| Credit Agricole Corporate v BDC Fin., LLC |
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| 2017 NY Slip Op 30134(U) |
| January 20, 2017 |
| Supreme Court, New York County |
| Docket Number: 651989/10 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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CREDIT AGRICOLE CORPORATE and INVESTMENT BANK NEW YORK BANK, f/k/a CALYON NEW YORK BRANCH, *et al.*,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

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UBS AG, STAMFORD BRANCH AND UBS LOAN FINANCE LLC,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

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AND RELATED COUNTERCLAIMS

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Index No. 651989/10

Mot. seq. nos. 024, 026

**DECISION**

BARBARA JAFFE, JSC:

Based on defendants' conduct as bidders in a bankruptcy proceeding auction (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]), and thereafter, plaintiffs assert contract and other claims against them. Defendants Black Diamond Capital Management, LLC (BDCM), BDC Finance, LLC and Black Diamond CLO 2006-1 (Cayman), Ltd. (together, BDC Lenders or Black Diamond), move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing counts II, VI, and VII of the amended complaint (mot. seq. no. 024). Plaintiffs move for an order granting them summary judgment in their favor on counts IV, VI and VII of the amended complaint (mot. seq. no. 026).

## I. BACKGROUND

Plaintiffs, some of which are financial institutions and investment funds, and BDC Lenders were among a syndicate of secured lenders that, together, loaned substantial sums to a nonparty group of affiliated business entities that managed and owned investments (GSC). The parties do not dispute that GSC pledged almost all of its assets to secure the loan, which included fee-generating investment management contracts and equity interests in the private equity funds that the GSC entities then managed (NYSCEF 83, ¶¶ 9-17). BDC Lenders held slightly over 51 percent of the loan interests, acquiring most of it when the loan was distressed. Plaintiffs, together with defendants, the secured creditors, assert that their interests in the now extinguished loan total 31.1112 percent.

Following the economic downturn of 2008, GSC defaulted on the loan, and both sides to this dispute contend that there was a defined event of default under the credit documents, as GSC filed for bankruptcy in 2010. Plaintiffs commenced this action in 2010, and served the amended complaint in September 2011. In December 2013, intervention plaintiffs, UBS Loan Finance LLC and UBS AG, Stamford Branch, also secured creditors, filed a complaint in intervention, with allegations almost identical to those set forth in plaintiffs' amended complaint (amended complaint and complaint in intervention together, the complaint).

In August 2010, BDC Lenders appointed its affiliate, defendant Black Diamond Commercial Finance, LLC (agent), as the administrative agent under the loan agreement and the collateral agent under the security agreement which governs the assets GSC pledged to secure its loan debt. Defendant GSC Acquisition Holdings, LLC (GSCAH) is an entity formed by a Black Diamond-controlled entity in 2011, to serve as a vehicle for the purchase of the GSC pledged assets, which were sold by GSC during the bankruptcy proceeding.

## A. The loan and security documents

The secured creditors loan agreement with GSC, entitled "Fourth Amended and Restated Credit Agreement," is dated February 28, 2007 (credit agreement). The agreement governing the collateral that GSC pledged to secure the loan is entitled "Second Amended and Restated Pledge and Security Agreement among [GSC] and UBS AG, STAMFORD BRANCH as Collateral Agent" (security agreement), and is dated February 15, 2006. The credit agreement defines the credit documents as "the Credit Agreement, the Notes, the Guaranty and the Security Documents." Here, they include the credit agreement and the security agreement.

### 1. The credit agreement

Section 10 of the credit agreement includes provisions that address GSC's default on the loan. It is undisputed that, then holding the majority interest in the loan, BDC Lenders were the "required banks." Credit agreement § 10.13, addressing "change of control," provides that:

> if any Event of Default shall then be continuing, the Administrative Agent may, and upon the written request of the Required Banks, shall . . . take any or all of the following actions . . . (iii) enforce, as Collateral Agent, all of the Liens and security interests created pursuant to the Security Documents.

The agent is permitted other recourse under credit agreement § 10.13, such as declaring the loan obligations due and owing.

Credit agreement § 10.14, governing the application of proceeds, addresses proceeds received by the agent, through the sale or collection of, or realization upon, the collateral assets upon an event of default by GSC, and provides that, after certain payments of, for example, the collateral agent's expenses and proceeds that the agent receives "shall be applied, in full or in part, together with any other sums then held by the Collateral Agent pursuant to this Agreement promptly by the Collateral Agent" first, to the payments of certain costs and fees associated with collection and realization on the collateral, and then to "the indefeasible payment in full in cash, pro rata" of GSC loan obligations, and of interest and principal (credit agreement § 10.14 [c], [d]). Remaining proceeds, if any, are to be distributed to those lawfully entitled to them.

Section 12 of the credit agreement governs the agent. A bank or the banks are defined in the credit agreement as the lending institutions, and section 12.1 of the credit agreement provides that the agent is not the lender banks' fiduciary, and it limits the agent's duties, although it also provides that section 12 is solely for the benefit of the agent and the bank. Credit agreement § 12.3 specifically exculpates the agent for actions lawfully taken or omitted in connection with the credit agreement, absent gross negligence or willful misconduct. It also provides that the agent:

> shall not be responsible to any Bank for the effectiveness, genuineness, validity, enforceability, collectability or sufficiency of this Agreement or any Credit Document or for any representations, warranties, recitals or statements made herein or therein or made in any written or oral statement or in any financial or other statements, instruments, reports, certificates or any other documents in connection herewith or therewith furnished or made by the Administrative Agent to the Banks or by or on behalf of any Credit Party to the Administrative Agent or any Bank or be required to ascertain or inquire as to the performance or observance of any of the terms, conditions, provisions, covenants or agreements contained herein or therein or as to the use of the proceeds of the Loans or of the existence or possible existence of any Default or Event of Default.

Pursuant to credit agreement § 12.4, the:

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> Administrative Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Credit Document unless it shall first receive the advice or concurrence of the Required Banks as it deems appropriate or it shall first be indemnified to its satisfaction by the Banks against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. The Administrative Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement, and the other Credit Documents in accordance with a request of the Required Banks, and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Banks.

For purposes of section 12, the terms administrative agent and agent include the agent in its capacity as collateral agent.

Section 12.5 of the agreement, addressing notice to the agent of a default, provides that:

> The Administrative Agent shall take such action with respect to such Default or Event of Default as shall be reasonably directed by the Required Banks, *provided* that unless and until the Administrative Agent shall have received such directions, the Administrative Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Banks.

Plaintiffs rely on section 14, subdivision 7(a) of the credit agreement, which governs the distribution of payments to the secured creditors that the agent receives from the borrower, GSC. It sets forth a pro rata scheme for distributions in proportion to the interest of each individual lender in relation to the total amount owed under the loan. Subdivision 7(b) provides that

> [e]ach of the Banks agrees that, if it should receive any amount hereunder (whether by voluntary payment, by realization upon security, by the exercise of the right of setoff or banker's lien, by counterclaim or cross action by the enforcement of any right under the Credit Documents or otherwise) which is applicable to the payment of the principal of, or interest on, the Loans or Fees, of a sum which with respect to the related sum or sums received by other Banks is in a greater proportion than the total of such Obligation then owed and due to such Bank bears to the total of such Obligation then owed and due to all of the Banks immediately prior to such receipt, then such Bank receiving such excess payment shall purchase for cash without recourse or warranty from the other Banks an

> interest in the Obligations of the Borrower to such Banks in such amount as shall result in a proportional participation by all of the Banks in such amount.

Pursuant to credit agreement § 14.12, it was also agreed that:

> [n]either this [Credit] Agreement nor any other Credit Document nor any terms hereof or thereof may be changed, waived, discharged or terminated unless such change, waiver, discharge or termination is in writing signed by the respective Credit Party thereto and the Required Banks, provided that no such change, waiver, discharge or termination shall, without the consent of each Bank directly affected thereby . . . release all or substantially all of the Collateral (except as expressly provided in the relevant Credit Documents).

2. The security agreement

The security agreement governs the assets that GSC pledged to secure its debt obligations under the credit agreement. In it, each pledging GSC entity is referred to as a grantor, and the agent, acting as a collateral agent, is granted liens on and security interests in the assets. Article VI of the security agreement sets forth the remedies that the agent, as collateral agent, is permitted, upon certain defaults by GSC, in order to enable the agent, on behalf of the secured lenders, to obtain or realize on the collateral that secured the debt. The first paragraph of article VI, entitled "Remedies upon Occurrence of Event of Default" is section 6.1 which provides that, upon an event of default, the agent is entitled to exercise any rights or powers, or remedies, under the agreement, or law, for the protection of the agent's rights with respect to the collateral, including those remedies of a secured party under the Uniform Commercial Code in effect in any jurisdiction. Thereafter are listed many separate enumerated, but not exclusive, remedies and rights, including those that permit the agent to take possession of and exercise rights in the collateral assets and otherwise seek to protect it and obtain its value.

The parties specifically address security agreement § 6.1(k), which permits the agent to sell and assign the collateral, at a public or private sale for cash or on credit, and upon prices and terms as the agent, in its discretion, deems reasonable under the circumstances. It also permits the agent to purchase collateral at such a sale, and further provides that:

> At any such sale neither the Collateral Agent nor any Secured Creditor shall be liable for failing to collect or realize upon any or all of the Collateral or for any delay in so doing nor shall any of them be under any obligation to take any action whatsoever with regard thereto[.]

The final remedy or right is set forth in section 6.1(l) whereby the agent is given permission to set off the collateral against GSC's loan obligations, and requires the agent to provide GSC with notice of such set offs. Following the enumerated list of rights and remedies is a provision whereby it is agreed that

> it being understood that each Grantor's obligation so to deliver the Collateral is of the essence of this Agreement and that, accordingly, upon application to a court of equity . . . the Collateral Agent shall be entitled to a decree requiring specific performance by such Grantor of said obligation. By accepting the benefits hereof, the Secured Creditors agree that this Agreement may be enforced only by the action of the Collateral Agent, in each case acting upon the instructions of the Required Banks and that no other Secured Creditor shall have any right individually to seek to enforce or to enforce this Agreement or to realize upon the security to be granted hereby, it being understood and agreed that such rights and remedies may be exercised by the Collateral Agent . . . for the benefit of the Secured Creditors upon the terms of this Agreement.

Security agreement § 6.5 governs the distribution of monies collected by the agent upon the sale or disposition of the collateral in connection with the exercise of the agent's remedies under article VI. The mandatory nature of the provision indicates that the monies collected or received by the agent under article VI are to be applied in a "waterfall" manner, beginning with the agent's expenses, followed by distribution to the secured creditors to pay off the outstanding loan debt claims in total, if the recovery is sufficient. If not, then the proceeds are to be distributed through a pro rata scheme based on the fraction of the loan held by each lender relative to the entire loan. In either case, payments required to be made to the bank creditors, defined as the collateral agent, the administrative agent, and the banks, are to be made to the administrative agent "for the account of the Bank Creditors," per security agreement § 6.5(c). Any remaining proceeds thereafter are to be distributed to the GSC grantor entity or, as directed by a court, to those lawfully entitled to receive the surplus.

B. The GSC bankruptcy

It is undisputed that when Black Diamond purchased its majority interest in the loan, the loan was distressed and trading at a discounted price. At the bankruptcy proceeding, from October 26, 2010 to October 29, 2010, most of GSC's assets, constituting the collateral that secured the loan debt, were auctioned, pursuant to Bankruptcy Code § 363. Plaintiffs assert that Black Diamond and the agent attended the auction as bidders, and that a representative of plaintiff Credit Agricole Corporate and Investment Bank New York Bank (Credit Agricole) attended as an observer. The parties do not dispute that the agent was permitted to credit bid the debt GSC owed for GSC's assets at the auction. A credit bid exchanges loan debt as consideration for assets.

During the auction, on October 27, 2010, a representative of Credit Agricole, and perhaps other plaintiff lenders, executed a letter agreement with GSC, confirming consent to modify the bidding procedures to include joint bidding, including a joint bid by Black Diamond and the agent, for the GSC assets to be sold at auction. The letter reflects that GSC had been approached by a number of bidders seeking permission to bid on lots on which they did not originally bid, and that Black Diamond and the agent had sought permission to submit a joint bulk bid. The letter also contains details of how the consent was obtained.

After soliciting plaintiffs' view on the modification, including whether to permit Black Diamond and the agent to submit a joint bulk bid, plaintiffs:

> advised [GSC] that you question the propriety of the Agent joining in a joint bid with [Black Diamond] and that such joinder and other action taken by the [Collateral] Agent in the course of the auction constitute an improper use by the Agent of the credit bid to further the interests of [Black Diamond] as bidder to the detriment of [plaintiffs] in disregard for the Agents's obligations to use the credit bid solely to protect the interests of [defendants] in the [C]ollateral.

(NYSCEF 58).

The letter also contains a representation that GSC had advised defendants that they would not agree to the joint bidding modifications unless defendants consented to a joint bid by the collateral agent and Black Diamond, and that

> [y]ou [plaintiffs] have advised us that, based on the foregoing, you consent to the modification of the bidding procedures referenced herein (including a joint bid by the Agent and [Black Diamond]. We note, however, that you reserve all claims and causes of action that you may have against the Agent and [Black Diamond] for the improper use by the Collateral Agent of the credit bid to the detriment of the [plaintiffs] and that your consent to the modifications referenced herein should not be construed as a waiver of any such claims or cause of action.

(*Id.*).

During the three-day auction, at successive rounds of bids, Black Diamond bid $5 million in cash and a $6 million note for specific lots of assets, and did not increase this amount for what plaintiffs contend were assets valued by a GSC advisor at $126 million. For other assets, BDC Lenders instructed the agent to increase the credit bid continually until it reached $224 million of the debt claim owed by GSC. Plaintiffs contend that GSC's advisor valued those assets at close to $12 million at one point, and later lowered it to approximately $5 million.

Plaintiffs allege that Black Diamond instructed the agent not to bid jointly with other bidders at the auction. On October 29, 2010, GSC determined that the joint Black Diamond/Agent bid won. Plaintiffs did not object at the auction.

C. Post-auction events

After the auction, an asset purchase agreement was executed for the sale of the auctioned assets (APA 1). Pursuant to it, GSC Acquisition Partners (Partners) was to take possession of the assets for which Black Diamond bid the cash and note, and GSCAH would take possession of the assets purchased with the $224 million credit bid. On December 3, 2010, APA 1 was amended to increase the note to $6.7 million, for a total cash and credit bid of $11.7 million.

By letter dated December 18, 2010, Black Diamond changed the structure of APA 1, directing that the assets bid for with the cash/note bid at the auction be transferred to GSCAH, and not Partners. In the letter, Black Diamond states that GSCAH was owned by the agent and Partners, defining GSCAH as the designated purchasers. (Mot. seq. no. 026 [NYSCEF 826, exh. EEE]).

On December 20, 2010, defendants filed a motion for the appointment of a chapter 11 trustee for the GSC estate, which was granted, given the bankruptcy court's determination that a GSC executive had entered into a questionable transaction concerning Black Diamond.

By letter to Black Diamond, dated December 26, 2010, GSC stated that it was terminating, repudiating, and rescinding the APA 1 sale, expressing a concern about the breach of its fiduciary duties. (NYSCEF 793).

By email, dated December 27, 2010, counsel for a defendant stated that on behalf of the agent, an attached proposed asset agreement was being submitted on the agent's behalf. It provides as consideration for GSC assets a credit bid in the amount of the entire GSC loan debt obligation, without a separate cash/note component (the "vanilla credit bid"). And, given the exigencies of the circumstances, counsel also stated that the proposal would remain open until close of business December 29, 2010. BDC Lenders assert that the vanilla credit bid constitutes an offer to purchase all of the GSC assets using only a credit bid of the entire GSC outstanding loan debt, which would have given all of the secured creditors a pro rata share of all membership interests in the acquisition entity formed to acquire all of the auctioned assets. Defendants maintain that plaintiffs rejected the proposal, desiring an alternative structure and management of GSC's assets based on the second-place bid at the auction. It is undisputed that the vanilla credit bid was not used.

By letter dated May 23, 2011, GSCAH, and the trustee on behalf of GSC, and Stephen Deckoff, on behalf of defendant BDCM, agreed to resurrect and amend the previously terminated APA 1. APA 1, as amended, was executed by GSC, BDCM and, for those provisions that applied to it, GSCAH, as the designated purchaser. The agent is not a signatory to this letter, or APA 1 as amended. In APA 1, Black Diamond agrees to direct the agent to credit bid $224 million of the secured creditors' claim against GSC, extinguishing $224 million of the GSC loan debt, and releasing the liens on the collateral that secured the debt (APA 1, § 3.1 [a] [iii]). Also exchanged for the assets was $5 million in cash and a $6.7 million note. The GSC assets sold were listed in two separate schedules labeled, respectively, exhibit G, credit bid allocations, and exhibit H, cash bid allocations.

A second asset purchase agreement, dated May 23, 2011, was entered into by GSCAH, through one of its Black Diamond LLC members, and GSC, for additional assets that secured the

GSC loan listed on an attached schedule (APA 2, together with APA 1, the APAs). In exchange, GSC received a credit bid for the remaining GSC loan debt outstanding, of $33 million at closing. It is undisputed that, under the APAs, GSC agreed to transfer substantially all of its assets in exchange for a credit bid for the full amount of the $257 million secured GSC loan claim ($224 million in APA 1 plus $33 million in APA 2), but that other, unsecured creditors, also received assets from the GSC estate. APA 2 provides that Partners assigned its rights under APA 1 to GSCAH to assume and have assigned to it by GSC the cash bid items, referring to one of the schedules listing assets in APA 1.

The trustee's motion for an order authorizing a sale of the assets resulted in a sale order, dated July 11, 2011, whereby the bankruptcy court approved the sale, pursuant to APA 1 and APA 2, but expressly preserved the rights and remedies and claims that had been filed by the parties in this action. The sale order states that nothing in it or any related bankruptcy court opinion would constitute a finding by that court concerning this action.

On July 18, 2011, the bankruptcy court issued a decision relating to the sale order, in which it notes that the minority lenders consented to modification of the bidding procedures to include a joint bid by the agent and Black Diamond, and it determined that, as defined under the bankruptcy law, there was no finding of bad faith or collusion, and that the minority lenders did not reserve a right to withdraw consent to the joint bid, but reserved the right to have adjudicated the issue of allocation of the GSC assets in this, the state court action. (*In re GSC, Inc.*, 453 BR 132, 154 [SD NY 2011]). The court also stated that, although section 2.6 of APA 1 divided the GSC assets into separate cash and credit bid allocable items, the allocation was undone by letter agreements, and the allocation among the creditors would take place after the sale hearing and before closing. For the latter proposition, the court cited Deckoff's deposition testimony. (*Id.* at 160.)

On July 26, 2011, the sale closed. The $6.7 million note was issued by GSCAH, not Black Diamond. The agent's sole employee alleges that, at the closing, the agent received $5 million from GSC in partial payment of the loan obligations and that it was understood that this had been paid to GSC as part of the purchase price for the sale, and the amount was deposited in to the agent's account at JP Morgan, with $4.72 million used to reimburse expenses incurred in connection with the sale. The agent also represents that it received a $6.7 million note from GSC, in partial payment under the loan, assigned to the agent, that has not matured and is being held on behalf of the former lenders, that in connection with the closing, it received class A membership interests in GSCAH, pursuant to the instructions of the required banks, and that holders of these interests have certain rights as set forth in GSCAH's limited liability company organizational agreement (GSCAH LLC agreement). The agent also represents that, at the direction of Black Diamond, it delivered a letter to GSC extinguishing the loan, deeming it satisfied in full, and releasing the security interests/liens, granted through the security agreement, on the collateral that had secured the GSC loan.

D. The GSCAH LLC agreement and distributions

Plaintiffs assert that, on August 20, 2011, Black Diamond provided plaintiffs with a copy of the GSCAH LLC agreement, dated July 2, 2011 (mot. seq. no. 26), which is a restated and amended agreement reflecting that when GSCAH was formed, its sole member was Partners, but that the members set forth in the amended agreement are the agent for class A interests, and Partners for class B and class C interests. It is undisputed that, on April 28, 2012, the agent attempted to transfer class A membership interests to plaintiffs. In plaintiffs' reply to Black Diamond's motion, they provide their counsel's testimony to the bankruptcy court by which he suggested that plaintiffs may have had information about the GSCAH LLC Agreement (NYSCEF 938), but whether the agreement is identical to the one in the record is not established.

Article III of the GSCAH LLC agreement provides that class A interests were exchanged with the agent on behalf of the secured creditors, in exchange for completion of the credit bid pursuant to the July 11, 2011 bankruptcy court sale order, and including the assets for which the agent credit bid $224 million at the auction and those sold in APA 2 for the $33 million credit bid. GSCAH issued class B and class C membership interests and distributed them to a Black Diamond entity, and it appears and is undisputed, that the assets allocated to those membership interests by GSCAH are the same assets for which Black Diamond submitted the cash bid at the auction. The parties agree that class B assets include GSC's management contracts, which have generated management fees. A separate agreement between BDCM and GSCAH states that BDCM is entitled to those fees.

The GSCAH LLC agreement provides that GSCAH's board is composed of one manager for each of the three membership classes, which could be the same person for more than one of the classes. The initial manager was GSC Manager, defined as a Delaware limited liability company. BDC Lenders do not dispute plaintiffs' contention that the GSCAH board, and Black Diamond, are controlled by Deckoff, or that GSCAH's distribution to members based on class A interests are in the sole and absolute discretion of GSCAH's board. The class A interests are transferrable to another GSCAH member, or otherwise, if the member attempting to sell the interests provides GSCAH with a right of first refusal, and meets certain other legal/regulatory requirements that do not include the consent of a Black Diamond entity or principal. (GSCAH LLC Agreement §§ 8.1-8.2).

As of early 2016, when plaintiffs advanced this motion, they had not yet received a distribution from GSCAH, but, at that time, approximately five years after the GSC asset sale, in 2011, GSCAH sent out a notice that class A members would be receiving a distribution.

E. Plaintiffs' claims

In Count II of the complaint, plaintiffs seek a declaration that Black Diamond and the agent may not act to injure the rights of plaintiffs to receive their pro rata share of the collateral or proceeds, based upon credit agreement §§ 10.14 and 14.7, and that they breached the implied covenant of good faith and fair dealing.

In Count IV, plaintiffs allege that the agent breached credit agreement § 12.5 and security agreement § 6.1 which require that it exercise the rights and remedies set forth in the latter for the benefit of the secured creditors. Plaintiff maintains that the agent knowingly undertook actions with knowledge that they would harm the secured creditors, including plaintiffs, and that the agent agreed to submit credit bids in connection with the APAs that would extinguish the secured creditors' $257 million debt claim against GSC in exchange for receiving nothing, and took no steps to ensure that the secured creditors receive their ratable share of the collateral procured under the APAs, as part of a strategy to siphon to its affiliates the collateral securing the secured creditors' debt claims, and avoid complying with the ratable sharing provisions of credit agreement § 10.14 and security agreement § 6.5. Plaintiffs also allege that the agent breached credit agreement § 14.12 by releasing the secured creditor's lien on the GSC assets in exchange for nothing, without the secured creditors' consent. Plaintiffs claim damages of not less than $85 million on this claim, and on all the claims on which they seek summary judgment here.

Count VI is for breach of contract against BDC Lenders. Plaintiffs contend that credit agreement § 14.7 (b) obligated BDC Lenders to share the GSC assets purportedly obtained in their individual capacity, using the cash and note portion of the joint bid, because they obtained those assets in combination with the credit bid, and breached section 14.7 by failing to share the assets. They also allege that Black Diamond breached credit agreement § 14.12 by directing the agent to release the secured creditors' lien on the collateral in exchange for nothing to the secured creditors, causing the agent to effectuate a waiver to which plaintiffs did not unanimously consent.

Additionally, plaintiffs claim that Black Diamond breached credit agreement § 12.5 and security agreement § 6.1 by directing the agent to submit credit bids in connection with the APAs that would extinguish the $257 million of outstanding loan obligations under the credit agreement as part of a strategy to siphon the collateral securing the secured creditors' debt claims to themselves, in violation of the ratable sharing provisions of the credit documents. Plaintiffs allege that Black Diamond may only direct the agent to exercise rights and remedies the "for the benefit of the Secured Creditors," and breached security agreement § 6.1 and credit agreement § 12.5 by failing to do so.

In Count VII of the complaint, plaintiffs maintain that BDC Lenders breached the duty of good faith and fair dealing by depriving plaintiffs of their rights to receive the fruits of the credit documents, and their reasonable expectations thereunder, which include the rights to receive a pro rata share of the proceeds from a disposition of the collateral, as set forth in credit agreement §§ 10.14 and 14.7, and security agreement § 6.5 and to have the controlling lenders, Black

Diamond, exercise control rights under the credit documents to advance the collective interest of the secured creditors, rather than their own pecuniary interests at the expense of all secured creditors.

## II. DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The construction of an unambiguous contract is a matter of law, appropriate for court disposition. (*See Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]) "When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document" (*ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1st Dept 2003] [citations omitted]), and the court should enforce the writing according to its terms (*Vermont Teddy Bear Co.*, 1 NY3d at 474). The court should strive to give a fair and reasonable meaning to the language, in light of the purpose and intent of the agreement as a whole (*Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d 1, 9-10 [1997]), and "every part [of the contract] will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007] [internal quotation marks and citation omitted]). In determining the parties' intent as to a particular section, a court should "consider the entirety of the agreement in the context of the parties' relationship and circumstances," so that provisions are not read in isolation (*Matter of Riconda*, 90 NY2d 733, 738 [1997]), or portions rendered meaningless. "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations." (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977] [internal quotation marks and citation omitted]) It is well settled "that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." (*Cole v Macklowe*, 99 AD3d 595, 596 [1st Dept 2012])

A. BDC Lenders' motion for summary judgment dismissing the complaint (seq. no. 24)

1. Breach of contract against BDC Lenders (sixth cause of action)

In seeking dismissal of the sixth cause of action, BDC Lenders deny that they breached credit agreement §§ 12.5, 14.7, 14.12 or security agreement § 6.1. They argue that, given the complexity of the transaction and the sophistication of the parties, the unambiguous credit agreement may not be interpreted to reflect plaintiffs' notions of fairness, which would result in an equitable windfall that would lessen a rational lender's incentive to bid jointly, and be commercially unreasonable, and as plaintiffs, unwilling to bid, consented to joint bidding, and rejected the vanilla credit bid which would have provided the pro rata distribution to which they claim entitlement. Black Diamond contends that the credit documents provide fora majority rules scheme upon an event of default on the loan, as the majority lender could appoint and instruct the agent which is exclusively authorized act on the collateral, including to credit bid.

a. Credit Agreement § 14.7 (b)

Black Diamond argues that section § 14.7 (b) requires pro rata sharing only of amounts received that are applicable to payments of principal or interest on the loans, which they contend, are only assets received for the credit bid, as they alone constitute payment on the loan, and denies that the section applies to the assets it obtained individually for the cash/note bid, paid as consideration to GSC for those particular assets, and that the GSC assets received in exchange are not "applicable to the payment of the principal of, or interest on, the Loans." It argues that the point of joint bidding was its treatment as a separate "person" that paid separate consideration for separate assets, and that, in paragraphs 70 and 74 of the complaint, plaintiffs admit that BDC Lenders acquired certain assets for itself with the cash/note bid, which was incorporated into the APAs.

In opposition, plaintiffs deny having admitted anything in their papers and argue that the evidence demonstrates that the credit bid was used to purchase all of the collateral, except $5 million worth, and that Black Diamond breached section 14.7 (b) at the closing, and thereafter, by failing to share ratably all collateral and its proceeds. Plaintiffs' position is that the terms of APA 2 and APA 1, as amended, including the May 23, 2011 side letter, demonstrate that the credit bid was used in combination with the cash to purchase all of the GSC collateral, as do Black Diamond's tax and other accounting documents. They maintain that the economic reality of the transaction is that the $5 million that Black Diamond put up for the assets did not, as shown by the tax and other evidence, buy $26 million dollars of cash held by GSC, and that the class B and C assets that Black Diamond reported to the IRS were valued at $183 million at closing.

According to plaintiffs, BDC Lenders' unilateral allocation of assets into the three GSCAH membership classes breached section 14.7(b), as all of the collateral was purchased through enforcement of the credit bid through the credit documents, without which Black Diamond would not have obtained any of the collateral. Plaintiffs assert that Black Diamond improperly divided the collateral, allocating to itself the most valuable collateral, the class B and C assets, attempting, through GSCAH, to re-institute the auction allocation.

Plaintiffs submit post-closing documents which they claim show that Black Diamond reported to the IRS an asset allocation reflecting that the credit bid was used to purchase the majority of the GSC assets. This includes BDC Lenders' alleged IRS filings indicating that they reported to have paid fair market value for one portion of class B assets of $72,407,615, which exceeds the $11.7 million combined cash/note consideration that Black Diamond claims to have contributed individually to the purchase price. Plaintiffs assert that the difference could only have come from the credit bid, which constitutes an admission that GSCAH used the credit bid to purchase this portion of the collateral. Plaintiffs also submit other tax-related documents purporting to show that Black Diamond allocated far more than $11.7 million toward the purchase price for the assets, and a spreadsheet that BDC Lenders submitted to their outside auditors that plaintiffs assert demonstrates that $211.8 million of the GSC assets were acquired with the credit bid. Plaintiffs provide the testimony of a GSC witness that Black Diamond could not have acquired the GSCAH class B and C assets in exchange for the cash/note consideration, as well as the trustees's testimony that the cash/note contributions to the purchase constituted *de minimis* consideration.

In reply, BDC Lenders denies that section § 14.7(b) requires them to share ratably assets they purchased in their individual, non-lender capacity, which are not payments received attributable to principal or interest, and that plaintiffs either have received or will receive the pro rata distribution of the assets purchased with the credit bid, which was allocated to the GSCAH class A assets, and all to which plaintiffs are entitled. Black Diamond challenges plaintiffs' assertion that the joint bid does not govern the sale of GSC Group's assets to GSCAH as it was unsubstantiated and rejected by the trustee. BDC Lenders contend that plaintiffs' current opposition claim, that APA 1 was on substantially different terms than the winning bid at the Auction (NYSCEF 931 at 3, 11), is contradicted by judicial admissions in the complaint that APA 1 embodied the joint bid.

Section 14.7 applies to a secured creditor that receives an amount in payment of the loan, in excess of its pro rata share in payment on the loan, and requires the lender to share the excess amount with the other secured creditors in accordance with their pro rata shares of the GSC loan, through the purchase of loan obligations. The amount may be received through realization upon the security, or by the enforcement of a right under any of the credit documents. When viewed with section 14.7(a), the provision evinces the intention that, whether the agent, acting as the administrative agent, received a payment, or a lender received amounts constituting a payment of the principal or interest on the loan, the amount would be shared. It is undisputed that Black Diamond, acting as the required banks, exercised a right to instruct the agent to credit bid, and credit bid the entire amount of the loan. It is also undisputed that Black Diamond, as a bidder at the auction, or through APA 1, received assets pledged as collateral on the loan.

Defendants assert that plaintiffs' allegations demonstrate that the auction governed the transaction and not the APAs. "Facts admitted by a party's pleadings constitute formal judicial admissions [and] are conclusive of the facts admitted in the action in which they are made." (*Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010] [citations omitted]; *Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012] [statement must be factual]). In paragraph 70 of the complaint, plaintiffs allege that Black Diamond and the agent submitted their first bid at the auction, and that Black Diamond would acquire for itself, and not in its capacity as a secured creditor, certain management contracts which GSC's advisor initially valued at $126 million, for approximately $11 million, while under the joint bid, the agent would acquire assets the advisor valued at $5 million for a credit bid of approximately $130 million. Paragraph 74 continues that Black Diamond bid for the management contracts, but the agent credit bid $224 million for $5 million of assets. Plaintiffs argues that their description of what Black Diamond purported to do under the terms of the joint bid does not constitute an admission where, a few paragraphs later in the complaint, plaintiffs sued to recover their share of all of the collateral purchased.

Where plaintiffs seek recovery in the complaint based on alleged wrongful bidding conduct and the APAs, paragraphs 70 and 74 of the complaint, viewed in a light favorable to plaintiffs and with the benefit of all reasonable favorable inferences that can be drawn (*Negri v Stop & Shop,*, 65 NY2d 625, 626 [1985]), may not be read as a concession that the auction governed the sales transaction, or that Black Diamond was permitted to bid for itself under the credit documents, or in the manner in which it did.

Black Diamond's documentary evidence also raises an issue of fact as to whether or not the credit bid was partly used to purchase the GSC assets. Even without consideration of the GSC testimony that, essentially, the GSC assets were sold for the consideration of both the cash and the credit bids, and the amendments to the initial asset purchase agreement, some of Black

Diamond's tax and other internal documents appear to indicate that the credit bid amounts were used to purchase all of the assets, and allocate the consideration in a manner inconsistent with Black Diamond's position concerning the auction. BDC Lenders do not dispute the content of some of those documents, but argue that they should be ignored, because they reflect only an agreement with GSC and because courts may ignore tax documents that parties use in order to obtain other advantages. However, Black Diamond does not seriously dispute plaintiffs' contentions about the contents of the documents, the meaning of which constitutes a fact issue.

In reply, Black Diamond argues that APA 1 incorporates the auction results, and that each APA contains a section expressly providing that the purchase price will be allocated among the various acquired assets subsequent to the closing of those agreements (APA 1 § 11 [b]; APA 2 § 10.1 [a]). According to Black Diamond, these sections suggest that the assets were allocated to match the respective auction bids. In any event, in moving, defendants do not demonstrate how the allocation was included in the APA agreements, the purchase price terms of which are not identical to the bid. For instance, the note amount was increased to $6.7 million, and while a Black Diamond entity may have been ultimately responsible for its payments, through the GSCAH LLC agreement, it was not issued by a Black Diamond bidder. Black Diamond's reply argument, that plaintiffs admit in the complaint that APA 1 encompasses the auction results, is based on allegations in the complaint that are not raised in its moving (*see* NYSCEF 83, §§ 77, 86), and are not considered.

Black Diamond also maintains that the assets to be shared with the minority lenders under credit agreement § 14.7 were only those purchased with the credit bid at auction. Assuming, without deciding, the truth of this assertion, Black Diamond does not demonstrate, in moving, that it met the obligations sets forth in section 14.7 to purchase the debt obligations of the other lenders in cash, nor does it explain why it did not, or how the approximate five-year delay in distribution comports with the credit documents, or with the law. These issues preclude summarily dismissing the contract claim.

b. Credit agreement § 14.12

Black Diamond argues that plaintiffs' claim that credit agreement § 14.12 requires the unanimous consent of all of the lenders before Black Diamond could direct the credit bid to extinguish the loans and release the collateral, contradicts their admissions during the bankruptcy proceedings, conflicts with the terms of the credit documents, and has been consistently rejected by the courts. Defendants deny that credit agreement § 14.12 was breached because the security interests on the collateral were released in a manner consistent with the credit documents, as credit agreement § 10 and security agreement § 6.1 (k) provide the agent the authority to purchase the collateral upon an event of default, if instructed to do so by the required banks. Defendants argue that plaintiffs' interpretation of these provisions would render them meaningless, as they admitted that Black Diamond has the right to control the credit bidding, and that, had the parties intended to require plaintiffs to consent to a credit bid, they could have so provided.

Where a defined event of default by GSC occurs, the agent may exercise many remedies under the security agreement (*see* security agreement § 6.1). Credit agreement § 14.12 provides that, without the consent of each bank directly affected, all or almost all of the collateral may not be released except as provided for in the credit documents. A credit bid by the agent is consistent with the credit documents, as the security agreement provides the agent with the right to access any right, power or remedy vest in it by law (*id.*), which would include credit bidding under the bankruptcy law (*see Matter of Metaldyne Corporation*, 409 BR 671, 678-679 [SD NY 2009] [credit bid and release of security interests permitted under loan documents]). Although defendants argue that their actions are consistent with the credit documents, they do not demonstrate, as a matter of law, that the agent purchased or collected the collateral, for which it was instructed to bid, with the credit bid, a basis for the release of the GSC debt, where the assets were transferred to GSCAH, or how it is consistent with the credit documents, thereby precluding summary judgment at this juncture.

c. Credit agreement § 12.5

In the complaint, plaintiffs claim that Black Diamond failed to act for the benefit of all of the secured creditors by submitting inflated credit bids, increasing only the credit bid, and prohibiting the agent from entering into joint bids with other bidders. BDC Lenders argue that they are entitled to summary judgment dismissing plaintiffs' contract claim because credit agreement § 12.5 and security agreement § 6.1 impose no obligation on the required banks, and security agreement § 6.1(k) is exculpatory. While, as discussed below, I do not interpret security agreement § 6.1(k) as exculpating Black Diamond, plaintiffs submit no opposition to this portion of the motion. Consequently, plaintiffs' contract claim, under credit agreement § 12.5, is dismissed to the extent that the complaint states a claim for the breach of a direct contractual duty imposed upon BDC Lenders under that provision, other than the duty of good faith and fair dealing based on control rights in the credit documents.

d. Other issues

Black Diamond's unsupported assertions as to what a rational sophisticated lender/bidder might or might not do concerning bidding at a bankruptcy auction are not dispositive. Without supporting evidence, Black Diamond's assertion does not resolve, but merely raises, the issue, about which no party points to record evidence.

Black Diamond's argument, that, at the auction, plaintiffs failed to claim entitlement to assets that other bidders desired to purchase, does not address that the other bidders were not parties to the credit agreement or part of the lending syndicate. BDC Lenders' contentions about the trustee's conclusions concerning the sale ignores that the trustee administered the GSC bankruptcy estate, and his opinions are not conclusive evidence of legal issues in this case.

The circumstances under which plaintiffs may have rejected the vanilla credit bid, an offer that may have been rejected by GSC, are not adequately addressed in the record, and the significance of Black Diamonds' assertion that plaintiffs rejected it because they did not want Black Diamond to manage, and presumably obtain the fees for managing, the management contracts, was provided as background information. Black Diamond has not adequately demonstrated how this is, as a matter of law, dispositive of the allegations in the complaint. Black Diamond is correct that plaintiffs point to nothing in the credit documents that specifically states that Black Diamond was required to follow the instructions of the minority lenders, but how that is dispositive is not demonstrated.

<u>2. Breach of the implied duty of good faith and fair dealing (seventh cause of action)</u>

BDC Lenders seek the summary dismissal of count VII in which plaintiffs allege that Black Diamond's acts deprived them of the fruits of the credit documents, and their reasonable expectations thereunder, which plaintiffs describe as the right of each secured creditor to receive its pro rata share of the proceeds from a disposition of the collateral, as set forth in credit agreement §§ 10.14 and 14.7 and security agreement § 6.5, and to have the controlling lenders under the credit documents exercise their control rights thereunder to advance the collective interest of the secured creditors rather than their own pecuniary interests at the expense of all secured creditors, resulting in $85 million in damages.

It is well known that every contract contains an implied covenant of good faith and fair dealing which "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [implied promises include "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" [internal quotation marks and citations omitted]). The party making a claim of an implied promise in an agreement, "must prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole." (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]).

Where a contract contemplates the exercise of discretion, discretion may not be exercised in bad faith, depriving other contracting parties of the agreement's benefits, but in a rational manner that is not arbitrary. (*Dalton*, 87 NY2d at 389; *see Matter of Kaszirer v Kaszirer*, 298 AD2d 109, 110 [1st Dept 2002]; *1–10 Indus. Assoc. v Trim Corp. of Am.*, 297 AD2d 630, 631–632 [2d Dept 2002] [where relocation agreement did not contain express provision requiring defendant to act reasonably in approving proposed sites, obligation to exercise good faith was implied]; *see Cohen PDC, LLC v Cheslock–Bakker Opportunity Fund, LP*, 94 AD3d 539, 540 [1st Dept 2012] [dismissing implied covenant where buy/sell calculation was governed by the express language agreement, and nonmovant failed to establish that movant "engaged in any arbitrary, unreasonable, oppressive, or underhanded conduct"]). "The exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits." (*Hirsch v Food Resources, Inc.*, 24 AD3d 293, 296 [1st Dept 2005]; *see Tradewinds Fin. Corp. v Repco Sec., Inc.*, 5 AD3d 229, 230-231 [1st Dept 2004] ["Although defendants had the discretion to call in their margin loan to plaintiffs at any time reasonably necessary for their protection, this discretion was not unfettered since it remained subject to the implied duty of good faith"]).

BDC Lenders argue that plaintiffs' allegation that they breached the implied covenant of good faith and fair dealing in July 2011 must be dismissed: (1) as duplicative of the contract claim; (2) because security agreement § 6.1(k) precludes such liability; and (3) because, under the terms of the credit documents, those in plaintiffs' position would not have been justified in understanding that certain alleged implied promises were included in the transactions.

a. Duplicative

Where contract and implied covenant claims both arise from the same facts and seek the same damages, the latter may be dismissed as duplicative. (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419–420 [1st Dept 2011]). BDC Lenders argue that since their motion to dismiss the implied covenant claim was denied as duplicative, disclosure has generated no evidence that it is duplicative, and argue that the claims for breach of contract and the implied covenant are based on the facts set forth in the 93 paragraphs comprising the factual portion of the complaint, and that both claims are based on allegations that: (1) plaintiffs are entitled to their ratable share of the proceeds from a distribution of collateral; (2) Black Diamond failed to act for the benefit of all lenders; and (3) the injury is the failure to share ratably assets obtained in the auction. They also observe that the damages sought in each claim are the same. In opposition, plaintiffs rely on the First Department's rejection of defendants' arguments.

As BDC Lenders' argument is based on alleged gaps in the opposing party's case, instead of disposing of material factual issues, as required on this motion (*Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]), and as defendants' earlier motion on the same ground was adjudicated against them by the appellate division, and based on the reasoning set forth therein, it will not be revisited.

b. Section 6.1(k)

Black Diamond argues that within security agreement section 6.1(k) is an exculpatory provision that insulates all of the secured creditors from liability, including Black Diamond acting in the role of required banks. As discussed *supra* (II.A.2., at 6-7), section 6.1(k) is encompassed within article VI of the security agreement which addresses and enumerates the rights and remedies to which the agent is entitled, including the agent's right to sell, or assign and deliver, or grant options to purchase the collateral, at a public or private sale for cash, credit or other property. It is at any "such" sale, to the extent not prohibited by law, that the agent, on behalf of the secured creditors, was permitted to bid for and buy collateral sold.

In context, section 6.1(k) addresses a particular remedy, that of the agent's sale of collateral, and its purchase of collateral during such a sale, and it exculpates the agent or the secured creditors against liability in the exercise of that remedy. However, the agent did not sell GSC's collateral assets. Rather, GSC, the debtor bankruptcy estate, did, and the exculpatory provision does not apply to GSC. That section 6.1 otherwise supports Black Diamond's contention that the parties intended to ensure the orderly realization and disposition of the collateral, and enforcement through the agent, it is separated from the enumerated remedies, and is not dispositive.

In its reply brief, Black Diamond relies on *Manufacturers Hanover Trust Co. v Horak*, 1989 WL 2082, *1-4, 1989 US Dist LEXIS 250, *10-11 [D NJ 1989]). While distinguishable on its facts, the decision demonstrates the general purpose of such exculpatory provisions. There, a lending bank argued that a loan guarantor could not assert a claim of breach of the implied covenant as a defense to the enforcement of the guaranty based on the bank's settlement of a dispute for the borrower's accounts receivable claim against a third party for less than full value. The court dismissed the implied covenant defense, stating that the purpose of the exculpatory provision was to allow the bank to determine for itself how to recover funds upon the borrower's default, and that the borrower relinquished the right to second-guess the bank as to its handling of the matter, whereby it merely took advantage of a contractual provision agreed to by the parties. In that case, the court determined that the exculpatory provision applied. Here, by contrast, borrower GSC has not attempted to sue the secured creditors or the agent for failing to realize upon the collateral. Consequently, *Manufacturers Hanover* is inapposite in the circumstances presented here.

BDC Lenders assert that neither they nor plaintiffs are parties to the security agreement, the overall purpose of which was to permit the agent to obtain and realize upon the GSC assets, for the lenders. BDC Lenders ignore that the security agreement, defined as a credit document in the credit agreement, demonstrates, with other provisions set forth in the credit documents, that

Black Diamond was afforded certain control rights to exercise.

c. The implied promises

Defendants argue that the implied duty claim should be dismissed, as a matter of law, because it does not create independent contractual rights or imply obligations inconsistent with contract terms, or nullify contract rights, and includes only those promises that a reasonable person in plaintiffs' position would understand to be included.

Defendants argue that they should not be subject to after-the-fact claims of duties that are not tied to the express written agreements, and that the implied duty claims, inconsistent with the contract, should be dismissed. Black Diamond argues that in the credit documents, sophisticated lenders: (1) authorized the required banks to direct the actions of the agent upon an event of default; (2) agreed that those directions were binding on all banks; and (3) agreed that no lender would incur liability for a failure to realize on the collateral. Thus, it maintains that a reasonable promisee would not believe that the required banks were obligated to match the valuation of the underlying assets sought to be acquired with the bids, or to defer to the judgment of other lenders as to how best to proceed after default. As discussed *supra* (II.A.2.b., at 29), security agreement § 6.1 is not exculpatory. That Black Diamond could direct the agent, and that this was binding on the other secured creditors is not sufficient to demonstrate, as a matter of law, that there could be no implied promises.

Relying on credit agreement § 14.7, Black Diamond states that the credit documents provide that only amounts received that are "applicable to principal, or interest, on the Loans" are to be shared, and argues that a reasonable promisee would not believe that it was required to share with the other secured creditors assets for which it individually paid cash, for its own benefit, at the auction, merely because it jointly bid with the agent where the other secured creditors agreed to allow joint bids, and each lot bid upon was to go to the winning bidder for the particular lot. BDC Lenders also contend that a reasonable promisee would not have believed that the required banks' designated asset manager would have to share with the other lenders the management fees it earned in exchange for managing the assets, where plaintiffs concede that the credit documents were drafted to permit the agent to submit a plain vanilla credit bid for all assets, which allowed the required banks to take control of the management contracts, and hire an asset manager of their choosing.

In opposition, plaintiffs deny having claimed that Black Diamond was required to match bids or to defer to the judgment of other lenders, and argue that BDC Lenders avoid addressing plaintiffs' claim that they breached the implied covenant by using their power as the required banks to deprive them of the contractual benefits of: (1) the right of each secured creditor to have the controlling lenders under the credit documents exercise their control rights thereunder to advance the collective interest of the secured creditors, rather than their own pecuniary interests at the expense of all secured creditors; and (2) each lender's pro rata share of the proceeds from a disposition of the collateral, as set forth in credit agreement §§ 10.14 and 14.7 and security agreement § 6.5.

In relying on security agreement § 6.1, plaintiffs argue that, in enforcing the security agreement, the collateral agent must act "for the benefit of the Secured Creditors," and credit agreement § 12.5, which expressly imposes duties on the agent toward the secured creditors. According to plaintiffs, a reasonable person would understand that the required banks, as majority lenders, could not exercise the control rights of section 6.1 for their exclusive benefit by using the credit bid as a mere tool to advance their own interests at the expense of the secured creditors as a group, but that Black Diamond did so by giving the agent unreasonable directions to act against the secured creditors' collective interests. Plaintiffs assert that defendants do not argue against the existence of such a duty, or allege that they complied with it, or that their instructions to the agent were either reasonable or for the benefit of the secured creditors. They also maintain that the evidence establishes that BDC Lenders instructed the agent to submit credit bids that grossly exceeded the value of the collateral purportedly to be acquired thereby, so that BDC Lenders could acquire GSC's most valuable assets at a shockingly low price, squandering the secured creditors' secured claims, and that this was not a bidding strategy "for the benefit of the secured creditors," thereby depriving plaintiffs of their right to have the agent act in that manner. Absent this conduct, plaintiffs contend that the secured creditors would have received at least the proceeds of the next highest bid at the auction, that they assert was valued at $194 million, but instead have received nothing.

While plaintiffs' interpretation of credit agreement § 12.5 may be overly expansive, and various sections of the credit documents permit Black Diamond to instruct the agent, Black Diamond does not demonstrate that it was not required to act in good faith. In the remedies section of the security agreement, section 6.1 vests in it entitlement to exercise all of the rights and remedies under the security agreement, and the law. The final portion of section 6.1, which applies to all of the remedies, provides that the secured creditors, including BDC Lenders, agree that only the agent may enforce the remedies, acting upon the required bank's instructions, and that the secured creditors have no right to either enforce the agreement, in other words, to exercise the remedies, or otherwise interact with GSC, individually or "to realize upon the security to be granted," in that it was understood and agreed that only the collateral agent could exercise the rights and remedies for the benefit of the secured creditors. As the remedies may be exercised only upon a default by the borrower, this provision was intended to ensure action by the collateral agent against GSC, to obtain a recovery for the secured creditors, per the security agreement. Black Diamond has not demonstrated that it exercised control rights that it had to instruct the agent in good faith, at either the auction, or in the amended APA 1, or in instructing the agent to accept membership interests from GSCAH with restrictions on distributions at Black Diamond's control.

Black Diamond uses the term "majority rules," but does not demonstrate that the term is synonymous under the credit documents with conferring on the majority lender unbridled discretion to exercise control rights over the distribution of assets or monies, where the pertinent provisions governing distribution evince the intentions that the lenders act collectively, with the required banks directing the agent for the benefit of the collective group. The agent was the agent for the banks, not BDC Lenders in their capacity as a secured lender, or in the role of required banks (*see eg* credit agreement § 12.1 ["the Administrative Agent shall act solely as agent of the Banks"]; security agreement recitals ["Collateral Agent . . . for the Secured Creditors"]; section 6.1 [remedies may be exercised by Collateral Agent . . . for the benefit of the Secured Creditors"]). That Black Diamond, acting as the required banks, was permitted to instruct the agent, with those instructions binding on the secured creditors, is not exculpatory, and the loan documents were drafted by sophisticated parties that could have, but did not, make that clear.

The evidence demonstrates that what Black Diamond claims was purchased with the credit bid may have been grossly disproportionate to the value of the bid, and employing Black Diamond's logic, the secured creditors would have no recourse had Black Diamond bid $1 in cash for a $100 million mansion, and instructed the agent to credit bid $100 million of the outstanding loan debt for the door mat. Black Diamond alludes to this issue, through, for example, its contention that it was not required to defer to the minority lender's direction, but it does not constitute a demonstration of good faith conduct in exercising a right effecting a collective group.

Black Diamond also fails to demonstrate, as a matter of law, that the fact that plaintiffs entered into the letter agreement, with GSC permitting the joint bid, bars plaintiffs' claim as a matter of law. The letter agreement is not with Black Diamond, and it contains a reservation of rights. Although it is not disputed that there was an announcement at the auction that joint bids were permitted, it cannot be concluded, as matter of law, that this constituted plaintiffs' agreement or representation that no matter how BDC Lenders instruct the agent to use the joint bids, plaintiffs intended to relinquish legal rights against Black Diamond concerning the nature of the bid or the structuring of the purchase. No party states that plaintiffs' counsel, or any plaintiff, stated or suggested to Black Diamond or the other bidders that the minority lenders were agreeing to exculpate Black Diamond from liability for the improper use of the credit bid, including in a manner inconsistent with the credit documents. GSC may have been able to use the letter as a sword against plaintiffs, or at least Credit Agricole, but BDC Lenders have not established, as a matter of law, the entitlement to do so in a blanket manner against plaintiffs under the circumstances.

In light of the foregoing, Black Diamond's motion to dismiss count VII of the complaint is denied, and it is unnecessary to reach plaintiffs' argument that BDC Lenders abused their contractual authority as majority lenders by directing Black Diamond to submit the credit bid and payoff letter in connection with APA 1 and APA 2, or exercised their control rights to deprive plaintiffs of their right to receive their pro rata share of loan recoveries.

B. Plaintiffs' summary judgment motion (seq. no. 026)

1. The contract claim

"To recover damages for breach of contract, the plaintiffs must demonstrate the existence of a contract, [their] performance pursuant to that contract, the defendants' breach of their obligations pursuant to the contract, and damages resulting from that breach." (*W. Park Assoc., Inc. v Everest Natl. Ins. Co.*, 113 AD3d 38, 44 [2d Dept 2013] [internal quotation marks and citation omitted]) Plaintiffs argue that Black Diamond breached credit agreement § 14.7 by failing to share GSC assets it received, and that the structure of GSCAH was impermissible under section 14.7, as it renders the membership interests worthless. Plaintiffs seek damages of $79,966,784, or alternatively, $68,292,899.

a. The alleged breach of section 14.7

Plaintiffs describe section 14.7 as a standard sharing provision, through which lenders collectively share the risk of unequal treatment, and argue that section 14.7 (b) imposes on BDC Lenders an affirmative duty to share with them any loan and collateral recovery that they received as a result of asset purchases made with the lender's loan claim, as the provision requires a secured creditor that receives an amount in excess of its pro rata share to share such excess amount with the other secured creditors, in accordance with their pro rata shares of the GSC loan, through the immediate purchase of loan interests. (NYSCEF 852 at 16).

Plaintiffs rely on Deckoff's statements in affidavits filed in this case, shortly before the July 26, 2011 closing on the sales transaction, that they would receive at closing their pro rata share of GSCAH interests, based on their respective individual interests in the loan "attributable to the GSC assets purchased pursuant to the Credit Bid as set forth in [APA 1]" as well as the assets purchases pursuant to APA 2. They also rely on *Prudential Ins. Co. of Am. v WestLB AG*, in which the court determined that assets purchased with a credit bid were to be shared under the terms of the parties' agreement, even though only some lenders also contributed additional funding outside the underlying credit/security agreement. (37 Misc 3d 1208 [A], 2010 NY Slip Op 51935(U) [Sup Ct, NY County]). In *Prudential*, there is no dispute that the collateral was purchased with the credit bid.

According to plaintiffs, they are entitled to the repayment of their entire loan claim because the value of the collateral that was required to be shared exceeded the value of the GSC debt, and argue that because BDC Lenders directed the agent to credit bid the entire secured debt claim and extinguish GSC's debt obligation, they are estopped from claiming that the value of the collateral acquired with the credit bid was less than that amount of the $257 million credit bid they directed. They alternatively contend that the value of the collateral to be shared is at least $211,766,879, based on BDC Lenders' documents used for tax reporting that indicate that at closing the collateral assets had a fair value of no less than $223,466,879. By subtracting the $5 million and $6.7 million note consideration, plaintiffs conclude that the fair value received in exchange for the credit bid was $211,766,879. Plaintiffs state that documents they submit demonstrate that Black Diamond allocated the $211,766,879 fair value ratably among the secured creditors in documents submitted to the IRS.

In opposition, BDC Lenders contend that plaintiffs fail to meet their burden of establishing entitlement to judgment as a matter of law because the West affirmation contains errors, inconsistencies, and omissions, rendering it insufficient to support summary judgment. Without defendants' explanation as to how any mistake or issue with the affidavit precludes summary judgment, this argument is conclusory. Any instances where an assertion not supported with admissible evidence, such as the assertion in paragraph 30 of the affirmation, may be disregarded.

BDC Lenders argue that plaintiffs' claim of a breach of section 14.7 should be dismissed because: (1) plaintiffs fail to establish that they breached section 14.7, which is inapplicable as the agent purchased the assets bid upon with the credit bid pursuant to security agreement § 6.1(k), and distributed the GSCAH class A membership interests pursuant to article VI of the security agreement; (2) section 14.7 does not require payments of the assets Black Diamond acquired individually with the cash bid; (3) security agreement 6.1(k) contains an exculpatory provision; and (4) section 14.7 applies only to repayments on the GSC loan, and plaintiffs do not identify any amounts that the GSC Lenders received applicable to principal or interest on the loan in excess of BDC Lenders' pro rata share.

Again, security agreement 6.1(k) does not apply, and although section 14.7 requires a lender that receives assets applicable to payment on the loan, with values in excess of its pro rata share, through enforcement of the credit bid or otherwise, to purchase loan obligations of other lenders, fact issues remain. In the complaint, plaintiffs' statements, viewed in a light most favorable to Black Diamond, suggest that the sales transaction was structured so that assets that would have been sold under the joint bid would be sold pursuant to APA 1. (NYSCEF 83, ¶ 86]).

Plaintiffs do not address the auction in their motion. Rather, they focus on the three months after the auction and argue in reply that the APAs, as purchase documents, govern the sale over the auction as nothing was sold until then. Whether this is true, what occurred at the auction is not irrelevant, and as it was not adequately addressed by plaintiffs in moving, it is improperly raised for the first time in reply and does not constitute a sufficient basis for granting summary judgment.

In their reply, plaintiffs also attempt to remedy deficiencies in their moving papers by relying on Black Diamond's assertions in other motions to demonstrate what they deem Black Diamond's confession that section 14.7 applies and requires distribution of certain assets. Assuming that Black Diamond's prior assertions constitute evidence of an informal judicial admission (*see GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011] ["An informal judicial admission is a fact "incidentally admitted during the trial or in some other judicial proceeding. Such an admission is not conclusive . . . in the litigation but is merely evidence of the fact or facts admitted" [internal quotation marks and citation omitted]), again, having raised it in reply without affording Black Diamond an opportunity here to address it, precludes entitlement to summary judgment on this ground.

<u>b. The structuring of GSCAH after the sale</u>

Plaintiffs also contend that Black Diamond breached section 14.7 by taking control of the collateral, misallocating it through GSCAH, and providing plaintiffs with GSCAH class A membership interests that are worthless because they are not transferable and because GSCAH distributions to members are subject to the consent of its board, controlled by Deckoff, preventing their monetization. According to them, even though the collateral GSCAH holds has generated millions of dollars in cash returns, in addition to the $26 million cash transferred to GSCAH at the closing of the APAs, plaintiffs have not received a distribution from GSCAH in five years.

The GSCAH distribution demonstrates that the interests are not worthless, as plaintiffs argue, and are transferable. That the membership interests are subject to the consent of the GSCAH board, and may prevent their monetization, are unsupported by any evidence, and there is testimony in the record which may suggest that, while plaintiffs objected to the asset allocation, they did not object to GSCAH's structure (NYSCEF 938), and that the agent's inability to effect a GSCAH distribution may affect the value of the assets raises unanswered fact issues, including damages.

In reply, plaintiffs characterize as frivolous Black Diamond's assertion that section 14.7 does not apply because the credit bid assets were purchased by the agent under security agreement § 6.1, arguing that the agent did not purchase any assets and was not a party to the APAs, as GSCAH was the purchaser. Although the APAs reflect that the agent never directly collected the assets GSC sold, as they were transferred to GSCAH as the purchasing entity, plaintiffs do not address this issue in their initial papers. Rather, the premise of their argument is that the interests had no value.

Black Diamond also raises a factual issue as to damages concerning the fees generated from management contracts, which Black Diamond contends plaintiffs had no reasonable expectation of receiving. Plaintiffs' reply argument about damages is based on evidence concerning events that occurred after plaintiffs filed their motion. While the sudden distribution by GSCAH may reflect Black Diamond's prior failure to act in good faith, which in itself constitutes a factual issue, it may not be first raised in reply, even if based on new evidence. And, in addition to providing two figures for damages in moving, plaintiffs argue that, absent defendants' conduct, the secured creditors would have received the proceeds of the next highest bid at the auction, valued at $194 million. Plaintiffs' estoppel argument as to the value of the assets ignores that the complaint also raises a fact issue as to the value of the credit bid assets.

2. The implied covenant of good faith and fair dealing

Plaintiffs contend that BDC Lenders did not exercise control rights under the credit agreement and security agreement to advance the collective interests of the secured creditors, rather than their own interests, and breached the implied covenant by instructing the agent to release liens on all collateral and to allow it to be transferred to the exclusive control of Deckoff in APA 1 and APA 2. They argue that the ability of a majority of lenders to instruct the agent upon an event of default by the GSC Group arises under credit agreement §10.13, which concerns the agent's enforcement of the liens and security interests created pursuant to the security agreement. Plaintiffs also maintain that the required banks may direct the agent to enforce the security agreement pursuant to its terms only, which permit the agent to enforce that agreement in a manner that is for the benefit of the secured creditors. According to them, even though the credit documents may not expressly prohibit Black Diamond from giving a direction to the agent that is contrary to the secured creditors' interests, such a direction is prohibited by the implied covenant, because, as majority lenders, defendants had a duty not to abuse their contractual rights to achieve an unfair or disproportionate recovery compared to the minority lenders.

Plaintiffs deem Black Diamond's instructions to the agent to release the collateral to

GSCAH, instead of to the control of the agent, charged with acting on behalf of the secured creditors, a bad faith effort to deprive them of the fruits of the loan bargain, as the agent had no knowledge of recoveries, if any, the secured creditors might receive in exchange. They assert that BDC Lenders' directions to the agent in connection with the APAs resulted in Black Diamond receiving a grossly disproportionate allocation of the collateral, at the expense of plaintiffs who received nothing for five years, and to the extent that BDC Lenders had discretion in their ability to direct the agent, the instructions constituted an abuse of discretion that injured plaintiffs' right to receive the fruits of the contract.

In opposition, Black Diamond does not deny that it has a duty of good faith and fair dealing, but argues that it satisfied those duties, relying on the exculpatory provision of section 6.1(k). Again, however, that provision does not apply. It argues that after the bankruptcy court approved the sale, the APAs were consummated, and GSC sold its assets to GSCAH, the entity designated thereunder to make the purchase.

As discussed *supra*, plaintiffs fail to establish, as a matter of law, their entitlement to that portion of the collateral that Black Diamond claims as its own. In addition, assuming, *arguendo*, the truth of plaintiffs' contention that BDC Lenders received the assets under section 14.7 and breached that provision by failing to share them, plaintiffs do not sufficiently demonstrate how it implicates Black Diamond's instructions to the agent. The premise of plaintiffs' argument about section 14.7 is that Black Diamond received the assets, and that where any lender does so, under the terms of section 14.7, that lender is obligated to act. This provision does not involve the agent, as it is breached by the receiving lenders' receipt of "amounts" and that lenders' failure to share purchase loan obligations under those circumstances.

And assuming, for purposes of argument, that the structuring of the sale, transferring the assets to an LLC acquisition vehicle, and then distributing membership interests with restrictions, was a breach of the implied covenant, there is a factual issue as to the damages that flow therefrom. For the aforementioned reasons, plaintiffs' motion for summary judgment against BDC Lenders is denied.

C. Plaintiffs' summary judgment motion against the agent (seq. no. 26)

In count IV of the complaint, plaintiffs allege that the agent breached credit agreement § 12.5 and security agreement § 6.1, by following the unreasonable instructions of Black Diamond to release all of the collateral that secured the loan to GSCAH without ensuring that the secured creditors received a pro rata share of the proceeds of the bankruptcy sale. They assert that the agent thereby disregarded the secured creditors' interests in bad faith.

Plaintiffs argue that notwithstanding the requirement set forth in section 12.5 that the agent follow Black Diamond's reasonable instructions, and act in the best interests of the secured creditors, the agent did neither when it accepted and followed Black Diamond's directions to nullify the collective design and customary pro rata sharing provisions, demonstrated in credit agreement §§ 14.7 and 10.14 and security agreement § 6.5. They also argue that as section 6.1 requires that the agent act "for the benefit of the Secured Creditors," the Agent thereby promised to act for the secured creditors, as a collective group, to prevent individual lenders from attempting to enforce the security agreement against GSC. According to plaintiffs, this promise is at the heart of the security agreement, without which no secured creditor would forgo its rights to enforce the liens and security interests, and the loan would effectively not be secured. They interpret section 6.1 as requiring the agent to both act pursuant to an instruction from the required banks and "for the benefit" of the secured creditors.

Plaintiffs also argue that the agent enforced the security agreement when it released liens on the collateral, as one of the express enforcement mechanisms available to it, in section 6.1(l), "to set off any and all Collateral against any and all Obligations," but maintain that the setoff and release of the liens harmed the secured creditors by nullifying the pro rata distribution arrangement, and transferring all collateral to a Black Diamond-controlled entity, GSCAH, with recoveries distributed according to Deckoff's sole discretion. They observe that the standard pro rata distribution provisions in credit agreement §§ 10.14 and 14.7, and security agreement § 6.5 "underscore[] the collective design of the agreements that Lenders share the risks of potentially unequal treatment." (*Beal Sav. Bank*, 8 NY3d at 329; *see also Credit Francais Intl. v Sociedad Fin. de Comercio, CA*, 128 Misc 2d 564, 578 [Sup Ct, NY County 1985] [concerning standing of individual creditors; sharing provisions designed "to prevent any participating bank from obtaining an undue preference over another"]). Similarly, credit agreement §§ 10.14, 14.7 and security agreement § 6.5 demonstrate an intended pro rata distribution scheme.

Plaintiffs assert that, from the perspective of the secured creditors, the net effect of the APAs was to extinguish their GSC loan claims, release the liens on the collateral, and transfer hundreds of millions of dollars of collateral to third-party GSCAH, controlled by Deckoff and Black Diamond, with the predictable result that plaintiffs received nothing, demonstrating that the agent followed unreasonable instructions that were contrary to their interests.

In support, plaintiffs provide testimony of the agent's employee that he had no general knowledge of the assets purchased with the $224 million credit bid, or the value of credit bid assets incorporated into APA 1, or an understanding of what the secured creditors' recovery would be. As to damages, plaintiffs' position is that the value of the collateral at the closing of the sale was greater than the amount owed by GSC on the loan, and that they are therefore entitled to the full amount of their loan interests. They maintain that if the agent had been acting for the benefit of the secured creditors, it would not have agreed to deliver a payoff letter, and to release the liens for anything less than a full recovery for the secured creditors, and that they have received only worthless assets.

In opposition, the agent argues that the exculpatory provisions in the credit documents are dispositive, and not changed by section 12.5, which is consistent therewith, as it was written for the agent's protection and does not impose a duty to assess the reasonableness of the required banks' instructions, disregard instructions it deems unreasonable, and instead substitute its own independent judgment as to what is best for all lenders with respect to the realization of collateral, but compels it to follow the reasonable direction of the required banks. In the absence of such direction, the agent contends that section 12.5 provides that it may take action, but is not obligated to do so. It relies on section 12.5 wherein it permits but does not require it to take action, as demonstrating that it has the option of taking action with respect to realizing upon the collateral if it fails to receive appropriate instructions, but has no affirmative duty to do so. The agent also cites the bankruptcy court's opinion that the agent had "no discretion" when given instructions by the required banks (*see In re GSC*, 453 BR at 182-83, 186), and observes that had the parties intended to obligate the agent to exercise its own judgment over that of the required banks, the contract would have said so. The agent contends that section 12.5 does not create agent liability based on some hindsight claim as to the reasonableness of instructions received, which would run counter to the full protection given it in section 12.4.

The agent challenges plaintiffs' contentions that it improperly released all liens securing the collateral on the loan without obtaining value for plaintiffs in exchange, based on the $5 million in cash, a $6.7 million note and membership interests in GSCAH that it purchased and received with its credit bid on the secured lenders' behalf. The assets, minus expenses, it states, have been distributed to the secured creditors, pro rata, and that as a result of the sale, it was required to release the liens, as the loan was deemed paid in full, pursuant to the bankruptcy court order and the contract terms. The agent alleges that it distributed the GSCAH class A membership interests, which have had substantial value at all times, and pursuant to which no less than $49 million will be distributed, or remain available for distribution to former lenders, including plaintiffs.

Relying on section 12.4 and the exculpatory provision of section 12.3 as precluding liability absent gross negligence or willful misconduct, the agent maintains that the credit documents contain disclaimers of responsibility for ensuring collection from the collateral securing the loan, and which protections are standard in the industry, reflecting that it only played a ministerial role for which it cannot be liable, having acted in accordance with the instructions of the required banks.

The agent also argues that there is no evidence showing that it breached section 6.1, which requires that it act "for the benefit of the Secured Creditors" and not for its own account. It claims to have satisfied the requirement when it acted for the lenders' benefit in following the required banks' instructions because it did not act for its own account. The agent credit bid for an amount equal to the outstanding balance of the loan, as permitted by the contract, the law, and the bankruptcy court bidding procedures, and states that it held the GSCAH membership interests and the balance, after expenses, of the $5 million cash payment and the $6.7 million note received from GSC, and did not use any of these amounts for its own benefit, except those it was contractually entitled to apply to the payment of its own sale and expenses.

The agent argues that plaintiffs have suffered no damages, as they have received everything to which they are entitled what is being distributed to them, challenges the amount and the measure of damages, and argues that there is no evidence indicating what the lenders would have recovered, had it refused to credit bid, as plaintiffs point to no alternative confirmable bankruptcy plan, or other evidence, that would support a basis demonstrating that the lenders would have achieved a better recovery than they have, including if the agent had credit bid for all of the assets, so that the distribution would have been pro rata of all of the assets acquired from GSC. The agent also disputes the evidence about the amount of damages and raises many affirmative defenses, including estoppel, lack of standing, and release.

The exculpatory provisions of the agreements present a threshold issue. Credit agreement § 12.3, on which the agent relies, applies to the credit agreement and not to the security agreement, as it refers to the "Agreement" which is defined as the "Credit Agreement," and not as the credit documents. The agent does not show how it is thereby exculpated for distributions made pursuant to the security agreement, or that the distributions were made only under the credit agreement. The provision set forth in credit agreement § 12.4, that the the agent is "fully protected" applies to both the credit agreement and the security agreement, but its meaning is not defined or self-evident in terms of the relationship among the secured creditors, which is intercreditor in nature.

There is a fact issue about whether section 12.5 requires the agent to refuse to engage in the transactions, as described by the agent, including placing the credit bid assets into GSCAH, with distributions which are subject to approval of GSCAH's board, which may have prevented the agent from carrying out its duties under the distribution provisions of the credit documents. Section 12.5, requiring the agent to follow the reasonable directions of the required banks, is not unambiguous concerning the distribution scheme provisions which include the word "shall" (*see eg* credit agreement § 10.14) concerning the manner of distribution. To the extent that the assets were distributed through security agreement § 6.5, the basis for the agent having permitted the assets, including those assets that Black Diamond asserts were purchased at auction with the credit bid, to be transferred to an entity where the it lacks control to make distributions under any of the the distribution provisions, is not demonstrated. Plaintiffs also base their arguments on what they contend was the agent's improper release of the liens, but do not demonstrate that, in the bankruptcy court proceeding, the agent could have done otherwise. In addition, plaintiffs' position is that credit agreement § 14.7 requires Black Diamond to share the assets, which, as discussed above, does not appear to implicate the Agent. The reasonableness of the sales transaction, moreover, is not established as a matter of law.

There are also factual issues raised about damages, which prevent an award of summary judgment, and I decline to award plaintiffs $80 million dollars based on the agent's adoption of Black Diamond's answer of "oversecured," in response to an interrogatory question as definitively demonstrating the value of the collateral or the damages. Assuming, *arguendo*, that the agent should have refused to allow the assets to be transferred to GSCAH, plaintiffs do not explain their theory as to how the damages they seek flow from what a breach in placing the assets in the wrong type of entity at Black Diamond's instruction if the interests can be monetized, and there is an unresolved fact issue as to the meaning of "for the benefit of the Secured Creditors upon the terms of this Agreement" in security agreement § 6.1. While this provision may be part of the collective enforcement scheme, or a prohibition on the agent from acting for its own account, had the drafters of the credit documents wanted to prohibit the agent from acting on its own account, they could have said so (*see* NYSCEF 674 at 10 [credit agreement § 2.1(b)]; NYSCEF 675 at 25 [security agreement § 6.7 (b)]). Nonetheless, and in light of these unresolved factual issues, summary judgment is denied and it is unnecessary to reach the agent's affirmative defenses.

D. The declaratory judgment claim (count II)

BDC Lenders' unopposed motion to dismiss count II for a declaratory judgment against them, is granted. The claim is duplicative of the breach of the implied covenant of good faith and fair dealing claim against Black Diamond, as it is premised on the same facts, and is therefore infirm. (*Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016] ["A cause of action for declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract or injunctive relief" [internal quotation marks and citation omitted]).

E. Dismissal of the affirmative defenses

Plaintiffs' reply request for an order dismissing defendants' affirmative defenses is denied.

F. Other issues

I decline to incorporate into these motions arguments made in other motions, as to do so interferes with the application of the summary judgment burdens, as intended under the law, and allows evasion of page limit requirements. (*See* http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf [Rule 14 (b)]).

## III. CONCLUSION

The parties are directed to settle an order on notice in accordance with the foregoing.

ENTER:

BARBARA JAFFE, JSC

Dated: January 20, 2017
New York, New York