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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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| KOHLBERG CAPITAL FUNDING LLC I and KOHLBERG CAPITAL CORPORATION, | Index No.: 602688/09 |
| Plaintiffs, | |
| -against- | COMPLAINT |
| FAIRWAY FINANCE COMPANY, LLC, RIVERSIDE FUNDING, LLC, BMO CAPITAL MARKETS CORP., DEUTSCHE BANK AG, NEW YORK BRANCH, and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, | |
| Defendants. | |



Plaintiffs Kohlberg Capital Funding LLC I and Kohlberg Capital Corporation, through their undersigned counsel, allege as follows:

**Parties**

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

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

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

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

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

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

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

**Jurisdiction and Venue**

8. Jurisdiction is proper over all Defendants in this Court pursuant to CPLR § 302 because Defendants transact business in the State of New York, including negotiating and accepting of the Loan Funding and Servicing Agreement which is the subject of this action in the State of New York.

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

## Factual Background

### The $275,000,000 Loan Facility

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

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

12. Pursuant to the LFSA, the Defendants each agreed (upon specified conditions and upon Plaintiffs' request) to make Advances[1] to Plaintiffs during the Revolving Period (generally a five-year term commencing on February 14, 2007) up to the total aggregate principal amount of $275 million (the "Facility"). Specifically, Section 2.1(b) of the LFSA provides that "[d]uring the Revolving Period, the Borrower may, at its option, request the Lenders to make advances [emphasis added] of funds (each, an "Advance") ... in an aggregate amount up to the Availability as of the proposed Funding Date of the Advance. Following the receipt of a

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

Funding Request, subject to the terms and conditions hereinafter set forth, during the Revolving Period, the Lender *shall* fund such Advance" [emphasis added]. The LFSA, therefore, is a committed loan facility pursuant to which Kohlberg Funding may, at its discretion, request one or more Advances of funds during the Revolving Period, and Defendants are required to advance such requested funds. Kohlberg Funding issued to Defendants certain Variable Funding Notes to evidence the repayment obligations under the LFSA.

**The Defendants Are Obligated To Make Advances For A Five-Year Term – Or Until October 1, 2012**

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

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

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

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

**Defendants' Scheme To Circumvent The Obligations Under The LFSA**

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

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

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

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

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

a. Plaintiffs were not provided advance notice of such alleged expiration as contemplated by the extension procedures set forth in Section 2.1(c).

b. Defendants have not provided copies of the Liquidity Purchase Agreements that have allegedly expired – despite Plaintiffs' request therefor.

c. Defendants have refused to provide relevant information concerning these allegedly expired Liquidity Purchase Agreements and have even refused to identify the Liquidity Banks that are parties to such agreements.

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

19. Defendants' wrongful declaration of a Termination Date triggered the Amortization Period under the LFSA. By so doing, Defendants deprived Plaintiffs of the funding necessary to originate and acquire new loans, required Plaintiffs to prematurely liquidate loans in its portfolio, and prevented Plaintiffs from utilizing net interest cash flows for operating purposes (including, but not limited to, funding dividend payments to shareholders).

**Defendants Invent Fictitious "Termination Events"**

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

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

any other enforcement action or otherwise exercise its rights and remedies under the LFSA and related transaction documents. A true and correct copy of the Notice of Termination Events is annexed hereto as Exhibit C.

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

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

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

**Moody's Ratings**

25. The Notice of Termination Events asserted that Termination Events have occurred because Plaintiffs "failed to correctly determine the Moody's Rating of certain Loans included in the Collateral, resulting in multiple incorrect calculations, including the Weighted Average Moody's rating Factor, the Aggregate Purchased Loan Balance, the Advance Rate and the Borrowing Base all under the Loan Funding and Servicing Agreement." According to Defendants, these incorrect calculations have caused various underpayments of amounts required to be paid under the LFSA and also have resulted in the "occurrence and continuation of both an

Overcollateralization Shortfall and a Required Equity Shortfall," both of which are Termination Events under Section 9.1 of the LFSA.

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

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

> "The Borrower will ensure that each Transferred Loan shall have as of its Cut-Off Date a Moody's Rating ; *provided* that if any Transferred Loan does not have a Moody's Assigned Rating or a Moody's Shadow rating as of its Cut-Off Date, the Borrower (or Servicer on its behalf) will apply for a Moody's Rating to be assigned to such Transferred Loan (i) no later than the Cut-Off Date for each such Transferred Loan and (ii) within 10 Business Days of any amendment to the related Loan Documents that is

> deemed material in the Servicer's reasonable judgment; *provided further* that at any time up to 10% of the Aggregate Outstanding Loan Balance may consist of Transferred Loans that have a S&P Shadow Rating in lieu of a Moody's Rating."

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

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

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

**Separateness Covenants**

31. The Notice of Termination Events also asserts that Plaintiffs failed to adequately maintain the separate existence of the Borrower as required under Section 4.1(t)(xxv) – relating to obligations to use separate invoices and checks – and Section 4.1(t)(xxix) – which requires

the Borrower to refrain "from taking, *as applicable*, each of the activities specified in the non-consolidation opinion of Ropes & Gray LLP, dated as of the Closing Date," (emphasis added) – and Section 5.1(m) of the LFSA. The failure to cure these alleged separateness covenant defaults within twenty days of the date of the letter would result in the occurrence of an additional Termination Event.

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

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

34. As Plaintiffs pointed out in their June 23rd Letter, however, these alleged compliance failures, even if true, are in no way material and cannot constitute a breach of Sections 4.1(t) and 5.1(m) of the LFSA. Borrower, therefore, is under no obligation to cure these alleged breaches. Specifically, (i) there is no charter requirement that the Borrower conduct

annual meetings of its board of directors; (ii) Borrower does maintain separate books, which is precisely what Defendants' auditors found; (iii) Borrower does not engage in correspondence that requires the use of any stationary (but it does maintain separate stationary); (iv) Borrower uses no checks because all bank accounts are maintained and administered through the Trustee.

35. No Termination Event exists as a result of any alleged breach of Sections 4.l(t) and 5.l(m) of the LFSA.

**Invalid Termination Of The Revolving Period**

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

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

38. According to Defendants, the language providing for an additional 364-day extension of both the five-year Revolving Period and a Liquidity Purchase Agreement means

that it was agreed that the *initial term* of the Liquidity Purchase Agreement was 364 days; or that Borrower was aware that this undisclosed agreement had a 364-day term.

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

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

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

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

**Defendants' Breaches Of Their Obligations Will Cause Irreparable Harm To Plaintiffs**

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

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

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

**First Cause Of Action**

**(Declaratory Judgment as to Invalidity of the Notices, Non-Occurrence of Termination Events and Termination Date)**

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

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

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

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

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

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

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

## Second Cause Of Action

### (Specific Performance to Remedy Breach of the LFSA and Anticipatory Repudiation of the LFSA)

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

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

55. Plaintiffs have no adequate remedy at law for Defendants' breaches and will be irreparably harmed thereby.

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

**Third Cause Of Action**

**(Breach of the LFSA and Anticipatory Repudiation of the LFSA)**

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

58. By their conduct, Defendants have repudiated and breached their obligations under the LFSA by, among other things, failing and refusing to fund additional Advances, issuing the invalid Notices, making demand for payment of "default" interest, and forcing the liquidation of the Collateral.

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

**Fifth Cause Of Action**

**(Breach of the Covenant of Good Faith and Fair Dealing)**

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

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

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

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

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

**Sixth Cause of Action**

**(Permanent Equitable Relief)**

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

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

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

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

WHEREFORE, Plaintiffs Kohlberg Capital Funding LLC I and Kohlberg Capital Corporation request that this Court:

(a) Render a declaration that the (i) Notices were unlawful, invalid, ineffective and a nullity; (ii) a Termination Date under the LFSA has not occurred; and (iii) no Termination Events under the LFSA have occurred.

(b) Order Defendants' specific performance of their obligations under the LFSA to (i) make further Advances; and (ii) withdraw the Notices.

(c) Award Plaintiffs a judgment suspending and/or discharging Plaintiffs' obligations under the LFSA (as appropriate) as well as judgment against Defendants in an amount to be determined at trial, but no less than $5,000,000;

(d) Award Plaintiffs the costs, disbursements, and attorneys' fees of this action; and

(e) Award such other and further relief as the Court deems proper.

Dated: August 28, 2009

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