

**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 (I) IN FURTHER
SUPPORT OF DEBTORS' MOTION TO DISMISS ADVERSARY
COMPLAINT, PURSUANT TO RULE 12(B)(6) OR FOR
SUMMARY JUDGMENT PURSUANT TO RULE 12(D) AND RULE
56, FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED AND (II) IN OPPOSITION TO MOTION OF
NVR, INC. FOR PARTIAL SUMMARY JUDGMENT**

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

ELLIOTT GREENLEAF

Rafael X. Zahraiddin-Aravena (DE Bar No. 4166)
Shelley A. Kinsella (DE Bar No. 4023)
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

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Attorneys for the Debtors

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
NATURE AND STAGE OF THE PROCEEDINGS	4
SUPPLEMENTAL FACTUAL BACKGROUND	5
ARGUMENT.....	9
I. THE GOVERNING LEGAL STANDARDS.....	9
II. THE DEBTORS ARE ENTITLED TO JUDGMENT IN THEIR FAVOR ON NVR’S CLAIMS FOR BREACH OF CONTRACT AND PAYMENT OF THE BREAK-UP FEE	10
A. By Its Express Terms and Applicable Law, No Portion of the APA Was Effective Unless and Until Approved by the Court.....	11
B. Causing a Hearing on the Sale Motion to Go Forward Would Have Served No Purpose	18
C. The Implied Covenant of Good Faith and Fair Dealing Is Not Implicated	23
D. NVR Has Suffered No Compensable Damages	25
III. THE DEBTORS ARE ENTITLED TO JUDGMENT IN THEIR FAVOR ON NVR’S QUASI-CONTRACTUAL CLAIMS	26
A. The Debtors Are Entitled to Judgment on NVR’s Claim for Promissory Estoppel	26
1. The Debtors Never Promised or Represented Anything to NVR to Induce Its Reliance.....	27
2. NVR Could Not Reasonably Rely on “Reasonable Best Efforts” Language in the APA to Substantiate Its Promissory Estoppel Claim	30
B. The Debtors Are Entitled to Judgment on NVR’s Claims for Unjust Enrichment.....	32
CONCLUSION	34

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>American-European Art Associates, Inc. v. Trend Galleries, Inc.</i> , 227 A.D.2d 170 (N.Y. App. Div. 1996)	23-24
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	9-10
<i>Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)</i> , 181 F.3d 527 (3d Cir. 1999).....	12-13, 33n
<i>Canstar v. J.A. Jones Construction Co.</i> , 622 N.Y.S. 2d 730 (N.Y. App. Div. 1995).....	24n
<i>Carlson v. Hallinan</i> , 925 A.2d 506 (Del Ch. 2006)	26
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	9
<i>Continental Insurance Co. v. Rutlege & Co.</i> , 750 A.2d 1219 (Del. Ch. 2000)	24, 25
<i>County of Washington v. Counties of Warren & Washington Indus. Development Agency</i> , 2 Fed. Appx. 71 (2d Cir. 2001).....	23
<i>Fasolino Foods Co. v. Banca Nazionale Del Lavoro</i> , 961 F.2d 1052 (2d Cir. 1992).....	24
<i>F.E. Myers Co. v. Pipe Maintenance Services, Inc.</i> , 599 F. Supp. 697 (D. Del. 1984)	26
<i>First National Bank of Arizona v. Cities Service Co.</i> , 391 U.S. 253 (1968).	10
<i>In re Fortunoff Fine Jewelry & Silverware, LLC</i> , No. 08-10353, 2008 WL 618983 (Bankr. S.D.N.Y. Feb. 22, 2008)	33n
<i>In re Frye</i> , 216 B.R. 166 (Bankr. E.D. Va. 1997)	14, 15
<i>Gillenardo v. Connor Broadcasting Delaware Co.</i> , No. C.A. 98-C-06-025, 2002 WL 991110 (Del. Super. Ct. Apr. 30, 2002)	25n
<i>H.B. Zachry Co. v. O'Brien</i> , 378 F.2d 423 (10th Cir. 1967).....	11
<i>In re Headquarters Dodge, Inc.</i> , 13 F.3d 674 (3d Cir. 1993).....	10
<i>Herman v. Green</i> , No. 99-6161, 2000 WL 1591272 (2d Cir. 2000)	20

<i>Kiely v. Raytheon Co.</i> , 105 F.3d 734 (1st Cir. 1997).....	27, 29
<i>In re Leslie Fay Companies</i> , 168 B.R. 294 (Bankr. S.D.N.Y. 1994)	16n, 17
<i>M&M Holdings, LLC v. Unsecured Creditors Committee (In re SpecialtyChem Products Corp.)</i> , 372 B.R. 434 (E.D. Wis. 2007).....	16-17
<i>In re Martin</i> , 91 F.3d 389 (3d Cir. 1996)	13, 19-20
<i>Matsushita Electric Industries Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	10
<i>Merrill v. Crothall-American, Inc.</i> , 606 A.2d 96 (Del. 1992).....	25
<i>Montagne v. Ag Venture Financial Services, Inc., (In re Montagne)</i> , 431 B.R. 72 (Bankr. D. Vt. 2010).....	31n
<i>Moore Development Ltd. v. M.G. Midwest, Inc.</i> , No. C06-1014, 2007 WL 2331021 (N.D. Iowa Aug. 13, 2007)	27-28
<i>National Controls Corp. v. National Semiconductor Corp.</i> , 833 F.2d 491 (3d Cir. 1987).....	26
<i>NCNB National Bank v. Bridgewater Steam Power Co.</i> , 740 F. Supp. 1140 (W.D.N.C. 1990).....	31-32
<i>Neitzke v. Williams</i> , 490 U.S. 319 (1989)	10-11
<i>NFL Properties, Inc. v. Dallas Cowboys Football Club, Ltd.</i> , 922 F. Supp. 849 (S.D.N.Y. 1996).....	24n
<i>Northview Motors, Inc. v. Chrysler Motors Corp.</i> , 186 F.3d 346 (3d Cir. 1999)	11-12
<i>Pinnacle Books v. Harlequin Enterprises, Inc.</i> , 519 F. Supp. 118 (S.D.N.Y. 1981).....	31
<i>Rapaport v. United States Department of Treasury</i> , 59 F.3d 212 (D.C. Cir. 1995).....	33
<i>In re Roth American, Inc.</i> , 975 F.2d 949 (3d Cir. 1992)	12, 15-16
<i>In re Seminole Walls & Ceilings Corp.</i> , 388 B.R. 386 (M.D. Fla. 2008).....	14

<i>Silver Court Nursing Center v. Sunbridge Care & Rehabilitation Center (In re Sun Healthcare Group, Inc.)</i> , No. 99-3657, 2002 WL 1000999 (Bankr. D. Del. May 2, 2002).....	16n, 17
<i>Siradas v. Chase Lincoln First Bank, N.A.</i> , No. 98-civ-4028, 1999 WL 787658 (S.D.N.Y. Sept. 30, 1999).....	24n
<i>Songbird Jet Ltd. v. Amax Inc.</i> , 581 F. Supp. 912 (S.D.N.Y. 1984).....	34, 34n
<i>In re Sparks</i> , 190 B.R. 842 (Bankr. N.D. Ill. 1996).....	13, 15, 20-21
<i>In re Telesphere Communications, Inc.</i> , 179 B.R. 544 (Bankr. N.D. Ill. 1994).....	14
<i>Trafalgar Power, Inc. v. Aetna Life Insurance Co.</i> , 396 B.R. 584 (N.D.N.Y. 2008).....	24
<i>Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.</i> , 832 F.2d 214 (1st Cir. 1987).....	31
<i>In re Tidewater Group, Inc.</i> , 8 B.R. 930 (Bankr. N.D. Ga. 1981).....	14
<i>In re Turner</i> , 274 B.R. 675 (Bankr. W.D. Pa. 2002).....	14
<i>In re United Shipping Corp.</i> , No. 4-88-533, 1989 WL 12723 (Bankr. D. Minn. Feb. 17, 1989).....	14
<i>W. Alton Jones Foundation v. Chevron U.S.A. Inc. (In re Gulf Oil/Cities Service Tender Offer Litigation)</i> , 725 F. Supp. 712 (S.D.N.Y. 1989).....	30-31
<i>In re Weiss</i> , 376 B.R. 867 (Bankr. N.D. ILL. 2007).....	29-30

Rules

Fed R. Bankr. P.

9019.....	14, 15
-----------	--------

Fed R. Civ. P.

12(b)(6)	1
12(d).....	1, 5, 9
56	1, 9

Statutes

Bankruptcy Code

11 U.S.C. § 363(b)	<i>passim</i>
--------------------------	---------------

Judicial Code

28 U.S.C. § 2075.....	14
-----------------------	----

Other Authorities

Restatement (Second) of Contracts § 193 (1981).....	32
---	----

The above-captioned debtors and debtors-in-possession and the two non-debtor affiliates named as defendants in this adversary proceeding (for ease of reference, collectively, the “Debtors”) respectfully submit this memorandum of law (i) in further support of the Debtors’ motion to dismiss (the “Motion to Dismiss”) [Adv. Docket No. 24] the adversary complaint filed by NVR, Inc. (as amended, the “Complaint”) [Adv. Docket No. 10], pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(d) and 56, for failure to state a claim on which relief can be granted, and (ii) in opposition to the motion of NVR, Inc., for partial summary judgment on the Complaint (the “Motion for Summary Judgment”) [Docket No. 47].

PRELIMINARY STATEMENT¹

NVR has failed to respond meaningfully to the Motion to Dismiss, and all of NVR’s causes of action are ripe for dismissal as a matter of law for the reasons set forth in the Debtors’ Moving Brief. At the status conference held by the Court on August 6, 2010, however, the Court indicated that it might be relevant to the Motion to Dismiss to understand when and why the Debtors changed their view as to whether to proceed with the sale; and the Court asked how the proposed sale is viewed by the principal constituencies in the proceeding other than the Debtors—the Official Committee of Unsecured Creditors (the “Committee”) and the Debtors’ pre-petition and post-petition

¹ Terms capitalized but not otherwise defined herein have the meanings ascribed to them in the Debtors’ memorandum of law in support of the Motion to Dismiss (the “Debtors’ Moving Brief”) [Adv. Docket No. 25].

secured lenders. The Court authorized NVR to take limited discovery on those issues, and NVR did so.

The question posed by the Court proved to be prescient, as NVR's entire focus in its opposition to the Motion to Dismiss and in support of its own Motion for Summary Judgment is that the Debtors cancelled the hearing on the Sale Motion rather than letting it proceed to the inevitable result of a refusal by the Court to approve the sale given the changed circumstances. At the core of the Complaint and Motion for Summary Judgment is that a hearing on the Sale Motion was never held. But NVR implicitly concedes, as it must, that if a hearing on the Sale Motion had occurred and the Court had refused to approve the transaction, NVR would have no basis whatsoever for the recovery it seeks here. Nevertheless, NVR incredulously argues that the fact that the hearing did not occur should lead to an entirely different result. NVR is wrong as a matter of fact and law.

The factual record is now clear that the holders of the pre- and post-petition secured debt that had supported (and even required) the sale at the time the asset purchase agreement ("APA") with NVR was signed and the Sale Motion was filed, sold their positions in the Debtors' pre- and post-petition secured debt and that the new holders of a controlling amount of both favored a reorganization approach over the sale. It is also beyond dispute that the Committee opposed the proposed sale before its official announcement and also favored a reorganization approach. With the sudden support of the secured lenders for a reorganization plan, and their willingness to allow the DIP facility to be restructured in such a way so as to allow sufficient time to complete the plan

process, it quickly became apparent to the Debtors that a plan approach was superior to the sale to NVR for all of the Debtors' constituencies. Thus, a hearing on the Sale Motion would have been futile and a waste of the Court's and the parties' resources.

NVR's argument that the Debtors, as fiduciaries to their estates, should have expended considerable time and resources asking this Court to approve the doomed APA and Sale Motion, which would not have had the support of any of the Debtors' key constituencies (or even the Debtors themselves) because the proposed transaction would not have maximized the value of the Debtors' estates, is absurd. The reality here is that the Debtors now have the chance to emerge from Chapter 11 as a going concern pursuant to a stand-alone plan of reorganization (the "Plan") [Docket No. 1821], which will be considered by this Court at the confirmation hearing, currently scheduled for November 16, rather than being sold in a fire sale. The Plan has the support of the Debtors, the Committee, the Debtors' pre- and post-petition senior secured lenders, and other of the Debtors' key constituencies. At the time the Sale Motion was withdrawn, the APA and the Sale Motion did not have (and never would have had) such support, and under no circumstances would this Court have approved the sale transaction once the changed circumstances emerged.

If the Court chooses to rely on the supplemental evidentiary submission accompanying this memorandum pursuant to Fed. R. Civ. P. 12(d), then summary judgment for the Debtors is appropriate. In any event, NVR's Motion for Summary Judgment should be denied in all respects because it is based on the erroneous

proposition that the Debtors were required to proceed with a hearing on the Sale Motion even when a negative outcome was assured.

NATURE AND STAGE OF THE PROCEEDINGS

On July 14, 2010, the Debtors filed the Motion to Dismiss and the Debtors' Moving Brief. At a status conference on August 6, 2010 this Court permitted NVR to engage in limited discovery related to the Motion to Dismiss. (8/6/2010 Hr'g Tr. 18:4-6.) On August 30, 2010, the Court entered an initial scheduling order in this adversary proceeding [Adv. Docket No. 42] setting forth the briefing schedule for the Motion to Dismiss and acknowledging NVR's waiver of any further notice if the Court elected to treat the motion to dismiss as one for summary judgment under Fed. R. Civ. P. 12(d) and 56. On September 15, 2010, the Debtors responded to NVR's first set of document requests (the "Document Requests") and the Debtors subsequently produced approximately 365 documents—comprising some 1285 pages—in response to the Document Requests.

By order of this Court dated September 20, 2010 (the "Scheduling Order") [Adv. Docket No. 46], this Court extended the time, through October 8, 2010, for NVR (i) to oppose the Motion to Dismiss and (ii) to file a motion for summary judgment in its favor. In the Scheduling Order, the Court also fixed October 29, 2010, as the date by which the Debtors may submit reply papers in further support of the Motion to Dismiss and oppose any motion for summary judgment of NVR. On October 8, 2010, NVR filed the Motion for Summary Judgment and a memorandum of law in support thereof (the "NVR Mem.") [Adv. Docket No. 48].

SUPPLEMENTAL FACTUAL BACKGROUND²

On April 13, 2010, the Debtors filed the Sale Motion [Docket No. 545] to sell substantially all of their assets to NVR for \$170 million, subject to adjustments, pursuant to the APA. The effectiveness of the APA was at all times subject to this Court's approval.³ At the time the Debtors filed the Sale Motion, they sincerely believed that a sale pursuant to Section 363(b)(1) of the Bankruptcy Code presented the best option for the Debtors to maximize value in Chapter 11 under the then existing circumstances, including limited availability of post-petition financing. Indeed, the Sale Motion (as NVR cites numerous times in the Complaint) makes such representations. (*See* Complaint ¶¶ 10, 22.)

Unbeknownst to the Debtors, while they were negotiating the APA with NVR and finalizing the Sale Motion, certain parties and their affiliates (the "Lender Group") purchased in excess of two-thirds of the amounts outstanding under the Debtors' pre-petition senior secured and post-petition debtor-in-possession financing ("DIP") facilities. As set forth in a May 2, 2010, e-mail from Mr. Vincent Colistra (one of the Debtors' restructuring advisors) to the Debtors' Board of Directors, the shift from a Section 363 sale to the possibility of a stand-alone reorganization occurred in late April 2010—over

² The Debtors incorporate all facts alleged in the Debtors' Moving Brief as if fully set forth herein, and the Debtors will not repeat them here.

³ A hearing on the initial relief sought in the Sale Motion (the "Sale Hearing") was originally scheduled for May 4, 2010.

two weeks after the Debtors filed the Sale Motion—according to the following chronology:⁴

- Between April 18, 2010, and April 30, 2010, the Debtors became aware that “several hedge funds were accumulating significant levels of the senior debt and in fact we were informed last Monday [4/26/2010] that the agent, Wachovia, had sold their debt” (Burke Decl., Ex. 1 at NVR 1177.)
- On April 27, 2010, one of the Lender Group’s members “requested a meeting” with the Debtors’ management and advisors. (*Id.*)
- On April 30, 2010, the Lender Group inquired whether “the company would consider exploring a Plan of Reorganization . . . rather than a quick ‘363’ sale.” (*Id.*)
- “Over the course of several conference calls” on April 30, 2010, and May 1, 2010, the Lender Group, the Debtors, and their advisors and counsel explored the possibility of “‘putting off’ the sale hearing . . . for two weeks while the company, the hedge funds [Lender Group] and their respective lawyers had time to development the framework of what a Plan would look like from a structure and capitalization point of view.” (*Id.*)
- On May 3, 2010, the Debtors contacted NVR to inform it of the change in plans. (*See id.* at NVR 1178.)
- On May 4, 2010, the Debtors filed and served the Second Amended Notice of Agenda of Matters Scheduled for Hearing on May 4, 2010 at 10:30 AM [Docket No. 795], indicating that the Sale Hearing had been postponed to May 21, 2010.

By letter dated May 3, 2010 (well after the Debtors filed the Sale Motion), the Lender Group sent a letter to Mr. Mitchell B. Arden, the Debtors’ Chief Restructuring Officer, indicating that it held a substantial majority of the Debtors’ pre- and post-petition

⁴ The May 2, 2010 e-mail from Mr. Colistra to the Board of Directors is attached to the Declaration of Kevin J. Burke (“Burke Decl.”) as Exhibit 1, which has been submitted contemporaneously herewith.

senior secured debt. (Burke Decl., Ex. 2 at NVR 1101.) In that same letter, the Lender Group stated that:

We believe that proceeding with the proposed 363 sale transaction with NVR, Inc. on the currently proposed timeline is not likely to maximize recoveries or otherwise be in the best interests of the Company's various constituencies. While we would need to confirm our views through further diligence, we believe that with additional time we can work with the Company to formulate a plan for the Company's emergence from bankruptcy that would yield superior recoveries to the Company's creditors and ensure the continued viability of the Company's business. . . . We are prepared to move quickly toward outlining a detailed transaction proposal and request that the Company adjourn the May 4 hearing to approve, among other things, its proposed bidding procedures. . . . To facilitate this adjournment, we are concurrently delivering a proposed letter agreeing to make certain amendments to the DIP Credit Agreement, subject to the terms therein.

(*Id.* at NVR 1101-02.) The modifications to the Debtors' DIP facility the Lender Group proposed included increasing availability, providing greater flexibility on budget compliance, permitting construction of homes in the early stages of completion, and providing for more flexible deadlines than previously imposed. (Burke Decl., Ex. 3 at NVR 1107-10.) As a result of that development, and understanding that the Lender Group was proposing that the Debtors exit Chapter 11 through a plan of reorganization rather than the sale, the Debtors—in fulfillment of their fiduciary duties to their estates and creditors—agreed to postpone the hearing on the sale and bidding procedures contemplated in the Sale Motion until May 21, 2010, in order to explore the possibility of a reorganization through a Chapter 11 plan.

After conducting its due diligence, on May 19, 2010, the Lender Group officially informed the Debtors that, in its belief, proceeding with the sale of substantially all the Debtors' assets pursuant to the APA would not maximize recoveries or otherwise be in

the best interests of the Debtors' various constituencies. Indeed, the Lender Group suggested that a plan of reorganization "would yield superior recoveries to the Company's creditors and ensure the continued viability of the Company's business." (Burke Decl., Ex. 4 at NVR 1087.) The Debtors, the Lender Group, and their respective advisors accordingly began to discuss the structure of a plan of reorganization that would, among other things, de-lever the Debtors' capital structure, provide the Lender Group with all or substantially all of the equity in the reorganized Debtors, provide the reorganized Debtors with a sustainable capital structure upon emergence from Chapter 11, provide the Debtors' management and employees with appropriate incentives and benefits, and permit the Company to preserve its relationships with vendors and contractors. (*Id.* at NVR 1087-88.) To further such discussions, the Debtors withdrew the Sale Motion with the support of the Lender Group, and the Lender Group permitted the amendment of the DIP financing to avoid the requirement of a quick sale. (*Id.* at NVR 1088.)

Thereafter, the Debtors began negotiation of the Plan in earnest and withdrew the Sale Motion in advance of the scheduled May 21, 2010, hearing. The Plan now has the support of all of the Debtors' major constituencies, and this Court approved the disclosure statement accompanying the Plan (the "Disclosure Statement") [Docket No. 1822] by order dated October 4, 2010 [Docket No. 2220].⁵ The Debtors have since

⁵ The Plan and Disclosure Statement were originally filed on August 12, 2010, with amended and modified versions filed on September 27, and October 1, 2010, respectively.

commenced the process of soliciting votes on the Plan, and the confirmation hearing is currently scheduled for November 16, 2010. If confirmed, the Plan will yield a far better outcome for the Debtors' estates and creditors than the transactions contemplated in the APA and the Sale Motion.

For the reasons set forth herein, the Motion to Dismiss should be granted, or (as appropriate) summary judgment in the Debtors' favor should be entered, with respect to each count of the Complaint.

ARGUMENT

I. THE GOVERNING LEGAL STANDARDS

The governing legal standard for the motion to dismiss is set out in the Debtors' Moving Brief at pages 7-9. To the extent the Court considers the additional materials submitted with this brief and converts the Motion to Dismiss under Rule 12(d) to a motion for summary judgment, the standards for a Rule 56 motion will apply.

Pursuant to Rule 56, summary judgment in a defendant's favor should be granted if the defendant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Id.* at 322. Whereas the initial burden of demonstrating the absence of a material factual dispute rests with the movant, once met the burden then

shifts to the non-moving party to present “significant probative supporting evidence” that a factual dispute exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

A factual dispute can arise only if the issue is both “genuine” and “material.” To show a “genuine” issue of fact, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Similarly, factual issues are only “material” if they “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587, quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968). A fact is “material” if the fact may affect the outcome of the case. *In re Headquarters Dodge, Inc.*, 13 F.3d 674, 679 (3d Cir. 1993), citing *Anderson*, 477 U.S. at 248. And an issue is “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Id.*, citing *Anderson*, 477 U.S. at 248.

As set forth below, there is no genuine dispute of material fact here, and the Debtors are entitled to judgment in their favor on all counts enumerated in the Complaint.

II. THE DEBTORS ARE ENTITLED TO JUDGMENT IN THEIR FAVOR ON NVR’S CLAIMS FOR BREACH OF CONTRACT AND PAYMENT OF THE BREAK-UP FEE

Whether the APA was a binding contract that the Debtors could have breached prior to its being approved by this Court is a legal issue, and this Court may dispose of Count I (Breach of Contract) and Count IV (Claim for Termination Fee and Expense Reimbursement (the “Break-Up Fee”)) of the Complaint as a matter of law. *See Neitzke*

v. Williams, 490 U.S. 319, 326-27 (1989) (dismissal is additionally appropriate where an issue of law is dispositive). This is doubly true given that both the Debtors and NVR have requested summary judgment on the issue. Although the fact that both sides have asked for summary judgment on a particular issue does not necessarily establish that there is no genuine issue of material fact, courts may assume that there is no evidence that needs to be considered other than that which has been filed by the parties. See *H.B. Zachry Co. v. O'Brien*, 378 F.2d 423, 425 (10th Cir. 1967) (“Cross motions under Rule 56, F. R. Civ. P., [generally] give rise to the inference there is no evidence other than the pleadings and supporting instruments to be considered.”).

A. By Its Express Terms and Applicable Law, No Portion of the APA Was Effective Unless and Until Approved by the Court

The Debtors’ position and authorities on the lack of effectiveness of the APA before approval by this Court are set out at length in the Debtors’ Moving Brief at pages 9-16. The cases NVR relies upon to support its contrary position that the Debtors somehow could have breached an unapproved agreement to sell substantially all of their assets do not refute the Debtors’ position. Indeed, the vast majority of such cases support it.

First, NVR relies on *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346 (3d Cir. 1999), for the proposition that the “APA ‘became legally binding . . . upon its execution,’ even if ‘its consummation was subject to the satisfaction of a condition subsequent—bankruptcy court approval.’” (NVR Mem. At 15.) *Northview Motors* does not stand for that proposition. The *Northview* court expressly stated that it “assume[d], *without deciding*, that an agreement within the scope of § 363 is effective on execution

subject to conditions subsequent,” such as notice, a hearing, and court approval. *Northview Motors*, 186 F.3d at 351 (emphasis added). NVR’s reliance on that *obiter dictum* is curious, especially given that the *Northview Motors* court reiterated that “a contract providing for use or sale of estate property outside the regular course of business is unenforceable absent court approval.” *Id.*, citing *In re Roth Am., Inc.*, 975 F.2d 949 (3d Cir. 1992). If anything, *Northview Motors* supports the Debtors’ position that the APA was unenforceable in its entirety prior to receiving the approval of this Court.

NVR then cites to *Calpine Corp. v. O’Brien Environmental Energy, Inc. (In re O’Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999), for the proposition that “as of the hearing date for a Section 363 sale motion, [NVR] already possessed a pair of rights, ‘the right to require [the debtor] to seek approval by the Bankruptcy Court as per its contract and the right to enforce the contract if such approval was secured.’” (NVR Mem. at 15.) Yet NVR ignores the *O’Brien* court’s specific finding that the counterparty to the asset purchase agreement in that case did not “have a binding contract with [the debtor], as the sale of substantially all of a debtors’ assets is a transaction outside the ordinary course of business, which requires bankruptcy court approval to become effective.” *O’Brien*, 181 F.3d at 531. NVR characterizes *O’Brien* as bolstering its proposition that NVR had some sort of right to require the Debtors, at considerable expense to their estates and with no support from their key constituencies, to ask this Court to approve the Sale Motion. The paragraph NVR cites for its dubious proposition reads, in full:

In this circumstance, we cannot conclude that the Bankruptcy Court’s decision diminished Calpine’s property, increased its burdens, or impaired

its rights. The only rights Calpine had on August 17, 1995 were the right to require O'Brien to seek approval by the Bankruptcy Court as per its contract and the right to enforce the contract if such approval was secured. The first right was duly exercised when O'Brien moved for approval at the August hearing; the second right never became exercisable *because the condition precedent to its enforcement never occurred*. Thus, neither of Calpine's rights was impaired by the Bankruptcy Court's decision to deny approval.

Id. at 531 (citations omitted; emphasis added).

The hearing on the motion to approve the asset purchase agreement in *O'Brien* actually went forward because it had the support of the debtor's key constituents. *See id.* at 529 ("the Debtor, the Creditor's Committee, O'Brien's secured creditors, and several unsecured creditors each supported the [sale] motion. . . ."). Thus, the court never addressed whether the contract would require a debtor to proceed with a futile hearing such as the circumstance here. The court did, however, remove any doubt that court approval of a sale of substantially all of a debtor's assets is a *condition precedent* to the enforceability of any of sale agreement provisions. *Id.* at 531.

There is nothing in *O'Brien* to suggest that a Chapter 11 debtor is required to advance a transaction that is not in the best interest of its estate, and applicable law runs entirely to the contrary. *See In re Martin*, 91 F.3d 389, 394 (3d Cir. 1996) (rejecting the proposition that "a trustee is required to champion a motion to approve a stipulation that is no longer in the best interest of the estate."); *In re Sparks*, 190 B.R. 842, 843 (Bankr. N.D. Ill. 1996) (refusing to consider motion to approve settlement under 363(b) where debtor withdrew motion and determined he had received better offer).

In a further attempt to salvage its argument that the APA was somehow enforceable notwithstanding that this Court never approved it, NVR cites to a slew of

inapposite case law. (See NVR Mem. at 18-19, citing *In re Frye*, 216 B.R. 166 (Bankr. E.D. Va. 1997); *In re Turner*, 274 B.R. 675 (Bankr. W.D. Pa. 2002); *In re Seminole Walls & Ceilings Corp.*, 388 B.R. 386 (M.D. Fla. 2008); *In re United Shipping Corp.*, No. 4-88-533, 1989 WL 12723 (Bankr. D. Minn. Feb. 17, 1989); *In re Tidewater Group, Inc.*, 8 B.R. 930 (Bankr. N.D. Ga. 1981).) In each of those cases, courts were faced with agreements to approve compromises and settlements in accordance with Bankruptcy Rule 9019—not a contract to sell substantially all of a debtor’s assets pursuant to Section 363(b) of the Bankruptcy Code. The fundamental flaw in analogizing the facts here to those in NVR’s line of cases noted above becomes obvious when examining the focus and scope of Bankruptcy Rule 9019. As one court put it:

Consistent with this legislative purpose, the Bankruptcy Code contains no requirement for judicial approval of settlements. . . . One of the rules of bankruptcy procedure, Fed. R. Bankr. P. 9019(a), provides a procedure for motions to settle, but it cannot create a substantive requirement for court approval that does not exist in the Code itself. Thus, unless the Bankruptcy Code requires court approval for the underlying action that the trustee seeks to accomplish, there should be no need for court approval of a settlement that effectuates that action.

In re Telesphere Commc’ns, Inc., 179 B.R. 544, 551-52 (Bankr. N.D. Ill. 1994). Indeed, the statute that authorizes the United States Supreme Court to adopt bankruptcy rules specifies that such rules shall not “abridge, enlarge, or modify any substantive right.” 28 U.S.C. § 2075. Bankruptcy Rule 9019 itself therefore cannot provide the basis for the refusal to enforce a settlement agreement solely because it has not been approved by the bankruptcy court. NVR fails to recognize that bankruptcy court approval is expressly required in the event a Chapter 11 debtor contemplates the use or sale of estate property

outside the ordinary course of business, whether in the context of a Bankruptcy Rule 9019 settlement or otherwise.

For example, in *In re Frye*, a case on which NVR places some reliance, the court expressly noted that “in most instances, there [is] no requirement for judicial approval of settlement agreements if the agreement was for the sale of assets of the estate in the ordinary course of business. *Where, however, judicial approval was necessary for a transaction to go forward, an agreement could not be binding absent the required [court] approval.*” *In re Frye*, 216 B.R. at 173, citing *Sparks*, 190 B.R. at 843 (emphasis added). Indeed, the *Frye* court expressly distinguished the circumstance before it from those in *Sparks*. *Id.* *Sparks*, as *Frye* recognized, involved a withdrawn Bankruptcy Rule 9019 settlement agreement that contemplated the sale of estate property outside the ordinary course, which was held to be unenforceable in its entirety on account of not having received bankruptcy court approval; *Frye*, apparently, did not. *Id.*

NVR’s attempt to distinguish the cases the Debtors cite in support of their position that the APA was neither binding nor enforceable absent this Court’s approval is similarly unavailing. First, NVR ignores the decision of the Court of Appeals for the Third Circuit in *In re Roth American Inc.*, 975 F.2d 949 (3d Cir. 1992). In that case, the court considered whether there can be a cognizable claim for breach of contract by a Chapter 11 debtor when the allegedly breached contract was one outside the ordinary course of business that the bankruptcy court had not approved. The *Roth* court held that a post-petition memorandum agreement to amend the terms of an existing collective bargaining agreement was a contract outside the ordinary course of business, requiring

notice, a hearing, and court approval before it could become binding. The counterparty argued that the contract was binding when executed notwithstanding the absence of bankruptcy court approval, but after an analysis of the reasons why court approval for non-ordinary course of business transactions under section 363 of the Bankruptcy Code is needed in Chapter 11, the *Roth* court held that there could be no claim for breach of contract because the court had not approved it. *Roth*, 975 F.2d at 954.⁶

Second, whereas *M&M Holdings, LLC v. Unsecured Creditors Committee (In re SpecialtyChem Products Corp.)*, 372 B.R. 434 (E.D. Wis. 2007), does, as NVR suggests, involve a request for payment of a break-up fee, NVR sidesteps that the claim for a break-up fee was made in the alternative to the plaintiff's breach of contract claim just as NVR asks for the Break-Up Fee here. *Id.* at 438 Putting aside that *SpecialtyChem* is

⁶ NVR also characterizes *In re Leslie Fay Companies*, 168 B.R. 294 (Bankr. S.D.N.Y. 1994), as "simply" holding "that a post-bankruptcy amendment to a collective bargaining agreement that contained proposals to settle significant pre-petition claims was outside the ordinary course and therefore was unenforceable in its entirety without notice and approval by the bankruptcy court." (NVR Mem. at 20.) Yet that holding is precisely on point here and constitutes additional authority for the proposition that agreements outside the ordinary course of business require court approval in order to be enforceable in any way.

NVR's attempt to distinguish *Silver Court Nursing Center v. Sunbridge Care & Rehabilitation Center (In re Sun Healthcare Group, Inc.)*, No. 99-3657, 2002 WL 1000999 (Bankr. D. Del. May 2, 2002), fares no better. Although NVR characterizes *Sun Healthcare* as being a case involving "a letter of intent and an unsigned purchase agreement a buyer sought to enforce" (NVR Mem. at 21 n.14), NVR neglects to mention that the *Sun Healthcare* court found that "[e]ven if the parties had executed the Agreement of Purchase, [the counterparty] has no right to enforce it. The purported sale . . . required Court approval pursuant to section 363 of the Bankruptcy Code." *Sun Health Care*, 2002 WL 1000999, at *3.

dispositive on Count IV of the Complaint, the first issue the *SpecialtyChem* court addressed was whether *any portion* of an agreement to purchase substantially all of the debtor's assets in that case was enforceable absent bankruptcy court approval. The *SpecialtyChem* court ruled that it was not:

M&M argues that under Wisconsin contract law, it had entered into an enforceable contract with SPC to be the stalking horse bidder via the asset purchase agreement. This argument fails because it ignores the larger bankruptcy context, and in particular the requirement that any asset purchase agreement reached by SPC be court-approved. M&M points to Nixon's testimony that he believed, upon leaving the hearing of September 29, 2006, that the bankruptcy court had tacitly acquiesced in the agreement between SPC and M&M. However, Nixon's subjective belief in the court's tacit acquiescence is no substitute for actual court approval. . . . [T]he bankruptcy judge did not approve the purchase agreement between SPC and M&M at that hearing or subsequently. Because of the bankruptcy context operative here and the need for court approval, SPC's and M&M's mutual understanding that they had become contractually bound did not create an enforceable contract.

Id. at 439. Contrary to NVR's representation that *SpecialtyChem* "does nothing to bolster the Debtors' argument" (NVR Mem. at 20), the holding in *SpecialtyChem* (as well as the holdings in *Roth*, *Leslie Fay*, and *Sun Healthcare*) eviscerates NVR's breach of contract claim.

Indeed, in at least one other recent bankruptcy case, this Court has agreed with the Debtors' position. See *In re Penn Traffic Co.*, No. 09-14078 (PJW) (Bankr. D. Del). Specifically, during a January 8, 2010, hearing, this Court recognized that a contract to sell substantially all of a debtor's assets is not binding absent bankruptcy court approval: "Well, you don't have contractual rights until I enter an order saying that the transaction

is approved.” (*In re Penn Traffic Co.*, 1/8/2010 Hr’g Tr. 45:32-3.⁷) As noted in the Debtors’ Moving Brief, this Court made similar statements at a hearing in the *Penn Traffic* case in March. (Debtors’ Mov. Br. at 16.)

B. Causing a Hearing on the Sale Motion to Go Forward Would Have Served No Purpose

In apparent recognition that its breach of contract claim is legally deficient, NVR resorts to the untenable argument that, although *most* of the APA required this Court’s approval to be effective, the portion of the APA requiring the Debtors to use their “reasonable best efforts” to have this Court hear the Sale Motion was an enforceable obligation that was breached. (*See* NVR Mem. at 15.) This argument fails as a matter of fact and, independently, as a matter of law.

First, as a matter of fact, the Debtors did comply fully with their obligation to use their *reasonable* best efforts to present the Sale Motion to this Court. The Sale Motion was duly filed and set for a hearing well within the time line required by the APA, notwithstanding the stated opposition of the Committee to a quick 363 sale. When, however, it became clear that an alternative route provided a better avenue for all creditors and that not even the Lender Group would support the sale any longer; when the means to move forward with a Plan became available through the amendment of the DIP financings; and when the Debtors concluded that pursuing the Plan rather than the sale was in the best interest of all of their constituencies, it was no longer *reasonable* to

⁷ The relevant pages of the transcript of the January 8, 2010, hearing in *Penn Traffic* can be found at Burke Decl., Ex. 5.

pursue the Sale Motion. Nor can it be credibly argued that “reasonable best efforts” requires the expenditure of resources to commence a futile hearing process.

As a matter of law, NVR’s argument fails as well because none of the cases it cites requires a debtor, even one with an unqualified commitment to seek approval of a sale, to continue when it is clear such sale would not be approved. Although NVR cites *In re Martin* in support of its proposition that the Debtors are liable for breaching the unapproved and unenforceable APA by not going forward with the hearing on the Sale Motion, no language in that case helps NVR.

In *Martin*, the court reviewed whether an agreement entered into by the trustee to sell assets of the estate outside the ordinary course of business was binding and whether the trustee was in breach of that agreement if she agreed to accept a better offer. *In re Martin*, 91 F.3d at 395. After finding that the inferior settlement agreement was not binding on the parties, the *Martin* court expressly stated that it was not addressing the issue of “whether, absent intervention of a bankruptcy court, parties are bound by the terms of a settlement pending final approval of the bankruptcy court.” *Id.* at 394. Thus, *Martin* does not have the implications NVR claims it has. *See id.* (noting that the decision “would not expand the matter beyond its perimeters.”). Indeed, *Martin* makes abundantly clear that binding precedent in the Third Circuit has expressly “reject[ed] the proposition that a trustee is required to champion a motion . . . that is no longer in the best interest of the estate.” *Id.*

NVR argues that the Debtors should have wasted scarce time and resources by going forward with the Sale Hearing, knowing that (i) the APA and the Sale Motion had

no support among Debtors' key constituencies and (ii) approval of the sale was no longer in the best interests of the Debtors' estates. The Court in *Sparks* recognized that NVR's position is untenable. *Sparks* involved an individual Chapter 11 debtor who had reached an outside-the-ordinary-course Bankruptcy Rule 9019 settlement agreement with certain parties to a residential lease regarding a dispute over an option to purchase the leased property (owned by the debtor) and other matters. 190 B.R. at 843. Just before a hearing on the settlement agreement, the debtor, believing he had received a better offer for the property in question, withdrew the settlement agreement and did not seek its approval. *Id.* The counterparties objected to the withdrawal. *Id.* After a thorough analysis of applicable case law, the *Sparks* court refused to enforce the settlement agreement or to allow a hearing thereon to go forward. Critical to its analysis was the concept of a Chapter 11 debtor's role as a fiduciary:

The debtor-in-possession operates as a fiduciary; any actions taken by the debtor are to be in the best interests of the creditor body as a whole. For that reason the debtor is frequently, *except when acting in the ordinary course of business*, prohibited from acting unilaterally; instead its actions are subject to complete disclosure and review by the creditors of the estate and the bankruptcy court.

Id. at 844-45 (emphasis added). Much like NVR suggests should have happened here, the counterparties to the revoked settlement agreement in *Sparks* suggested that the bankruptcy court proceed with a hearing to approve the settlement agreement anyway.

Id. at 845. The *Sparks* court refused to do so and recognized the impossibility of such a situation:

[T]his would pit the debtor in a conflict between his fiduciary duty to the estate and a duty to go forward with the agreement. For example, if the debtor receives a better offer to purchase the assets before the agreement is effective (i.e. approved), he has a duty to report that offer to the court and

to the creditors. He would then be put in a position of either “breaching” the initial agreement or supporting the initial agreement when a better offer has been made, thereby breaching his duty to the estate. . . . At the same time requiring a debtor to seek approval of an agreement it no longer supports would create confusion about the applicable legal standard. . . .

[W]hen an agreement is before the court and the debtor advises the court that he no longer supports the agreement because he has received a better offer, should the court give deference to the debtor’s initial decision to enter into the agreement or its later decision to back out of the agreement? What standard should the court apply in deciding whether to approve the agreement? The very statement of these questions illustrates the difficulty with the [objecting counterparties’] position: It creates confusion and conflicts that disappear if the agreement is not enforceable until it has been approved.

Id. Accordingly, because “[t]he settlement agreement . . . involved disposition of estate assets,” the *Sparks* court held that “creditors of this estate had to be notified of the agreement and this Court had to approve it before it became enforceable” and deferred to the debtor’s business judgment on the matter. *Id.* For similar reasons, there was no basis for the Sale Hearing to go forward in these cases.

Further, NVR’s contention that “[w]hether the Court would or would not have approved the APA is beside the point” has already been implicitly rejected by this Court. (NVR Mem. 22.) In a status conference held on August 6, 2010, this Court unequivocally stated:

I’m sure you’re aware of the Penn Traffic decision that I made here. . . . I pointed out that, let’s see, the two days before the motion to approve the sale and the auction procedure, two days before the debtor backed out because the new buyer came in with a lot more money. And I pointed out in that opinion that had the—notwithstanding the new bidder with more money, if the debtor attempted to go forward with the sale process that was to be heard two days later, it was very obvious that the committee would oppose that motion. And given the reasons why the committee stated they would oppose it if it went forward, I concluded that the contract would not have been approved. And therefore, it never got to first base, if you will.

(8/6/2010 Hr'g Tr. 15:17-18; 15:24-16:10.) NVR's attempt to convince this Court that *Penn Traffic* somehow does not apply here because a break-up fee was involved should not be accepted. (NVR Mem. at 20-21.) And NVR's implication in a footnote that the Committee actually supported the Sale Motion is inaccurate. (NVR Mem. at 2 n.4.) At the outset of these cases, the Committee strenuously objected to the entire concept of a quick Section 363 sale in its objection [Docket No. 399] to the Debtors' motion to obtain post-petition financing, noting that "[w]hile the Committee believes other options are available and should be pursued, the Lenders have forced the Debtors to position themselves for an immediate sale, pursuant to which, value will be irretrievably lost."⁸ (Committee DIP Obj. 2.)

In sum, on account of the Lender Group's proposal, going forward with the Sale Motion and the hearing thereon would have been nothing more than a waste of time and resources, as none of the Debtors' major constituencies—not to mention the Debtors

⁸ Although NVR makes much of the Committee's position in a statement regarding the Sale Motion [Docket No. 737] that its concerns had been "adequately addressed," that pleading, filed on April 28, 2010, well before the extent of the changed circumstances were known, addressed only the sale procedure aspect of the motion and not the Committee's view of the merits of the sale. In that same pleading, the Committee expressly "reserve[d] all of its rights to object to the sale of substantially all of the Debtors' assets and nothing [in the statement] is intended nor should it be construed to be a waiver of such rights." (*Id.* ¶ 8.) As noted above, the Committee had previously in the context of the DIP motion made clear its objections to the sale and, in light of the Plan and the Lender Group's changed perspective, would certainly have opposed the APA and the Sale Motion had a hearing been held. The Committee has, however, supported the Plan, as indicated in the Committee's letter included as part of the Debtors' solicitation package. (Burke Decl., Ex. 6.)

themselves—would have supported the Sale Motion or the APA. Indeed, it would have arguably been a breach of the Debtors’ fiduciary duty to the estates to permit the Sale Hearing to go forward in light of the fact that, at that time, no reasonable person could have believed the APA would ever (or should ever) have been approved.

C. The Implied Covenant of Good Faith and Fair Dealing Is Not Implicated

NVR also raises the argument that the Debtors, by withdrawing the Sale Motion, breached some “implied covenant of good faith and fair dealing.” (NVR Mem. at 17.) First, a breach of the covenant of good faith and fair dealing was not pleaded in the Complaint so it should not be at issue with respect to the Motion to Dismiss. Second, NVR fails to recognize the well-settled law that, where there is no binding contract, there can be no cognizable claim for breach of any implied covenant of good faith and fair dealing. *See Cnty. of Wash. v. Cntys. of Warren & Wash. Indus. Dev. Agency*, 2 Fed. Appx. 71, 74 (2d Cir. 2001) (“no covenant of good faith and fair dealing arises in the absence of a contract.”). *See also Herman v. Green*, No. 99-6161, 2000 WL 1591272, at *2 (2d Cir. 2000), *citing Am.-European Art Assocs., Inc. v. Trend Galleries, Inc.*, 227 A.D.2d 170, 171 (N.Y. App. Div. 1996). In addition, because the covenant of good faith and fair dealing is an implied contractual term, “breach of that duty is merely a breach of the underlying contract” and is not distinct therefrom. *Fasolino Foods Co., Inc. v. Banca*

Nazionale Del Lavoro, 961 F.2d 1052, 1056 (2d Cir. 1992) (citation omitted); *Trafalgar Power, Inc. v. Aetna Life Ins. Co.*, 396 B.R. 584, 590 (N.D.N.Y. 2008).⁹

Third, notwithstanding the other defects of NVR's allegations regarding the implied covenant of good faith and fair dealing, Delaware courts have found that the doctrine "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract." *Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000) (citation omitted). Here, withdrawing the Sale Motion was neither arbitrary nor unreasonable: the Debtors did so only after the Lender Group agreed to sponsor a stand-alone plan of reorganization, on terms superior from the estates' perspective than the APA. NVR would never have "received the fruits" of the APA, as the Debtors' key constituents would not have supported it, and this Court consequently never would have approved it.

Finally, "[t]he Delaware Supreme Court has explicitly held that a claimant must demonstrate that the conduct at issue involved fraud, deceit, or misrepresentation in order

⁹ Indeed, alleging both breach of contract and the breach of the covenant of good faith and fair dealing is redundant, and courts confronted with such situations regularly dismiss any freestanding claim for breach of the implied covenant. *See, e.g., Siradas v. Chase Lincoln First Bank, N.A.*, No. 98-civ-4028, 1999 WL 787658, at *6 (S.D.N.Y. Sept. 30, 1999) ("A party may maintain a claim for breach of the duty of fair dealing only if it is based on allegations different than those underlying the accompanying breach of contract claim."); *Canstar v. J.A. Jones Constr. Co.*, 622 N.Y.S.2d 730, 731 (N.Y. App. Div. 1995); *NFL Props., Inc. v. Dallas Cowboys Football Club, Ltd.*, 922 F. Supp. 849, 855 (S.D.N.Y. 1996).

to prove a breach of the implied covenant [of good faith and fair dealing].” *Id.*, citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992). NVR has not alleged facts or pointed to any other evidence revealing fraud, deceit, or misrepresentation. Indeed, the Debtors merely acted in accordance with their fiduciary duty to maximize the value of their estates, and they informed NVR that the Sale Hearing would be postponed (and later cancelled) shortly after receipt of the Lender Group’s agreement to work in good faith to pursue a plan of reorganization.

D. NVR Has Suffered No Compensable Damages

NVR alleges that “its allegations of reliance damages are all the law requires to state a case for breach of contract,” and “whether the Court would or would not have approved the APA is beside the point” (NVR Mem. at 21-22); that is an incorrect statement of the law.¹⁰ In order to prevail on any breach of contract claim, NVR must prove, among other things, that it suffered damages *as a result of* the breach of a valid and enforceable contract. *See Carlson v. Hallinan*, 925 A.2d 506, 528-29 (Del. Ch. 2006).

Even if there were a valid contract that the Debtors breached (which the Debtors have shown there was not), it is axiomatic that NVR must prove that any damages were proximately caused by any breach, and not through some other cause. *See F.E. Myers*

¹⁰ The sole authority that NVR cites for its doubtful proposition does not support it. *Gillenardo v. Connor Broad. Del. Co.*, No. C.A. 98-C-06-015, 2002 WL 991110 (Del. Super. Ct. Apr. 30, 2002), involved the breach of a requirement in a contract to negotiate in good faith. Importantly, in that case there was a binding and enforceable contract, which, for the reasons set forth above, is not the case here.

Co. v. Pipe Maint. Servs., Inc., 599 F. Supp. 697, 704 (D. Del. 1984) (collecting cases); accord *Nat'l Controls Corp. v. Nat'l Semiconductor Corp.*, 833 F.2d 491, 496 (3d Cir. 1987). Here, nothing the Debtors did can be said to have caused any damages to NVR where this Court would never have approved the APA, which consequently never would have become a binding and enforceable contract capable of being breached.

**III. THE DEBTORS ARE ENTITLED TO JUDGMENT
IN THEIR FAVOR ON NVR'S QUASI-
CONTRACTUAL CLAIMS**

This Court should reject NVR's attempt to get around the court approval requirement under Section 363(b) of the Bankruptcy Code through the assertion of quasi-contractual claims. Such claims in quasi-contract, as posited by NVR, would eviscerate the fundamental requirement that bankruptcy courts approve transactions outside the ordinary course of business involving property of the estate, and NVR's claims for promissory estoppel and unjust enrichment should be dismissed on that basis alone. In any event, NVR's quasi-contractual claims are also legally deficient and should be dismissed accordingly.

**A. The Debtors Are Entitled to Judgment on NVR's
Claim for Promissory Estoppel**

With respect to its promissory estoppel claim, NVR (a sophisticated party represented by experienced counsel throughout the negotiations surrounding the APA) asks this Court to believe that supposed representations of the Debtors and provisions of the APA induced it to *reasonably* rely, to its detriment, that the Debtors would engage in conduct outside the ordinary course of business without this Court's approval. To substantiate that impossible claim, NVR argues that the written words in the unapproved

and unenforceable APA somehow required the Debtors to abandon their fiduciary duty and champion a transaction that was no longer in the best interest of their estates, and consequently, had no hope of receiving this Court's approval. The argument fails as a matter of law to support a claim for promissory estoppel.

**1. The Debtors Never Promised or Represented
Anything to NVR to Induce Its Reliance**

For the reasons set forth in the Debtors' Moving Brief, none of the purported promises or other representations NVR alleges the Debtors made to it can constitute a "promise" for the purpose of promissory estoppel. (Debtors' Mov. Br. at 17-22.) Indeed, each of the alleged representations to which NVR alludes, both in the Complaint and its response to the Motion to Dismiss, occurred while the Debtors were negotiating the APA with NVR or shortly thereafter—well in advance of the Lender Group's approach to the Debtors about the possibility of pursuing a stand-alone reorganization.

In apparent recognition that the laundry list of the Debtors' alleged representations NVR sets forth is not sufficient to substantiate a claim for promissory estoppel (NVR Mem. at 7-8), NVR focuses on the terms of the unapproved and unenforceable APA providing that the Debtors would use their "reasonable best efforts" to obtain approval of the Bidding Procedures as the principal basis for its promissory estoppel claim. (NVR Mem. at 9.) But as the Debtors have set forth elsewhere, the terms of an agreement that never became legally effective cannot constitute a promise for the purposes of promissory estoppel. (Debtors' Mov. Br. at 20-21.) NVR's attempts to distinguish *Moore Development, Ltd. v. M.G. Midwest, Inc.*, No. C06-1014, 2007 WL

2331021 (N.D. Iowa Aug. 13, 2007) and *Kiely v. Raytheon Co.*, 105 F.3d 734 (1st Cir. 1997), fail, and those cases fully support the Debtors' position.

In *Moore*, the plaintiff alleged that the defendant made a promise to lease a parcel of land and open a video store thereon. Much as NVR asserts here, the plaintiff in *Moore* asserted that he relied to his detriment on the defendant's promise by complying with the defendant's build-out requirements on the land to be leased. *Moore*, 2007 WL 2331021, at *6. The defendant argued that both parties were clear that no binding agreement would exist until both parties executed a lease agreement, notwithstanding a letter of intent that, in addition to listing the defendant's build-out requirements, the term of the lease, the rental rate, and other contractual details, also provided that a lease agreement be executed before any obligation would be binding. *Id.* at *6-7. The defendant never executed the lease agreement on account of changed business circumstances. *Id.* at *2-3. In granting summary judgment to the defendant, the *Moore* court ruled that, because both parties knew that a lease agreement must be executed before any obligations in the letter of intent would be binding, there was insufficient evidence of a "clear and definite promise" for promissory estoppel purposes. *Id.* at *7.

Here, NVR admits that "NVR was always aware of the possibility that the Bidding Procedures Order and the Sale Order would not be entered by the Court" (NVR Mem. 11.) And as set forth in the Debtors' Moving Brief, NVR was well aware that the APA and all the terms therein were subject in their entirety to this Court's approval. (Debtors' Mov. Br. 6-7, 9.) As was the case in *Moore*, the provisions of a

document that never became legally effective are not sufficient to sustain a claim for promissory estoppel.

Moreover, assuming, *arguendo*, that the terms of the unapproved APA did constitute a sufficiently definite “promise” for promissory estoppel purposes, because the Debtors were legally precluded from performing its terms until the APA received this Court’s approval, such terms cannot form the basis of a claim for promissory estoppel. It is on this point that NVR’s attempt to distinguish *Raytheon* fails. In *Raytheon*, an employer promised his employee that he would not be forced to seek early retirement on account of mishandling certain classified documents in violation of Department of Defense regulations. *Raytheon*, 105 F.3d at 735-36. The Court of Appeals for the First Circuit held that, notwithstanding the definitiveness of such promise, a claim for promissory estoppel based upon a promise to do something contrary to law would not stand as a matter of public policy. *Id.* at 737. Accordingly, none of the provisions in the APA, which the Debtors could not legally have performed absent this Court’s approval, can serve as the basis for NVR’s promissory estoppel claim.

NVR’s attempt to distinguish *In re Weiss*, 376 B.R. 867 (Bankr. N.D. Ill. 2007), is similarly unavailing. In *Weiss*, the debtor attempted to assign his interests in various closely held companies to third parties, which assignments were found to be invalid because they were prohibited by certain operating documents of such companies. *Id.* at 877-78. The assignees then argued that they detrimentally relied on the debtor’s representations that he could assign his interest in the companies, and that debtor should therefore be estopped from using his own violation of the operating agreements to his

benefit. *Id.* at 879. In rejecting the assignees’ promissory estoppel claims, the *Weiss* court noted that the assignees knew the debtor did not have the authority to transfer his interests under the applicable operating agreements and that the requisite prior consent to assign had not been obtained. Accordingly, the *Weiss* court found that any reliance on the part of the assignees was not reasonable. *Id.* at 880. In the same manner as the assignees in *Weiss*, NVR’s assertion that it relied to its detriment on the terms and other provisions of the APA, knowing that the Debtors had no authority to be bound thereby unless and until this Court approved it, is not credible.

**2. NVR Could Not Reasonably Rely on
“Reasonable Best Efforts” Language in the APA to
Substantiate Its Promissory Estoppel Claim**

As set forth above, the Debtors believe that they fully complied with the “reasonable best efforts” requirements in the APA, so no contrary claim can survive, including the promissory estoppel claim. Moreover, although the APA does provide, for example, that the Debtors were to use their “reasonable best efforts to seek entry of the Bidding Procedures Order” (APA § 7.1(a)), the APA also makes clear that approval by this Court of the APA was a condition precedent to the Debtors’ obligations under the APA. (*See, e.g.*, Complaint at §§ 5.2, 5.5(a), 7.1, 7.2, 8.9, 8.10 and 9.3(b); APA § 7.1 (“[NVR] expressly acknowledges and agrees that this Agreement is subject to approval by the Bankruptcy Court”).) NVR apparently would like to pretend that such caveats relating to court approval, which NVR acknowledged in its own public filings with the Securities Exchange Commission and elsewhere (Debtors’ Mov. Br. at 5-7), are separate and apart from any “reasonable best efforts” language. Yet “promissory estoppel, as an equitable measure, does not allow parties [such as NVR] to pick and

choose which statements they prefer to hear.” *W. Alton Jones Found. v. Chevron U.S.A. Inc. (In re Gulf Oil/Cities Serv. Tender Offer Litig.)*, 725 F. Supp. 712, 735 (S.D.N.Y. 1989). NVR cannot demonstrate, as a matter of law, that its reliance on any “reasonable best efforts” language in the unapproved APA was reasonable in light of the numerous provisions therein requiring bankruptcy court approval as a condition precedent to its effectiveness, as well as the requirements of the Bankruptcy Code generally. *See id.* (“best efforts” clause in ineffectual contract could not be relied upon where contract also contained numerous provisions indicating existence of risks to such contract’s ultimate effectiveness).¹¹

Courts have acknowledged that the term “best efforts” “cannot be defined in terms of a fixed formula; it varies with the facts and the field of law involved” (such as the Bankruptcy Code). *Triple-A Baseball Club Assoc. v. Ne. Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir. 1987); *see also Pinnacle Books v. Harlequin Enters., Inc.*, 519 F. Supp. 118, 121 (S.D.N.Y. 1981) (noting that performance required under best efforts clause may be implied from circumstances of case). Moreover, “best efforts” is a “term which necessarily takes its meaning from the circumstances.” *See NCNB Nat’l Bank of N.C. v.*

¹¹ Nothing in *Montagne v. Ag Venture Financial Services, Inc. (In re Montagne)*, 431 B.R. 72 (Bankr. D. Vt. 2010), which NVR cites for the proposition that a provision in an allegedly ineffectual contract to use “best efforts” is binding, suggests that in that case the contract at issue expressly noted the existence of substantial risks or contingencies (such as bankruptcy court approval) that may have prevented it from becoming binding and enforceable. The APA, on the other hand, did contain language expressly setting forth the substantial risks and conditions precedent to its ultimate effectiveness.

Bridgewater Steam Power Co., 740 F. Supp. 1140, 1151 (W.D.N.C. 1990). NVR was undoubtedly aware that, under section 363(b) of the Bankruptcy Code, a Chapter 11 debtor cannot bind itself to a sale of assets outside the ordinary course of business without court approval and that it has a duty to pursue superior offers that would result in a more favorable recovery to creditors. Accordingly, NVR cannot take the “best efforts” language in the APA—which in this case was further qualified by the word “reasonable”—and isolate such language, ignoring that these are bankruptcy cases and the Debtors must act at all times with their estates’ best interests in mind, which is precisely what the Debtors did here. *See id.* at 1152 (“The requirement that a party use its best efforts necessarily does not prevent the party from giving reasonable consideration to its own interests.”). To represent that any “best efforts” clause in the APA could have induced NVR to reasonably rely on the assumption that the Debtors would violate or abrogate their fiduciary duties to their estates should be rejected. *See* Restatement of Contracts (Second) § 193 (1981) (“A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such violation is unenforceable on grounds of public policy.”).

B. The Debtors Are Entitled to Judgment on NVR’s Claims for Unjust Enrichment

NVR’s claim for unjust enrichment fails as a matter of law for at least two reasons. First, the Debtors were not enriched on account of NVR’s bid. Despite the discovery NVR has taken to date, it has apparently uncovered nothing (which, of course, is because there never was anything to uncover) to substantiate its baseless allegations that its \$170 million bid in any way made the Plan possible. Further, NVR’s argument

that “setting a floor is a recognized benefit in bankruptcy law” is particularly off point here. (NVR Mem. at 13.) 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.¹² The sale was abandoned in favor of pursuing the Plan, and the two are not directly connected. NVR has offered nothing more than its own hyperbole to support its contrary view. *See Rapaport v. U.S. Dep’t of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995) (rejecting unjust enrichment claim based on nothing more than claimant’s conclusory allegations).

There was also nothing unjust about the Debtors’ conduct. The Debtors withdrew the Sale Motion and declined to pursue the sale in accordance with their duties under the Bankruptcy Code. Their conduct was, therefore, inherently just. Indeed, contrary to NVR’s representations in its opposition to the Motion to Dismiss that the Debtors “had not given NVR the slightest indication it [*sic*] was considering abandoning the auction process and pursuing a stand-alone reorganization plan” (NVR Mem. at 8), as soon as the Debtors received assurances that a potential stand-alone reorganization was possible on

¹² NVR’s reliance on *In re Fortunoff Fine Jewelry & Silverware, LLC*, No. 08-10353, 2008 WL 618983 (Bankr. S.D.N.Y. Feb. 22, 2008) is misplaced. That case approves a break-up fee in the context of a 363 sale that presumably was in the best interests of the estate. Here, the entire 363 sale process was appropriately abandoned under the circumstances. But even if the auction had gone forward and a non-NVR bid was accepted, the mere fact that NVR provided the initial bid, without more, is insufficient to have conveyed a benefit upon the estates in these cases. *See O’Brien*, 181 F.3d at 537 (upholding bankruptcy court’s holding that merely providing initial bid did not entitle bidder to break-up fee without showing that the initial bid “served as a catalyst to higher bids”).

or about May 2, 2010, they promptly informed NVR that circumstances had changed and filed an amended agenda noting that the Sale Hearing had been adjourned. Prior to that time, there were no changed circumstances to report, as the Debtors, at best, were only vaguely aware that certain hedge funds were purchasing secured debt. (*See* Burke Decl., Ex. 2 at NVR 1177.)

NVR has offered no evidence to credibly allege that the Debtors were enriched, let alone unjustly, by its bid. Unjust enrichment is not an appropriate remedy to recover costs associated with a failed business transaction, and there is no evidence before this Court to substantiate NVR's unjust enrichment claim. *See Songbird Jet Ltd. v. Amax Inc.*, 581 F. Supp. 912, 926 (S.D.N.Y. 1984).¹³

CONCLUSION

Based on the foregoing and the other pleadings and proceedings in this case, this Court should enter judgment in the Debtors' favor on each count enumerated in the Complaint and dismiss the Complaint and this adversary proceeding with prejudice in its entirety. From the outset, NVR's attempt to extract an unwarranted recovery from the Debtors on account of a failed asset purchase has been premised on unsupportable, conclusory allegations and a complete misapplication of legal authority. As the Debtors have demonstrated herein and in the Debtors' Moving Brief, a Chapter 11 debtor cannot

¹³ NVR's attempt to distinguish *Songbird Jet* on the ground that it is not a bankruptcy case is curious. (NVR Mem. at 14 n.11.) Indeed, because these are bankruptcy cases, NVR should have been doubly aware at the outset that the transactions in the APA could not go forward absent this Court's approval, which was never certain to occur.

breach an unapproved contract to sell substantially all of its assets. Any prospective counterparty to such a contract, particularly one as sophisticated and well advised as NVR, should be abundantly aware of that. NVR should not be permitted to accomplish an end-run around the Bankruptcy Code by prevailing on claims in quasi-contract.

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ELLIOTT GREENLEAF



Rafael X. Zahralddin-Aravena (DE Bar No. 4166)
Shelley A. Kinsella (DE Bar No. 4023)
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

- 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 Debtors