LAKELAND BANK, EQUIPMENT LEASING DIVISION. Plaintiff, vs. BENCHMARK FINANCIAL GROUPS, LLC, AND MARCUS P. DAVIN, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO: BER-L-4657-09 **Trial Date: February 1, 2011**

DEFENDANTS' TRIAL BRIEF

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PRELIMINARY STATEMENT

This is a commercial book account collection case brought by an equipment leasing division of Lakeland Bank (the "Bank") against defendants, Benchmark Financial Groups, LLC ("Benchmark"), and its principal Marcus P. Davin ("Davin").

The Complaint, filed on May 20, 2009,[1] alleges that Benchmark breached its obligations to the Bank under a certain Master Agreement for Sale and Assignment of Leases and Loans ("Master Agreement"), pursuant to which the Bank agreed to purchase Benchmark's right, title and interest in certain commercial equipment lease agreements between Benchmark and its customers/vendors. The Complaint specifies monetary damages of $175,998.15 as of May 7, 2009.[2] In its Complaint the Bank also accuses Benchmark of engaging in the tort of conversion with respect to a $6,999.30 payoff made by one leasing customer. Plaintiff is suing the individually named defendant, Marcus P. Davin ("Davin") based on a personal guaranty ("Guaranty"). Davin is a principal of Benchmark.

Defendants dispute that a debt is due and owing to the Bank, and have counterclaimed against the Bank alleging breach of contract, and breach of express and implied warranties. Specifically, defendants claim that the Bank acted improperly by:

(i) Declaring Benchmark in default of the Master Agreement. Benchmark contends the Bank failed to cooperate with Benchmark and was otherwise negligent in not timely informing Benchmark of customer lease defaults,

[1] The Complaint was filed less than two (2) weeks after the Bank issued a written notice of default to defendants on May 7, 2009.

[2] Although never formally amending its Complaint, just four (4) days prior to the January 31, 2011 scheduled trial date the Bank informed defendants of eight (8) additional leases which the Bank claims went into default post-litigation thereby increasing its alleged damages from $175,998.15 to $282,073.45 – an increase in excess of $100,000! To the best of defendants' knowledge, at no point prior to January 27, 2011 did the Bank ever notify defendants of the additional lease defaults.

thereby depriving Benchmark of the opportunity to cure such defaults at an early stage;

(ii) Failing to provide Benchmark with payoff quotes for defaulting lease customers;

(iii) Failure to provide Benchmark with accurate payoff quotes in numerous instances, or in some instances failure to provide any payoff quotes or even allow Benchmark to repurchase or sell its performing leases;

(iv) Cashing a residual check made payable to Benchmark that was sent to Lakeland by mistake;

(v) Settling with certain lessees without involving Benchmark;

(vi) Charging fees and payments to Benchmark's customer which did not belong to Lakeland;

(vii) Failing to involve Benchmark in the process of attempting collection of delinquent customer accounts;

(viii) Failing to timely provide Benchmark with the opportunity to repurchase any defaulted lease during the early stages of default;

(ix) Grossly miscalculating the amounts alleged to be in default under the loss reserve formula set forth in the Master Agreement;

(x) Failing to properly credit Benchmark for default loss reserves withheld by the Bank from the purchase price of each and every single lease assigned by Benchmark under the Master Agreement;

(xi) Invoicing leasing customers under its own name instead of doing so under Benchmark's name in violation of the private label program; and

(xii) Failing to mitigate its damages, if any, sustained by the Bank.

The case is scheduled for trial on February 1, 2011. The parties exchanged documents and interrogatories, however no depositions were taken.

INTRODUCTION

Benchmark is a California corporation that provides leasing and financing programs for its customers. Based in Aliso Viejo, California, Benchmark has been in business since 1999. Originally called Bluedot Funding, LLC ("Bluedot'), in 2005 the company sold its assets and residuals it owned to IFC Credit Corp. In or about 2007, Bluedot changed its name to Benchmark and again established lending relationships.

Benchmark is owned and managed by Davin, who also resides in California. Davin has more than 15 years of experience in the equipment leasing industry.

FACTUAL STATEMENT

Historically, Benchmark has worked with over 100 various funding sources for its equipment leasing division including the Bank. The funding relationship between the Bank and Benchmark began in September 2004 with Bluedot,[3] and then again on or about February 12, 2007, the date of a written proposal issued by the Bank and addressed to Benchmark c/o Davin (the "2007 UNL Funding Proposal"). Davin was already familiar with the Bank and vice versa because back in the fall of 2004 the Bank had entered into a similar funding proposal with Benchmark's predecessor Bluedot.

A. The 2007 UNL Funding Proposal

The 2007 UNL Funding Proposal stated that Benchmark would assign the Bank all of its rights, title and interest in and to certain triple net leases in exchange for the Bank's promise to fund up to $3,000,000 in annual lease transactions that met the Bank's credit approval terms.

[3] In fact, the Bank admits that it's presently holding at least $4,590.00 in reserve funds that belong to Bluedot dating back to 2005.

Specifically excluded from the assets to be assigned were "any renewals, residuals or other payments that are not assigned to Assignee." Id., at Section II, p. 1.

The 2007 Funding Proposal identified the typical lease as between $5,000 to $100,000 in value, with a term ranging between 24 and 60 months. In consideration for the Bank's promise to fund a $3,000,000 annual credit facility (the "Funding Facility"), the 2007 UNL Funding Proposal provided for the Bank receiving lease assignments from Benchmark at a discount rate equal to 8.5% of the present value of the rental stream under each lease.

In addition, the 2007 UNL Funding Proposal offered the following formula for allocating the risk of losses between the Bank and Benchmark for future customer defaults:

> G. **Reserves.** Assignor [Benchmark] will provide Assignee [Bank] with an Ultimate Net Loss (UNL) Pool as described below:

		Unfunded	Holdback
Tier I:	Liquid Credit Scores of 205+	.75%	2.50%
Tier II:	Liquid Credit Scores between 190-204	2.00%	4.00%

Under this UNL Pool, the Bank proposed to establish a total reserve fund of 3.25% for every Tier 1 lease and a total reserve fund of 6% for every Tier II lease. So for example, if a Tier I lease defaulted the Bank would be protected by a total reserve of 3.25%. Using the Tier I lease default scenario for purposes of illustration, Davin and Benchmark understood that the Bank would apply the 2.50% holdback toward the lease customer's default and then look to Benchmark to fund the remaining .75%. of the current amortized amount – its obligation under the UNL Pool as confirmed by Section 9.2 of the Master Agreement.

Further, Section III (H) of the 2007 UNL Funding Proposal gave the Bank the option to require Benchmark to repurchase any individual lease transaction that goes into declared default prior to the Bank's receipt of the first two (2) lease payments due from the customer.

Lastly, the 2007 UNL Funding Proposal contemplated that the Bank would assume primary responsibility for all billing, accounting, and tax reporting for all lease payments assigned by Benchmark, but that Benchmark would retain primary responsibility for collection activity, including repossession and liquidation. Specifically, Section IV of the 2007 UNL Funding Proposal stated:

> It is understood that the Assignee shall act as master servicer for Assignor and will be responsible for all billing, collecting (with the assistance of Assignor), accounting, tax reporting and remittance with respect to sales, use tax for all of the lease payments assigned under the Funding Facility.
>
> Assignor will take the lead on collection activity/repossession and, if needed, liquidation of the assets associated with a defaulted lease.

Id. (Emphasis supplied).

It is understandable why the Bank proposed to cede primary control to Benchmark for collecting accounts receivables on defaulted leases – after all, the Bank was receiving an assignment of a revenue stream from Benchmark's customers. The 2007 UNL Funding Proposal reflects a common sense business practice that Benchmark, having the direct relationship with the lessees, would be in a better position than the Bank to collect on defaulting leases. Stated in other terms, it would be less confrontational for Benchmark to pursue collections from its customer accounts as opposed to the Bank acting in such capacity.

Benchmark accepted the Bank's 2007 UNL Funding Proposal as reflected in correspondence authored by Davin the same day - February 12, 2007. In agreeing to the 2007 UNL Funding Proposal, Davin remarked in an e-mail to the Bank's Vice President Kevin Kepp ("Kepp" or "Mr. Kepp") that, "[W]e had a great working relationship in the past and I look forward to working with you and your team again."

B. February 27, 2007 Bank Internal Memorandum

A February 27, 2007 internal Bank memorandum sent from Kepp to Steve Schachtel, the Bank's President, briefly discusses the contemplated relationship with Benchmark:

> I wanted to give you some additional insight into Benchmark Financial (formerly Bluedot Funding) as well as Marcus Davin.
>
> Benchmark is a "re-establishment" of Bluedot Financial --- as you might know, IFC Credit purchased Bluedot Financial in early 2005 and intended to use that office to grow a West Coast Facility.
> With some of the challenges that IFC has had over the past two Years – this office did not grow as expected – as a result Rudy and Marcus mutually agreed to go their own ways.
>
> Marcus has re-established a company as Benchmark Financial
>
> * * *
>
> It is also my understanding that when Bluedot had the relationship with Lakeland – Marcus repurchased a deal without hesitation …..if this is the case, it helps demonstrate some good character on his part.
>
> I would suggest that we approve Benchmark for a program Funding Proposal --….

<u>Id.</u>

C. Master Agreement

In furtherance of the 2007 UNL Funding Proposal, in early March 2007 the Bank sent Benchmark a proposed 35-page agreement (Master Agreement), with 3-pages of attachments, and a personal guaranty ("Guaranty"). Similar to the 2007 UNL Funding Proposal, the Master Agreement identified two different types of lease portfolios that Benchmark would assign to the Bank; namely, Tier I, defined as lessees with a credit score of 205 or greater, and Tier II defined as lessees with a credit score of 190-204.

In addition, the Master Agreement carried over the same UNL Pool formula originally stated in the 2007 UNL Funding Proposal for allocating risks between Benchmark and the Bank for defaulted leases – that being 3.25% reserve for defaults of leases in the Tier 1 portfolio, and a 6.00% reserve for leases in the Tier II portfolio, – and also provided the Bank with the right to demand that Benchmark repurchase any lease where the customer defaulted in the first 2 payments due to the Bank. These terms are found in Section 9.1 of the Master Agreement, which states:

> 9.1 Recourse
>
> (a) In the event a Lease . . . becomes a Defaulted Lease, then promptly upon fifteen (150) days written demand from Purchaser (each a "Repurchase Date"), Seller shall repurchase such Lease for an amount equal to the Repurchase Price as defined in Section 9.2 hereof; provided, Seller's maximum payment liability pursuant to this Section 9.1 shall in no event be greater than Three and one quarter (3.25)% of the aggregate amount of the Purchase Prices for all Leases in the Tier I Portfolio (Liquid Credit Scores of 205%), and Six (6)% of the aggregate amount of the Purchase Prices for all Leases in the Tier II Portfolio (Liquid Credit Scores between 1920-204)("Maximum Liability)).
>
> (b) In the event (i) a Lessee has failed to timely and fully make the first two (2) payments under the Lease …then promptly upon fifteen (15) days written demand from Purchaser . . . Seller shall repurchase such Lease, together with all of Purchaser's right, title and interest in and to the Equipment covered by the Lease, for an amount equal to the Repurchase Prices as defined in Section 9.2 hereof.

Section 9.2 of the Master Agreement calculates the "Repurchase Price" "as the sum of (i) an amount equal to the net present value, as of the date of repurchase, of the aggregate Remaining Lease Receivables and any Put Option due under such Leas(s) (which shall be net of advance payments and prepaid rentals) computed at the Discount Rate per annum in arrears." Id., at Section 9.2.

D. E-Mail Communications Pertaining to Master Agreement

Following his receipt and review of the 35-page Master Agreement, from March 10, 2007 through March 16, 2007 Davin exchanged a series of e-mails with Kepp, the Bank's Vice President, asking for clarification about certain terms of the Master Agreement including computation of the UNL Pool for defaulted leases. The following colloquy between Davin and

Kepp appears in their various e-mails exchanged during this time period in mid March 2007, with Kepp's responses appearing in CAPITAL LETTERS:

* * *

> Page 8 – Consideration – Seems quite simple yet I'd like to walk thru an example to make sure we're on the same page
>
> VERY SIMPLE EXAMPLE
>
> 60 MONTH DEAL – 2 ADVANCES – YOU ARE SELLING LAKELAND 58 PAYMENTS
>
> PAYMENT AMOUNT – PAYMENT AMOUNT OF $1,047.07 DISCOUNT RATE OF 8.50% ---- THE PV IS $49,659.44
>
> UNDER TIER 1 – WE WILL PAY 97.50% OF THE PV …….$48,417.95 ……. AND $1,241.49 IS CREDITED TO THE RESERVE
>
> UNDER TIER II – WE WILL PAY 96.00% OF THE PV ...... $47,673.06 ……AND $1,986.38 IS CREDITED TO THE RESERVE
>
> CERTAINLY YOUR TOTAL PROFIT IS THE $48,417.95 + 2 ADVANCES EQUALLING $2,094.14 ……WE WILL ONLY LOOK AT THE 48,417.95
>
> Page 19 – Recourse – a) Call me to discuss this. This 3.25% and 6% is coming from my UNL correct?
>
> YES – BUT
>
> TIR I --- THE HOLDBACK IS 2.50% --- SO YOU HAVE ANOTHER .75% RESPONSIBILITY THAT IS NOT FUNDED
> TIER II --- THE HOLDBACK IS 4.00% --- SO YOU HAVE ANOTHER 2.00% RESPONSIBILITY THAT IS NOT FUNDED
>
> Page 20 –b – How do payoff's work? Is my payoff the current amortized lease amount or is it the sum of the remaining payments?
>
> THE PAYOFF IS THE CURRENT AMORTIZED LEASE AMOUNT …….IF REPURCHASED WITHIN THE FIRST 12 MONTHS, THERE IS A 2.00% PENALTY ASSOCIATED WITH IT.

In a March 16, 2007 e-mail Davin asked Kepp whether the Bank would notify him if one of his customers called in for a buyout quote, and told Kepp he assumed the Bank would not quote anything without first directing the customer to Benchmark. In response, Kepp represented to Davin in pertinent part, as follows:

> Remember – the customer does not know Lakeland is involved – this is a private label program so the customer will call you for a buyout…you will call Lakeland ---we will quote you a payoff amount, anything over that is really yours (the Master Agreements states this).

In another e-mail response from Kepp on March 12, 2007, he represented to Davin that regarding defaulted leases the Bank would first deduct Benchmarks' cash reserves and then look to Benchmark for the unfunded portions of the UNL Pool, to wit:

> One more thing.
>
> Regarding defaults, if a lease defaults the bank will take the remaining principle amount and deduct it from your cash reserve. If you do not have enough in the reserve to cover the amount, Benchmark will be responsible for either .75% or 2.0% of the remaining principle balance depending on the credit tier.

In reliance on the Bank's written representations made through its Vice President Kepp in the various e-mails exchanged in mid March 2007, Davin executed the Master Agreement on behalf of Benchmark and also signed the personal Guaranty.

E. Bank's Policy and Procedure Manual Developed Specifically for Benchmark

Shortly after returning the signed contract documents to the Bank, Davin and Benchmark received a package from the Bank containing its Policy and Procedural Manual specifically prepared for Benchmark (the "PPM").[4] The Overview section of the PPM, at page 2 thereof, explains in relevant part:

[4] Interestingly, the PPM was conspicuously absent from the Bank's pretrial discovery production.

> Our goal is to provide you with a premier small ticket financing program. To this end, we have prepared this policy and procedure manual for your reference. It is meant as a general guide to assure that all parties are operating under the same assumptions. While we endeavor to make this manual as accurate and complete as possible, our legal team insists that we emphasize that the terms of the Master Agreement control the relationship between you and Lakeland Bank Equipment Leasing, not this manual. . . **The information and materials provided to you in this manual are reflective only of the guidelines upon which Lakeland Bank Equipment Leasing basis its current practices, and outlines the manner we expect our relationships to operate.** . . . .
> Our success depends on your success in meeting the needs of your customers. We will do whatever we can to make this happen.
>
> Our goal is to provide ***First in Class Service*** ….. resulting in ***First in Class Partnerships***

PPM, at p. 2. (Emphasis in original).

At page 3 of the PPM it lists a variety of contact information at the Bank, such as the Bank's mailing address and telephone numbers, and the names of the Bank's officers and employees along with their telephone extensions and e-mails. Kepp is identified as a Vice President and Benchmark's National Account Manager, and his role was spelled out in the PPM as follows:

> Your National Account Manager is the person responsible for the creation of this relationship and/or the individual responsible for the global relationship with your company. If there are any questions or concerns that are not addressed at the day-to-day level, they should be brought to the attention of the National Account Manager.

Id., at p. 3. Other Bank officers and employees identified in the PPM and their respective titles included:

President:	Steve Schachtel
Head of Credit:	Phil Smith
Credit Specialist:	Ken Markman

Funding Manager: Karon Amorosi

Head of Servicing: Phil Smith

Head of Collections: Nicholas Poulos

Id.

The PPM also spelled out the Bank's policies and procedures for handling customer invoicing, customer collections, and monthly reporting to Benchmark. Under the "SERVICING" caption on page 14 of the PPM, the Bank made the following representations to defendants:

> **In Who's Name?**
>
> This program has been established as a **Non-Notification Program.** As such, Lakeland Bank Equipment Leasing will invoice the customer as well as conduct all communications with the customer in the name of **Benchmark Financial Groups, LLC.**[5]
>
> **Collections**
>
> Lakeland Bank Equipment Leasing will perform its collection duty with the same diligence whether we collect under our name or yours.
>
> The name of your Collection Specialist is on Page 3 of this manual. We encourage you to establish a working relationship with this person. It is likely that he or she will be contacting your office for assistance on various issues throughout our relationship.
>
> * * *
>
> The ultimate success of any relationship relies on the performance of the assets being funded – we will always work as partners while collecting "our" assets.
>
> **Monthly Reports:**

[5] Contrary to the Bank's representations in the PPM that the billing relationship would be a Non-Notification Program (i.e., a private label program), the Bank unilaterally changed the rules midstream when it began invoicing leasing customers under the Bank's name instead of under Benchmark's name.

> As previously stated, you will be provided with Servicer Reports on a weekly basis.[6] This will outline the funding activity for the previous month and on an aggregate basis; provide you with the delinquency figures for your accounts. You are encouraged to review the reports carefully upon receipt and speak with your National Account Manager to address any issues or concerns.
>
> Please work with the Lakeland Bank's collection personnel concerning an / all transactions which are past due.

Id. at p. 14. (Emphasis in original).

Consistent with the UNL Funding Proposal, Master Agreement and the March 2007 emails between Davin and Kepp, the PPM identifies two tiers of credit criteria for leasing customers: Tier I defined as having liquid credit score of 205 and above, and Tier II defined as having liquid credit scores of 190 – 204. Id., at p. 10. Also, page 12 of the PPM confirms the cash reserve percentages established in the Master Agreement for Tier I and Tier II lease defaults, and further explains to defendants how the Bank would apply the reserves for both tiers:

> **Reserves** will be the two forms based on the Credit Tier assigned to a given transaction
>
> **A. First Loss Reserve:**
>
> | | |
> |---|---|
> | Tier I – Liquid Credit Scores of 205+ | .75% |
> | Tier II – Liquid Credit Scores of 190-204 | 2.00% |
>
> **B. Cash Reserve**
>
> | | |
> |---|---|
> | Tier 1 – Liquid Credit Scores of 195+ | 2.50% |
> | Tier II – Liquid Credit Scores of 180 – 194 | 4.00% |

Critically, the Bank made the following representation when delivering the PPM to Benchmark and Davin:

> The First Loss Reserve will be charged before the Cash Reserves. The reserves will be credited at a point in time when a lessee has

[6] During pretrial discovery the Bank did not produce a single weekly or monthly report issued to Benchmark.

> been in default for a period of 90 days. You should be intimately involved during the entire collection process.

Id., at p. 12. (Emphasis added). In other words, for customers whose leases were in default for 90 days or more the Bank represented to defendants that it would credit Benchmark's UNL Pool liability by the amount of the cash reserves; namely, 2.50% of Tier I leases, and 4.00% for Tier II leases.

The evidence and testimony at the trial will establish that by the time the Bank sent Benchmark a default notice on May 7, 2009 every lease the Bank alleged to be in default was more than 90 days past due. Consequently, as outlined in the PPM the Bank was obligated to first deduct Benchmark's cash reserves, and if that amount was not sufficient then defendants understood the Bank would then look to Benchmark to pay the unfunded portions for each portfolio tier. In point of fact, this is exactly what the Bank's Vice president Kepp previously said in his March 12, 2007 e-mail when he represented to Davin:

> Regarding defaults, if a lease defaults the bank will take the remaining principle amount and deduct it from your cash reserve. If you do not have enough in the reserve to cover the amount, Benchmark will be responsible for either .75% or 2.0% of the remaining principle balance depending on the credit tier.[7]

Furthermore, the evidence and testimony at the trial will establish that during the course of their working relationship the Bank did not honor the representations it made to Benchmark as outlined in the PPM. For example, the Bank began invoicing leasing customers under its own name instead of billing under Benchmark's name, a violation of the private label program spelled out at page 14 of the PPM. In addition, the Bank did not engage Benchmark as a true partner in the collection process for defaulting customers, and failed to regularly provide

[7] Kepp's statement in his March 12, 2007 e-mail was later confirmed by the Bank in the PPM that it sent to defendants shortly after both parties signed the Master Agreement.

weekly or monthly service reports thus depriving Benchmark from receiving timely information and notice of delinquent customer accounts.

F. Individual Customer Lease Assignments

The Master Agreement and PPM explain how the parties contemplated working together on lease funding deals. For example, the PPM sets forth the Bank's credit guidelines, the Bank's documentation requirements, confirmed the 8.50% discount rate,[8] explained how the Bank would service the accounts and report to Benchmark, and provided sample forms for Benchmark to use in every lease assignment transaction. As clearly noted in the PPM, the Bank had the right to approve or reject the funding of any new lease transaction presented by Benchmark.

If the Bank approved a new lease agreement, Benchmark would then prepare the lease documents and send them to the customer. Once the customer signed the documentation and returned same to Benchmark, the leased equipment would be shipped and delivered to the customer, and then Benchmark would scan and email or overnight the entire funding file to the Bank.

Benchmark had a discounting relationship with the Bank, which means Benchmark would discount the payments and assign a certain amount of payments to the Bank. This course of dealing is clearly reflected on the "Discounting Invoice" that Benchmark sent to the Bank for each and every lease assignment that came under the umbrella of the Master Agreement. Usually on a 48-month lease term where Benchmark had collected two (2) payments from the customer (first and last), Benchmark would assign 46 payments to the Bank. The calculations were from an amortization schedule using the customers' payments,

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[8] The Master Agreement defines "discount rate" as "the interest rate at which Leases subject to an Assignment shall be discounted as agreed to by the Parties two (2) days prior to the applicable Closing date or as otherwise provided herein." Master Agreement, at p. 3.

using the term of payments assigned, not the payments on the lease, and discounting the stream of payment by the buy rate given to Benchmark by Lakeland, usually 8.5%. So the value of a 48-month lease at $1,000 per month was not $48,000 but $40,570. Pursuant to the PPM, the Bank established a cap on the amount it would pay Benchmark - which was 112% or 115% of the equipment cost, depending on the dollar amount. PPM, at p. 13.[9]

For example, with respect to the lease assignment transaction involving the customer William P. Anull MD, Inc., which happens to be one of the accounts the Bank claims is in default, the Discounting Invoice issued by Benchmark to the Bank states the following:

Date:	8/9/07
Lessee:	William P. Aull MD, Inc.
Your ID#:	070719-10
Buy Rate to Benchmark:	8.50
Buyout:	Option to Benchmark
Lease Payment:	337.63 (Plus Tax)
Payments Assigned:	~~34~~ 46
Tax Treatment:	Stream

PV Less Holdback & Documentation Fee		$12,715.97
Cost of Equipment:	$12,000.00	
Total Deductions:		
Due to Benchmark Financial Groups, LLC:		**$12,715.97**

***Please respond with any discrepancies ASAP**
To Marcus Davin @ 949-716-2100
***Please send broker check via overnight mail to:**

Benchmark Financial Groups, LLC
65 Enterprise
Aliso Viejo, CA 92656

The Equipment Lease Agreement signed by this customer (William P. Aull MD, Inc.) was a 48-month term at $337.63 per month. However, as clearly noted under this particular

[9] On several occasions Benchmark would assign 1, 2 or 3 fewer payments to the Bank in order to get under the 115% cap amount.

Discounting Invoice Benchmark assigned the Bank only 46 monthly payments. Thus, in this example, as with the majority of its assignment transactions with the Bank, Benchmark retained two (2) lease payments.[10]

Upon receiving and reviewing Benchmark's final documentation, if the Bank accepted the transaction it would fund the deal by sending Benchmark a check or a wire – in the above example for $12,715.97 based on the Discounting Invoice. Benchmark would then pay the vendor and bill for the interim rent which is the period from when the lease funded until the end of the month since the customers advanced lease payments usually went towards their first and last month's payment.

This is the same course of dealing that Benchmark has engaged in for over 14 years with other funding sources. So like the customer noted above (William P. Aull MD, Inc.), if Benchmark had a 48-month lease and already collected two (2) payments from the customer, per the lease contract the customer must make an additional 46 payments. Benchmark could, and often times did, assign the Bank 44 of the remaining 46 payments, and after the Bank billed and collected on those 44 payments Benchmark would directly bill and collect from the customer payment #'s 45 and 46. Not once did the Bank ever invoice a customer (or Benchmark) for a payment that was not assigned to the Bank. In other words, the Bank never billed for a lease residual that was not assigned by Benchmark.

G. Alleged Customer Defaults

According to the Bank's documents produced in pretrial discovery, by letter dated May 7, 2009 the Bank declared Benchmark in default of the Master Agreement and Davin in default of the Guaranty. The Bank's written default declaration was based on ten (10) defaulting

[10] Similar to a car lease where the customer can return it at the end of the lease, a customer has the option to purchase the equipment at 10% of the purchase price or return it. – this is also known as a payment upon termination or "PUT." This type of end of term is called a fixed residual.

leases - three (3) leases under the Tier 1 portfolio plus seven (7) leases under the Tier II portfolio – and a $6,999.30 payment that the Bank accused Benchmark of receiving directly from a leasing customer following the closing of the Master Agreement. Attached to the default notice was a separate Schedule of the alleged ten (10) defaulting leases, which stated the following.

CERTAIN DEFAULTED LEASES REQUIRED TO BE REPURCHASED BY BENCHMARK

Tier I Lessee	*Lease No.*	*Months Past Due*	*Total Amount due*
Anthony D. Dowdy	IP16609A	09/08 – present	$25,017.05
Stephen Haas	IP15522A	01/09 – present	$ 8,333.17
William P. Aull, MD, Inc.	IP12136A	08/08 – present	$11,231.37
Current Tier I Defaulted Leases			$44,581.59
Tier I Maximum Liability		3.25% x $2,167,069	$70,429.74
Current Tier I Repurchase Obligations			$44,481.59
Tier II Lessee	*Lease No.*	*Months Past Due*	*Total Amount due*
Five Gigs Corp	IP10606A	09/08 – present	$25,017.05
Mrtranserv 101	P11467A	12/08 - present	$ 8,333.17
Preferred Transportation Services, LLC.	IP13895A	07/08 - present	$11,231.37
Premier Back Rehabilitation Center, P.C.	IP11451A	08/08 - present	
The Sheboygan House, Inc.	P10603A	10/08 - present	$44,581.59
The Sheboygan House, Inc.	P13051B	10/08 - present	$70,429.74
Xcessoride	P13362A	01/09 - present	$44,481.59

TOTAL CURRENT REPURCHASE OBLIGATIONS (as of 5/7/09) $175,998.15

The default notice did not demand that Benchmark repurchase the defaulted leases, but rather demanded Benchmark and Davin to immediately pay all amounts that the Bank alleged was due and owing at that particular time.[11] With a few exceptions, the majority of these

[11] The Bank instituted this lawsuit less than two (2) weeks later. The default notice issued by the Ban k on May 7, 2009 did not notify Benchmark that it was terminating the Master Agreement.

leases went into arrears or default in the fall of 2008. Yet, the Bank did not declare Benchmark in default until many months later on May 7, 2009!

H. Improper Method of Calculating Default Damages

The evidence will establish that the Bank's method of calculating the alleged default amounts on both Tier I and Tier II portfolios suffers from several major flaws. First of all, the Bank has improperly calculated Benchmark's "Maximum Liability" for the defaulted leases as that term is defined under the Master Agreement. For example, the Bank erroneously values the entire Tier I and Tier II lease portfolios as of the date of closing with Benchmark as $2,167,069 and $2,190,276, respectively. However, this draconian approach fails to take into consideration that the values of each lease portfolio drop as customers continue making monthly payments, pay off leases early, or the lease term ends. So when the Bank declared Benchmark in default of the Master Agreement more than two (2) years later on May 7, 2009, the values of the Tier I and Tier II lease portfolios were worth substantially less than $2 million because every customer (except the 18 defaulting customers claimed by the Bank) made more than two (2) years worth of monthly payments.

In point of fact, Section 9.2 of the Master Agreement reflects the parties' understanding that the value of a given lease would depreciate over time. For that reason, in Section 9.2 of the Master Agreement the parties agreed to calculate Benchmark's "Repurchase Price" obligations for defaulting leases as follows: ". . . the sum of (i) an amount equal to the net present value, as of the date of repurchase, of the aggregate Remaining Lease Receivables and any Put Option due under such Lease(s) (which shall be net of advance payments and prepaid rentals) computed at the Discount Rate per annum in arrears." The Master Agreement defines the term "Remaining Lease Receivable" as "an amount equal to the product of the monthly rental payment due under a Lease (not including sales or use tax or other miscellaneous charges) times the number of months remaining under the originally scheduled term of the Lease.

Thus, the parties contemplated computing Benchmark's repurchase obligations on a lease by lease basis and based on the "net present value" of each lease as of the date of repurchase, which included the remaining lease term payments plus any Put Options. Instead of calculating Benchmark's Repurchase Price obligations under the formula spelled out in Section 9.2 of the Master Agreement, the Bank erroneously calculates Benchmark's repurchase obligations based on the original value of the entire Tier 1 and Tier II portfolios as of the date of the Master Agreement.

Second, Benchmark maintains that the Bank must initially apply all cash reserves as a credit to reduce Benchmark's obligation on the defaulting leases, and at that point Benchmark's liability to the Bank should be computed as follows: (i) For Tier I leases first multiplying .75% by the balance due on a particular defaulting lease, with Benchmark's maximum liability limited to .75% of the present day value of the entire Tier 1 portfolio; and (ii) for Tier II leases multiplying 2% of the present value of the Tier II portfolio.

Instead, the Bank is "double dipping" because it already has withheld a 2.50% cash reserve for Tier I leases, and 4% cash reserve for Tier II leases yet seeks to charge Benchmark twice for the same cash reserve without ever crediting the initial cash reserve, thus making a 5.75% total reserve for tier 1, and a 10% total reserve for Tier II. In other words, instead of using a multiplier of .75% to compute default damages for Tier I leases the Bank is using a multiplier of 3.25%, and instead of using a multiplier of 2% to compute default damages for Tier II leases the Bank is using a multiplier of 4%. Under the Bank's approach, Benchmark would not be credited for the initial cash reserves that the Bank withheld on every single lease assigned by Benchmark. This is a significant issue considering that the Bank informed Davin in early November 2008 that Benchmark's cash reserve was $101,202.47.

In point of fact, the Bank's calculation of default damages totally contradicts the written representations made by the Bank through its Vice President Kepp in his March 12, 2007 e-mail sent to Davin prior to Benchmark entering into a contract with the Bank, in which Kepp assured Davin as follows:

> Regarding defaults, if a lease defaults the bank will take the remaining principle amount and deduct it from your cash reserve. If you do not have enough in the reserve to cover the amount, Benchmark will be responsible for either .75% or 2.0% of the remaining principle balance depending on the credit tier.

In addition, the Bank's erroneous calculation of its default damages contradicts the Bank's representations made in the PPM delivered to Benchmark after the parties signed the Master Agreement, wherein the Bank assured Benchmark and Davin that the cash reserve would be "credited at a point in time when a lessee has been in default for a period of 90 days." PPM, at p. 12. (Emphasis added).

I. Economy Declines in 2008 & 2009 – Bank Starts Changing the Rules

As the lending industry began to pummel in 2008 and continuing in 2009, the Bank decided to close its leasing division, fired its key employees, and arbitrarily changed the rules of the game on Benchmark, including refusing to apply cash reserves on defaulted leases despite Benchmark and Davin's repeated demands to do so, miscalculating defaults and payoffs, filing to continually provide Benchmark with weekly or monthly status reports on delinquent accounts, and otherwise excluding Benchmark from the collection process on delinquent accounts.[12]

One striking example of how the Bank was trying to implement new rules in the middle of the game is reflected in an internal e-mail dated April 21, 2008 authored by the Bank's Vice President Kepp and addressed to several of the other key officers in the Bank's leasing division, including Phil Smith, the Head of Credit, and the President Steve Schachtel. In this e-mail, Kepp is discussing two (2) leasing customers – Preferred Transportation which at that time was three (3) months past due, and C&I – and is discouraging his colleagues from applying the cash reserves to cure the Preferred Transportation customer's default while admitting in the same sentence that the reserves were established exactly for that purpose, to wit:

> Keep in mind, one of them is simply an early buyout (I believe) – the customer is completely current but wants to buyout.
>
> The other needs to be repurchased ---- I know that Marcus has called Steve about this. Steve and I also talked briefly ---- <u>while we do not want them to use the cash reserve for any repurchases, that is what it was developed for so it is something that Steve will push on Marcus</u>.

<u>Id.</u> (Emphasis added).

Although during late April 2008 the Bank did ultimately deduct approximately $50,000 from Benchmark's cash reserve to cure the C&I customer's lease default, later on the Bank decided to follow Kepp's advice, which is discussed <u>infra</u>.

Becoming more increasingly concerned with the Bank's adversarial behavior and feeling less like a partner, in mid July 2008 Davin reached out to his original contact, the

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[12] In fact, in April 2009 the Bank informed Davin that it would not solicit Benchmarks' help with billing and collecting. This is reflected in several e-mails exchanged between Davin and Robert Ingram of the Bank on April 10, 2009, and April 22, 2009.

Bank's Vice President Mr. Kepp. A July 18, 2008 e-mail from Kepp to Davin is quite telling, in which he warned Davin:

> Got your message --- here is the scoop.
>
> Today is my last day with Lakeland --- they are all but getting out of the business ……If you need new funding solutions – I may be able to help on a contract basis or something but understand where you are with Lakeland so that you don't get money in there that you are not going to get out.

Kepp's warning bell rung true about five (5) months later, in mid December 2008 when the Bank ignored Davin's requests to apply the cash reserves to cure several other customer defaults. For example, in Davin's December 15, 2008 e-mail to Phil Smith (which listed as the subject the defaulting lease customer "ANTHONY D. DOWDY"), he asked Smith point blank, "[W]hy don't you take the money in the UNL pool and get these leases current?" According to information just produced by the Bank, on the same day Mr. Smith e-mailed Mary Nix at the Bank and asked her, "What's our next move?"

In a December 17, 2008 e-mail from Davin to Mary Nix of the Bank, he posed the following questions:

> What did Lakeland do with the "reserve" taken from each deal we funded? You have over 100M!
>
> Why did Lakeland apply the serve to a lease in default earlier this year?
>
> Why do I have emails , letters and signed agreements from both Kevin Kepp and Steve Schachtel pertaining to this?

In her response issued on December 17, 2008, Nix misrepresents that the Bank's "use of its own funds to cure arrears <u>is without any basis under the Master Agreement</u> and therefore is declined." <u>Id.</u> (Emphasis added). Continuing further, Nix claimed that "[A]ny loss reserves established by Lakeland Bank belong exclusively to Lakeland Bank. Nothing under the Master

Agreement provides or implies that Benchmark may seek to have any such reserves for Benchmark's recourse obligations." Nix's statements totally contradict what had transpired only eight (8) months earlier when, in an April 23, 2008 e-mail from Phil Smith, the Bank's Head of Servicing, Smith asked Davin whether the Bank should use the cash reserves to cure the default on the customer C&I. In fact, the testimony will establish that the Bank did, in fact, do just that.

J. Failure to Mitigate Damages

In pretrial discovery, the Bank failed to produce any documents reflecting communications between the Bank and each defaulting lease customer identified in its May 7, 2009 default notice. Thus, defendants are without any information that would enable them to determine what efforts, if any, the Bank made to attempt collection from the customers on these ten (10) leases, and whether the Bank ever initiated legal action to repossess the equipment from these lessees.[13]

The evidence will reveal that during the summer of 2008 and continuing into the fall of 2008, Benchmark frequently attempted to intervene in the collection process on several customer accounts the Bank claimed were in default. Despite the Bank's prior written representation in the PPM that it would apply the cash reserves to defaulting lease, a practice the Bank later confirmed in a separate April 23, 2008 e-mail from Phil Smith, Head of Credit,[14] starting in the latter part of 2008 the Bank refused to credit the reserves and instead began

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[13] Among the affirmative defenses plead in defendants' Answer to plaintiff's Complaint is the following: "Plaintiff caused its own damages, failed to take remedial actions, and/or failed to mitigate its damages, if any, and therefore its claims are barred." Defendants' Answer, at p. 10.

[14] In his April 23, 2008 e-mail addressed to Davin and concerning a particular lease default (C&I), Mr. Smith asked Davin if he wanted the Bank "to debit the reserve…" or whether he would "be sending a check or wire for the above account." I his e-mail reply on the same day, Davin instructed Smith to deduct this customer's default from Benchmark's funded cash reserve or UNL. Davin understands that the Bank withdrew approximately $50,000 from Benchmark's funded cash reserve and applied it to cure C&I's default.

demanding that Benchmark pay off the defaulting leases. As of Mr. Smith's e-mail dated November 5, 2008, the Bank was holding a cash reserve of $101,202.47 for the Benchmark portfolio of Tier I and Tier 11 leases. To date, the Bank has never accounted to Benchmark for the $101,202.47 in cash reserves that existed as of November 5, 2008.[15]

The Bank has not given Benchmark any reporting, collection information or any additional information regarding the 10 defaulted leases. For instance, Benchmark doesn't know how many payments are due, how many payments the Bank collected, or what collection activities the Bank has undertaken. Benchmark maintains that Preferred Transportation, one of the customers included by the Bank in the 10 defaulted leases, has made all their lease payments yet the Bank is still demanding that Benchmark write a check in the amount of $68,910.[16] Benchmark doesn't know if this happened with any of the other alleged defaulted leases.

K. <u>Wireless Beach Customer</u>

The Bank accuses Benchmark of improperly converting a $6,999.30 payment made by a customer known as Wireless Beach. The testimony by Davin will establish that as of April 2008 Wireless Beach owed Benchmark $3,659.92 for invoices unrelated to the assignment held by the Bank. The customer approached Benchmark about modifying the loan to reduce the monthly payment, and Benchmark agreed to assist. The customer then sent Benchmark a check (dated April 16, 2008) for $6,999.30 to cure the $3,659.92 past due amount owed to

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[15] In addition, through pretrial discovery the Bank has admitted that it is still holding $4,590.00 in reserves from the original lease Funding Proposal with Bluedot, the predecessor to Benchmark.

[16] In fact, just last week the Bank disclosed that post-litigation it collected $31,535 from Preferred Transportation. Defendants have no information how the Bank collected this debt, such as whether the Bank agreed to a discounted settlement with this customer. Prior to the litigation, the parties did communicate about this particular leasing customer, however the Bank refused to permit Benchmark to participate in collecting this account and until a week ago never informed Benchmark that it collected $31,535 from this customer. Post-litigation, defendants discovered that the Bank sold the Preferred Transportation lease to Westcliff Portfolio Sales, and that as of October 201 the account had a payoff balance of $7,875 .

Benchmark, and Benchmark credited the customer's account by $3,340.30 (the difference between the $6,999.30 payment less the $3,659.92 debt owed to Benchmark). When Davin approached the Bank to modify the customer's lease, the Bank refused to supply any payoff information and otherwise refused to cooperate.

LEGAL ARGUMENT

POINT I

IN INTERPRETING THE PARTIES' CONTRACT AS A WHOLE, AND THE PARTIES' UNDERSTANDING OF THE CONTRACT, THE COURT SHOULD CONSIDER NOT ONLY THE MASTER AGREEMENT BUT ALSO THE PRECEDING 2007 ULN FUNDING PROPOSAL AND THE SUBSEQUENT POLICY & PROCEDURE MANUAL

The Master Agreement stipulates that New Jersey law governs its interpretation and enforcement. As demonstrated herein, to aid the Court in interpreting the parties' understanding of the Master Agreement, in particular how default amounts for Tier 1 and Tier 2 leases would be calculated under Sections 9.1(a) and 9.2 thereof, the Court should consider the written communications exchanged between the parties immediately prior to, and subsequent to, the date parties signed the Master Agreement. This includes the 2007 ULN Funding Proposal, the e-mails exchanged between Davin, the Bank's Vice President Mr. Kepp and others, and the PPM which the Bank sent to Benchmark after execution of the Master Agreement. In essence, the Court should read the 2007 UNL Funding Agreement, Master Agreement, and PPM *in pari materia*.

As New Jersey law provides, the Court can consider this extrinsic evidence notwithstanding the integration clause of the Master Agreement[17] and regardless whether or

[17] Section 14(a) of the Master Agreement contains an integration clause, which reads as follows:

> This Agreement (together with the other agreements to be executed by the Parties hereunder, including the Assignments and Exhibits hereto and thereto) contains the full and complete agreement between the

not the terms of the Master Agreement are deemed to be clear and certain, or ambiguous and uncertain.

The principles of law pertaining to the construction of a contract as in the instant case are firmly and well established in New Jersey. "The interpretation of the terms of a contract are [sic] decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). When interpreting the terms of a contract, the writing must be interpreted as a whole and the "terms of the contract must be given their 'plain and ordinary meaning.'" Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). The Court should interpret contract terms "so as to avoid ambiguities, if the plain language of the contract permits." Stiefel v. Bayly, Martin and Fay of Conn., Inc.,. 242 N.J. Super. 643, 651 (App. Div. 1990).

One of the Court's critical functions in interpreting a contract is to seek the intention of the parties, and to such end the writing is to have a reasonable interpretation. Newark Publishers' Ass'n v. Newark Typographical Union, No. 103, 22 N.J. 419 (1956). The intention of the parties is to be gathered from the language used in the instrument as a whole. Washington Construction Co., Inc. v. Spinella, 13 N.J.Super. 139 (App. Div. 1951), aff'd 8 N.J. 212 (1951). The court will not make a different or better contract than the parties have seen fit to make for themselves. The Great Atlantic & Pacific Tea Company, Inc. v. Checchio, 335 N.J.Super. 495, 501 (App. Div. 2000), citing Schnakenberg v. Gibraltar Savings & Loan Ass'n, 37 N.J.Super. 150, 155-156 (App. Div. 1955). As one New Jersey appellate jurist explained:

Parties with respect to the subject matter set forth herein and supersedes all prior written agreements and understandings between the Parties, including, without limitation, any letter or letters of intent executed by the Parties. This Agreement may not be modified except by a writing signed by executive officers of both of the Parties.

> <u>The situation of the parties, the attendant circumstances, and the objects they sought to attain are all necessarily to be considered by the trial court in its inquiry as to the intention of the parties.</u> When the meaning of an integrated contract is ambiguous, the surrounding circumstances may be introduced for the purpose of elucidation. . . <u>Even when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissible in aid of interpretation.</u> "The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said." Casriel v. King, 2 N.J. 45 (1949).
>
> * * *
>
> <u>Accordingly, whether the clause under consideration is regarded as clear and certain, or ambiguous and uncertain, if the intention of the parties is not to be gleaned from a reading of the instrument as a whole, the plaintiff should have had the opportunity of presenting evidence of the facts and circumstances surrounding the execution of the lease.</u>

<u>Schnakenberg</u>, at 155-156. (Emphasis added).

When interpreting an integrated contract, such as the Master Agreement, another New Jersey appellate court explained:

> . . . the judicial quest "is for the reasonably certain meaning of the language used, taken as an entirety, considering the situation of the parties, the attendant circumstances, the operative usages and practices, and the objects the parties were striving to achieve. . . . [T]he chosen words and phrases are to be realistically assessed, in relation to the context and the obvious general purpose of the compact, for the meaning that is reasonably clear, such as is within the reasonable understanding of the symbols of expression."

<u>Cozzi v. Owens Corning Fiber Glass Corp.</u>, 63 N.J. Super. 117, 121 (App. Div. 1960). Other examples where New Jersey law allows the Court to determine the parties' contractual

intentions through their actual conduct is found in the Uniform Commercial Code, in particular N.J.S.A. 12*A*:2-204(1).[18]

Defendants anticipate that the Bank will raise the parol evidence rule in urging the Court to disregard the parties' pre and post contract communications, which include the 2007 UNL Funding Proposal and the PPM. "The parol evidence rule precludes, as a matter of substantive law, the introduction of evidence of antecedent negotiations or agreements to alter a subsequent writing, on the theory that such antecedent matters were integrated in the written agreement." Emerson New York-New Jersey, Inc. v. Brookwood Television, Inc. 122 N.J. Super. 288 (Law Div. 1973), citing Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293 (1953). See A. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953) (holding, the "parol evidence rule 'purports to exclude testimony' only when it is offered for the purpose of 'varying or contradicting' the terms of an 'integrated contact'").

However, defendants do not seek to introduce evidence of antecedent negotiations or agreements to alter the terms of the Master Agreement, but rather to aid the Court in the interpretation of the Master Agreement as a whole for the purpose of establishing the parties' intentions. To do so, respectfully requires the Court to consider the facts and circumstances surrounding Benchmark's execution of the Master Agreement which includes the 2007 UNL Funding Proposal that preceded the Master Agreement, and PPM which the Bank provided to Benchmark after execution of the Master Agreement.

[18] N.J.S.A. 12A:2-204(1) states, in pertinent part:

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

POINT II

PLAINTIFF WILL NOT BE ABLE TO SUSTAIN ITS BURDEN OF ESTABLISHING BREACH OF CONTRACT AGAINST DEFENDANTS DUE TO PLAINTIFF'S NON-PERFORMANCE OF ITS CONTRACTUAL DUTIES AND ITS BREACH OF THE CONVENANT OF GOOD FAITH AND FAIR DEALING

To sustain a breach of contract claim under New Jersey law, the Bank must satisfy the following elements: (1) a contract; (2) a breach of that contract; by the defendants (3) damages flowing therefrom; and (4) that the Bank performed its own contractual duties. See Pub. Serv. Enter. Group, Inc. v. Phila. Elec. Co., 722 F.Supp. 184, 219 (D.N.J. 1989)(internal citation omitted); Nat'l Util. Serv., Inc. v. Chesapeake Corp., 45 F. Supp. 2d 438, 448 (D.N.J. 1999). See also In re Cendant Corp. Sec. Litig., 139 F.Supp. 2d 585, 604 n.10 (D.N.J. 2001) (noting that New Jersey law requires pleading of performance of movant's own contractual duties). See also New Jersey Civil Model Jury Charges, §4.10a.[19]

The evidence and testimony at trial will establish that the Bank failed to perform many of its own contractual duties to defendants; specifically that the Bank:

(i) Failed to cooperate with Benchmark and was otherwise negligent in not timely informing Benchmark of customer lease defaults, thereby depriving Benchmark of the opportunity to cure such defaults at an early stage;

(ii) Failed to provide Benchmark with payoff quotes for defaulting lease customers;

[19] New Jersey law requires plaintiff to establish four (4) elements to sustain a claim for breach of contract against Benchmark. These elements are:

1. The parties entered into a contract containing certain terms.
2. The plaintiff did what the contract required the plaintiff to do.
3. The defendant did not do what the contract required the defendant to do. This failure is called a breach of the contract.
4. The defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.

New Jersey Civil Model Jury Charges, §4.10a.

(iii) Stopped providing Benchmark with payoff quotes and refusing to allow Benchmark to repurchase or sell its performing leases;

(iv) Cashed a customer's residual check made payable to Benchmark that was sent to the Bank by mistake;

(v) Settled with certain lessees (such as Preferred Transportation) without notifying Benchmark or securing Benchmark's approval;

(vi) Invoiced leasing customers under its own name instead of invoicing under Benchmark's name;

(vii) Charged fees and payments to Benchmark's customers which did not belong to the Bank;

(viii) Failed to involve Benchmark in the process of attempting collection of delinquent customer accounts;

(ix) Failed to timely provide Benchmark with the opportunity to repurchase any defaulted lease during an early stage of default;

(x) Grossly miscalculated the amounts alleged to be in default under the loss reserve formula set forth in the Master Agreement;

(xi) Failed to properly credit Benchmark for default loss reserves withheld by the Bank from the purchase price of each and every single lease assigned by Benchmark under the Master Agreement; and

(xii) Failed to mitigate its damages, if any.

In committing the aforesaid acts, defendants argue that the Bank breached the covenant of good faith and fair dealing. In New Jersey the covenant of good faith and fair dealing is contained in all contracts and mandates 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." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130 (1965). Consequently, because of the Bank's non-performance of its obligations under the contract the Court should enter a judgment of no cause of action as to the First, Second, Third, Fifth and Sixth Count of the Bank's Complaint.

POINT III

THE BANK FAILED TO MITIGATE ITS DAMAGES

"Mitigation of damages is a doctrine applicable to breach of contract cases . . . and defendant sustains the burden of proof . . . as to actual or potential mitigation and the amount thereof." Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J.Super. 437 (App. Div. 1976), certif. den., 71 N.J. 503 (1976). Stated another way, the burden of proving that losses could have been reduced or avoided "is always upon the party who has broken the contract." Banco di Roma v. Fidelity Union Trust Co., 464 F.Supp. 817, 826-27 (D.N.J.1979).

In addition to the Bank's failure to share any information with defendants as to what efforts the Bank made, if any, to collect from the defaulting leases, including repossession of the leased equipment and resale, the Bank also was negligent in not timely informing Benchmark of customer lease defaults thereby depriving Benchmark of the opportunity to cure such defaults at an early stage. Take for example the customer Preferred Transportation. Defendants learned post-litigation that the Bank transferred or sold this customer lease account to another funding company, that the Bank seemingly collected $31,535 on this account, and that as of October 2010 the customer owed only 7,875 on this account.[20]

In addition, the Bank refused and/or neglected to regularly provide Benchmark with payoff quotes for defaulting lease customers, including the most recent alleged lease defaults which the Bank only notified Benchmark about less than a week ago, and otherwise failed to

[20] See note 16, supra.

allow Benchmark the opportunity to repurchase the defaulted leases in a timely manner, or to use the cash reserves as a source for Benchmark to satisfy its repurchase obligations for several defaulted customer leases. Also, the Bank failed to involve Benchmark in the collection of delinquent customer accounts despite written assurances to Benchmark that it would do so, as expressed quite clearly in the PPM.

Lastly, but most importantly, the Bank has not accounted to Benchmark for its UNL Pool loss reserve, which as of November 5, 2008 had a balance in excess of $100,000. Had the Bank applied the loss reserves to cure the defaulted leases, then Benchmark's repurchase obligation and/or cure obligation would have been substantially less than that claimed by the Bank.

POINT IV

THE BANK WILL NOT BE ABLE TO PROVE A PRIMA FACIE CLAIM OF CONVERSION

In the Fourth Count of its Complaint, the Bank accuses defendants of engaging in the tort of conversion by wrongfully converting a $6,999.30 customer lease payment (Wireless Beach") paid to Benchmark in error. Defendants admit that Benchmark received the funds from Wireless Beach, but deny that such constitutes the tort of conversion.

As previously mentioned in the Factual Statement, supra, Davin's testimony will establish that as of April 2008 Wireless Beach owed Benchmark $3,659.92 for invoices unrelated to the assignment held by the Bank. The customer approached Benchmark about modifying the loan to reduce the monthly payment, and Benchmark agreed to assist the customer. On or about April 16, 2008 the customer sent Benchmark a check for $6,999.30 to cure the $3,659.92 past due amount owed to Benchmark, and Benchmark credited the customer's account by $3,340.30 (the difference between the $6,999.30 payment less the

$3,659.92 debt owed to Benchmark). Thereafter, when Davin approached the Bank to modify the customer's lease, the Bank refused to supply any payoff information and otherwise refused to cooperate.

Conversion is defined under New Jersey law as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." LaPlace v. Briere, 404 N.J.Super. 585, 595-96 (App. Div. 2009), cert. den. 199 N.J. 133 (2009), citing Barco Auto Leasing Corp. v. Holt, 228 N.J.Super. 77, 83 (App. Div., 1988). See also#Mueller v. Technical Devices Corp., 8 N.J. 201, 207 (1951)(Defining common law conversion as "the exercise of any act of dominion in denial of another's title to the chattels or inconsistent with such title."). While the tort of conversion was developed to apply to chattels, it has been extended to apply to money, as well. Chicago Title Ins. Co. v. Ellis, 409 N.J.Super. 444, 454-55 (App. Div. 2009), citing Hirsch v. Phily, 4 N.J. 408, 416 (1950); Glenfed Fin. Corp. v. Penick Corp., 276 N.J.Super. 163, 181 (App. Div., 1994).

In this instance, the expression, "the pot shouldn't be calling the kettle black," is indeed relevant. Plaintiff received and cashed another leasing customer's residual payment of $4,615.55 made payable to Benchmark - the customer was Bridgeville Plastics. Benchmark retained the residual payments on this lease when it assigned it to the Bank, and thus Bridgeville Plastic's payment belonged to Benchmark. To date, the Bank has refused to refund this fee to Benchmark.

POINT V

THE COURT SHOULD DRAW AN ADVERSE INFERENCE AGAINST THE BANK AS A RESULT OF THE BANK'S FAILURE TO PRODUCE INFORMATION REGARDING COMMUNICATIONS BETWEEN THE BANK AND THE ALLEGED DEFAULTING LEASE CUSTOMERS

In pretrial discovery, defendants requested that the Bank provide information pertaining to communications between the Bank, its agent and any customer whose lease was alleged to be in default. Specifically, during the pretrial discovery period, in an effort to obtain information about the defaulting lessees, the defendants served the Bank with a formal Demand for Production of Documents pursuant to R. 4:18-1 requesting the following information:

> 25. Identify and attach copies of any and all documents which refer or relate in any way to communications between Plaintiff and any third party lessee whose lease is made part of the Master Lease Agreement between plaintiff and defendant Benchmark Financial Groups.
>
> 27. Identify and attach copies of any and all default notices, late payment notices and/or other demands for payment which plaintiff and/or its authorized agents issued to any lessee whose lease is made a part of the Master Lease Agreement.
>
> 28. Identify and attach copies of any and all correspondence, e-mails and other writings with Plaintiff received from any lessee and/or their authorized agents in response to any default notices, late payment notices and/or other payment demands sent by plaintiff.

In answering defendants Demand for Production of Documents, the Bank failed to produce just one single piece of paper that can be deemed responsive to paragraphs 25, 27 and 28 thereof. Instead, the Bank generally referred to 151 pages of bates stamped documents none of which reflect communications between the Bank, its agents and the third party lessees and their agents. This either of the following two (2) scenarios must be true: 1) the Bank never once communicated with any third party lessee, including those defaulting lessees who are the subject of this litigation, or 2) the Bank consciously chose not to produce this information because it would reflect unfavorably upon its case. Either way, defendants respectfully submit that the Court should draw an adverse inference that had the Bank should possessed such information in its files, and that had the Bank produced such evidence it would be unfavorable to the Bank.

In criminal and civil trials, "failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him." State v. Clawans, 38 N.J. 162, 170-171 (1962). See Nisivoccia v. Ademhill Associates, 286 N.J.Super. 419 (App.Div. 1996)(Applying the adverse inference principles of Clawans to civil matters). The trial court has the responsibility to determine if the inference is reasonable under the circumstances of the case. See State v. Carter, 91 N.J. 86, 128 (1982). But the court must exercise caution in authorizing the inference. Parentini v. S. Klein Dep't Stores, Inc., 94 N.J.Super. 452, 456 (App. Div. 1967), certif. denied, 49 N.J. 371 (1967).

Various civil remedies have been developed with the intent of making "whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; punish[ing] the wrongdoer; and deter [ring] others from such conduct." Rosenblit v. Zimmerman, 166 N.J. 391, 401 (2002). Depending on the circumstances, spoliation can result in dismissal, a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. Jerista v. Murray, 185 N.J. 175, 201 (2005); Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J.Super. 358, 364, 368-369 (App. Div. 1998).

An adverse inference is certainly warranted under the circumstances of this case. The Bank has the duty to keep accurate records of its customer accounts. The Bank's failure to produce any relevant information concerning its communications with the defaulting lessees has wholly prejudiced the defendants' ability to establish any proofs on their affirmative defense of mitigation of damages.

POINT VI

THE COURT SHOULD FIND IN DEFENDANTS' FAVOR ON THEIR COUNTERCLAIM FOR BREACH OF CONTRACT, AND BREACH OF THE IMPLIED AND EXPRESS WARRANTIES, AND DEDUCT OR OFFSET ANY DAMAGES SUSTAINED BY DEFENDANTS AGAINST THE DAMAGES, IF ANY, PROVEN BY PLAINTIFF

As previously mentioned, defendants have counterclaimed against the Bank for breach of contract, including breach of the covenant of good faith and fair dealing, and breach of express and implied warranties. The elements to sustain a cause of action for breach of contract and breach of the covenant of good faith and fair dealing are outlined in Point I, supra.

Here, the Court should apply the equitable doctrine of set-off to reduce any damages that the Court may find the Bank to have sustained by the amount of damages proven by the defendants. A setoff is the right which exists between two parties, each of whom under an independent contract owes an ascertained amount to the other, to set off his respective debts by way of a mutual deduction so that in any action brought for the larger debt, the residue only, after such a deduction, shall be recovered. Keegan v. Estate of Keegan, 179 N.J. 242, 246 (1981). Setoff "involves an affirmative recovery on a claim that may be independent of the transaction upon which the plaintiff's claim is based". Miah v. Ahmed, 179 N.J. 511 (2004), *citing* Beneficial Fin. Co. of Atl. City v. Swaggerty, 86 N.J. 602, 609 (1981).

Alternatively, the Court should apply the equitable doctrine of recoupment to reduce any damages found to have been sustained by the Bank. Recoupment is defined as the 'right of the defendant in the same action, to cut down…plaintiff's demand'. Resolution Trust Corp. v. Shoreview Builders, Inc., 252 N.J.Super. 408, 419 (App. Div. 1991). Recoupment permits claims arising out of the same transaction to be adjudicated in the same proceeding. Although not codified in the Bankruptcy Code, the common law doctrine of recoupment has been established through decisional law. In re Flagstaff Realty Associates, 60 F.3d 1031, 1035. (3rd Cir. 1995). Contending claims *must* derive from the same transactions. Recoupment *cannot* be the basis for asserting independent claims against the estate. Id.

CONCLUSION

For the foregoing reasons and authorities, the Court should return a verdict of no cause of action as to the entirety of Plaintiffs' Complaint against the defendants. In addition and/or in the alternative, the Court should award defendant damages as for their Counterclaim, and if such damages exceed that claimed by plaintiff then enter a judgment in favor of defendants.

Respectfully submitted,

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