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
Plaintiffs-Below/Appellants,	Case Below:
v.	Superior Court of New Castle County Civil Action No. N11C-08-259-FSS [CCLD]
AIG MATCHED FUNDING CORP. and AMERICAN INTERNATIONAL GROUP, INC.,	
Defendants-Below/Appellees.	

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

When they entered the Investment Agreements, Plaintiffs and Defendants AIG and AIGMFC understood that the agreements would provide critical funding for the long term construction and maintenance of military housing. Defendants were fully aware that Plaintiffs' business plans relied on the income stream provided by these instruments. But when Defendants suffered profound financial distress due to their own misconduct and speculative investments in instruments tied to mortgage-backed securities, they determined that it would be expedient to abandon their responsibilities under the Investment Agreements. As a direct result, Plaintiffs lost the critical income stream they had bargained for and, because they were unable to find an adequate substitute, suffered significant damages. Defendants, on the other hand, recorded exorbitant gains after their self-inflicted financial distress led them to abandon their obligations on these and similar contracts.

Plaintiffs seek only to be returned to the position they would be in but for Defendants' breach or, alternatively, to be allowed to reinvest on the terms previously offered, as explicitly allowed by the contracts. In an attempt to defeat Plaintiffs' Reinvestment Claims, Defendants invoke a host of defenses that involve facts outside of the Complaint. The Superior Court could not properly rely on such defenses on a motion to dismiss. Defendants also argue that the Investment Agreements themselves do not allow for reinvestment. But Defendants have not demonstrated, and cannot demonstrate, that the contracts, which expressly *allow* reinvestment, can only be reasonably interpreted to *bar* reinvestment.

The Court should also reject Defendants' attempt to extend New York's unearned interest rule to bar expectation damages. The unearned interest rule does not bar such damages, and Defendants' authority is not to the contrary. Moreover, even if the rule generally applied to bar expectation damages, it should not apply to the Investment Agreements, which (1) differ in character from agreements to which the rule is usually applied and (2) contain an explicit reservation of rights provision. Finally, Plaintiffs properly seek consequential damages, which are not barred by the unearned interest rule.

Neither the Investment Agreements nor applicable authority bar Plaintiffs, as a matter of law, from recovering the income stream Defendants promised them. The Superior Court's grant of Defendants' motion to dismiss was error and should be reversed.

ARGUMENT

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

As set forth in Plaintiffs' opening brief, the Investment Agreements clearly provide for subsequent investments. (*See* Corrected Appellants' Opening Brief ("Opening Br.") at 16–18.) Nothing in the Investment Agreements altered the ability to reinvest after AIG suffered a Ratings Event, as defined in Section 3.2 of the Investment Agreements.

Defendants ignore the applicable legal standard, misconstrue the language of the contracts, and invoke facts outside of the Complaint in an effort to avoid the contracts' straightforward language allowing reinvestment. All of those arguments should be rejected, and the Superior Court's dismissal of the Reinvestment Claims should be reversed.

A. Defendants ignore the applicable legal standard.

Defendants invoke a host of alleged failures by Plaintiffs—almost all of which draw upon facts outside of the Complaint—in support of their assertion that Plaintiffs should not be permitted to reinvest after a Ratings Event. Conspicuously absent from Defendants' response, however, is any discussion of the applicable legal standard. Defendants thus do not dispute that dismissal is improper where contractual provisions are "susceptible to more than one reasonable interpretation." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). So long as the Investment Agreements can reasonably be interpreted to allow for reinvestment after a Ratings Event, dismissal was in error. *See id.*; *Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). Plaintiffs need not establish, in response to a motion to dismiss, that their interpretation of the contractual provisions at issue is correct, or even that it is more likely than Defendants' interpretation. *See Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007). Plaintiffs need only establish that their interpretation is *reasonable*. *See id.* As demonstrated in Plaintiffs' opening brief, and below, it is eminently reasonable to interpret the Investment Agreements to allow for reinvestment after a Ratings Event. (*See* Opening Br. at 16–18.)

B. The Investment Agreements did not terminate in 2008.

Contrary to Defendants' assertions (*See* Answering Brief of Appellees-Defendants Below AIG Matched Funding Corp. and American

International Group, Inc. ("Opp'n") at 21–23), nothing terminated the Investment Agreements prior to Plaintiffs' efforts to reinvest in 2012. Defendants claim the Investment Agreements automatically terminated in 2008 after they returned Plaintiffs' funds pursuant to Section 3.2. (*Id.*) But a plain reading of the Investment Agreements demonstrates that Section 3.2 is not an acceleration clause and does not terminate the contracts. Defendants' invocation of external events allegedly supporting termination must likewise be rejected because a court may only consider the allegations of the complaint on a motion to dismiss. *See White v. Panic*, 783 A.2d 543, 548 n.5 (Del. 2001). For the same reason, Plaintiffs' alleged prior breach of the Investment Agreements provides no justification for dismissal.

1. The Investment Agreements did not terminate pursuant to their own terms.

Defendants argue that the Investment Agreements terminated automatically after they returned funds pursuant to Section 3.2. (Opp'n at 21–23.) Defendants again ignore the standard for interpreting a contract at the pleadings stage—dismissal is proper only if *the sole* reasonable interpretation of the Investment Agreements is that they terminated after Defendants returned Plaintiffs' principal. *See Appriva*, 937 A.2d at 1292. Defendants nonetheless argue, contrary to the plain language of the Investment Agreements, that (1) Section 3.2 is an acceleration clause (Opp'n at 21) and (2) "the operation of Section 3.2's acceleration clause terminated the [Investment Agreements] in 2008" (*id.* at 22.) Neither proposition is accurate.

The dictionary definition of "acceleration" cited by Defendants highlights that Section 3.2 *is not* an acceleration clause. *Black's Law Dictionary* defines "acceleration clause" as "a provision *that requires* the debtor to pay off the balance sooner than the due date if some specified event occurs." (*Id.* at 21 (quoting *Black's Law Dictionary* (9th ed. 2009) (emphasis added).) Section 3.2 did not *require* Defendants to return Plaintiffs' principal; the return of principal was only one option available to Defendants. (*See, e.g.*, A 33–34, Ft. Benning Agreement § 3.2.) Thus, even under Defendants' definition, Section 3.2 is not an acceleration clause.

To the contrary, Section 3.2 provides *Defendants*, not Plaintiffs, with the option to repay. *In re Saint Vincent's Catholic Medical Centers of*

New York, 440 B.R. 587, 595–97 (Bankr. S.D.N.Y. 2010), cited by Defendants for the proposition that optional and mandatory acceleration should be treated the same (Opp'n at 22), illustrates that acceleration clauses provide the option to accelerate to lenders, not debtors. In *Saint Vincent's*, the acceleration clause at issue, like the acceleration clause in Section 5.2 of the Investment Agreements, made amounts "'immediately due and payable'" upon acceleration. *Saint Vincent's*, 440 B.R. at 595. And like Section 5.2, the contract in that case gave the option to accelerate to *the lender*, not the debtor. *Saint Vincent's* thus provides an example of a typical acceleration clause, one like Section 5.2 of the Investment Agreements, that requires *the debtor* to pay all amounts due in certain instances and gives *the lender* the option to require repayment in other circumstances. A provision that gives the debtor the option to repay early, like Section 3.2, is not an acceleration clause. *See id.* Nor have Defendants pointed to any authority recognizing such a provision as an acceleration clause.

Defendants also argue, with no citation to authority, that "[t]he obvious corollary" to the dictionary definition of "acceleration clause" is that "the investment terminates" after acceleration. (Opp'n at 22.) But there is nothing "obvious" about acceleration terminating a contract. In fact, New York law holds the opposite: acceleration does not affect the other terms of a contract. *NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 492 (N.Y. 2011). Where, as here, a contract contains other provisions, acceleration does not impact those terms.

Defendants attempt to escape *NML* by arguing that the case stands only for the limited proposition that parties may specify the obligations after acceleration, but must do so explicitly. (Opp'n at 22.) This argument is mistaken for two reasons. First, *NML* did not opine on the required explicitness to preserve rights after acceleration. Instead, the court stated simply, "[W]e are unaware of any rule of New York law declaring that other terms of the contract not necessarily impacted by acceleration . . . automatically cease to be enforceable after acceleration." *NML*, 952 N.E.2d at 492. Second, the Investment Agreements are equally explicit about Plaintiffs' right to reinvest as the contracts at issue in *NML* were about continuing interest. In *NML*, the contracts required that interest be paid "until the principal hereof is paid." *Id.* at 488. The Investment Agreements state, "AIGMFC *shall accept as an investment* . . . all funds received by the [Plaintiffs] from and after the Closing Date." (*E.g.*, A 18–

19, Ft. Benning Agreement § 2.1(a) (emphasis added).) The Investment Agreements thus explicitly require Defendants to accept later investments.

Dismissal would only have been proper if Defendants established that the *only* reasonable interpretation of the Investment Agreements is that they automatically terminated in 2008 pursuant to Section 3.2. *See Appriva*, 937 A.2d at 1292. Defendants cannot meet this standard. Even if Section 3.2 is considered an acceleration clause (it is not), nothing in the Investment Agreements indicates that they automatically terminated prior to Plaintiffs' attempt to reinvest. Rather, the Investment Agreements can reasonably be interpreted to allow for reinvestment after a Ratings Event. The Superior Court thus erred by dismissing Plaintiffs' claims.

2. Defendants may not rely upon matters outside of the pleadings to argue that the Investment Agreements terminated.

Defendants' claims that the Investment Agreements terminated through mutual agreement or mutual abandonment (Opp'n at 23–26) do not withstand scrutiny. Both arguments invoke facts outside of the pleadings, which is improper upon a motion to dismiss.[1]

A court may not consider matters outside of the pleadings when deciding a motion to dismiss, *see King Constr., Inc. v. Plaza Four Realty, LLC*, 976 A.2d 145, 155 (Del. 2009), and thus may not resolve affirmative defenses upon such a motion, *see Stewart v. Dep't of Corr.*, 2002 WL 31045233, at *2 (Del. Super. Ct. Aug. 8, 2002). Defendants nevertheless invite the Court to consider extrinsic facts in support of their claim that the parties mutually agreed to terminate the contracts. Defendants improperly refer to termination notices AIGMFC sent to the Plaintiffs on September

[1] The Superior Court's order referenced neither mutual abandonment nor mutual agreement, stating only, "Fort Benning did not refuse AIG's September 29, 2008 attempted repayment, as it could under section 3.2." (A. 149, Order at 10.) Neither that sentence nor the Court's opinion as a whole should be construed to rely upon the doctrine of mutual agreement or mutual abandonment. As set forth below, nothing within the Complaint supports such a conclusion. Thus, the Court would have had to improperly consider extrinsic facts to invoke either doctrine.

25, 2008, which Defendants claim constituted an offer to terminate the Investment Agreements. (Opp'n at 23–24.) Defendants may not, however, invoke extrinsic documents in support of a motion to dismiss. *See King Constr.*, 976 A.2d at 155; *White*, 783 A.2d at 548 n.5 (citing *Vanderbilt*, 691 A.2d at 613) ("[T]he court may not employ assertions in documents outside the complaint to decide issues of fact against the plaintiff without the benefit of an appropriate factual record.").

There are "only two exceptions to the general rule prohibiting consideration of such extrinsic material on a motion to dismiss: (i) where an extrinsic document is integral to a plaintiff's claim and is incorporated into the complaint by reference, and (ii) where the document is not being relied upon to prove the truth of its contents." *Furman v. Del. Dep't of Transp.*, 30 A.3d 771, 774 (Del. 2011) (citing *Vanderbilt*, 691 A.2d at 613). Neither exception applies here.

Defendants claim that the September 25, 2008 termination notices are "integral to and incorporated into the Plaintiffs' allegation . . . that 'AIGMFC repaid . . . the full, aggregate amount of principal plus unpaid, accrued interest' . . . [and] 'Defendants stated that AIGMFC was returning the principal pursuant to Section 3.2 of the [Investment Agreements].'" (Opp'n at 24 n.8 (quoting Compl. ¶ 155).) But these notices were neither attached to nor referenced in the Complaint and are not properly considered. Plaintiffs' allegations refer only to Section 3.2 of the Investment Agreements, which notably is not even mentioned in the notices. Nor are these documents "integral" to Plaintiffs' Complaint, which places in issue neither whether Defendants issued notices nor the contents of those notices. *Compare 7547 Partners v. Beck*, 682 A.2d 160, 163 (Del. 1996) (finding that, when a claim alleges inadequate or misleading disclosures, "a court may refer to the allegedly deficient corporate document to determine what was disclosed"), *with White*, 783 A.2d at 548 n.5 ("[T]he plaintiff affirmatively placed the facts in the article before the Court . . . by attaching the full text of the article to his answering brief opposing the defendants' motion to dismiss."). The termination notices therefore may not be considered on a motion to dismiss.

Even if the Court below could have properly considered the notices, they provide no basis for dismissal. Defendants concede that they had a contractual option to return Plaintiffs' principal pursuant to Section

3.2. (Opp'n at 3.) But they also claim that, by simply attaching termination notices to their repayment, they terminated the contracts and are no longer bound by any additional provisions. (*See id.* at 23–24.) The law does not allow such tactics—performance of one contractual provision is not sufficient to nullify the rest of the contract. As set forth in one of the termination cases cited by Defendants, a party must do more than comply with the terms of the agreement to justify modification. *See Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 522 (2d Cir. 1990) (rejecting modification claim where conduct was "entirely consistent with the agreements as written"); *see also Home Loan Inv. Bank. v. Goodness & Mercy, Inc.*, 2012 WL 1078963, at *5 (E.D.N.Y. Jan. 4, 2012), *report and recommendation adopted*, 2012 WL 1078886 (E.D.N.Y. Mar. 30, 2012) (finding oral modification to loan document invalid because "the defendants' payment is in accord with the original agreement, and therefore does not unequivocally refer to the new agreement; nor is it incompatible with the agreement as written"). Defendants' effort to terminate the Investment Agreements, by doing no more than what Section 3.2 of those Agreements required, must be rejected, especially where the Investment Agreements required any modification to be executed by both parties. (*E.g.*, A 40–41, Ft. Benning Agreement § 6.4.)

Defendants' mutual abandonment argument must also be rejected. Mutual abandonment is an affirmative defense based on the factual issue of intent. It is not properly decided on a motion to dismiss. *Jones v. Hirschfeld*, 348 F. Supp. 2d 50, 59–60 (S.D.N.Y. 2004) ("The burden of proving the intent to abandon rests upon the party asserting it and ordinarily presents an issue of fact."). To establish mutual abandonment, Defendants must show that they acted "in a manner inconsistent with the existence of the contract" and that Plaintiffs "acquiesce[d] in that behavior." *EMF Gen. Contracting Corp. v. Bisbee*, 774 N.Y.S.2d 39, 43 (N.Y. App. Div. 2004). This acquiescence must be "positive, unequivocal and inconsistent with an intent to be further bound by the contract." *Cauff, Lippman & Co. v. Apogee Fin. Grp., Inc.*, 807 F. Supp. 1007, 1021 (S.D.N.Y. 1992).

Defendants cite no allegation of the Complaint establishing that Plaintiffs unequivocally agreed to abandon the contract. Silence in response to a termination notice is equivocal and does not establish a party's intent to abandon. *EMF*, 774 N.Y.S.2d at 43 ("The mere lack of any communication between the parties . . . does not support a conclusion that EMF abandoned, or acquiesced to an abandonment of, the contract."). Mere delay (even a delay of years) likewise does not necessarily indicate a party's intention to abandon its rights under a contract. *Id.* (lengthy silence between parties not abandonment); *Tierney v. Drago*, 833 N.Y.S.2d 127, 129 (N.Y. App. Div. 2007) (holding that whether a nine-year delay constituted abandonment was a genuine issue of material fact that precluded summary judgment). This is especially so where the parties agreed in the Investment Agreements that any "delay by a party hereto in exercising any right, power or remedy shall not preclude the further exercise thereof." (*E.g.*, A 40, Ft. Benning Agreement § 6.3.) Whether delay constitutes abandonment is a fact issue that simply cannot be decided solely on the basis of the Complaint. *Tierney*, 833 N.Y.S.2d at 129. Defendants' claim of mutual abandonment thus cannot serve as the basis for dismissal.

C. Plaintiffs' alleged prior breach does not support dismissal.

Defendants further argue that Plaintiffs breached the Investment Agreements long before their attempted reinvestment by failing to invest funds with AIGMFC between September 2008 and March 2012. (Opp'n at 28–29.) But an alleged prior breach, like mutual abandonment, is an affirmative defense not properly considered on a motion to dismiss. *Stoner v. Culligan, Inc.*, 300 N.Y.S.2d 966, 970 (1969) (noting that whether the plaintiff had committed a prior breach of contract that would supply a complete defense to plaintiff's breach of contract action was "a material and triable issue of fact"); *see also Visual Edge Sys., Inc. v. Takefman*, 2000 WL 193107, at *2 n.9 (Del. Ch. Jan. 31, 2000) (noting that the doctrine of prior breach "is not often raised for the eminently sensible reason [that] it simply makes more sense to assert forthrightly a breach of contract action as a counterclaim").

The Investment Agreements can reasonably be construed to allow reinvestment. Defendants may not, on a motion to dismiss, argue against that result by invoking material outside of the Complaint. Accordingly, the Superior Court's decision dismissing Plaintiffs' Reinvestment Claims should be reversed.

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

Defendants have not demonstrated that New York's unearned interest rule bars expectation damages. They cite no applicable New York precedent and instead rely on two bankruptcy decisions that fail to address the fundamental principle behind the rule. Nor should the unearned interest rule extend to the Investment Agreements here. Plaintiffs do not seek the double recovery that the rule prevents, and the Investment Agreements contain an express provision allowing the recovery Plaintiffs do seek. Finally, Defendants are incorrect that Plaintiffs' damages amount only to expectation damages—Defendants were fully aware that Plaintiffs relied on the guaranteed income from the Investment Agreements and thus are liable for Plaintiffs' consequential damages from the breach.[2]

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2 Defendants argue in a footnote that Plaintiffs have "failed to allege any actual breach" of the Investment Agreements. (Opp'n at 11 n.3.) The Court below did not adopt this argument and, in fact, presumed for the purpose of the motion that Plaintiffs had established breach. (A. 146–49, Order at 7–10.) Regardless, Defendants' assertion that Plaintiffs failed to allege a breach is false. Plaintiffs specifically allege that "AIG and AIGMFC committed at least six Events of Default under each of the [Investment Agreements]" and that "[e]ach Event of Default was a material breach of the [agreements]." (A. 97, Compl. ¶¶ 179–80.) And while Defendants argue that an Event of Default is different from a breach of contract (Opp'n at 11 n.3), the agreements themselves make no such distinction. Finally, Section 5.3 of the Investment Agreements states that, upon the occurrence of an Event of Default, Plaintiffs "may exercise any of the rights and remedies available to [them] *at law* or *in equity*." (*E.g.*, A. 38, Fort Benning Agreement § 5.3 (emphasis added).) A party is only entitled to seek these types of relief from a court once the contract has been *breached*. *See Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 403–04 (S.D.N.Y. 2004) (listing breach as an element of a contract claim). In the context of these investment contracts, the parties clearly intended the enumerated Events of Default in Section 5.1 to constitute breaches of the agreements.

A. The unearned interest rule does not bar expectation damages.

Defendants concede that no New York court has applied the unearned interest rule to preclude expectation damages. Only the *Calpine* and *Solutia* bankruptcy cases, discussed below, have applied the rule to preclude such damages under specific circumstances not present here. This Court should not extend a New York rule that arose to prevent double recoveries to preclude expectation damages.

Defendants fault Plaintiffs for relying upon cases decided in 1895 and 1966—*Illinois Steel Co. v. O'Donnell*, 41 N.E 185 (Ill. 1895) and *Franklin National Bank of Long Island v. Capobianco*, 272 N.Y.S.2d 519 (N.Y. Sup. Ct. 1966)—to illustrate the purpose underlying the rule. (Opp'n at 13 n.5.) But in light of the fact that New York courts have not interpreted the rule to bar expectation damages, it is appropriate to consider early decisions in order to determine the rule's purpose. *O'Donnell* and *Franklin*, two of the earliest cases to apply the rule, make clear that the rule exists to prevent double recoveries, not to bar expectation damages. Defendants cite no later cases to the contrary.

The sole New York case cited by Defendants in support of their claim that the unearned interest rule bars expectation damages—*Northwestern Mutual Life Insurance Co. v. Uniondale Realty Associates*, 816 N.Y.S.2d 831 (N.Y. Sup. Ct. 2006)—is inapposite. *Northwestern Mutual* did not find that the unearned interest rule precluded expectation damages. In fact, the *Northwestern Mutual* court did not even reach the issue of whether the unearned interest rule precluded damages. *Id.* at 836 ("The question raised by defendant Uniondale [regarding unearned interest] also is significant . . . . Such questions would present themselves if the subject clause were worded differently. However, this court need not reach such issues at this time, as the subject clause is not applicable in foreclosure."). *Northwestern Mutual* thus does not support Defendants' claim that the unearned interest rule prohibits expectation damages.

Defendants' reliance upon *Calpine* and *Solutia* is also misplaced. Defendants concede that *Calpine* and *Solutia* are not binding if they are "contrary in principle" to New York law. (Opp'n at 14.) As argued in Plaintiffs' opening brief, *Calpine* and *Solutia* are, in fact, contrary to the principle behind New York's unearned interest rule. And contrary to Defendants' assertion (*id.*), *Calpine* and *Solutia* were not based upon careful consideration of New York law. *Calpine* and *Solutia* failed to assess the purpose behind the rule, or even to acknowledge that the cases were applying the rule in a novel way. *See HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010); *In re Solutia, Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007). Moreover, as noted in Plaintiffs' opening brief, New York cases confirm that the rule exists to prevent a lender from collecting a double recovery. (Opening Br. at 27 (citing *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 297 (2d Cir. 2009) (allowing recovery of unearned interest "would allow [plaintiff] to recover interest twice on the same principal"); *Bostwick-Westbury Corp. v. Commercial Trading Co.*, 404 N.Y.S.2d 968, 972 (N.Y. Civ. Ct. 1978) ("Excess [unearned] interest is in the nature of a penalty . . . "); *Chaifetz v. Schreiber*, 2003 WL 21738599 (E.D.N.Y. June 10, 2003).) *Calpine* and *Solutia* are thus contrary in principle to established New York law. Having conceded that the Court need not follow bankruptcy court cases that are contrary in principle to New York law, Defendants cannot now argue that *Calpine* and *Solutia* are binding on this Court.

Defendants' claim that *Calpine* and *Solutia* were based on careful analysis of state law is also without merit. In its discussion of the matter, the *Calpine* court cites several bankruptcy cases but only one state case: *Northwestern Mutual*, which, as discussed above, does not stand for the proposition that expectation damages may not be recovered after acceleration. *Calpine*, 2010 WL 3835200, at *5–*7. *Solutia* cites New York cases for the unremarkable proposition that a party may not retain unearned interest, 379 B.R at 487, but none of the cases dealt with expectation damages. In declining to award expectation damages, the *Solutia* court again relied upon *Northwestern Mutual* and federal bankruptcy cases, including *Calpine*. *Id.* at 488. Despite Defendants' desire that the cases be treated as the final word on the issue, *Calpine* and *Solutia* must be evaluated as bankruptcy decisions balancing the rights of competing creditors in the context of the Bankruptcy Code, and in the context of agreements that, unlike here, did not explicitly preserve the right to seek damages post-acceleration, as discussed below. Their extension of the unearned interest rule to bar expectation damages, when weighed against the history of the rule and the absence of a similar decision by a New York state court, should be rejected.

Defendants next claim that the existence of the mitigation doctrine establishes that the unearned interest rule precludes expectation damages. (Opp'n at 14.) The mitigation doctrine bars all damages other than expectation damages. Because the unearned interest rule must bar damages in addition to those barred by the mitigation doctrine, Defendants reason, the unearned interest rule must bar expectation damages. (*Id.*) A party's obligation to mitigate damages, however, in no way compels the conclusion that the unearned interest rule bars expectation damages. Defendants' mitigation argument proceeds from the false assumption that the mitigation doctrine and the unearned interest rule must bar different kinds of damages. There is no reason to accept this proposition. Indeed, as set forth above, New York cases citing the rule routinely note that it exists to prevent double recoveries. The fact that the mitigation doctrine also prohibits double recoveries in no way compels the conclusion that the unearned interest rule bars expectation damages.

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

Defendants cite no authority applying the unearned interest rule to investment contracts, arguing instead that debt instruments "are purchased for investment purposes." (Opp'n at 15.) But Defendants fail to address the important distinctions between the Investment Agreements and debt instruments, most notably that the Investment Agreements allow for fluid deposits and withdrawals over time. As argued in Plaintiffs' opening brief, the rule should not be extended to these instruments. (*See* Opening Br. at 32.)

Allowing damages in this case would not result in a windfall, as Defendants claim. (Opp'n at 15–16.) Ignoring the position taken by Plaintiffs throughout this litigation, Defendants argue that allowing damages would "provide Plaintiffs precisely the double benefit that is prohibited under New York law." (*Id.* at 16.) To the contrary, Plaintiffs seek only to recover the difference between what they would have earned under the Investment Agreements and what they were able to earn in mitigation. They seek no double recovery.

Finally, Section 5.3 of the Investment Agreements preserves Plaintiffs' ability to seek expectation damages. Section 5.3 is not the "plain vanilla" provision referenced in *Solutia*. (Opp'n at 17 (citing

Solutia, 379 B.R. at 488–89).) The provision at issue in that case merely stated an obligation already present in the contract:

> 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 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; *see also* 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 (containing nearly identical language). As the *Solutia* court pointed out, this "language d[id] nothing beyond the obvious, which is to state that payments shall be made when due." 379 B.R. at 488–89. Section 5.3 of the Investment Agreements, however, grants Plaintiffs the right to "exercise any of the rights and remedies available . . . at law or in equity" upon an Event of Default. (A. 38, Fort Benning Agreement § 5.3.) Defendants do not suggest that this language merely restates rights or obligations found elsewhere in the agreements. Instead, they vaguely claim that Section 5.3 lacks the "explicitness" necessary to preserve Plaintiffs' right to expectation damages—despite the fact this is not a repetitive "plain vanilla" clause of the type discussed in *Solutia*. As set forth in Plaintiffs' opening brief, the provisions at issue in *Calpine* and *Solutia* merely restated the noteholders' right to principal and interest. (Opening Br. at 31.) In contrast, Section 5.3 reaches more broadly and reflects the parties' intent to allow for recovery after acceleration. That intent should be honored.

C. The consequential damages sought by Plaintiffs are recoverable.

Plaintiffs' request for consequential damages is also cognizable under the law. In support of their effort to preclude consequential damages, Defendants cite *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York*, 886 N.E.2d 127 (N.Y. 2008), for the proposition that a party cannot recover consequential damages based on a "pure agreement to pay." (Opp'n at 18.) *Bi-Economy*, however, supports Plaintiffs' claims and makes clear that dismissal was in error. In *Bi-Economy*, an insurer's delayed payment to a meat market forced the meat market out of business. 866 N.E.2d at 129. The market sued the insurer, seeking consequential damages for the total loss of its business. *Id.* The defendant and the dissent, cited by Defendants, argued that the contract was purely one for payment of money and thus precluded consequential damages.

The Court of Appeals' majority rejected that claim, however, and concluded that consequential damages could be awarded.[3] In doing so, the majority concluded that "contrary to the dissent's view, the purpose of the contract was not just to receive money, but to receive it promptly so that . . . the business could avoid collapse." *Id.* at 132. The court also noted that the insurer knew the purpose of the payments and knew that failure to perform would undercut the purpose of the agreement. *Id.* As the court explained, in a "pure agreement[] to pay . . . what the payee plans to do with the money is external and irrelevant to the contract itself. In the present case, however, the purpose of the agreement—what the insured planned to do with its payment—was the very core of the contract itself." *Id.* at 130–31.

The rationale for the majority's holding in *Bi-Economy* applies with equal force here. Like the insurance contract in *Bi-Economy*, the Investment Agreements existed for one purpose: to fund Plaintiffs'

[3] Defendants' citation to the *Bi-Economy* dissent is unpersuasive here because it does not represent New York law. Delaware courts "give[] the same preclusive effect to the judgment of another state or federal court as the original court would give." *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 642 (Del. Ch. 2006). And in New York—as in most jurisdictions—the majority opinion from the state's highest court is binding on all other courts. *See In re Schneider's Will*, 131 N.Y.S.2d 215, 218 (N.Y. Surr. Ct. 1954) ("The authoritative force of a decision as a precedent in succeeding cases is not determined by the unanimity or division in the court. The controversy settled by a decision in which a majority concur should not be renewed without sound reasons . . . .").

military housing projects. The agreements were "specifically developed to meet the needs of the Plaintiffs and were negotiated with AIMGFC and AIG prior to the bond issuance." (A. 61, Compl. ¶ 40.) As in that case, Defendants here were intimately involved in Plaintiffs' financing. (A 61, 62, 64, Compl. ¶¶ 40, 41, 44, 51.) They knew that Plaintiffs' construction efforts were dependent upon the proceeds of the Investment Agreements. (*Id.*) And "AIG and AIGMFC were . . . well aware of the fact that the [Investment Agreements]—and specifically the guaranteed rate of return over a fixed period of time provided by AIGMFC—were essential to both the bond issuance and Plaintiffs' overall financing efforts." (A 61, Compl. ¶ 41.) Under the *Bi-Economy* standard, the Investment Agreements were not "pure agreement[s] to pay" because what Plaintiffs planned to do with the money was neither "external" nor "irrelevant" to the agreements. Thus, like the plaintiff in *Bi-Economy*, Plaintiffs here are entitled to consequential damages.

Scavenger, Inc. v. GT Interactive Software Corp., 734 N.Y.S.2d 141 (N.Y. App. Div. 2001), also cited by Defendants (Opp'n at 19), further illustrates that consequential damages are appropriate in this case. In *Scavenger*, a computer game developer sued a computer game producer who had failed to pay the developer for two of the games it had developed. The developer's business collapsed, and it sued for consequential damages. The court granted the amount the plaintiff was due under the contract but refused plaintiff's claim for consequential damages: "[P]laintiff has failed to raise any triable issue as to whether defendant, at the time it contracted with plaintiff, knew or should have known that, in the event of its breach, it would be answerable in damages for any consequent failure of plaintiff as an entity." *Scavenger*, 734 N.Y.S.2d at 142. The contract in *Scavenger* only contemplated the payment of money. Unlike the insurance contract in *Bi-Economy* and the Investment Agreements here, the *Scavenger* contract did not acknowledge that the money would be needed to maintain the plaintiff's business endeavors. *Scavenger* thus only emphasizes that Defendants' awareness of how termination would affect Plaintiffs' projects renders consequential damages both fair and appropriate in this case.

As set forth above, Defendants have not established, and cannot establish, that the Plaintiffs' Insolvency Default Claims were properly dismissed. The Court should not extend the unearned interest rule to preclude expectation damages. And even if the Court so extends the rule, it should not apply to the Investment Agreements because (1) they are investment instruments, not debt instruments, and (2) Section 5.3 of the agreements provides for expectation damages. Finally, the rule cannot be interpreted to bar the consequential damages sought by Plaintiffs' Complaint. For all of these reasons, the Superior Court's dismissal of Plaintiffs' Reinvestment Claims should be reversed.

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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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2013, a copy of the within document was served electronically by Lexis/Nexis File and Serve on the following attorneys of record:

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