

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

----- X		
In re:	:	Chapter 11
	:	
ORLEANS HOMEBUILDERS, INC., <i>et al.</i> ,	:	Case No. 10-10684 (PJW)
	:	
Debtors.	:	Jointly Administered
	:	
----- X		
NVR, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adv. Proc. No. 10-51083
	:	
ORLEANS HOMEBUILDERS, INC., <i>et al.</i> ,	:	
	:	
Defendants.	:	
----- X		

**DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION  
TO DISMISS ADVERSARY COMPLAINT FILED BY NVR, INC.,  
FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE  
GRANTED PURSUANT TO FED. R. BANKR. P. 7012(b) AND FED.  
R. CIV. P. 12(b)(6)**

---

**CAHILL GORDON & REINDEL LLP**

Joel H. Levitin  
Kevin J. Burke  
Michael R. Carney  
Eighty Pine Street  
New York, New York 10005  
Telephone: (212) 701-3000  
Facsimile: (212) 269-5420  
Email: [jlevitin@cahill.com](mailto:jlevitin@cahill.com)  
Email: [kburke@cahill.com](mailto:kburke@cahill.com)  
Email: [mcarney@cahill.com](mailto:mcarney@cahill.com)

**ELLIOTT GREENLEAF**

Rafael X. Zahralddin-Aravena (DE Bar No. 4166)  
Shelley A. Kinsella (DE Bar No. 4023)  
Theodore A. Kittila (DE Bar No. 3963)  
1105 North Market Street, Suite 1700  
Wilmington, Delaware 19801  
Telephone: (302) 384-9400  
Facsimile: (302) 384-9399  
Email: [rxza@elliottgreenleaf.com](mailto:rxza@elliottgreenleaf.com)  
Email: [sak@elliottgreenleaf.com](mailto:sak@elliottgreenleaf.com)  
Email: [tak@elliottgreenleaf.com](mailto:tak@elliottgreenleaf.com)

July 14, 2010

*Attorneys for the Defendants*

**TABLE OF CONTENTS**

	<u>Page</u>
PRELIMINARY STATEMENT .....	1
NATURE AND STAGE OF THE PROCEEDINGS .....	4
ARGUMENT.....	7
I. THE GOVERNING LEGAL STANDARD FOR MOTIONS TO DISMISS.....	7
II. UNDER ITS EXPRESS TERMS AND BY OPERATION OF APPLICABLE BANKRUPTCY LAW, THE APA WAS NEVER AN ENFORCEABLE CONTRACT AND COUNTS I AND IV MUST BE DISMISSED .....	9
A. By its Express Terms, the APA was not Effective Unless and Until Approved by the Court .....	9
B. By Operation of Section 363 of the Bankruptcy Code, the APA was not Effective Unless and Until Approved by the Court .....	10
C. NVR Is Not Entitled to any Termination Fee or Reimbursement of Expenses .....	14
III. NVR CANNOT RECOVER UNDER THEORIES OF QUASI-CONTRACT ....	16
A. NVR Has Not Alleged Facts Sufficient to Support a Claim for Promissory Estoppel.....	17
1. The Debtors Never Promised Anything to NVR and Made No Representations They Believed Would Induce NVR’s Reliance....	17
2. Any Reliance by NVR Was Not Reasonable .....	21
B. NVR’s Claims for Unjust Enrichment Are Without Merit and Should Be Dismissed.....	22
1. The Debtors Were Not Enriched on Account of NVR’s Bid .....	23
2. There Is No Connection Between NVR’s Bid and the Possibility of a Stand-Alone Plan of Reorganization. ....	25
3. Any Enrichment Was Not Unjust.....	26
IV. “SUBSTANTIAL DAMAGES” ARE NOT AN APPROPRIATE REMEDY.....	29
CONCLUSION .....	31

## TABLE OF AUTHORITIES

### CASES

<i>In re A&amp;B Heating &amp; Air Conditioning</i> , 823 F.2d 462 (11th Cir. 1987), <i>vacated on other grounds sub nom. U.S. v. A&amp;B Air Conditioning</i> , 486 U.S. 1002 (1988) .....	30
<i>American Viking Contractors, Inc. v. Scribner Equipment Co.</i> , 745 F.2d 1365 (11th Cir. 1984) .....	21
<i>In re American West Airlines, Inc.</i> , 166 B.R. 908 (Bankr. D. Ariz. 1994).....	10
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009).....	8, 26
<i>Astor Holdings, Inc. v. Roski</i> , No. 01-civ-1906, 2002 WL 72936 (S.D.N.Y. Jan. 17, 2002).....	28-29
<i>Auto Chem Labs., Inc. v. Turtle Wax, Inc.</i> , No. 07-cv-156, 2009 WL 3063422 (S.D. Ohio Sept. 21, 2009) .....	24-25
<i>Baraka v. McGreevey</i> , 481 F.3d 187 (3d Cir. 2007) .....	7, 26
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	7-8, 26
<i>In re Beth Israel Hospital Association.</i> , No. 06-16186, 2007 WL 2049881 (Bankr. D.N.J. July 12, 2007).....	11
<i>Bouriez v. Carnegie Mellon University</i> , No. 02-3204, 2005 WL 3006831 (W.D. Pa. Nov. 9, 2005).....	25
<i>In re Burlington Coat Factory Securities Litigation</i> , 114 F.3d 1410 (3d Cir. 1997) .....	8
<i>Calpine Corp. v. O'Brien Environmental Energy Inc. (In re O'Brien Envtl. Energy, Inc.)</i> , 181 F.3d 527 (3d Cir. 1999) .....	10-11, 12, 14
<i>Catalina Dev. Inc. v. Given (In re Crowder)</i> , No. 96-1033, 2008 WL 4228382 (B.A.P. 10th Cir. Sept. 17, 2008) .....	14
<i>Chrysler Corp. v. Chaplake Holdings, Inc.</i> , 822 A.2d 1024 (Del. 2003).....	17
<i>Citadel Equity Fund Ltd. v. Aquila, Inc.</i> , 168 Fed. Appx. 474 (2d Cir. 2006).....	9
<i>Committee to Save St. Brigid v. Egan</i> , 30 A.D.3d 356 (N.Y. App. Div. 2006).....	18
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957).....	7

<i>Cunningham v. Merchant-Sterling Corp.</i> , 587 N.Y.S.2d 492 (N.Y. Sup. Ct. 1991)...	28-29
<i>In re Daticon, Inc.</i> , No. 06-30034, 2006 WL 3804671 (Bankr. D. Conn. Dec. 22, 2006).....	24
<i>Derry Finance N.V. v. Christiana Companies</i> , 616 F. Supp. 544 (D. Del. 1985), <i>aff'd</i> , 797 F.2d 1210 (3d Cir. 1986).....	18
<i>Feather v. United Mine Workers</i> , 711 F.2d 530 (3d Cir. 1983).....	24
<i>Fleer Corp. v. Topps Chewing Gum, Inc.</i> , 539 A.2d 1060 (Del. 1988).....	22
<i>Gallagher v. E.I. DuPont De Nemours &amp; Co.</i> , No. 06C-12-188, 2010 WL 1854131 (Del. Super. Ct. Apr. 30, 2010).....	17, 18
<i>Gruen Industries v. Biller</i> , 608 F.2d 274 (7th Cir. 1979).....	28
<i>Hilderman v. Enea Teksci, Inc.</i> , No. 05-vc-1049, 2010 WL 546140 (S.D. Cal. Feb. 10, 2010).....	24
<i>In re Holley Garden Apartments, Ltd.</i> , 238 B.R. 488 (Bankr. M.D. Fla. 1999).....	30-31
<i>Howard Hess Dental Labs. Inc. v. Dentsply International, Inc.</i> , 602 F.3d 237 (3d Cir. 2010).....	7
<i>IJKG, LLC v. Bayonne Medical Center, Inc. (In re Bayonne Medical Center, Inc.)</i> , No. 08-1540, 2009 WL 1025123 (Bankr. D. N. Feb. 3, 2009).....	26
<i>Jackson National Life Insurance Co. v. Kennedy</i> , 741 A.2d 377 (Del. Ch. 1999).....	23
<i>James Cable, LLC v. Millennium Digital Media Systems, LLC</i> , No. 3637-VCL, 2009 WL 1638634 (Del. Ch. June 11, 2009).....	17-18
<i>Kanter v. Barella</i> , 489 F.3d 170 (3d Cir. 2007).....	7
<i>In re Katrina Canal Breaches Consolidated Litigation</i> , 601 F. Supp. 2d 809 (E.D. La. 2009).....	24
<i>Kiely v. Raytheon Co.</i> , 105 F.3d 736-37 (1st Cir. 1997).....	21
<i>Knight Securities, L.P. v. Fiduciary Trust Co.</i> , 5 A.D.3d 172 (N.Y. App. Div. 2004).....	22
<i>LaSalle National Bank v. Perelman</i> , 82 F. Supp. 2d 279 (D. Del. 2000).....	22
<i>Lum v. Bank of America</i> , 361 F.3d 217 (3d Cir. 2004).....	8

<i>M&amp;M Holdings, LLC v. Unsecured Creditors Committee (In re SpecialtyChem Prods. Corp.)</i> , 372 B.R. 434 (E.D. Wis. 2007) .....	10, 12-15
<i>Mann v. Brenner</i> , No. 09-2461, 2010 WL 1220963 (3d Cir. Mar. 30, 2010) .....	7
<i>Metropolitan Life Insurance Co. v. Childs Co.</i> , 130 N.E. 295 (N.Y. 1921).....	18
<i>Mizlou Communications Co. v. Landmark Communications, Inc. (In re Mizlou Communications, Inc.)</i> , No. 91-6752 (PKL), 1993 WL 36/58 (S.D.N.Y. Feb. 10, 1993).....	12
<i>Moore Development v. M.G. Midwest, Inc.</i> , No. C06-1014, 2007 WL 2331021 (N.D. Iowa Aug. 13, 2007).....	21
<i>Morse v. Lower Merion School District</i> , 132 F.3d 902 (3d Cir. 1997) .....	7
<i>Myers v. Martin (In re Martin)</i> , 91 F.3d 389 (3d Cir. 1996).....	11
<i>Neitzke v. Williams</i> , 490 U.S. 319 (1989).....	7
<i>New England Surfaces v. E.I. Du Pont de Nemours &amp; Co.</i> , 517 F. Supp. 2d 466 (D. Me. 2007), <i>rev'd in part on other grounds</i> , 546 F.3d 1 (1st Cir. 2007).....	19
<i>Northview Motors, Inc. v. Chrysler Motors Corp.</i> , 186 F.3d 346 (3d Cir. 1999) .....	14, 15
<i>Novecon Ltd. v. Bulgarian-American Enterprise Fund</i> , 190 F.3d 556 (D.C. Cir. 1999).....	21
<i>OCA, Inc. v. Hodges</i> , 615 F. Supp. 2d 477 (E.D. La. 2009) .....	14
<i>Official Committee of Unsecured Creditors v. Credit Suisse First Boston (In re Exide Technologies, Inc.)</i> , 299 B.R. 732 (Bankr. D. Del. 2003).....	9
<i>Oppman v. IRMC Holdings</i> , No. 600929/2006, 2007 WL 151355 (N.Y. Sup. Ct. Jan. 23, 2007) .....	22
<i>Oren v. Strafford</i> , 226 F.3d 275 (3d Cir. 2000).....	8-9
<i>In re Phillips Petroleum Securities Litigation</i> , 697 F. Supp. 1344 (D. Del. 1988), <i>vacated in part on other grounds</i> , 881 F.2d 1236 (3d Cir. 1989) .....	18
<i>In re Reliant Energy ChannelView LP</i> , 594 F.3d 200 (3d Cir. 2010) .....	11-12
<i>In re Roth American, Inc.</i> , 975 F.2d 949 (3d Cir. 1992) .....	14, 15
<i>Santoni v. Federal Deposit Insurance Corp.</i> , 677 F.2d 174 (1st Cir. 1982) .....	18

<i>Siddiqui v. Gardner (In re Williamson)</i> , 327 B.R. 578 (Bankr. E. D. Va 2005).....	10
<i>Songbird Jet Ltd. v. Amax Inc.</i> , 581 F. Supp. 912 (S.D.N.Y. 1984).....	27-28
<i>In re Sovereign Estates, Ltd.</i> , 104 B.R. 702 (Bankr. E.D. Pa. 1989).....	12
<i>Sturm v. Clark</i> , 835 F.2d 1009 (3d Cir. 1987).....	7
<i>In re Sun Healthcare Systems</i> , No. 99-3657, 2002 WL 1000999 (Bankr. D. Del. 2002).....	14, 15
<i>Sutter Home Winery, Inc. v. Vintage Selections, Ltd.</i> , 971 F.2d 401 (9th Cir. 1992).	19, 21
<i>In re The Leslie Fay Companies</i> , 168 B.R. 294 (Bankr. S.D.N.Y. 1994).....	13
<i>Urban Holding Corp. v. Haberman</i> , 162 A.D.2d 230 (N.Y. App. Div. 1990) .....	18
<i>In re Vlasek</i> , 325 F.3d 955 (7th Cir. 2003).....	12
<i>In re Weiss</i> , 376 B.R. 867 (Bankr. N.D. Ill. 2007) .....	22

## STATUTES

11 U.S.C. § 363 .....	<i>passim</i>
11 U.S.C. § 1129(a)(9) .....	30

## RULES

Fed. R. Bankr. P. 7012(b).....	1, 7
Fed. R. Civ. P. 12(b)(6) .....	1, 7

The above-captioned debtors and debtors-in-possession and the two non-debtor affiliates named as defendants in this proceeding (for ease of reference, collectively, the “Debtors”), respectfully submit this memorandum of law in support of their motion to dismiss (the “Motion”) the adversary complaint (the “Complaint”) of NVR, Inc. (“NVR”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.<sup>1</sup>

### **PRELIMINARY STATEMENT**

Disappointed over its failure to acquire substantially all of the Debtors’ assets, NVR filed the Complaint in this adversary proceeding based upon an alleged breach of an asset purchase agreement (the “APA”) that was, by NVR’s own admission, never

---

<sup>1</sup> The following Debtors have been named as defendants in this adversary proceeding: Orleans Homebuilders, Inc., Brookshire Estates, L.P., Greenwood Financial Inc., Masterpiece Homes, LLC, OHB Homes, Inc., OHI Financing, Inc., OHI PA GP, LLC, OPCNC, LLC, Orleans Arizona Realty, LLC, Orleans Arizona, Inc., Orleans at Covington Manor, LLC, Orleans at Crofton Chase, LLC, Orleans at East Greenwich, LLC, Orleans at Elk Township, LLC, Orleans at Hamilton, LLC, Orleans at Harrison, LLC, Orleans at Hidden Creek, LLC, Orleans at Jennings Mill, LLC, Orleans at Lambertville, LLC, Orleans at Lyons Gate, LLC, Orleans at Mansfield LLC, Orleans at Meadow Glen, LLC, Orleans at Millstone, LLC, Orleans at Millstone River Preserve, LLC, Orleans at Tabernacle, LLC, Orleans at Thornbury, L.P., Orleans at Upper Freehold, LLC, Orleans at Upper Saucon, L.P., Orleans at Upper Uwchlan, LP, Orleans at West Bradford, LP, Orleans at West Vincent, LP, Orleans at Westhampton Woods, LLC, Orleans at Windsor Square, LP, Orleans at Woolwich, LLC, Orleans at Wrightstown, LP, Orleans Construction Corp., Orleans Corporation, Orleans RHIL, LP, Parker & Lancaster Corporation, Parker & Orleans Homebuilders, Inc., Parker Lancaster, Tidewater, L.L.C., Realen Homes, L.P., RHGP LLC, Stock Grange, LP, and Wheatley Meadows Associates, LLC. The two non-debtor entities named in the Complaint are OHI PA, LLC and OHI NJ, LLC.

approved by this Court and, consequently, never became effective or enforceable against the Debtors. In apparent recognition that the Debtors cannot breach a non-binding and unenforceable contract, NVR also asserts other quasi-contractual claims that are equally without merit.

Counts I and IV should be dismissed because the contract NVR alleges the Debtors breached was never legally binding. A fundamental principle of bankruptcy law is that a Chapter 11 debtor cannot engage in transactions outside the ordinary course of business—such as selling substantially all of its assets—without court approval. As a result, the APA's effectiveness was expressly conditioned on this Court's approval. Because this Court never approved the APA, NVR's claim for breach of contract contained in Count I of the Complaint, as well as the claims for liquidated damages based thereon in Count IV of the Complaint, are without merit and should be dismissed with prejudice.

Counts II and III of the Complaint allege alternative bases for relief under dubious theories of quasi-contract. Each of these claims fails as well. NVR's claim for promissory estoppel (Count II) should be dismissed because the Debtors never promised NVR anything, and NVR could not have reasonably relied on provisions of an agreement that it was (or reasonably should have been) aware never became enforceable. NVR, a well-advised and sophisticated party, had no reasonable or valid basis to rely on the APA (or any alleged representations made in connection therewith) until this Court approved it.

NVR's unjust enrichment/substantial contribution count (Count III) should also be dismissed because NVR never conferred a benefit on the Debtors to enrich (let alone unjustly enrich) them. NVR's claim that the decision of third parties to purchase a substantial portion of the Debtors' secured debt and pursue a potential reorganization plan was somehow on account of NVR's failed bid to purchase substantially all the Debtors' assets is a non sequitur. There is no plausible connection between the two events.

In any event, NVR suffered no damages as a result of the conduct alleged in the Complaint. NVR's allegations in the Complaint that various secured lenders opposed a Section 363 sale and favored a plan of reorganization, as well as the creditors' committee's statements in filings with the Court voicing its opposition to a sale, make clear that none of the Debtors' key constituents would have supported the APA and the Sale Motion (defined below). In all probability, the APA would not have received Court approval, and NVR knew there was never any guarantee that the transactions contemplated in the APA would be consummated.

The Complaint is, in essence, a misguided attempt to extract money from the Debtors' estates where the Debtors, in honoring their fiduciary duties to their estates, creditors, and other parties-in-interest, abandoned the proposed sale to NVR, which was subject to the approval of this Court, among other conditions, choosing instead to pursue a stand-alone plan of reorganization that could potentially allow the Debtors to avoid liquidation and to emerge from Chapter 11 as a reorganized going concern to the benefit of all their constituencies.

The Complaint and this adversary proceeding should be dismissed with prejudice.

### **NATURE AND STAGE OF THE PROCEEDINGS**

The Complaint alleges that NVR is entitled to “substantial damages” against forty-four of the Debtors and two non-Debtor affiliates based upon theories of (i) breach of contract, (ii) promissory estoppel, (iii) unjust enrichment, and (iv) an entitlement to liquidated damages pursuant to the APA. On June 11, 2010, this Court entered an order extending the time by which the Debtors have to file a responsive pleading until July 14, 2010 [Adv. D.I. 22]. The Debtors have not yet filed an answer and instead file the Motion.

### **FACTUAL BACKGROUND**<sup>2</sup>

The Debtors build, develop, market, and sell single-family homes, townhouses, and condominiums to various segments of the homebuyer market. (Complaint ¶ 7.) The Complaint names as defendants Orleans Home Builders, Inc. and 44 of its affiliates, all but two of which are debtors in these proceedings. (*Id.*, ¶ 8.)

In March, 2010, shortly after the petition date, the Debtors and NVR reached a tentative agreement for the purchase by NVR of substantially all of the assets of the Debtors. (*Id.*, ¶ 9.) The definitive APA and various court filings were negotiated over several weeks and the APA was signed on or about April 13, 2010. (*Id.*) Pursuant to the

---

<sup>2</sup> For purposes of this Motion, the well-pleaded factual allegations in the Complaint are accepted as true. The Debtors reserve the right to put NVR to its proof on all allegations if this matter proceeds beyond this Motion.

APA, NVR would purchase substantially all of the Debtors' assets, subject to higher and better offers, to be solicited prior to and at an auction for a base purchase price of \$170 million in cash (subject to certain post-closing adjustments and other terms and conditions). (*Id.*, ¶ 21 and Exhibit A.)

As set forth in various places in the APA, approval by this Court of the APA was a condition precedent to the Debtors' obligations under the APA. (*See, e.g.*, Complaint Exhibit A at §§ 5.2, 5.5(a), 7.1, 7.2, 8.9, 8.10 and 9.3(b).) For example, Section 7.1 of the APA states unequivocally, "Purchaser [NVR] expressly acknowledges and agrees that this Agreement is subject to approval by the Bankruptcy Court . . . ." The APA further provided that the Debtors would use "reasonable best efforts" to obtain approval of the sale and the bidding procedures. (*Id.*, Exhibit A § 7.1.)

Even apart from the language of the APA, NVR has acknowledged openly that the APA was ineffective absent the approval of this Court. In a form 8-K filed with the Securities and Exchange Commission dated April 14, 2010, NVR unequivocally stated:

On April 13, 2010, NVR, Inc. . . . entered into a "stalking horse" Asset Purchase Agreement . . . with Orleans Homebuilders, Inc. and certain of its affiliates . . . under which [NVR] has agreed to purchase all of the land under development, homebuilding work in process and other related assets of [the Debtors]. The Seller is a debtor in a Chapter 11 case before the United States Bankruptcy Court for the District of Delaware . . . . **The effectiveness of the Agreement was subject to the approval of the Bankruptcy Court . . . . If the Agreement is approved** [NVR] will be designated as the "stalking horse" bidder in auction of the Assets under Section 363 of the U.S. Bankruptcy Code. . . . The completion of the acquisition is subject to a number of customary conditions, which,

among others, include the entry of the Bidding Procedures Order and the Sale Order by the Bankruptcy Court. (Emphasis added.)<sup>3</sup>

On April 13, 2010 the Debtors filed their motion (the “Sale Motion”) [D.I. 545] to approve sale procedures and bid protections and scheduling an auction and hearing to consider approval of the sale in accordance with the APA. (Complaint ¶ 22.) The Sale Motion, insofar as it sought the establishment of bid procedures and other initial relief, was expected to be considered by the Court on May 4, 2010. (*Id.*, ¶ 24; Sale Motion ¶¶ 8-9.)

Shortly prior to the May 4, 2010, hearing on the Sale Motion, NVR allegedly learned that the Debtors were in discussions with “certain distressed asset investors regarding a stand-alone reorganization plan.” (*Id.*, ¶ 38.) As NVR has alleged in the Complaint, some of the banks that previously had approved the sale process then sold their interests to certain investors that decided to pursue an alternative course and, on May 19, 2010, the Debtors withdrew the Sale Motion. (*Id.*)

Following the withdrawal of the Sale Motion, NVR once again publicly disclosed, in a form 8-K filed with the Securities and Exchange Commission dated May 19, 2010, a true and correct copy of which is attached as Exhibit 2 to the Burke Declaration, that:

On April 13, 2010, NVR, Inc. . . . entered into a “stalking horse” Asset Purchase Agreement . . . with Orleans Homebuilders, Inc. and certain of its affiliates . . . subject to the terms and conditions contained in the Agreement. The Seller is a debtor in a Chapter 11 case before the

---

<sup>3</sup> A true and correct copy of NVR’s April 14, 2010 SEC filing is attached as Exhibit 1 to the Declaration of Kevin J. Burke (the “Burke Declaration”) submitted with this Motion.

United States Bankruptcy Court for the District of Delaware . . . . **The effectiveness of the Agreement was subject to the approval of the Bankruptcy Court . . . .** (Emphasis added.)

## ARGUMENT

### **I. THE GOVERNING LEGAL STANDARD FOR MOTIONS TO DISMISS**

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding pursuant to Bankruptcy Rule 7012(b), is to test the legal sufficiency of a complaint. *Mann v. Brenner*, No. 09-2461, 2010 WL 1220963, at \*2 (3d Cir. Mar. 30, 2010), *citing Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). Dismissal is appropriate if the moving party demonstrates that the plaintiff has not pleaded facts sufficient to allow the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010) (citations omitted). Dismissal is also appropriate where an issue of law is dispositive. *Neitzke*, 490 U.S. at 326 (citations omitted).

Whereas courts generally accept well-pleaded factual allegations as true, courts are “not compelled to accept ‘unsupported conclusions and unwarranted inferences.’” *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citation omitted); *see also Kanter v. Barella*, 489 F.3d 170, 178 (3d Cir. 2007) (“[A] court need not credit either ‘bald assertions,’ or ‘legal conclusions’ in a complaint when deciding a motion to dismiss.”); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (same). A plaintiff must “provide the grounds of his entitlement to relief” and supply factual

allegations strong enough to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “[A] formulaic recitation of the elements of a cause of action will not do.” *Id.* As the Supreme Court has recently explained, there is a difference between pleading the *possibility* of a defendant’s liability and the *plausibility* of such liability. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.”) (citation and internal quotation marks omitted). To pass muster and to withstand a motion to dismiss, a complaint must “permit the court to infer more than the mere possibility of misconduct.” *Id.* at 1950.

In determining whether to grant a motion to dismiss, courts also should consider documents that are either “*integral to or explicitly relied upon* in the complaint.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (citation omitted). That is, this Court may consider, in addition to the allegations set forth in the Complaint, the exhibits attached thereto, the documents cited in the Complaint, or other documents that are an integral part of the claims asserted in the Complaint. *See Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004) (“In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.”). Courts may also take judicial notice of public disclosure documents filed with the Securities and Exchange Commission and consider such documents in ruling on a motion to dismiss. *Oren v. Strafford*, 226 F.3d 275, 289 (3d Cir. 2000)

(courts may take judicial notice of public disclosure documents filed with the SEC on motions to dismiss); *Citadel Equity Fund Ltd. v. Aquila, Inc.*, 168 Fed. Appx. 474, 475-76 (2d Cir. 2006) (upholding trial court's taking judicial notice of SEC filings in dismissing breach of contract action).

To the extent that such documents are inconsistent with the allegations of the Complaint, this Court should not accept such inconsistent allegations in the Complaint as true. *See, e.g., Official Comm. of Unsecured Creditors v. Credit Suisse First Boston (In re Exide Techs., Inc.)*, 299 B.R. 732, 740-41 (Bankr. D. Del. 2003) (reviewing subject loan documents and dismissing claim where provisions in loan documents supported motion to dismiss and were inconsistent with facts asserted in complaint).

**II. UNDER ITS EXPRESS TERMS AND BY OPERATION OF APPLICABLE BANKRUPTCY LAW, THE APA WAS NEVER AN ENFORCEABLE CONTRACT AND COUNTS I AND IV MUST BE DISMISSED**

**A. By its Express Terms, the APA was not Effective Unless and Until Approved by the Court**

As noted above, in Section 7.1 of the APA, NVR expressly acknowledged that the APA would not be effective unless and until this Court approved it. That acknowledgment is reflected in various other sections of the APA as well. (*See, e.g.,* Complaint Exhibit A at §§ 5.2, 5.5(a), 7.2, 8.9, 8.10 and 9.3(b).) In addition, NVR admitted as much in its SEC filings. (*See* Burke Declaration, Exhibits 1 and 2.) Accordingly, NVR cannot now be heard to complain that certain provisions were breached by the Debtors when none of the provisions was ever approved by this Court.

**B. By Operation of Section 363 of the Bankruptcy Code, the APA was not Effective Unless and Until Approved by the Court**

NVR's claims for breach of contract and payment of liquidated damages must also fail because as a matter of bankruptcy law there was never an enforceable contract between the Debtors and NVR. NVR fails to recognize the fundamental difference between contracting to purchase a business in bankruptcy and contracting to purchase a business outside bankruptcy. See *In re Am. West Airlines, Inc.*, 166 B.R. 908, 911 (Bankr. D. Ariz. 1994) ("Acquisition of an ongoing business in bankruptcy is fundamentally different from that of an acquisition not in bankruptcy."). In a private, non-bankruptcy sale, the parties make their own decisions and are then bound by them. *M&M Holdings, LLC v. Unsecured Creditors Comm. (In re SpecialtyChem Prods. Corp.)*, 372 B.R. 434, 438-39 (E.D. Wis. 2007). "In a bankruptcy sale, however, there are absent third parties—that is, the creditors and equity holders—whose interests must be protected." *Id.* at 439, citing *Siddiqui v. Gardner (In re Williamson)*, 327 B.R. 578, 581 (Bankr. E.D. Va. 2005).

One way the interests of such third parties are protected is by the requirement that a bankruptcy sale outside the ordinary course of business, such as the sale contemplated in the APA and the Sale Motion, be approved by the bankruptcy court. *Id.* at 439. Indeed, it is axiomatic that a debtor operating under Chapter 11 cannot enter into a binding contract for a sale of substantially of all its assets without bankruptcy court approval. *E.g., Calpine Corp. v. O'Brien Envtl. Energy Inc. (In re O'Brien Envtl.*

*Energy, Inc.*), 181 F.3d 527, 531 (3d Cir. 1999) (contract to sell substantially all debtor's assets not binding until approved by bankruptcy court).

Section 363(b)(1) of the Bankruptcy Code states that “a trustee [or debtor-in-possession], after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate . . . .” The very purpose of Section 363(b)(1) is, in part, to prevent a trustee or debtor-in-possession from unilaterally binding the estate to the detriment of its creditors. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (“[T]his schema [of notice, hearing, and approval under Section 363(b)(1)] is intended to protect both debtors and creditors (as well as their trustees) by subjecting a trustee's actions to complete disclosure and review by the creditors of the estate and by the bankruptcy court.”); *In re Beth Israel Hosp. Ass'n. of Passaic*, No. 06-16186, 2007 WL 2049881, at \*15 (Bankr. D.N.J. July 12, 2007) (“The requirement of notice and hearing and court approval for transactions that are out of the ordinary course of business, such as sales conducted under § 363(b)(1), is an obvious safeguard imposed to insure that such transactions actually benefit the estate rather than just one or more of the parties to the transaction.”).

It is accordingly beyond question that a sale of a debtor's business is not an ordinary course transaction, and courts in this Circuit and elsewhere have uniformly held that a sale of substantially all of a Chapter 11 debtor's assets requires both a hearing and the approval of the bankruptcy court under Section 363(b)(1) before a contract for such sale can be binding and enforceable. See *In re Reliant Energy ChannelView LP*, 594 F.3d 200, 203 (3d Cir. 2010) (“Inasmuch as the Debtors were in bankruptcy, consummation of

the APA required the Bankruptcy Court's approval."); *see also In re Vlasek*, 325 F.3d 955, 961 (7th Cir. 2003) ("the trustee must petition the bankruptcy court for approval to pursue the sale of estate property"). There is no dispute that this Court never approved the APA as required under Section 363(b)(1).

NVR does not argue—nor can it—that the sale contemplated under the APA was anything other than a sale of estate property outside the ordinary course of business requiring this Court's approval after notice and a hearing. *In re Sovereign Estates, Ltd.*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989) (proposed sale of substantially all debtor's assets must comply with Section 363(b), (e), and (f) of the Bankruptcy Code); *Mizlou Commc'ns Co., Inc. v. Landmark Commc'ns, Inc. (In re Mizlou Communications, Inc.)*, No. 91-6752 (PKL), 1993 WL 36158, at \*2 (S.D.N.Y. Feb. 10, 1993) (same). Yet in a misguided attempt to sidestep the obvious, NVR argues, implicitly, that certain components of the APA were not subject to the approval of this Court, as required under Section 363(b) of the Bankruptcy Code. For example, NVR alleges in the Complaint that "[the Debtors'] obligation under Section 8.9 of the APA to use its reasonable best efforts to obtain entry of the Bidding Procedure Order by May 7, 2010, necessarily was not contingent on Court approval of the APA." (Complaint ¶ 30.) That statement is simply wrong, because every part of an agreement to sell substantially all of a Chapter 11 debtor's assets falls outside the ordinary course of business, and no provision of any such an agreement could be removed from the purview of Section 363(b)(1). *SpecialtyChem*, 372 B.R. at 439; *see also O'Brien*, 181 F.3d at 531 (a contract for "the sale of substantially all of a debtor's assets is a transaction outside of the ordinary course of

business, which requires bankruptcy court approval to become effective”); *In re The Leslie Fay Cos.*, 168 B.R. 294, 295 (Bankr. S.D.N.Y. 1994) (where agreement was unenforceable as an unapproved transaction outside the ordinary course of business, mandatory arbitration clause therein was also unenforceable).

*SpecialtyChem* is instructive. In that case, a counterparty to an asset purchase agreement argued that a break-up fee portion of an unapproved asset purchase agreement should be paid because the asset purchase agreement at issue, despite not being approved by the bankruptcy court as required pursuant to 363(b)(1), was nevertheless an enforceable contract under applicable state law. *SpecialtyChem*, 372 B.R. at 438. The *SpecialtyChem* court ruled that the asset purchase agreement was unenforceable, notwithstanding its enforceability under applicable state law, noting that any “argument [to the contrary] fails because it ignores the larger bankruptcy context, and in particular the requirement that any asset purchase agreement reached [with the debtor] be court-approved.” *Id.* at 439. The reasoning behind the *SpecialtyChem* decision was both straightforward and correct:

Because of the bankruptcy context operative here and the need for court approval, [the] mutual understanding that [the parties] had become contractually bound did not create an enforceable contract. . . . In affirming the bankruptcy court’s conclusion that no enforceable contract existed, I rely on an alternative ground, namely, the undisputed fact that [the debtor] did not obtain the required court approval of its stalking horse agreement. . . .

*Id.* at 439 n.3.

Such reasoning applies with equal force to the facts here: this Court did not approve the APA, and therefore no portion of it is enforceable. *See id.*, at 439. Binding

precedent in this Circuit is in accord with the reasoning in *SpecialtyChem*. See *O'Brien*, 181 F.3d at 531; *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 350 (3d Cir. 1999) (“a contract providing for use or sale of estate property outside the regular course of business is unenforceable absent court approval”) (citation omitted); *In re Roth Am., Inc.*, 975 F.2d 949, 954 (3d Cir. 1992) (post-petition amendment to collective bargaining agreement unenforceable *in toto* where amendment was outside ordinary course of business and amendment had not received bankruptcy court approval); *In re Sun Healthcare Sys.*, No. 99-3657, 2002 WL 1000999, at \*3 (Bankr. D. Del. 2002) (“It is undisputed that Court approval was neither sought nor obtained by any party to the purported agreement. Accordingly, the purported agreement is not enforceable by [the plaintiff]”); see also *Catalina Dev. Inc. v. Given (In re Crowder)*, No. 96-1033, 2008 WL 4228382, at \*7 (B.A.P. 10th Cir. Sept. 17, 2008) (“an agreement to sell property of the estate outside the ordinary course of business is not a binding contract . . .”).

Because this Court never approved the APA, no enforceable contract ever existed between NVR and the Debtors. The APA, and each of its individual provisions is, therefore, a nullity, and NVR’s claim for breach of contract fails as a matter of law: a contract that cannot be performed without violating a statute (here, Bankruptcy Code § 363(b)) is not enforceable. See *OCA, Inc. v. Hodges*, 615 F. Supp. 2d 477, 487 (E.D. La. 2009) (“an agreement which . . . cannot be performed without violation of [a statute] . . . is illegal and void”) (citations omitted).

**C. NVR Is Not Entitled to any Termination Fee or Reimbursement of Expenses**

As is the case with the rest of the APA, the liquidated damages provision

contained in Section 4.6(d) of the APA is unenforceable. The court in *SpecialtyChem* faced a request for payment of a break-up fee substantially similar to that set forth in Count IV of the Complaint.

In that case, the debtor did not pursue court approval of an asset purchase agreement when a better deal for the disposition of the debtor's assets surfaced. The counterparty to the unapproved asset purchase agreement requested payment of a break-up fee as set forth therein. On appeal, the district court refused to permit payment of the break-up fee because, *inter alia*, the purchase agreement was unenforceable in its entirety for lack of bankruptcy court approval, and any termination fee or similar liquidated damages provision contained therein was unenforceable as a consequence. *SpecialtyChem*, 372 B.R. at 436, 438-39; *see also Roth*, 975 F.2d at 954; *Northview*, 186 F.3d at 350; *Sun Healthcare*, 2002 WL 1000999, at \*3. Likewise, NVR is not entitled to any termination fee or expense reimbursement in connection with the APA.

This Court has recognized that a potential stalking-horse bidder under an ineffective Section 363 sale agreement has no right to a break-up fee and contributed nothing to benefit the estate simply by virtue of being an unapproved stalking-horse bidder under such agreement. *See In re The Penn Traffic Co.*, No. 09-14078 (PJW) (Bankr. D. Del). During a March 3, 2010, hearing in *Penn Traffic*, this Court was faced with the request of a potential stalking-horse bidder under a Section 363 sale agreement, which the debtors in that case chose not to pursue, for payment of an administrative claim pursuant to Section 503(b) of the Bankruptcy Code in the amount equal to the break-up

fee under the abandoned agreement.<sup>4</sup> In recognizing that the claimant “never was a stalking horse bidder,” this Court found that the claimant was “not entitled to the contract claim they are making.” (Hr’g Tr. at 62, Mar. 3, 2010.) In reaching that conclusion, this Court noted that “[o]nly the Debtor has the right to seek a 363 sale transaction, of which this was, and they elected not to pursue it, and therefore the [claimant] has no contractual right . . . .” (*Id.* at 63.) Accordingly, this Court denied the claimant’s application.

Though the facts and procedure in *Penn Traffic* are not identical to those in this matter, this Court’s reasoning in that case applies with equal force here. The Debtors, for the reasons acknowledged in the Complaint, elected not to pursue the Sale Motion and abandoned the sale process. Because this Court never approved the APA, NVR, like the claimant in *Penn Traffic*, was never an actual stalking-horse bidder. NVR accordingly has no contractual rights under the APA and is not entitled to the contractual claim it is making, namely, a termination fee and reimbursement of expenses as provided for in Section 4.6(d) of the APA.

### **III. NVR CANNOT RECOVER UNDER THEORIES OF QUASI-CONTRACT**

Because there is no valid and enforceable contract between NVR and the Debtors for the reasons set forth above, NVR asserts theories of quasi-contract, namely promissory estoppel and unjust enrichment in Counts II and III of the Complaint, respectively. NVR cannot recover under either theory as a matter of law, however,

---

<sup>4</sup> The relevant pages of the transcript of the March 3, 2010, hearing in *Penn Traffic* are attached as Exhibit 3 to the Burke Declaration.

because to allow such recoveries would render the approval requirements of Section 363 of the Bankruptcy Code ineffective. A disgruntled suitor cannot do an end-run around Section 363 simply by restating its claim as one for estoppel or unjust enrichment.

In any case, NVR has failed to state a claim under either theory because it has not alleged (and cannot legitimately allege) the necessary elements of either claim.

**A. NVR Has Not Alleged Facts Sufficient to Support a Claim for Promissory Estoppel**

A plaintiff seeking to recover under a claim of promissory estoppel must prove, by clear and convincing evidence, that:

- (i) a promise was made;
- (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee;
- (iii) the promisee reasonably relied on the promise and took action to his detriment; and
- (iv) such promise is binding because injustice can be avoided only by enforcement of the promise.

*Chrysler Corp. v. Chaplake Holdings, Inc.*, 822 A.2d 1024, 1032 (Del. 2003) (citation omitted); *see also Gallagher v. E.I. DuPont De Nemours & Co.*, No. 06C-12-188, 2010 WL 1854131, at \*4 (Del. Super. Ct. Apr. 30, 2010).

**1. NVR Does not Allege that the Debtors Ever Promised Anything to NVR or Intended to Induce NVR's Reliance**

NVR's claim for promissory estoppel fails at the first step: The Debtors never promised anything to NVR that could form the basis for promissory estoppel. This lack of an express promise on the Debtors' part is fatal to Count II of the Complaint. *James*

*Cable, LLC v. Millennium Digital Media Sys., LLC*, No. 3637-VCL, 2009 WL 1638634, at \*6 (Del. Ch. June 11, 2009) (lack of adequately pleaded promise fatal to claim for promissory estoppel); *Comm. to Save St. Brigid v. Egan*, 30 A.D.3d 356, 356 (N.Y. App. Div. 2006) (affirming dismissal of claim for promissory estoppel where no specific promise alleged). For the purposes of promissory estoppel, any purported “promise” must be “clear and unambiguous,” *Urban Holding Corp. v. Haberman*, 162 A.D.2d 230, 231 (N.Y. App. Div. 1990), and “sufficiently definite and not vague,” *Gallagher*, 2010 WL 1854131, at \*4.

Courts distinguish a promise from a non-promise through a “reasonable interpretation of the parties’ expressions in light of the surrounding circumstances.” *Gallagher*, 2010 WL 1854131, at \*4. A mere expression of opinion, assumption, or expectation is insufficient. *In re Phillips Petroleum Secs. Litig.*, 697 F. Supp. 1344, 1354 (D. Del. 1988), *vacated in part on other grounds*, 881 F.2d 1236 (3d Cir. 1989) (upholding judgment below dismissing promissory estoppel claim). Additionally, statements of future intention cannot be reasonably relied upon for promissory estoppel purposes. *Id.*; *Santoni v. Fed. Deposit Ins. Corp.*, 677 F.2d 174, 179 (1st Cir. 1982) (“A mere expression of future intention . . . does not constitute a sufficiently definite promise to justify reasonable reliance thereon.”); *Derry Fin. N.V. v. Christiana Cos., Inc.*, 616 F. Supp. 544, 550 (D. Del. 1985), *aff’d*, 797 F.2d 1210 (3d Cir. 1986), *quoting Metro. Life Ins. Co. v. Childs Co.*, 130 N.E. 295, 298 (N.Y. 1921) (“[A] truthful statement as to the present intention of a party with regard to his future acts is not the foundation upon which an estoppel may be built.”).

Moreover, “expressions of good faith” and the viability of an ongoing relationship “are not the type of specific promises which can support an action for promissory estoppel.” *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 409 (9th Cir. 1992). And “vague statements of acting as a partner and loyalty are not sufficiently clear and definite to form the basis for a valid action of promissory estoppel.” *New England Surfaces v. E.I. Du Pont de Nemours & Co.*, 517 F. Supp. 2d 466, 486 (D. Me. 2007), *rev’d in part on other grounds*, 546 F.3d 1 (1st Cir. 2007).

In the Complaint, NVR alleges that the following induced its reliance, allegedly to its detriment, that the transactions contemplated in the APA would be consummated:

- (i) Inferences that the Debtors did not intend to pursue a stand-alone reorganization. (Complaint ¶ 17.)
- (ii) Alleged statements by the Debtors’ representatives that they expected the Sale Motion to be heard on May 4, 2010, with an “auction to be held within approximately 45-60 days, and Court approval and Closing shortly thereafter.” (*Id.*, ¶ 20.)
- (iii) Statements in the Sale Motion that the Debtors believed as of April 13, 2010, that the transactions contemplated in the Sale Motion and APA were the Debtors’ best option to exit Chapter 11. (*Id.*, ¶ 22.)
- (iv) A statement in an e-mail dated April 13, 2010, by one of the Debtors’ financial advisors that there was “no turning back from the 363 process.” (*Id.*, ¶ 23.)
- (v) Statements made by the Debtors in an April 14, 2010, press release that the Debtors’ board of directors had approved, and the Debtors executed, the APA. (*Id.*, ¶ 24.)
- (vi) A statement by the Debtors’ former Chief Financial Officer that “the APA ‘fulfills the commitment we made at the outset of the Chapter 11 case to pursue potential purchasers of the Company.’” (*Id.*, ¶ 24.)
- (vii) Alleged assurances by the Debtors that they would use their “reasonable best efforts” to obtain approval of the bidding procedures contemplated in the Sale Motion. (*Id.*, ¶ 28.)

Even if the Debtors actually made such representations (which the Debtors reserve the right to dispute), and putting aside that any actual promises made by the Debtors in connection with the APA and sale process would be outside the ordinary course of business and would require Section 363 approval in any event, such representations would be insufficient to constitute “promises” to establish a viable claim for promissory estoppel.

Although the Complaint does contain additional conclusory allegations of promises the Debtors made to NVR (Complaint ¶ 58), nowhere is there mentioned an express, unambiguous, and definite promise on which NVR could possibly (let alone reasonably) have relied. All of the Debtors’ representations that NVR has alleged constitute “promises,” at best, merely reflect that, prior to a shift in ownership of their secured debt, the Debtors (i) believed that a sale under Section 363(b) pursuant to the terms of APA was their only viable option and (ii) expressed a vague (but sincere) intention of good faith about the viability of the Debtors’ business relationship with NVR. Neither is sufficient to give rise to a claim for promissory estoppel.

Similarly, no provision of the APA—including the provisions NVR cites purportedly requiring the Debtors to use their “reasonable best efforts” to obtain entry of an order approving bidding procedures and consummate the transactions contemplated thereby—can be construed to constitute a promise sufficient to support a claim for promissory estoppel. (Complaint ¶¶ 28-30.) The terms of an agreement that never became legally effective—including a requirement to “act in good faith” to bring about a certain result—cannot constitute a promise for the purposes of promissory estoppel. *See*

*Moore Dev. v. M.G. Midwest, Inc.*, No. C06-1014, 2007 WL 2331021, at \*7 (N.D. Iowa Aug. 13, 2007) (obligations of legally ineffective agreement not promises giving rise to claim for promissory estoppel); *see also Kiely v. Raytheon Co.*, 105 F.3d 736-37 (1st Cir. 1997) (terms of illegal contract cannot serve as basis for promissory estoppel claim); *Sutter Home Winery*, 971 F.2d at 409; *see also Novecon Ltd. v. Bulgarian-Am. Enter. Fund*, 190 F.3d 556, 565 (D.C. Cir. 1999) (for purposes of promissory estoppel, promise must be something more than statement of intent to proceed in good faith).

## **2. Any Reliance by NVR Was Not Reasonable**

Even if the Debtors made “promises,” as NVR alleges, nothing in the APA, nor any representations related thereto, can constitute an unambiguous promise on which NVR could have reasonably relied. The APA, in its entirety, was subject to the approval of this Court: “Purchaser expressly acknowledges and agrees that this Agreement is subject to the approval by the Bankruptcy Court . . . .” (APA § 7.1.) No provision therein could reasonably be construed as anything the Debtors were required to do—or even could do—unless and until this Court approved it. *See Am. Viking Contractors, Inc. v. Scribner Equip. Co.*, 745 F.2d 1365, 1372 (11th Cir. 1984) (promise which is unenforceable cannot be reasonably relied upon). Significantly, NVR has acknowledged as much in its SEC filings and cannot now be heard to plead the contrary in this proceeding. (Burke Declaration, Exhibits 1 and 2.) It is telling that NVR itself was aware that the effectiveness of the APA, including any obligations thereunder, was contingent on this Court’s approval, which approval this Court never gave. NVR cannot be said to have reasonably relied on a purported “promise” by which it knew the Debtors

had no authority to be bound absent the approval of this Court. *In re Weiss*, 376 B.R. 867, 879-80 (Bankr. N.D. Ill. 2007) (holding there is no unambiguous promise on which to rely where counterparty to unenforceable contract knew debtor had no authority to be bound by certain terms therein). Given NVR's own admissions in publicly filed documents, it knew that the APA was at all times ineffective and unenforceable absent the approval of this Court.

In sum, "it is neither reasonable, nor foreseeable, for plaintiffs to rely on a promise, where the individuals purportedly making the promise lacked sufficient control over whether such promises would be honored . . . ." *Oppman v. IRMC Holdings*, No. 600929/2006, 2007 WL 151355, at \*15 (N.Y. Sup. Ct. Jan. 23, 2007), *citing Knight Secs., L.P. v. Fiduciary Trust Co.*, 5 A.D.3d 172 (N.Y. App. Div. 2004). Regardless of the Debtors' alleged representations about the APA when it was announced (long before a stand-alone plan of reorganization became a viable option) or the express provisions of the APA itself, everyone knew that whether the APA was ultimately approved and consummated—or even whether the sale procedures and bid protections would be approved—was not completely within the Debtors' control.

**B. NVR's Claims for Unjust Enrichment Are Without Merit and Should Be Dismissed**

"Unjust enrichment is the 'unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity or good conscience.'" *LaSalle Nat'l Bank v. Perelman*, 82 F. Supp. 2d 279, 294-95 (D. Del. 2000), *quoting Flee Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988). In order to establish a claim for unjust enrichment, NVR must

demonstrate “1) an enrichment, 2) an impoverishment, 3) a relation between the enrichment and the impoverishment, 4) the absence of justification, and 5) the absence of a remedy provided by law.” *Id.*, citing *Jackson Nat’l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999). NVR has not pleaded such elements.

### **1. The Debtors Were Not Enriched on Account of NVR’s Bid**

NVR’s claim for unjust enrichment rests on the ground that the Debtors were “enriched as a result of NVR’s having agreed to act as [the] stalking horse bidder” because the Debtors “retain[ed] the benefit of NVR having set a ‘floor’ value for the Purchased Assets.” (Complaint ¶ 64.) NVR alleges that its “bid and agreement to the APA served as a catalyst for interest in the acquisition of OHB’s debt and, ultimately, control of OHB and the OHB Defendants’ assets, which have led to discussions of a stand-alone reorganization plan OHB now claims to be pursuing.” (*Id.*, ¶ 64.)

NVR’s claim for unjust enrichment fails because the Debtors were not enriched on account of NVR’s potential stalking-horse bid. To the extent NVR alleges that the “enrichment” it provided to the Debtors was the \$170 million bid itself, the Debtors submit that, because the auction and sale never took place, such price floor conferred absolutely no benefit on the Debtors as a matter of law. This is not a situation where, after NVR submitted its bid, another party used such bid as a baseline to make a higher and better offer and NVR lost out.

Moreover, it is difficult to see, as NVR alleges in the Complaint, how the independent decision of certain “distressed asset investors” (Complaint ¶ 38) to purchase secured debt is an enrichment of the Debtors—even if, assuming for the sake of

argument, such investors decided to do so on the basis of NVR's bid (a highly unlikely proposition). The reality here is that the Debtors' secured debt merely changed hands from one party to another, and such transfer did not impact (let alone enrich) the estates in any way. No secured debt purchased was forgiven. See *In re Katrina Canal Breaches Consol. Litig.*, 601 F. Supp. 2d 809, 818 (E.D. La. 2009) (“[A]s a general rule, the identity of the creditor should be immaterial to the debtor who owes a performance”); *In re Daticon, Inc.*, No. 06-30034, 2006 WL 3804671, at \*17 n.46 (Bankr. D. Conn. Dec. 22, 2006) (“merely substituting one secured creditor from another” has “no effect on the estate”).

It is axiomatic that an “enrichment” for unjust enrichment purposes cannot be “speculative” or “intangible.” *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 541 (3d Cir. 1983). Rather, any alleged enrichment must be “based on sufficient facts or data.” *Hilderman v. Enea Teksci, Inc.*, No. 05-cv-1049, 2010 WL 546140, at \*3 (S.D. Cal. Feb. 10, 2010). Because it is obvious that the mere fact that the Debtors' secured debt changed hands is not, in and of itself, an enrichment, the only purported enrichment NVR can actually point to is “discussions of a stand-alone reorganization plan OHB now claims to be pursuing.” (Complaint ¶ 64.) Yet nowhere does NVR quantify—or even represent it could quantify—the value of “discussions of a stand-alone reorganization plan,” much less connect how those discussions were somehow the result of the existence of NVR's offer. *Auto Chem Labs., Inc. v. Turtle Wax, Inc.*, No. 07-cv-156, 2009 WL 3063422, at \*5 (S.D. Ohio Sept. 21, 2009) (following magistrate's recommendation to

dismiss unjust enrichment count where the court “is left to speculate as to the amount of value Plaintiffs provided”).

The reason NVR does not attempt to put a value on such purported “discussions of a stand-alone reorganization plan” is because it cannot. The only possible benefit the Debtors could receive as a result of the third-party purchases of their secured debt is a confirmed Chapter 11 plan providing the Debtors’ creditors and other stakeholders with a better outcome than they would have otherwise received had the APA been approved. Speculation as to a potential or possible future benefit—presumably a confirmed Chapter 11 plan that even NVR agrees may not materialize (Complaint ¶ 64)—does not give rise to a claim for unjust enrichment. *Bouriez v. Carnegie Mellon Univ.*, No. 02-3204, 2005 WL 3006831, at \*12 (W.D. Pa. Nov. 9, 2005) (“alleged benefit that [defendant] could potentially receive in the future is irrelevant . . . to establish an unjust enrichment claim”).

Unjust enrichment is a retroactive equitable remedy, and as such, NVR must establish that the Debtors benefited or were enriched in the past by NVR’s formulation of its bid. *See id.* at \*11. The alleged benefit the Debtors could potentially receive in the future (a confirmed Chapter 11 plan) is irrelevant “because to establish an unjust enrichment claim, it must be shown that the benefit has *already* been conferred.” *Id.*, at \*12 (emphasis added).

**2. There Is No Connection Between NVR’s Bid and the Possibility of a Stand-Alone Plan of Reorganization**

Even if NVR’s arguments that the Debtors were somehow enriched by its bid or the purchase of secured debt are accepted, it is difficult, if not impossible, to establish a

meaningful causal nexus between (i) NVR being willing to pay \$170 million for substantially all of the Debtors' assets and (ii) the purchasers, of their own accord and without the knowledge or encouragement of the Debtors, deciding to buy up most of the Debtors' secured bank debt and pursue a reorganization. There is simply no plausible connection, much less a causation, between them.

Unsupported conclusions and inferences in the Complaint based on nothing more than NVR's self-serving speculation that such causal connection exists, should not be taken as true. *See Baraka*, 481 F.3d at 195 (“[A] court need not credit either ‘bald assertions,’ or ‘legal conclusions’ in a complaint when deciding a motion to dismiss.”); *Bell Atl. Corp.*, 550 U.S. at 555 (plaintiff must “provide the grounds of his entitlement to relief” and supply factual allegations strong enough to “raise a right to relief above the speculative level”). The causal connection NVR attempts to make here “stops short of the line between possibility and plausibility,” *Ashcroft*, 129 S. Ct. at 1949-50, and should not be countenanced.

### **3. Any Enrichment Was Not Unjust**

Even if NVR could establish that its bid enriched the Debtors and that NVR's costs in formulating such bid were somehow connected to such enrichment (a highly dubious proposition), NVR cannot establish that such enrichment was unjust. At base, “[t]he unjust enrichment doctrine requires that [a] plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on [the] defendant . . . .” *IJKG, LLC v. Bayonne Med. Ctr., Inc. (In re Bayonne Med. Ctr., Inc.)*, No. 08-1540, 2009 WL 1025123, at \*17 (Bankr. D.N.J. Feb. 3, 2009) (citation omitted).

Moreover, “a common thread running throughout successful invocation of the doctrine of unjust enrichment is that the plaintiff expected remuneration from the defendant, or if the true facts were known to the plaintiff, he would have expected remuneration from the defendant at the time the benefit was conferred.” *Id.* (citation omitted). Here, NVR engaged in due diligence while on notice that it was solely responsible for any costs associated with such diligence. (*See, e.g.*, APA § 2.9 (stating that NVR “will have the right, at its sole cost and expense, to perform environmental investigations of the Real Property” but has to provide the Debtors with “a certified copy of a commercial general liability insurance policy” before entering on OHB’s real property; APA at §2.10 (stating that NVR “may, at its sole cost and expense, obtain a Title Commitment”).)

NVR always ran the risk that the APA might not be approved by this Court, yet it formulated a bid anyway. (Burke Declaration, Exhibits 2 and 3.) NVR’s supposed indignation over the fact that it spent money to formulate a bid to engage in a transaction that never occurred is disingenuous—NVR always knew that such an outcome was possible.

At bottom, NVR’s claims for unjust enrichment arise out of nothing more than NVR’s defeated expectations regarding a failed sale. But unjust enrichment is not an appropriate remedy for the recovery of expenses of an unsuccessful business transaction. *See Songbird Jet Ltd. v. Amax Inc.*, 581 F. Supp. 912, 926 (S.D.N.Y. 1984). In *Songbird Jet*, while negotiating a business transaction, both sides expended funds during negotiations, the negotiations ultimately failed, and one side filed a complaint for, *inter alia*, unjust enrichment, seeking “compensation for their time, efforts, and activities

expended during the negotiations . . . .” *Id.* The court dismissed the unjust enrichment count, noting that:

[Conducting due diligence and related] activities are not uncommon and are regularly engaged in by parties endeavoring to reach a mutual accommodation. They are the common grist of negotiations aimed toward consummation of an agreement. In such circumstances, the endeavors by either side, if they fail, do not warrant a claim that one party has been unjustly enriched at the expense of the other. Each side’s efforts were for the purpose of advancing its own interests. . . . The parties were engaged in a normal negotiation process for . . . purchase and resale . . . and no reasonable business executive would expect payment for his own preliminary activities if they failed to achieve their objective. “Every businessman faces the risk that the substantial transaction costs necessary to bring about a mutually beneficial contract will be lost if the negotiations fail to yield a satisfactory agreement.” This aspect of plaintiffs’ claim does not give rise to a valid contention that [defendant] was unjustly enriched, or, even, that [defendant] was enriched at all.

*Id.* (quoting *Gruen Indus. v. Biller*, 608 F.2d 274, 282 (7th Cir. 1979)).

NVR’s allegations are essentially the same as the plaintiff’s in *Songbird Jet*. NVR seeks compensation for its time and effort expended during the pursuit of a business transaction that ultimately did not bear fruit. NVR’s due diligence is common to any significant business acquisition, and parties endeavoring to reach the kind of mutual accommodation NVR sought regularly engage in such diligence. *See id.* If a transaction ultimately fails, as it did here, such failure does not warrant a claim for unjust enrichment. *Id.*

The gravamen of the Complaint is that NVR is disappointed it failed to acquire the Debtors’ assets. Such disappointment, though perhaps understandable, does not give rise to a valid claim for unjust enrichment. *See Astor Holdings, Inc. v. Roski*, No. 01-civ-1906, 2002 WL 72936, at \*17 (S.D.N.Y. Jan. 17, 2002) (citing *Cunningham v. Merchant-*

*Sterling Corp.*, 587 N.Y.S.2d 492, 494 (N.Y. Sup. Ct. 1991)) (“Unjust enrichment is not an appropriate remedy for fruitless negotiation, frustration or disappointed expectations.”).

**IV. “SUBSTANTIAL DAMAGES” ARE NOT AN APPROPRIATE REMEDY**

Even if NVR could recover under any of the claims and causes of action asserted in the Complaint—which it cannot—the appropriate remedy is not damages as claimed by NVR. (Complaint ¶ 47.) The essence of NVR’s claim is that Debtors should have allowed the hearing on the initial relief sought in the Sale Motion to go forward. Because such hearing did not take place, it is doubtful that any “damages” could ever be quantified because if the Sale Motion were ultimately denied (as it would have been), NVR would be entitled to nothing. Indeed, NVR’s own characterization of what the Debtors should have done here belies any purported appropriateness of damages: in paragraph 10 of the Complaint, NVR sets forth precisely how it thinks the Debtors should have proceeded:

OHB promised to use its reasonable best efforts to seek court approval of the APA and entry of the Bidding Procedures Order (that the parties agreed should govern the auction process for the OHB Defendants’ assets), and the Sale Order. OHB had obligations under the APA to use its “reasonable best efforts” to seek Court approval of the Bidding Procedures Order, the APA and the entry of the Sale Order.

Hence, by NVR’s own admission, any wrongful conduct of the Debtors could be completely redressed by the Debtors’ renewing the Sale Motion and noticing a hearing thereon. But renewing the Sale Motion and scheduling a hearing would be an exercise in

futility, as none of the Debtors' major constituents—not to mention the Debtors themselves—would likely support the Sale Motion or the APA.

NVR's allegation in paragraph 38 of the Complaint that “[s]ome of the banks that previously had approved the sale process then sold their interests to certain distressed investors that decided to pursue an alternative course of action,” if true, is itself suggestive that the Debtors' secured lenders—one of their main constituencies—would not have supported the initial or final relief requested in Sale Motion or the approval of the APA. The official committee of unsecured creditors (the “Committee”) also likely would have voiced its opposition to any sale. In its objection to the Debtors' motion to obtain debtor-in-possession financing (the “Committee DIP Objection”), the Committee notes that “other options [to a sale] are available and should be pursued” and that “value will be irretrievably lost” pursuant to “an immediate sale.” (Committee DIP Objection ¶ 2 [D.I. 399]).

Further, in the Debtors' own business judgment, the possibility of a reorganization appeared far superior to the transactions contemplated by the APA and the Sale Motion from the perspective of the Debtors' creditors, employees, and other constituents. For example, whereas any confirmed plan of reorganization would have to provide a full recovery to certain administrative and other priority creditors, see Bankruptcy Code § 1129(a)(9), the APA never guaranteed that holders of such claims would realize any recovery. See *In re A&B Heating & Air Conditioning*, 823 F.2d 462, 465 (11th Cir. 1987), *vacated on other grounds sub nom. U.S. v. A&B Air Conditioning*, 486 U.S. 1002 (1988); *In re Holley Garden Apartments, Ltd.*, 238 B.R. 488, 495 (Bankr.

M.D. Fla. 1999) (finding that “[a] reorganization plan is usually preferable to a liquidation”).

In sum, NVR cannot demonstrate any damages as a result of the Debtors’ withdrawing the Sale Motion because the sale procedures, bid protections, and any sale itself would never have been approved by this Court in light of the real possibility that the Debtors could exit Chapter 11 pursuant to a stand-alone reorganization as opposed to a Section 363 sale.

*(Remainder of page intentionally left blank.)*

**CONCLUSION**

Based on the foregoing and all other pleadings and proceedings in this case, the Complaint and this adversary proceeding should be dismissed with prejudice.

Dated: July 14, 2010  
Wilmington, Delaware

**ELLIOTT GREENLEAF**



---

Rafael X. Zahraiddin-Aravena (DE Bar No. 4166)  
Shelley A. Kinsella (DE Bar No. 4023)  
Theodore A. Kittila (DE Bar No. 3963)  
1105 North Market Street, Suite 1700  
Wilmington, Delaware 19801  
Telephone: (302) 384-9400  
Facsimile: (302) 384-9399  
Email: rxza@elliottgreenleaf.com  
Email: sak@elliottgreenleaf.com  
Email: tak@elliottgreenleaf.com

- and -

CAHILL GORDON & REINDEL LLP  
Joel H. Levitin  
Kevin J. Burke  
Michael R. Carney  
Eighty Pine Street  
New York, New York 10005  
Telephone: (212) 701-3000  
Facsimile: (212) 269-5420  
Email: jlevitin@cahill.com  
Email: kburke@cahill.com  
Email: mcarney@cahill.com

*Attorneys for the Defendants*