

COUNTY OF NEW YORK

Defendants.

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ANSWER OF BMO AND FAIRWAY

Complaint paragraph 1: Plaintiff Kohlberg Capital Funding LLC I (“Kohlberg Funding”) is a Delaware limited liability company having its principal office and place of business at 295 Madison Avenue, 6th Floor, New York, New York 10017. Kohlberg Capital’s registered agent is Corporation Service Company with a registered address at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808.

Answer to paragraph 1: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint; except admit, upon information and belief, that Kohlberg Funding is a Delaware limited liability company with an office at 295 Madison Avenue, 6th Floor, New York, New York 10017.

Complaint paragraph 2: Plaintiff Kohlberg Capital Corporation (“Kohlberg Capital”) is a Delaware corporation having its principal office and place of business at 295 Madison Avenue, 6th Floor, New York, New York 10017. Kohlberg Capital is the sole member of Kohlberg Funding. Kohlberg Capital’s registered agent is The Corporation Trust Company with a registered address at Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

Answer to paragraph 2: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint; except admit, upon information and belief, that Plaintiff Kohlberg Capital is a Delaware corporation with an office at 295 Madison Avenue, 6th Floor, New York, New York 10017.

Complaint paragraph 3: Defendant Fairway Finance Company, LLC is a Delaware limited liability company having an address at c/o Lord Securities Corporation, 48 Wall Street, 27th Floor, New York, New York 10005.

Answer to paragraph 3: The BMO Defendants admit the allegations contained in paragraph 3 of the Complaint.

Complaint paragraph 4: Defendant Riverside Funding, LLC is a Delaware limited liability company having an address at c/o Global Securitization Services, LLC, 445 Broad Hollow Road, Suite 239, Melville, New York 11747.

Answer to paragraph 4: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint; except admit, upon information and belief, that Defendant Riverside Funding, LLC is a Delaware limited liability company having an

address at c/o Global Securitization Services, LLC, 445 Broad Hollow Road, Suite 239, Melville, New York 11747.

Complaint paragraph 5: Defendant BMO Capital Markets Corp. is a Delaware corporation with registered offices at 3 Times Square, New York, New York 10036 and having an address at 115 South LaSalle Street, 13th Floor West, Chicago, Illinois 60603 (“BMO”).

Answer to paragraph 5: The BMO Defendants admit the allegations contained in paragraph 5 of the Complaint.

Complaint paragraph 6: Defendant Deutsche Bank AG, New York Branch is a German corporation having an address at 60 Wall Street, 19th Floor, New York, NY 10005 (“Deutsche Bank”).

Answer to paragraph 6: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint; except admit, upon information and belief, that Defendant Deutsche Bank AG, New York Branch is the New York branch of a German bank having an address at 60 Wall Street, 19th Floor, New York, NY 10005.

Complaint paragraph 7: Defendant U.S. Bank, National Association, named as defendant herein solely in its capacity as trustee, is a national banking association, having an address at One Federal Street, Third Floor, Boston, Massachusetts 02110.

Answer to paragraph 7: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint; except admit, upon information and belief, that Defendant U.S. Bank, National Association, is a national banking association, having an address at One Federal Street, Third Floor, Boston, Massachusetts 02110.

Complaint paragraph 8: Jurisdiction is proper over all Defendants in this Court pursuant to CPLR § 302 because Defendants transact business in the State of New York, including negotiating and accepting of the Loan Funding and

Servicing Agreement which is the subject of this action in the State of New York.

Answer to paragraph 8: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint; except admit that Fairway and BMO transact business in the State of New York. To the extent the allegations in paragraph 8 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 9: Venue is proper in this Court pursuant to CPLR § 503 because Plaintiffs reside in New York County.

Answer to paragraph 9: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint. To the extent the allegations in paragraph 9 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 10: Kohlberg Capital is an internally managed, non-diversified closed-end investment company that has elected to be regulated as a business development company under the Investment Company Act of 1940, as amended. Kohlberg Capital is in the business of originating, structuring, and investing in senior secured term loans, mezzanine debt and equity securities, primarily in privately-held middle market companies, and directly holds interests in certain collateralized loan funds.

Answer to paragraph 10: The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint.

Complaint paragraph 11: On or about February 14, 2007, the Plaintiffs entered into the Loan Funding and Servicing Agreement with Defendants (among others) which was amended, restated or replaced from time to time. The Loan Funding and Servicing Agreement is annexed hereto as Exhibit A and the terms thereof are incorporated herein by reference. The Second Amendment To Loan Funding And Servicing Agreement, which had a term beginning on October 1, 2007 and expiring on October 1, 2012, is annexed hereto as Exhibit B and the

terms thereof are incorporated herein by reference. Such amended and restated loan agreement is hereafter referred to as the LFSA.

Answer to paragraph 11: The BMO Defendants deny the allegations contained in paragraph 11 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 11 for their true and complete contents and admit that they entered into the Loan Funding Servicing Agreement on or about February 14, 2007 and that a true and correct copy of the Second Amendment To Loan Funding And Servicing Agreement is attached to the Complaint as Exhibit B.

Complaint paragraph 12: Pursuant to the LFSA, the Defendants each agreed (upon specified conditions and upon Plaintiffs' request) to make Advances¹ to Plaintiffs during the Revolving Period (generally a five-year term commencing on February 14, 2007) up to the total aggregate principal amount of \$275 million (the "Facility"). Specifically, Section 2.1(b) of the LFSA provides that "[d]uring the Revolving Period, the Borrower may, at its option, request the Lenders to make advances [emphasis added] of funds (each, an "Advance") ... in an aggregate amount up to the Availability as of the proposed Funding Date of the Advance. Following the receipt of a Funding Request, subject to the terms and conditions hereinafter set forth, during the Revolving Period, the Lender *shall* fund such Advance" [emphasis added]. The LFSA, therefore, is a committed loan facility pursuant to which Kohlberg Funding may, at its discretion, request one or more Advances of funds during the Revolving Period, and Defendants are required to advance such requested funds. Kohlberg Funding issued to Defendants certain Variable Funding Notes to evidence the repayment obligations under the LFSA.

¹Unless otherwise indicated, capitalized terms used but not defined herein shall have the meanings given to them in the LFSA.

Answer to paragraph 12: The BMO Defendants deny the allegations in paragraph 12 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 12 for their true and complete contents and admit that Kohlberg Funding issued to Defendants certain Variable Funding Notes to

evidence the repayment obligations under the LFSA. To the extent the allegations in paragraph 12 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 13: Unless excused by an express term in the LFSA (e.g., shortening the term of the Revolving Period), Defendants were required to advance funds from the Closing Date (February 14, 2007) until October 1, 2012 — the Commitment Termination Date. Such date, however, was subject to extension for additional 364-day periods by application of the procedures set forth in Section 2.1.(c) of the LFSA.

Answer to paragraph 13: The BMO Defendants deny the allegations in paragraph 13 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 13 for their true and complete contents. To the extent the allegations in paragraph 13 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 14: Notably, the language in Section 2.1(c) describing the procedure to be applied for such an extension does not expressly apply to the 364-day extension of the five-year initial term of the Revolving Period, but, instead applies to an extension of the so-called Liquidity Purchase Agreements. That term is defined by the LFSA as follows:

“Liquidity Purchase Agreement”: Any agreement entered into in connection with this Agreement pursuant to which a Liquidity Bank agrees to make purchases from or advances to, or purchase assets from, any Conduit Lender in order to provide liquidity support for such Conduit Lender’s Advances hereunder.

Thus, it was contemplated that Defendants might enlist others to support the five-year loan facility it had agreed to provide to Plaintiffs; to support the Advances it was required to make thereunder. Section 2.1 (c) sets forth the procedures by which both the five-year Revolving Period and the Liquidity Purchase Agreements might be extended.

Answer to paragraph 14: The BMO Defendants deny the allegations in paragraph 14 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 14 for their true and complete contents. To

the extent the allegations in paragraph 14 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 15: Beginning at a time unknown to Plaintiffs but sometime before August of 2008, Defendants embarked upon an egregious scheme to avoid their obligations under the LFSA.

Answer to paragraph 15: The BMO Defendants deny the allegations in paragraph 15 of the Complaint.

Complaint paragraph 16: In order to facilitate that scheme, in or about September 2008, Defendants declared that they were no longer required to make the Advances — and refused to do so.

Answer to paragraph 16: The BMO Defendants deny the allegations in paragraph 16 of the Complaint; except admit that, in or about September 2008, as a result of the occurrence of the Termination Date, Defendants were no longer required to make Advances under the LFSA.

Complaint paragraph 17: The articulated reason for Defendants' position was that a Termination Date under the LFSA had occurred. Termination Date is defined by the LFSA as:

"Termination Date": The earliest to occur of (a) the Business Day designated by the Borrower to the Agent as the Termination Date upon at least two Business Days' prior written notice, (b) the date of the occurrence of a Termination Event pursuant to Section 9.1, (c) the date on which any Liquidity Purchase Agreement shall expire in accordance with its terms and fail to be renewed for an additional period of 364 days pursuant to Section 2.1(c) or shall otherwise cease to be in full force and effect as in effect on the date hereof (without giving effect to any amendment, modification, waiver, supplement or restatement), and (d) the second Business Day prior to the Commitment Termination Date.

In particular, Defendants asserted that there was a Termination Date because the Liquidity Purchase Agreements expired and have not been renewed for an additional 364-day period pursuant to Section 2.1(c). Notwithstanding such assertion:

- a. Plaintiffs were not provided advance notice of such alleged expiration as contemplated by the extension procedures set forth in Section 2.1(c).
- b. Defendants have not provided copies of the Liquidity Purchase Agreements that have allegedly expired — despite Plaintiffs' request therefor.
- c. Defendants have refused to provide relevant information concerning these allegedly expired Liquidity Purchase Agreements and have even refused to identify the Liquidity Banks that are parties to such agreements.

Answer to paragraph 17: The BMO Defendants deny the allegations in paragraph 17 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 17 for their true and complete contents and admit that the Termination Date occurred as a result of the expiration of certain Liquidity Purchase Agreements and that they (a) did not provide Plaintiffs with advance notice of the expiration of any Liquidity Purchase Agreement and were not obligated, under the LFSA or otherwise, to do so, (b) have not provided Plaintiff with copies of any Liquidity Purchase Agreement and are not obligated, under the LFSA or otherwise, to do so, and (c) have not provided Plaintiff with any information concerning the Liquidity Purchase Agreements or identified the Liquidity Banks that are parties to such agreements and are not obligated, under the LFSA or otherwise, to do so.

Complaint paragraph 18: Defendants' refusal to fund Advances was improper and constituted a breach under the LFSA. As alleged hereafter (*see* ¶¶ 20-24; 35-41), Defendants' pretextual explanation for their conduct is devoid of any contractual or legal support.

Answer to paragraph 18: The BMO Defendants deny the allegations in paragraph 18 of the Complaint.

Complaint paragraph 19: Defendants' wrongful declaration of a Termination Date triggered the Amortization Period under the LFSA. By so doing, Defendants

deprived Plaintiffs of the funding necessary to originate and acquire new loans, required Plaintiffs to prematurely liquidate loans in its portfolio, and prevented Plaintiffs from utilizing net interest cash flows for operating purposes (including, but not limited to, funding dividend payments to shareholders).

Answer to paragraph 19: The BMO Defendants deny the allegations in paragraph 19 of the Complaint; except admit that the occurrence of the Termination Date triggered the Amortization Period under the LFSA.

Complaint paragraph 20: Beginning in or around August 2008, Plaintiffs have been engaged in continuing negotiations with Defendants regarding the modification and extension of the LFSA. On or about May 29, 2009, Plaintiffs believed they had reached an agreement with Defendants on the essential terms regarding such extension.

Answer to paragraph 20: The BMO Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph 20 of the Complaint; except admit that they have engaged in discussions with Plaintiffs regarding the LFSA.

Complaint paragraph 21: Shortly thereafter (on or about June 9, 2009) and notwithstanding Plaintiffs' understanding that negotiations had progressed such that there was agreement upon essential extension terms, BMO and Deutsche Bank suddenly issued a "Notice of Termination Events: Reservation of Rights," (the "Notice of Termination Events"). That notice asserted various breaches by Plaintiffs of their obligations under the LFSA and declared that various Termination Events have occurred or will occur. The Notice of Termination Events likewise asserted that these alleged breaches obligated Plaintiffs to pay the higher "default" rate of interest under the LFSA (equal to the applicable Prime Rate plus 0.75% for each day during any Accrual Period following the occurrence of a Termination Event that is continuing). BMO and Deutsche Bank then purported to reserve their rights to, *inter alia*, (i) declare the Termination Date to have occurred; (ii) direct the Borrower and Servicer to assemble and sell the Collateral; and (iii) take any other enforcement action or otherwise exercise its rights and remedies under the LFSA and related transaction documents. A true and correct copy of the Notice of Termination Events is annexed hereto as Exhibit C.

Answer to paragraph 21: The BMO Defendants deny the allegations in paragraph 21 of the Complaint; except respectfully refer the Court to the complete text

of the documents referenced in paragraph 21 for their true and complete contents and admit that a true and correct copy of the Notice of Termination Events is attached as Exhibit C to the Complaint.

Complaint paragraph 22: The imposition of the default rate of interest represents a quadrupling of the interest rate on the loan facility and has a significant adverse impact on Plaintiffs.

Answer to paragraph 22: The BMO Defendants deny the allegations in paragraph 22 of the Complaint; except admit that as a result of the imposition of the default rate of interest, the interest rate on the loan facility increased to the applicable Prime Rate plus 0.75%.

Complaint paragraph 23: Plaintiffs responded by letter dated June 11, 2009 (the "June 11th Letter"), and categorically rejected the Notice of Termination Events as contrary to the terms and conditions of the LFSA, and otherwise unlawful. Defendants were also advised that their wrongful refusal to provide Advances as required under the LFSA constituted a serious breach of the LFSA. A true and correct copy of the June 11th Letter is annexed hereto as Exhibit D.

Answer to paragraph 23: The BMO Defendants deny the allegations in paragraph 23 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 23 for their true and complete contents and admit that a true and correct copy of the June 11th Letter is attached as Exhibit D to the Complaint.

Complaint paragraph 24: A further exchange of correspondence between the parties illustrates that Defendants have invented fictitious defaults — Termination Events — in order to circumvent their funding obligations under the LFSA. Defendants' wrongheaded default allegations are addressed below.

Answer to paragraph 24: The BMO Defendants deny the allegations in paragraph 24 of the Complaint.

Complaint paragraph 25: The Notice of Termination Events asserted that Termination Events have occurred because Plaintiffs “failed to correctly determine the Moody’s Rating of certain Loans included in the Collateral, resulting in multiple incorrect calculations, including the Weighted Average Moody’s rating Factor, the Aggregate Purchased Loan Balance, the Advance Rate and the Borrowing Base all under the Loan Funding and Servicing Agreement.” According to Defendants, these incorrect calculations have caused various underpayments of amounts required to be paid under the LFSA and also have resulted in the “occurrence and continuation of both an Overcollateralization Shortfall and a Required Equity Shortfall,” both of which are Termination Events under Section 9.1 of the LFSA.

Answer to paragraph 25: The BMO Defendants deny the allegations in paragraph 25 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 25 for their true and complete contents and admit that Plaintiffs’ failure to correctly determine the Moody’s ratings of certain loans included in the Collateral has resulted in the occurrence and continuation of Termination Events under Section 9.1 of the LFSA.

Complaint paragraph 26: Defendants’ June 19th letter (the “June 19th Letter”), provided detail for these claimed Termination Events and, in particular, asserts that Section 5.1(bb) of the LFSA, obligated Plaintiffs to “ensure that each Transferred Loan had a Moody’s Rating, with carve outs for up to 10% of the Aggregate Outstanding Loan Balance that may consist of Unrated Loans and an additional 10% of the Aggregate Outstanding Loan Balance that may consist of Loans with an S&P Shadow Rating in lieu of a Moody’s credit estimate” and to “reapply, at least once every 12 months, for a new Moody’s credit estimate for all Transferred Loans carrying such a credit estimate.” The June 19th Letter proceeded to assert that Kohlberg Funding failed to renew the Moody’s credit estimates on certain Transferred Loans and concluded that “[s]hould Moody’s fail to renew any such credit estimate, such Transferred Loan will no longer have an Assigned Moody’s Rating and its Moody’s Rating must then be determined pursuant to the definition of Moody’s Derived Rating.” Based thereupon, it was claimed that Termination Events had occurred under Section 9.1 of the LFSA. A true and correct copy of the June 19th Letter is annexed hereto as Exhibit E.

Answer to paragraph 26: The BMO Defendants deny the allegations in paragraph 26 of the Complaint; except respectfully refer the Court to the documents

referenced in paragraph 26 for their true and complete contents and admit that Termination Events have occurred and are continuing under Section 9.1 of the LFSA.

Complaint paragraph 27: Plaintiffs responded by a letter dated June 23, 2009 (the "June 23rd Letter"). Therein, Plaintiffs pointed out the Defendants' June 19th Letter misquoted Section 5.1(bb) of the LFSA. Rather than such misquoted language, Section 5.1(bb) provides:

"The Borrower will ensure that each Transferred Loan shall have as of its Cut-Off Date a Moody's Rating ; *provided* that if any Transferred Loan does not have a Moody's Assigned Rating or a Moody's Shadow rating as of its Cut-Off Date, the Borrower (or Servicer on its behalf) will apply for a Moody's Rating to be assigned to such Transferred Loan (i) no later than the Cut-Off Date for each such Transferred Loan and (ii) within 10 Business Days of any amendment to the related Loan Documents that is deemed material in the Servicer's reasonable judgment; *provided further* that at any time up to 10% of the Aggregate Outstanding Loan Balance may consist of Transferred Loans that have a S&P Shadow Rating in lieu of a Moody's Rating."

Answer to paragraph 27: The BMO Defendants deny the allegations in paragraph 27 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 27 for their true and complete contents.

Complaint paragraph 28: The June 23rd Letter proceeded to explain that Plaintiffs complied with Section 5.1(bb) and, in particular, each Transferred Loan had a Moody's Rating or the Borrower had applied for Moody's Rating to be assigned as of the Cut-Off Date of each Transferred Loan. The Letter also explained why Section 5.1(bb) does *not* require continuing or repeated applications for a Moody's rating for all of the Transferred Loans. Instead, the provision actually provides that the "Borrower shall re-apply at least once every 12 months for a new Moody's Shadow Rating or S&P Shadow Rating, as applicable, *with respect to each Loan having a Moody's Shadow Rating or S&P Shadow Rating, respectively ...*" (emphasis added). A true and correct copy of the June 23rd Letter is annexed hereto as Exhibit F.

Answer to paragraph 28: The BMO Defendants deny the allegations in paragraph 28 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 28 for their true and complete contents and

admit that a true and correct copy of the June 23rd Letter is attached as Exhibit F to the Complaint.

Complaint paragraph 29: By the plain language of Section 5.1(bb), the Borrower's reapplication obligation applies only to Transferred Loans that — as of each of their respective Cut-Off Dates — had Moody's or S&P Shadow Ratings, (i.e., not to all Transferred Loans). Plaintiffs have fully complied with such application obligations.

Answer to paragraph 29: The BMO Defendants deny the allegations in paragraph 29 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 29 for their true and complete contents. To the extent the allegations in paragraph 29 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 30: Despite the above, Defendants continue to rely upon misquoted language and/or a misguided interpretation of the LFSA. Defendants likewise continue to claim multiple Termination Events based upon the erroneous contention that Kohlberg Funding has failed to obtain or renew the Moody's credit ratings for all of the Transferred Loans.

Answer to paragraph 30: The BMO Defendants deny the allegations in paragraph 30 of the Complaint.

Complaint paragraph 31: The Notice of Termination Events also asserts that Plaintiffs failed to adequately maintain the separate existence of the Borrower as required under Section 4.1(t)(xxv) — relating to obligations to use separate invoices and checks — and Section 4.1(t)(xxix) — which requires the Borrower to refrain "from taking, *as applicable*, each of the activities specified in the non-consolidation opinion of Ropes & Gray LLP, dated as of the Closing Date," (emphasis added) — and Section 5.1(m) of the LFSA. The failure to cure these alleged separateness covenant defaults within twenty days of the date of the letter would result in the occurrence of an additional Termination Event.

Answer to paragraph 31: The BMO Defendants deny the allegations in paragraph 31 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 31 for their true and complete contents and

admit that Plaintiffs' failure to cure the separateness covenants defaults within twenty days of the Notice of Termination Event would result in the occurrence of an additional Termination Event.

Complaint paragraph 32: Plaintiffs responded by pointing out that Defendants' allegation that Kohlberg Funding failed to use separate invoices and checks bearing its own name under Section 4.1(t)(xxv), even if correct, is wholly immaterial, as explained in paragraph 34 hereof, and this covenant is one that has been consistently and repeatedly waived by Defendants. Additionally, this alleged breach is curable within 20 days of the date of the Notice of Termination Event, before it can give rise to a Termination Event. Moreover, the vague allegations of breaches of the separateness covenants (or the reference to the Ropes & Gray opinion letter) does not provide sufficient information to enable Plaintiffs to effectuate the cure to which it is entitled to make under the LFSA.

Answer to paragraph 32: The BMO Defendants deny the allegations in paragraph 32 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 32 for their true and complete contents. To the extent the allegations in paragraph 32 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 33: The additional detail provided by Defendants demonstrates the speciousness of their allegations. Defendants complain that (i) the Borrower allegedly has not conducted annual meetings of its board of directors; (ii) the Borrower does not maintain books, stationery, checks, office space, and other routine administrative items separate from the Servicer; and (iii) the Borrower failed to use separate invoices and checks bearing the Borrower's name.

Answer to paragraph 33: The BMO Defendants deny the allegations in paragraph 33 of the Complaint; except admit that the agreed upon procedures review of the operations of the Servicer and the Borrower conducted by Protivity Inc. and dated March 19, 2008 found that the Borrower has not conducted annual meetings of

its board of directors, and that the Borrower does not maintain books, stationary, checks, office space and other routine administrative items separate from the Servicer.

Complaint paragraph 34: As Plaintiffs pointed out in their June 23rd Letter, however, these alleged compliance failures, even if true, are in no way material and cannot constitute a breach of Sections 4.1(t) and 5.1(m) of the LFSA. Borrower, therefore, is under no obligation to cure these alleged breaches. Specifically, (i) there is no charter requirement that the Borrower conduct annual meetings of its board of directors; (ii) Borrower does maintain separate books, which is precisely what Defendants' auditors found; (iii) Borrower does not engage in correspondence that requires the use of any stationary (but it does maintain separate stationary); (iv) Borrower uses no checks because all bank accounts are maintained and administered through the Trustee.

Answer to paragraph 34: The BMO Defendants deny the allegations in the first two sentences of paragraph 34 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 34 for their true and complete contents. The BMO Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 34; except admit that the agreed upon procedures review of the operations of the Servicer and the Borrower conducted by Protivity Inc. and dated March 19, 2008 found that the Borrower has not conducted annual meetings of its board of directors, and that the Borrower does not maintain books, stationary, checks, office space and other routine administrative items separate from the Servicer. To the extent the allegations in paragraph 34 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 35: No Termination Event exists as a result of any alleged breach of Sections 4.1(t) and 5.1(m) of the LFSA.

Answer to paragraph 35: The BMO Defendants deny the allegations in paragraph 35 of the Complaint.

Complaint paragraph 36: Plaintiffs' June 11th Letter explained that the Termination Date could not have occurred due to any purported refusal of a Liquidity Bank to renew the Liquidity Purchase Agreement, as the LFSA clearly contemplated that such Liquidity Purchase Agreement must support the loan advances required during the Revolving Period (which has *not* expired).

Answer to paragraph 36: The BMO Defendants deny the allegations in paragraph 36 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 36 for their true and complete contents. To the extent the allegations in paragraph 36 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 37: Defendants' June 19th Letter does not dispute that Borrowers may request Advances, that Defendants were required to make the requested Advances during the Revolving Period, and that the purpose of the Liquidity Purchase Agreement is to support those required Advances. Instead, Defendants have fabricated an argument that the LFSA contemplates that the Liquidity Purchase Agreement bear an initial term of 364 days. In so doing, Defendants rely on the definition of Termination Date (set forth in paragraph 17 hereof) and Section 2.1(c): the provision for the extension of both the five-year Revolving Period and the term of the Liquidity Purchase Agreements. As alleged above, Section 2.1(c) of the LFSA provides a process whereby both of these agreements may be extended by an additional 364 days.

Answer to paragraph 37: The BMO Defendants deny the allegations in paragraph 37 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 37 for their true and complete contents. To the extent the allegations in paragraph 37 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 38: According to Defendants, the language providing for an additional 364-day extension of both the five-year Revolving Period and a Liquidity Purchase Agreement means that it was agreed that the *initial term* of the Liquidity Purchase Agreement was 364 days; or that Borrower was aware that this undisclosed agreement had a 364-day term.

Answer to paragraph 38: The BMO Defendants deny the allegations in paragraph 38 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 38 for their true and complete contents. To the extent the allegations in paragraph 38 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 39: Plaintiffs were not aware, nor were they notified that the Liquidity Purchase Agreement had a 364-day initial term, and Plaintiffs had no reason to be aware of such a thing. Instead, Plaintiffs believed that Liquidity Purchase Agreements were contemplated to support the advances required under the LFSA; i.e., during the Revolving Period. Additionally, there is no logical basis to argue that a contractual provision allowing for a 364-day extension means or suggests the initial term of such agreement was 364 days — particularly, if the same extension provision applies to the Revolving Term; i.e., a five-year term.

Answer to paragraph 39: The BMO Defendants deny the allegations in paragraph 39 of the Complaint. To the extent the allegations in paragraph 39 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 40: Additionally, as Defendants continue to withhold documents and information about their undisclosed arrangements, it is impossible to understand and/or verify their contentions regarding the Liquidity Banks. Moreover, Defendants' failure to notify Plaintiffs of the terms of the Liquidity Purchase Agreements and of their expiration (if expiring) constituted a further violation of Plaintiffs' rights under the LFSA.

Answer to paragraph 40: The BMO Defendants deny the allegations in paragraph 40 of the Complaint. To the extent the allegations in paragraph 40 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 41: Plaintiffs, in their June 23rd Letter, rejected Defendants' illogical argument and reiterated their position that Agent and Lender Agent wrongfully terminated the Revolving Period, and improperly commenced the Amortization Period, prematurely triggering the priority waterfall set forth in Section 2.8(b) of the LFSA. Plaintiffs further reiterated their demand for copies of the Liquidity Purchase Agreements, which Agent and Lender Agent have, to date, have failed to provide to Plaintiffs.

Answer to paragraph 41: The BMO Defendants deny the allegations in paragraph 41 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 41 for their true and complete contents and admit that they have not provided copies of any Liquidity Purchase Agreements to Plaintiffs and are not obligated, under the LFSA or otherwise, to do so. To the extent the allegations in paragraph 41 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 42: Despite the parties' continued negotiations and Plaintiffs' good faith offers to cure any alleged defaults, Defendants have persisted in their scheme to circumvent obligations.

Answer to paragraph 42: The BMO Defendants deny the allegations in paragraph 42 of the Complaint.

Complaint paragraph 43: Defendants' breaches of their obligations will cause extensive and irreparable harm to Plaintiffs.

Answer to paragraph 43: The BMO Defendants deny the allegations in paragraph 43 of the Complaint.

Complaint paragraph 44: Defendants' scheme has deprived Plaintiffs of the funding needed to originate and acquire new loans; required Plaintiffs to prematurely liquidate loans in its portfolio; and deprived Plaintiffs of cash flow necessary to operate its business (including the funding of shareholders' dividends).

Answer to paragraph 44: The BMO Defendants deny the allegations in paragraph 44 of the Complaint

Complaint paragraph 45: Damages would not be an adequate remedy because the financial support provided under the LFSA is the life blood of Plaintiffs' business; and, given the widely recognized credit crisis, alternative financing is not currently available. Furthermore, damages from Defendants' wrongful conduct (i.e. flowing either from the inability to originate new loans or the premature liquidation of the Collateral) will be difficult to determine with reasonable certainty because of the uncertainty and volatility in the financial markets.

Answer to paragraph 45: The BMO Defendants deny the allegations in paragraph 45 of the Complaint.

Complaint paragraph 46: Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs.

Answer to paragraph 46: As to the allegations contained in paragraph 46 of the Complaint, the BMO Defendants repeat and reallege the responses contained in paragraphs 1 through 45 as if fully set forth herein.

Complaint paragraph 47: The LFSA is a valid and binding contract, pursuant to which Defendants agreed to advance up to \$275 million in funds to Kohlberg Funding.

Answer to paragraph 47: The BMO Defendants deny the allegations contained in paragraph 47 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 47 for their true and complete contents. To the extent the allegations in paragraph 47 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 48: Plaintiffs complied with all applicable covenants and conditions under the LFSA. At the time of the Notices, Plaintiffs had performed all obligations required of them to be performed, except to the extent Defendants' conduct prevented Plaintiffs from doing so.

Answer to paragraph 48: The BMO Defendants deny the allegations contained in paragraph 48 of the Complaint.

Complaint paragraph 49: Pursuant to the terms of the LFSA, Defendants were, and continue to be, obligated to approve the Kohlberg Funding's requests for Advances and to allow Plaintiffs to continue to exercise control over the Collateral.

Answer to paragraph 49: The BMO Defendants deny the allegations contained in paragraph 49 of the Complaint. To the extent the allegations in paragraph 49 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 50: Defendants' unlawful Notices, attendant refusal to fund Advances as required by the LFSA, acceleration of the Facility, and demand for "default" interest, constitute material breaches of their obligations under the LFSA.

Answer to paragraph 50: The BMO Defendants deny the allegations contained in paragraph 50 of the Complaint; except respectfully refer the Court to the complete text of the documents referenced in paragraph 50 for their true and complete contents. To the extent the allegations in paragraph 50 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 51: An actual controversy of justiciable issues exists between Plaintiffs and Defendants within the jurisdiction of this Court involving the rights and liabilities of the parties under the LFSA, in particular, Defendants' wrongful refusal to fund Advances as required by the LFSA, acceleration of the Facility, and demand for "default" interest, which controversies may be determined by a declaratory judgment of this Court. Expedious resolution of these controversies is both necessary and appropriate.

Answer to paragraph 51: The BMO Defendants deny the allegations contained in paragraph 51 of the Complaint. To the extent the allegations in paragraph 51 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 52: Accordingly, Plaintiffs are entitled to a declaration (a) that the Notices are invalid and contrary to the express terms of the LFSA, and (b) the Termination Date under the LFSA has not occurred.

Answer to paragraph 52: The BMO Defendants deny the allegations contained in paragraph 52 of the Complaint. To the extent the allegations in paragraph 52 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 53: Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs.

Answer to paragraph 53: As to the allegations contained in paragraph 53 of the Complaint, the BMO Defendants repeat and reallege the responses contained in paragraphs 1 through 52 as if fully set forth herein.

Complaint paragraph 54: Predicated on the improper and invalid Notices, Defendants have repudiated their obligations under the LFSA and have wrongfully and improperly (a) failed and refused to make Advances as required under the LFSA, and (b) made demand for payment of “default” interest.

Answer to paragraph 54: The BMO Defendants deny the allegations contained in paragraph 54 of the Complaint. To the extent the allegations in paragraph 54 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 55: Plaintiffs have no adequate remedy at law for Defendants’ breaches and will be irreparably harmed thereby.

Answer to paragraph 55: The BMO Defendants deny the allegations contained in paragraph 55 of the Complaint. To the extent the allegations in paragraph 55 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 56: Accordingly, Plaintiffs are entitled to a decree of specific performance compelling Defendants to perform as required under the LFSA.

Answer to paragraph 56: The BMO Defendants deny the allegations contained in paragraph 56 of the Complaint. To the extent the allegations in paragraph 56 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 57: Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs.

Answer to paragraph 57: As to the allegations contained in paragraph 57 of the Complaint, the BMO Defendants repeat and reallege the responses contained in paragraphs 1 through 56 as if fully set forth herein.

Complaint paragraph 58: By their conduct, Defendants have repudiated and breached their obligations under the LFSA by, among other things, failing and

refusing to fund additional Advances, issuing the invalid Notices, making demand for payment of "default" interest, and forcing the liquidation of the Collateral.

Answer to paragraph 58: The BMO Defendants deny the allegations contained in paragraph 58 of the Complaint. To the extent the allegations in paragraph 58 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 59: Accordingly, Plaintiffs' obligations under the LFSA have been suspended and/or discharged, and Plaintiffs are entitled to damages in an amount to be proven at trial, including but not limited to Plaintiffs' realized losses arising from the premature liquidation of assets in their portfolio.

Answer to paragraph 59: The BMO Defendants deny the allegations contained in paragraph 59 of the Complaint. To the extent the allegations in paragraph 59 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 60: Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs.

Answer to paragraph 60: As to the allegations contained in paragraph 60 of the Complaint, the BMO Defendants repeat and reallege the responses contained in paragraphs 1 through 59 as if fully set forth herein.

Complaint paragraph 61: In New York, a covenant of good faith and fair dealing is implied in every contract, and the LFSA is governed by New York law.

Answer to paragraph 61: The allegations in paragraph 61 of the Complaint state a legal conclusion to which no response is necessary.

Complaint paragraph 62: Defendants' conduct has injured and possibly destroyed the right of Plaintiffs to the benefits of their bargain under the LFSA.

Answer to paragraph 62: The BMO Defendants deny the allegations contained in paragraph 62 of the Complaint. To the extent the allegations in paragraph 62 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 63: Through its improper conduct, Defendants breached the covenant of good faith and fair dealing.

Answer to paragraph 63: The BMO Defendants deny the allegations contained in paragraph 63 of the Complaint. To the extent the allegations in paragraph 63 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 64: Accordingly, Plaintiffs are entitled to damages in an amount to be proven at trial.

Answer to paragraph 64: The BMO Defendants deny the allegations contained in paragraph 64 of the Complaint. To the extent the allegations in paragraph 64 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 65: Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs.

Answer to paragraph 65: As to the allegations contained in paragraph 65 of the Complaint, the BMO Defendants repeat and reallege the responses contained in paragraphs 1 through 64 as if fully set forth herein.

Complaint paragraph 66: Unless Defendants are ordered to withdraw the Notices and to specifically perform their obligations under the LFSA, Plaintiffs will suffer substantial and irreparable injury.

Answer to paragraph 66: The BMO Defendants deny the allegations contained in paragraph 64 of the Complaint. To the extent the allegations in paragraph 64 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 67: The benefits to Plaintiffs in obtaining the injunctive relief outweigh the potential harm which Defendants would incur if this Court grants the requested injunctive relief.

Answer to paragraph 67: The BMO Defendants deny the allegations contained in paragraph 67 of the Complaint. To the extent the allegations in paragraph 67 of the Complaint state a legal conclusion, no response is necessary.

Complaint paragraph 68: The public interest is best served by granting the requested injunctive relief.

Answer to paragraph 68: The BMO Defendants deny the allegations contained in paragraph 68 of the Complaint. To the extent the allegations in paragraph 68 of the Complaint state a legal conclusion, no response is necessary.

Additional Defenses

Without assuming any burdens not stated in the law, BMO Defendants assert the following defenses to Ocean Diving's claims:

First Defense

The Complaint fails to state a cause of action.

Second Defense

Plaintiffs' claims against the BMO Defendants are barred, in whole or part, by the doctrines of waiver, laches, equitable estoppel, and/or unclean hands.

Third Defense

Plaintiff's claims against the BMO Defendants are barred, in whole or part, by the terms of the LFSA.


Fourth Defense

Plaintiff's claims against the BMO Defendants are barred, in whole or part, by the parol evidence rule.

WHEREFORE, defendants Fairway Finance Company, LLC and BMO Capital Markets Corp. pray for judgment dismissing the Complaint with prejudice,

awarding the BMO Defendants their attorneys' fees and costs in this action, and granting such other, further and different relief as to the Court appears just and proper.

Dated: New York, New York
October 26, 2009

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