2009 Indenture," and a guarantee, and found that "[n]one of these clauses have the explicitness that would be expected in a typical post-acceleration yield-maintenance clause." 379 B.R. at 488-89 (citing *Nw. Mut. Life Ins. Co.*, 816 N.Y.S.2d 831). The court noted that the right to post-acceleration interest may not be implied by "plain vanilla" contractual language. *Id.* Irrespective of whether the language of Section 5.3 is "broader than the remedies provisions before the *Calpine* and *Solutia* courts," (OB at 31), it plainly does not rise past the level of "plain vanilla" language that may not be relied upon to recover post-acceleration damages.

The Court below noted that, "[w]hile it is possible to contract for post-acceleration damages, . . . [h]ere the contract does not contemplate post-acceleration damages," and found that the language of Section 5.3 "merely preserves rights; it does not create them." Op. at 9-10. Plaintiffs incorrectly contend that this construction renders Section 5.3 meaningless. OB at 30. To the contrary, Section 5.3 operates to protect Plaintiffs' rights in the event they do not elect acceleration following one of the other Events of Default, in the event they wish to seek equitable relief for partial breach, or in the event that AIG or AIGMFC fails to repay principal and accrued interest in the event of acceleration. It does *not* provide for post-acceleration damages.

3. Plaintiffs Have Articulated No Damages Other Than Expectation Damages.

During the proceedings in the Court below, Plaintiffs professed that they were seeking "nothing more than expectation damages, the hornbook remedy for breach of contract." A134. Suddenly, for purposes of this appeal, Plaintiffs now contend that they are in fact seeking not only expectation damages (*i.e.*, unearned interest), but are also seeking to recover for some vague, unspecified "consequential losses." OB at 32-33. But the only damages alleged by Plaintiffs are a direct result of Plaintiffs' inability to earn the same rate of interest on their

capital that they had been guaranteed under the GICs—in other words, expectation damages.

General damages, such as expectation damages, are those "which are the natural and probable consequence of the breach," while special, or consequential damages "do not so directly flow from the breach." *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co.*, 886 N.E.2d 127, 130 (N.Y. 2008) (quoting *Am. List Corp. v. U.S. News and World Report, Inc.*, 549 N.E.2d 1161, 1164 (N.Y. 1989)). Consequential damages are "unusual or extraordinary damages [that] must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." *Id.* at 130 (quoting *Kenford Co. v. County of Erie*, 537 N.E.2d 176, 178 (N.Y. 1989)); *accord Velocity Express, Inc. v. Office Depot, Inc.*, 2009 WL 406807, at *7 (Del. Super. Feb. 4, 2009) (noting that "Blacks Law Dictionary defines consequential damages as 'losses that do not flow directly from an injurious act but that result indirectly from the act'" and concluding that damages alleged were not consequential but rather "created *directly* by the actions of Defendant" (emphasis in original) (quoting BLACK'S LAW DICTIONARY (8th ed. 2004))).

Plaintiffs argue that, when AIGMFC repaid Plaintiffs' investments in the GICS, 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," resulting in "several joint ventures" having to "revise the scope of their development," "causing Plaintiffs to suffer consequential losses." OB at 33. But these are simply expectation damages—damages resulting directly from the lost interest income Plaintiffs had expected to receive under the GICs. Far from "unusual or extraordinary," the losses that Plaintiffs have alleged are, as Plaintiffs themselves admit, a "direct result" of Plaintiffs' loss of the income guaranteed by the GICs. OB at 33. Plaintiffs' original, telling declaration in the Court below that they sought "nothing more than expectation damages" remains true, notwithstanding their belated attempt to recast the damages arising out of their lost interest as vague and unspecified "consequential losses."

In any event, consequential damages may not be recovered where—as here—the contract is a "pure 'agreement[] to pay.'" *Bi-Econ.*, 886 N.E.2d at 130. When a contract is "for money only," "what the payee plans to do with the money is external and irrelevant to the contract itself," and "the only recoverable damage for breach is interest." *Id.* at 130-31; *cf. id.* at 134 (Smith, J., dissenting) ("Consequential damages are a means of measuring the harm done when a party fails in some nonmonetary performance—say, the transportation of a broken mill shaft." (internal citation omitted) (citing *Hadley v. Baxendale*, 9 Exch. 341

[1854])); *see also Scavenger, Inc. v. GT Interactive Software Corp.*, 734 N.Y.S.2d 141, 142 (N.Y. App. Div. 2001) (affirming dismissal of claim for consequential damages because "where the breach of contract was a failure to pay money, plaintiff should be limited to a recovery of the contract amounts plus appropriate interest"). The GICs are simple contracts "for money only," through which AIGMFC agreed to pay interest on principal deposited by Plaintiffs. By their plain terms, the GICs contained no "performance-based component"; what Plaintiffs planned to do with the GIC proceeds was "external and irrelevant" to the GICs. *See Bi-Econ.*, 886 N.E.2d at 130-31.[6] Thus, even if Plaintiffs had adequately alleged consequential damages, they would not be recoverable.

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[6] Moreover, once elected, acceleration operates as an exclusive remedy. An acceleration clause is a type of liquidated damages provision, *see The Edward Andrews Group, Inc.*, 2005 WL 3215190, at *5, and such provisions are by nature exclusive, since they "preclude[] a party from recovering lost profits and other measures of *damages*," *Vacold LLC v. Cerami*, 545 F.3d 114, 130 (2d Cir. 2008) (emphasis in original); *see also Fed. Realty Ltd. P'ship v. Choices Women's Med. Ctr.*, 735 N.Y.S.2d 159, 161 (N.Y. App. Div. 2001) (finding existence of valid liquidated damages provision precluded award of consequential damages).

II. THE COURT BELOW CORRECTLY DETERMINED THAT THE GICS HAVE TERMINATED AND THE PLAINTIFFS HAVE NO RIGHT TO MAKE ADDITIONAL INVESTMENTS

A. Question Presented

Did the Court properly dismiss Plaintiffs' claim that they were entitled to reinvest under the GICs where (1) AIGMFC had repaid Plaintiffs their principal and accrued interest pursuant to an acceleration clause; and (2) Plaintiffs had accepted that repayment, accepted termination of the GICs pursuant to express termination notices, and ceased all performance under the GICs.

B. Scope of Review

See Argument § I.B.

C. Merits of Argument

Plaintiffs argue that the GICs did not terminate in 2008, but rather remained in force and are presently available to Plaintiffs for ongoing investments. Plaintiffs' belated effort to make additional investments under this theory in March 2012 was a transparent attempt to manufacture a new argument to keep their claims alive after their initial unsuccessful attempt to argue they are entitled to post-acceleration damages. Moreover, this newfound theory is contrary both to the plain terms of the GICs and the parties' course of conduct for three and a half years following AIGMFC's repayment of Plaintiffs' capital.

As the Court below found, the GICs terminated in 2008 following the acceleration of their maturity date under the Ratings Event provision. Op. at 10. Moreover, even if the GICs were not terminated by virtue of this acceleration, they terminated by mutual agreement when the Plaintiffs accepted repayment of their principal *and* by mutual abandonment when both parties failed to perform under the contracts for three and a half years following acceleration. Finally, even if the GICs remained in force between 2008 and 2012, Plaintiffs breached their obligation to invest additional funds long before any alleged breach by AIG or AIGMFC. Plaintiffs may not recover for breach of a contract of which they have themselves been in breach for three and a half years.

1. The GICs Terminated in 2008

Plaintiffs wish to treat the GICs as a checking account available to them at any time and on any terms, not as a series of structured investment contracts governed by carefully negotiated contractual provisions. This interpretation is inconsistent with the plain language of the GICs and with the facts as alleged by Plaintiffs. The GICs terminated in 2008 when they were accelerated and repaid, and are no longer available for additional investments.

a. Section 3.2 Is An Acceleration Clause, Which, When Triggered, Terminated The Contract.

Plaintiffs argue that Section 3.2 is not an acceleration clause and that, even if it were, its operation would not terminate the GICs. OB at 19-22. Both claims are specious.

First, there is no doubt that the portion of Section 3.2 that provides for AIGMFC to "within ten (10) Business Days" "repay the principal of and accrued but unpaid interest on the Investments" is an acceleration clause. *E.g.*, A33-34 at § 3.2. Black's Law Dictionary defines an "acceleration clause" as a "provision that requires the debtor to pay off the balance sooner than the due date if some specified event occurs." BLACK'S LAW DICTIONARY (9th ed. 2009). Plaintiffs claim that, although requiring repayment "sooner than the due date if some specified event occurs" is *precisely* what Section 3.2 does, "[a]cceleration clauses make the entire debt 'due immediately.'" OB at 19. This argument appears to be staked on the distinction between "immediately" and "ten [] business days." It is not persuasive; ten days is tantamount to "immediate" taking into account the administrative tasks of calculating amounts due and arranging for payment. Section 3.2 plainly provides for acceleration of the GICs as one of three possible responses to a downgrade in AIG's debt ratings.

The fact that the GICs contain two acceleration clauses—Section 3.2 and Section 5.2—is of no moment. Although Section 5.2 is expressly an acceleration clause, while Section 3.2 is titled "Ratings Event," the GICs provide that headings are not to be used in interpreting the GICs' provisions. *E.g.*, A42 at § 6.10. Moreover, that Section 3.2 allows AIGMFC to *elect* acceleration does not render acceleration something else—indeed, Section 5.2 allows Plaintiffs (in

the case of certain events of default) also to *elect* acceleration.[7] *E.g.*, A38 at § 5.2. In fact, the similarities between the two provisions—one provides that "the principal of and accrued but unpaid interest on the Investment shall automatically become due and payable immediately," while the other provides that "within ten (10) Business Days" one of three possible actions AIGMFC may take is to "repay the principal of and accrued but unpaid interest on the Investments"—actually *bolsters* the claim that Section 3.2 is an acceleration clause, just like Section 5.2.

Second, the operation of Section 3.2's acceleration clause terminated the GICs in 2008. Acceleration is "[t]he advancing of a loan agreement's maturity date so that the payment of the entire debt is due immediately." BLACK'S LAW DICTIONARY (9th ed. 2009). The obvious corollary is that, once the outstanding principal of an investment has been returned, the investment terminates. The Court below properly concluded that "section 3.2, like section 5.2, is an acceleration clause and AIG's repaying the principal and accrued, unpaid interest satisfied section 3.2 and terminated the contract." Op. at 10.

Plaintiffs cite *NML Capital* for the proposition that "[o]ther contractual clauses continue to govern the parties' obligations *after acceleration*." OB at 21 (emphasis in original). But *NML Capital* dealt with a particular situation in which, although the debt at issue had been accelerated, the principal had not yet been repaid. 952 N.E.2d at 491-93. Noting that "[t]he parties to a loan agreement are free to include provisions directing what will happen in the event of default or acceleration of the debt, supplying specific terms that supersede other provisions in the contract if those events occur," the court held that the contract at issue expressly required that biannual interest payments continue after acceleration until the principal was repaid (not until the maturity date of the loan). *Id.* Thus, notwithstanding that acceleration had occurred, the parties were permitted to specify in their contract that these particular payments would continue post-acceleration, until repayment of the principal was complete. In other words, parties to a contract may specify obligations that will apply following acceleration, but must do so explicitly.

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[7] Optional and automatic acceleration are treated identically under the law. *See, e.g.*, *In re Saint Vincent's Catholic Med. Ctrs. of N.Y.*, 440 B.R. 587, 595-97 (Bankr. S.D.N.Y. 2010) (considering whether acceleration was "voluntary" or "automatic" and concluding this determination had no impact on the available post-acceleration remedies).

As discussed above, the GICs contain no such provision setting forth what will happen post-acceleration. Moreover, Plaintiffs have in fact received back their entire principal within the timeframe contemplated by the contracts, and with payment of all interest due under the contracts. The maturity date has therefore passed, Plaintiffs' capital has been repaid, and, as the Court below held, the GICs—which were premised on the investment of that very capital—have ceased operation.

b. The GICs Terminated By Mutual Agreement When Plaintiffs Accepted Repayment Of Their Principal And Accrued Interest And Both Parties Ceased Performance.

The Court below determined that the GICs were terminated in 2008 when, pursuant to the acceleration clause in 3.2, AIGMFC repaid the Plaintiffs' principal and accrued, unpaid interest. Op. at 10. The Court went on to hold, in the alternative, that regardless of whether Section 3.2 was an acceleration clause, Plaintiffs elected to terminate the GICs by accepting AIGMFC's repayment. Op. at 10-11. It is black letter law that a contract may be terminated by mutual abandonment, *Armour & Co. v. Celic*, 294 F.2d 432, 435 (2d Cir. 1961), or terminated by mutual agreement, *Rodgers v. Rodgers*, 139 N.E. 557, 557 (N.Y. 1923); *see also* 29 WILLISTON ON CONTRACTS § 73:19 (4th ed.). Termination of the GICs by *both* means occurred when, in September 2008, AIGMFC offered the Plaintiffs a choice between receiving repayment of their entire principal and accrued, unpaid interest, or remaining invested with AIGMFC, and Plaintiffs elected repayment and ceased performance under the GICs.

First, termination occurred by mutual agreement of the parties when Plaintiffs accepted repayment of their principal and unpaid interest pursuant to notices, sent on September 24, 2008, which stated:

> AIGMFC, in accordance with the terms of the Investment Agreement, has elected to repay the principal and accrued but unpaid interest outstanding under the Investment Agreement . . . . Accordingly, on September 29, 2008 . . . *unless AIGMFC's repayment obligation is waived either in writing or by return e-mail* . . .

> AIGMFC shall pay the Repayment Amount to the Trustee by wire transfer . . . .
>
> Upon payment of the Repayment Amount, *each of the Investment Agreement and the AIG Guarantee* delivered in connection with the Investment Agreement ***shall terminate and shall be considered for all purposes to be of no further force and effect.***

B372-382.[8] No Plaintiff elected to waive repayment; rather, each Plaintiff accepted repayment of their principal and accrued, unearned interest in full, pursuant to these notices, on September 29, 2008. A93 at ¶ 155. Then they reinvested those funds elsewhere. A96 at ¶ 172.

It is hornbook contract law that the recipient of a payment tendered subject to explicit terms indicates assent to those terms by accepting payment. According to the New York Court of Appeals, "[a] debtor paying his own money may couple the payment with such conditions as he pleases" and that one who

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[8] Plaintiffs note that it is error to rely on facts outside the complaint in deciding a motion to dismiss. OB at 23 (citing *King Constr., Inc. v. Plaza Four Realty, LLC*, 976 A.2d 145, 155 (Del. 2009)). As an initial matter, the Court may consider these termination notices because they are integral to and incorporated into the Plaintiffs' allegation, in their amended and supplemental complaint, that "AIGMFC repaid the GIC Counterparties the full, aggregate amount of principal plus unpaid, accrued interest" on September 29, 2008, at which time "Defendants stated that AIGMFC was returning the principal pursuant to Section 3.2 of the GICs." A93 at ¶ 155; *see In re Gen Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168-69 (Del. 2006); *Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). Indeed, if courts were not permitted to consider the termination notices, complaints—like the one at issue here—"'that quot[e] only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure.'" *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)). In any event, as Plaintiffs concede, there is no evidence that the Court relied upon the termination notices in reaching its conclusion. OB at 22-23 n.5. Thus, even if this Court determines consideration of these notices is improper, the determination by the Court below that the GICs terminated may not be overturned on that basis, and should be upheld for substantially the reasons set forth in the Order below at 10-11, and the other reasons set forth herein.

sends a check to another with a condition explicitly declared "may hold the creditor to the condition." *Hudson v. Yonkers Fruit Co.*, 179 N.E. 373, 375 (N.Y. 1932) (Cardozo, C.J.) (citing *Nassoiy v. Tomlinson*, 42 N.E. 715, 716-17 (N.Y. 1896)); *see also Geraghty v. Kiamie Fifth Ave. Corp.*, 210 F.2d 95, 98 (2d Cir. 1954) (holding that "the acceptance of . . . checks . . . constitutes an acceptance of receiver's counter offer" and that "[i]t would be unreasonable to require that appellant write back, 'I accept your offer'; its endorsement of the checks is sufficient signing . . . ."); *Daimon v. Fridman*, 773 N.Y.S.2d 441, 442 (N.Y. App. Div. 2004) ("The defendant's conduct in accepting [an additional] payment and in depositing [a] down payment check constituted an acceptance of the plaintiff's counteroffer."); *Josephine & Anthony Corp. v. Horwitz*, 396 N.Y.S.2d 53, 53 (N.Y. App. Div. 1977) ("When the plaintiffs cashed the checks, an acceptance of the renewed offer was indicated by their conduct."); *see also* 1-3 CORBIN ON CONTRACTS § 3.21 ("The cashing or depositing of the check is an exercise of dominion over the offeror's funds, and regardless of the intention, the offeree is estopped from denying that the offer was accepted."). Put simply, AIGMFC told Plaintiffs that repayment of their investments would terminate the GICs, and the Plaintiffs manifested assent to that termination by accepting the repayment.

The GICs' "no oral modification" provision, Section 6.4, does not alter this conclusion. *E.g.*, A40-41 at § 6.4. Although such clauses are generally enforceable, *see* N.Y. Gen. Oblig. Law § 15-301, they will *not* be enforced if (1) the oral modification has been fully performed; or (2) "there has been partial performance of an agreement to modify, so long as the partial performance is unequivocally referable to the oral modification." *DiStefano v. Maclay*, 102 F. App'x 188, 189-90 (2d Cir. 2004) (citing *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 522 (2d Cir. 1990)); *Rose v. Spa Realty Assocs.*, 366 N.E.2d 1279, 1283 (N.Y. 1977). Here, Plaintiffs fully performed on AIGMFC's offer to terminate the GICs by accepting repayment and ceasing investment under the GICs for the ensuing three-and-one-half years. In any event, even if this were deemed only partial performance, it was "unequivocally referable" to the termination notices Plaintiffs received directly after AIG's debt ratings were downgraded and the GICs accelerated pursuant to Section 3.2. Plaintiffs thereby agreed to termination of the GICs at that time.

Second, and irrespective of the termination notices, the parties mutually abandoned the GICs at the time they were accelerated and repaid. "The intention to abandon a contract need not be manifested expressly . . . but may be inferred from attendant circumstances and conduct of the parties." *Jones v. Hirschfeld*, 348 F. Supp. 2d 50, 59 (S.D.N.Y. 2004) (internal quotation marks omitted) (citing *Armour & Co*, 294 F.2d at 435 and *Aini v. Sun Taiyang Co., Ltd.*, 964 F. Supp. 762, 777 (S.D.N.Y. 1997)); *see also Portman v. Am. Home Prods. Co.*, 98

F. Supp. 494, 499 (S.D.N.Y. 1951) ("Mutual assent to abandon a contract, like mutual assent to form one, may be inferred from the attendant circumstances and conduct of the parties."); 29 WILLISTON ON CONTRACTS § 73:16 (4th ed.) (same).

Plaintiffs admit that they ceased performing under the GICs—and indeed, reinvested their capital elsewhere—after AIGMFC repaid their principal and accrued, unpaid interest. A96 at ¶ 172. Moreover, they do not allege any attempt to assert any purported right to make "additional investments" under the GICs for more than three years. This is sufficient to terminate the contracts through abandonment. *See, e.g., Timme v. Steinfeld*, 213 N.Y.S. 110, 118 (N.Y. App. Div. 1925) ("[W]here both parties have ignored the existence of the contract for a period of over sixteen months, as a matter of law it is deemed to have been terminated by mutual abandonment."); *see also* 29 WILLISTON ON CONTRACTS § 73:16 (4th ed.) ("[C]ircumstances of a negative character, such as the failure to take any steps looking towards the enforcement or performance of the contract, also justify the inference of mutual assent to rescind."); RESTATEMENT (SECOND) OF CONTRACTS § 283 cmt. a ("[M]ere inaction on both sides, such as the failure to take any steps looking toward performance or enforcement, may indicate an intent to abandon the contract").

2. Plaintiffs Have No Right to Make Additional Investments.

Plaintiffs also mistakenly contend that, because the GICs provided for limited additional investments of capital to supplement the initial principal investment, Plaintiffs enjoy a limitless right to continue depositing funds with AIGMFC. But the GICs, by their plain terms, allow Plaintiffs to make only strictly limited "additional" investments according to specific parameters—which the additional investments Plaintiffs sought to make in March 2012 do not meet. Moreover, the GICs actually *required* Plaintiffs to make certain specific additional investments, which they failed to do for three and a half years after receiving repayment of their principal in 2008. Thus, even assuming that the GICs were in force after September 2008—which they were not—the Plaintiffs breached them long before they sought to make additional investments in March 2012.

a. The Plain Terms Of The GICs Do Not Allow The Reinvestments Plaintiffs Sought To Make Here.

Plaintiffs correctly note that the GICs provide for additional investments to be made following the initial infusion of capital pursuant to which each GIC was inaugurated. OB at 17. However, the Plaintiffs' ability to make additional investments under the GICs is strictly cabined. The "Limitations on Additional Investments" section of each GIC, which governs and places strict limitations on such investments, provides that "[w]ith respect to each Investment,"—in other words, each fund defined in the preceding sections—the Trustee may make additional investments only above a certain amount, with sufficient notice, not more frequently than a set number of times per month. *E.g.*, A29 at § 2.11. The section also places a ceiling on the aggregate amount that may be invested under the GICs. *Id.*[9]

The sections governing each fund in turn set forth the parameters under which additional investment could be made, creating some specific additional investments (to be made in amounts and on dates set forth in the GICs) and some general additional investments (of anticipated bond proceeds intended for particular purposes). For example, Section 2.1 of the Fort Benning GIC provides that "the Trustee shall invest with AIGMFC" (1) a specific initial amount; (2) specific additional amounts, on a schedule set forth in an appendix to the GIC; and (3) "all funds received by the Trustee from and after the Closing Date for deposit in the [fund established by § 2.1] pursuant to" the indenture governing Fort Benning's bond issuances. A18-19 at § 2.1(a). Section 2.2 creates a fund that does not allow additional investments, while Section 2.3, like Section 2.1, provides that "the Trustee shall invest with AIGMFC" "all funds received by the Trustee from and after the Closing Date for deposit in the [fund established by § 2.3] pursuant to the Indenture." A20, 21 at §§ 2.2(a), 2.3(a).

The reinvestments Plaintiffs attempted in March 2012 did not follow the rules set forth in these provisions of the GICs. The deposits are not specifically provided for in any of the GICs (*cf.*, *e.g.*, A18-19 at § 2.1(a)), and the more general provisions for additional investments *require* investment of "*all* funds"

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9 Plaintiffs incorrectly state that the ceiling for the Fort Benning GIC was $415 billion, when it actually was $415 million. *Compare* OB at 8 *with* A30 at § 2.11.

received by the Trustee for deposit in a particular fund (*see, e.g.*, *id.*), pursuant to an overall scheme in which *all* of Plaintiffs' bond proceeds were to be invested under the GICs. Plaintiffs admit that, far from depositing "*all* funds received by the Trustee" in the GICs, they ceased to make deposits in the GICs altogether; rather, the "funds received by the Trustee from and after the Closing Date for deposit in [a specific fund]" were invested, during the course of three years, elsewhere—not with AIGMFC. *See* A96 at ¶ 172. The GICs created a scheme for investing *all* of Plaintiffs' hundreds of millions of dollars of actual and expected bond proceeds in the GICs; they do not permit the haphazard additional investments Plaintiffs attempted here.

b. Plaintiffs Breached The GICs Well Before 2012 By Failing To Make Required Deposits.

Setting aside whether Plaintiffs were indeed permitted to make additional investments, they may not recover for breach of the GICs as a result of AIGMFC's refusal to accept those investments because, if their claims are correct that (1) the GICs continued in force and (2) the Plaintiffs had the right to continue investing under the GICs following their acceleration, they breached the GICs long before AIGMFC's alleged breach.

In order to recover for breach of contract, a party must itself have materially complied with the contract. *See Rexnord Holdings Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994) (noting that performance by the plaintiff is an essential element of a breach of contract claim); *Harris v. Seward Park Hous. Corp.*, 913 N.Y.S.2d 161, 162 (N.Y. App. Div. 2010) (same); *Drapkin v. Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d 678, 685-86 (S.D.N.Y. 2011) (noting New York law governing breach of contract requires "proof of . . . performance of the contract by one party [and] breach by the other party" and that "[a] fundamental principle of contract law provides that the material breach of a contract by one party discharges the contractual obligations of the non-breaching party" (internal quotations omitted)).

If Plaintiffs are correct that the GICs remained in force following the acceleration in 2008 (OB at 18-19, 21-23), Plaintiffs have been materially breaching those contracts for over three and a half years. As described above, all of the "additional investments" that Plaintiffs now wish to make are mandatory; the GICs specify that "the Trustees *shall* invest" *all* funds received for a particular fund "pursuant to the Indenture." *E.g.*, A18-19 at § 2.1(a). But no such investments were made—or even attempted—between September 2008 and

March 2012; indeed, Plaintiffs concede that for three and a half years, they invested the funds described in the GICs elsewhere. A96 at ¶ 172. Rather, Plaintiffs' first attempts to invest additional capital under the GICs came as they faced an imminent deadline for resuscitation of a complaint the Court below had already indicated its intent to dismiss, and was a blatant attempt to manufacture an additional claim in order to maneuver around the anticipated dismissal of the claims in their original complaint. To the extent the GICs were still operative, this failure to invest was a breach of the GICs. Plaintiffs may not recover under agreements they have already violated. Plaintiffs' "Reinvestment Claims" therefore fail.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

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January 9, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of January, 2013, she caused to be served a copy of ANSWERING BRIEF OF APPELLEES-DEFENDANTS BELOW AIG MATCHED FUNDING CORP. AND AMERICAN INTERNATIONAL GROUP, INC. on the following counsel of record in the manner indicated:

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