UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE EXPORT-IMPORT BANK OF THE REPUBLIC OF CHINA,

Plaintiff/Judgment Creditor,

v.

GRENADA,

Defendant/Judgment Debtor.

13 Civ. 1450 (HB)

MEMORANDUM OF LAW OF PROPOSED INTERVENORS IN OPPOSITION TO GRENADA'S MOTION FOR JUDGMENT ON THE PLEADINGS

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GMO Trust, on behalf of its series GMO Emerging Country Debt Fund, GMO Emerging Country Debt L.P., GMO Emerging Country Debt Investment Fund plc, and Greylock Global Opportunity Master Fund Ltd. ("Intervenors"), holders of beneficial interests in bonds that were originally issued by Grenada in a 2005 debt exchange, submit this memorandum of law in opposition to Grenada's Motion for Judgment on the Pleadings Dismissing Plaintiff's Complaint [Docket No. 13]. Intervenors recognize that the Court has not yet ruled on their motion to intervene filed on May 20, but request that the Court consider this memorandum in connection with the Rule 12(c) motion scheduled for May 29.

PRELIMINARY STATEMENT

Before the Court is Grenada's motion for judgment on the pleadings under Fed. R. Civ. P. 12(c).[1] Plaintiff the Export-Import Bank of China ("Ex-Im Bank") filed a complaint seeking "specific performance" of certain covenants in loan agreements. Its apparent intent is to obtain an effective injunction against payments by Grenada of the debts of Intervenors and others similarly situated. Any such relief would be inappropriate, a point that Intervenors will address when it becomes ripe.

Grenada's motion raises a different concern. It argues that both "*res judicata*" and "merger" bar enforcement of covenants in the loan documents that address the relative priority of Ex-Im Bank and other creditors. Ex-Im Bank's covenants are standard, and typical in loan documents, including those under which Intervenors' notes were issued. Grenada's novel theory is that when Ex-Im Bank reduced its debt to judgment, it forfeited these rights (even if a violation of those rights did not occur for years after the judgment was sought). Grenada's

[1] Intervenors understand that a cross-motion for "partial judgment on the pleadings" has not been set for hearing, and that the Court advised the parties that it will first consider Grenada's motion. This memorandum addresses that motion. Intervenors briefly address the cross-motion at 19-20, *infra*.

motion would establish a new rule of law that would undoubtedly be cited to extinguish the rights of creditors in a broad array of contexts. This argument misreads the law of claim preclusion, which does not operate to extinguish all contractual rights when a debt is brought to judgment. In this memorandum, Intervenors focus on two areas not fully developed in the parties' briefing: (a) the application, under Rule 12(c), of claim preclusion doctrine to *distinct* contractual obligations in *separate* actions; and (b) prudential concerns, and the implication for courts and litigants if Grenada's motion were allowed.

RELEVANT BACKGROUND

The procedural context bears emphasis. This matter is before the Court under Rule 12(c). The rule limits the Court to considering the allegations of the complaint (with documents attached or incorporated by reference), the answer, and matters of which the Court can take judicial notice. *In re Bakery and Confectionery Union and Indus. Int'l Pension Fund Pension Plan*, 865 F. Supp. 2d 469, 472 (S.D.N.Y. 2012). "If the Court is presented with material outside of the pleadings, it should exclude the material in its consideration of the motion." *Id*. Grenada has gone far beyond the bounds of the rule. It has filed two declarations. In the most recent declaration, counsel acts as a witness, based on his firm's representation of another client, in another case, and reports a small portion of proceedings in that case. *See generally*, Supplemental Declaration of Boaz Morag in Further Support of Defendant Grenada's Motion for Judgment on the Pleadings [Docket No. 22]. He attaches newspapers and Internet articles, and makes assertions as to what was "common knowledge" at various times. None of this material may be considered on Rule 12(c). This posture alone makes adjudication under Rule 12(c) impermissible.[2]

[2] Intervenors do not suggest, however, that Grenada will not ultimately prevail on Ex-Im Bank's complaint, or that Ex-Im Bank will ever be entitled to relief on a full *factual* record. Those

I. The Exchange Bonds and Grenada's Default

In September, 2005, Grenada offered to restructure certain "Eligible Claims" held by its external creditors by exchanging U.S. Dollar Bonds Due 2025 and E.C. Dollar Bonds Due 2025 (the "Exchange Bonds") for the Eligible Claims. *See* Answer of Proposed Intervenors ("Intervenors' Answer") ¶ 17.[3] Most holders of Eligible Claims responded favorably, and in November, 2005, Grenada's debt exchange was completed. *Id.* ¶ 17. Interest on the Exchange Bonds is due each March 15 and September 15 of each year. *Id.* ¶ 22. Grenada's last interest payment was made late (on or about October 12, 2012), but did not constitute an event of default because the Exchange Bonds provide for a 30-day grace period following each interest due date. *Id.* ¶ 23. Grenada failed to make its March 15, 2013 interest payment. *Id.* ¶ 23. As of April 15, 2013, Grenada is in default of its obligations to Intervenors under the Exchange Bonds and claims that it has been unable to raise sufficient funds to make the payment. *Id.* ¶ 23.

II. Ex-Im Bank's Judgment and Suit to Bar Payment on the Exchange Bonds

Ex-Im Bank alleges that it is an unsatisfied judgment creditor by virtue of an order entered in a prior action, *Export-Import Bank the Republic of China v. Grenada*, No. 06 Civ. 2469 (HB) (AJP) (S.D.N.Y. Mar. 16, 2007). That judgment (as later amended) was based on Grenada's payment default on four loan agreements (the "Loan Agreements"),[4] and was in the

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questions are not before the Court on a Rule 12(c) motion.

[3] Pursuant to Fed. R. Civ. P. 24(c), Intervenors attached as Exhibit A to their motion the form of Answer in Intervention they wish to file.

[4] *See* Declaration of Paul E. Summit in Support of Motion by the Export-Import Bank of the Republic of China for an Order to Show Cause Why a Preliminary Injunction Should Not Issue, With a Temporary Restraining Order ("Summit Decl."), ¶¶ 10-14 Exs. A-E [Docket No. 4]. On a Rule 12(c) motion, the Summit Declaration is appropriately before the Court to the extent that it attaches documents incorporated by reference in the complaint. Otherwise it is outside the pleadings. *In re Bakery and Confectionery Union*, 865 F. Supp. 2d at 472.

amount of $21,586,057.38 (plus pre-judgment interest, attorneys' fees, and statutory interest). *See* Compl. ¶¶ 6-7.

In this litigation (the "Litigation"), Ex-Im Bank seeks an order for "specific performance" of certain covenants in the Loan Agreements that address relations between Grenada's creditors. Ex-Im Bank relies primarily on "*pari passu*" clauses (collectively, the "*Pari Passu* Clauses") in the Loan Agreements. Two of those clauses provide:

> [Grenada's] obligations under this Agreement and the Note will at all times rank at least pari passu with [Grenada's] any other [sic] External Indebtedness (direct or contingent) outstanding from time to time.[5]

The other two clauses provide:

> [Grenada's] obligations under this Agreement constitute and will at all times constitute, and its obligations under the Note once duly executed and delivered by [Grenada] … will at all times rank in right of payment at least pari passu with all other External Indebtedness and similar external obligations of the Borrower (whether direct or contingent) outstanding from time to time.[6]

Ex-Im Bank asserts that the *Pari Passu* Clauses "preclude Grenada from making a payment to a holder of External Indebtedness without making a ratable payment at the same time to Ex-Im Bank." Compl. ¶ 16. It further alleges that Grenada breached the *Pari Passu* Clauses by making years of payments on the 2005 Exchange Bonds without making payments to Ex-Im Bank. *Id*. ¶¶ 23, 34. Ex-Im Bank also relies on a "negative pledge" clause that prohibits Grenada from permitting another of its debts "to have any priority or be subject to any preferential arrangement, whether or not constituting a security agreement, in favor of any creditor or class of creditors, as to security, the repayment of principal and interest or the right to

[5] Summit Decl. Ex. B at 9; Ex. C at 10.

[6] Summit Decl. Ex. C at 12; Ex. D at 10.

receive income or revenue." Compl. ¶ 13. Ex-Im Bank seeks a judgment that would amount to a permanent injunction, "specifically enforcing the *pari passu* clauses and the negative covenant against granting preferential payment arrangements to other creditors." *Id.* ¶¶ 35-39; Prayer For Relief (1).

III. The Consent Order

On March 13, 2013, after a preliminary hearing, Ex-Im Bank and Grenada submitted an order on consent, which was entered by this Court ("Consent Order"), pursuant to which "Grenada shall not (i) make any payment with respect to the Bonds or (ii) attempt to alter or amend the processes or specific transfer mechanisms (including the use of existing firms) for the making of payments under the Bonds, without first having given not less than ten (10) calendar days' prior written notice to counsel for Ex-Im Bank and the Court." [Docket No. 2].

IV. Grenada's Motion for Judgment on the Pleadings

Grenada moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). [Docket Nos. 12-13]. Grenada's motion contends that doctrines of *res judicata* and "merger" prevent Ex-Im Bank from seeking contract-based relief in aid of its judgment liquidating the underlying debt.

ARGUMENT

Intervenors address below the only issue under Rule 12(c): whether the allegations of the complaint, read in line with the denials of the answer, and ignoring all material in declarations except copies of documents to which the complaint refers, can support a judgment. They cannot.

I. Claim Preclusion Does Not Bar Ex-Im Bank's Breach of Contract Action

A. The Governing Doctrine of Claim Preclusion

The question presented is whether a suit for relief under the *Pari Passu* Clauses is barred outright, no matter the facts and circumstances, by a prior judgment on the debt. The four part

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test of claim preclusion governs. Under New York law,[7] claim preclusion "applies to preclude later litigation if the earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *In re Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985). The analysis is applied flexibly and practically in New York. *La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1275-76 (2d Cir. 1974). The last inquiry -- "involving the same cause of action" -- is intensely fact-specific, and of most concern here. In the context of a second action for breach of a contract, such as Ex-Im Bank brought here, the second action is precluded only if two conditions are satisfied. The later claim must have arisen before the original suit was filed, and the breach alleged in the later suit must have been part of the same "cause of action" that underlies the first. *See infra* at 6-7.

Analysis under claim preclusion doctrine proceeds in two parts: (1) whether a later claim arose before commencement of the earlier action, and (2) whether the later claim arose from the same transaction or series of transactions underlying the first suit.

First, the claim brought in the second proceeding must have arisen before the original suit was filed. A claim "arises" only when the cause of action becomes "viable." *Maharaj v. Bankamerica Corp.*, 128 F.3d at 97-98 (claim for breach of stockholders' agreement and conversion of shares not barred by *res judicata* "[b]ecause these claims arise out of . . . an event that occurred after the filing of the complaint in [the first action]"). To determine whether a cause of action is viable, a court must examine whether the facts supporting the elements of the

[7] The parties agree that New York law applies. *See* Declaration of Boaz S. Morag in Support of Defendant Grenada's Motion for Judgment on the Pleadings, Ex. O at Art. VIII, §8.04; Ex. P at Art. VIII, §8.04 [Docket No. 14]. Because there is no distinction between federal and New York law on claim preclusion, res judicata, or merger, no choice-of-law analysis is necessary. *See Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997).

cause of action exist and whether those facts support the remedy plaintiff is seeking. *RENP Corp. v. Embassy Holding Co.*, 644 N.Y.S.2d 567, 569, 229 A.D.2d 381, 382-83 (2d Dep't 1996) (second action for claims of self-dealing and undercapitalization not barred by first action for breach of contract). If a plaintiff cannot state a viable claim at the time the first action is *commenced*, claim preclusion does not bar the second suit, even if the claim later arises before judgment enters on the first action. *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996) (holding that there is no obligation to supplement a complaint to include claims arising after an action is commenced).

Second, for claim preclusion to apply, the breach alleged in the later suit must have been part of the same "cause of action" that underlies the first -- that is (a) the same transaction or connected series of transactions is at issue, (b) the same evidence is needed to support both claims, (c) the facts essential to the second were present in the first, (d) both suits seek recovery for the same wrongful act, and (e) the second suit would impair rights established in the first judgment. *See NLRB. v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983); *Herendeen v. Champion Int'l Corp.*, 525 F.2d 130, 134 (2d Cir. 1975). This inquiry is intensely fact specific; the "bare fact that different causes of action spring out of the same contract [does not], *ipso facto* render[ ] a judgment on one, a bar to a suit on another, however distinct they may be, or however dissimilar the breaches, in their nature or origin." *Perry v. Dickerson*, 85 N.Y. 345, 40 Sickels 345, 352 (1881).

The third prong of *Teltronics* is also unmet here. The first action involved only the rights of two parties, Ex-Im Bank as creditor, and Grenada as debtor. That matter adjudicated only the rights of those parties. In this Litigation, however, Ex-Im Bank seeks an order that would preclude payments to Intervenors, and Grenada seeks judgment on a theory that would materially impair Intervenors' rights as creditors of Grenada. Thus this action does not involve precisely the same parties.

Claim preclusion is not a wooden, contract-specific bar. Its purpose is to put to rest parties' fully litigated disputes, not to lay a trap. *See Montana v. United States*, 440 U.S. 147, 153 (1979). The goal is that "rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917). But "public interest considerations" can also weigh "against the application of res judicata." *Jean Patou, Inc.*, 495 F.2d at 1275-76. The doctrine is "intended to serve the aims of fairness and efficient judicial administration" and thus "need not be applied mechanically[.]" *Id.*[8]

B. "Merger" is Subsumed Within the Governing Doctrine of Claim Preclusion

Grenada argues that the "merger doctrine" is a legal absolute in contract cases, "extinguish[ing]" other contract provisions unless the contract "uses 'clear, unambiguous and unequivocal language' that the contract provision is effective post-judgment." Memorandum of Law of Grenada in Support of its Motion for Judgment on the Pleadings Dismissing Plaintiff's Complaint ("Grenada Reply Mem. of Law") at 1-2 [Docket No. 21]. As a matter of law and in all circumstances, Grenada argues, a party forfeits the benefit of all contractual protections by

[8] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982): "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (*see* §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant *with respect to all or any part of the transaction, or series of connected transactions, out of which the action* arose." (emphasis added). What constitutes a "transaction" or "series" of transactions is a factual, "pragmatic[ ]" inquiry that must be applied "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id*. Such an inquiry is inappropriate on a review of pleadings under Rule 12(c). This is particularly true in the context of an alleged "*pari passu*" violation, which the court in *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246, 264 n.16 (2d Cir. 2012) discerned only as the result of an extended "course of conduct."

obtaining a judgment on a debt without simultaneously suing to enforce the balance of the terms of the contract. *Id*. As we show below, this position is incorrect; not even the courts that still use the term, "merger" go this far.

In fact, "merger" is a descriptive (and somewhat antiquated) term, not a stand-alone doctrine. At common law, the term was often used to describe principles of claim preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) ("claim preclusion describes the rules formerly known as 'merger' and 'bar'"); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("Claim preclusion . . . encompasses the law of merger and bar."); *NML Capital Ltd v. Banco Central de la Republica Argentina*, 652 F.3d 172, 185 (2d Cir. 2011) (describing merger as "the terminology of the common law that federal courts have supposedly retired"). "Merger" applies to grounds for recovery, not distinct rights that may arise under a common instrument: it "prevents the subsequent litigation of any . . . ground for recovery that was available to the parties in the original action, whether or not it was actually litigated or determined." *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); *see also* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 131.01, 131.10[2] (3d ed. 2009). A comment to the Restatement of Judgments cautions that "[w]hen by reason of the plaintiff's obtaining judgment upon a claim the original claim is extinguished and rights arise upon the judgment, *advantages to which the plaintiff was entitled with respect to the original claim may still be preserved despite the judgment.*" RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982), comment (g) (emphasis added).[9] The comment illustrates this point by reference to a judgment creditor with a lien upon real property of the debtor. Obtaining a judgment on the debt, he does

[9] RESTATEMENT (SECOND) OF JUDGMENTS § 18 provides that "[w]hen a valid and final personal judgment is rendered in favor of the plaintiff: . . . [t]he plaintiff cannot thereafter maintain an action on the original *claim or any part thereof*, although he may be able to maintain an action upon the judgment." (emphasis added).

not thereby lose the benefit of the lien. *Id*.; *see also* N.Y. U.C.C. § 9-601(a)(1) (security interest survives judgment on underlying debt).

The general rule is that independent contract rights are not forfeited by reducing a claim to judgment, even if those rights arise out of the same instrument upon which judgment was based. *Counsel Fin. Servs., LLC v. Leibowitz*, No. 09-CV-1025S, 2012 WL 1057311 (W.D.N.Y. Mar. 27, 2012), illustrates the point. Plaintiff sued on a note, and judgment entered. Defendant later was alleged to have breached a forum selection clause contained in the same instrument, and plaintiff commenced a second action to enforce the forum selection clause. The court denied a motion to dismiss, rejecting the argument that "merger" precluded separate enforcement of the forum selection clause. *Id.* at *4 ("Although these claims arise out of the same document, they find their foundation in a different set of facts. As such, the merger doctrine does not apply.");[10] *see also Jay's Stores, Inc. v. Ann Lewis Shops, Inc.*, 15 N.Y.2d 141, 147, 204 N.E.2d 638, 641 (1965) ("[M]erger by judgment does not destroy all of the identifying characteristics or relationships of the cause of action which the judgment determines; and it seems rather clear that the doctrine was not designed to weaken rights or destroy identities which the prevailing party had in his original cause and which he succeeded in establishing by judgment in his favor."); 17 David S. Siegel, New York Practice § 450 at 725 (3d ed. 1999) ("If there is anything about the underlying claim that offers the plaintiff some advantage, it should retain its identity and peer right through the judgment to make itself felt . . . . New York subscribes to the healthy view that

[10] Grenada is mistaken about this case. It argues that the second suit arose from a separate security agreement. Grenada Reply Mem. of Law at 4-5. But the second suit alleged a violation of the forum selection clause in the same note that supported the first suit, not a separate agreement. "In the former, CFS alleged that Leibowitz did not meet his payment obligations under the Note. In the latter, CFS alleged that Leibowitz brought claims in a Texas court in a separate violation *of the Note*. Although these claims arise out of the same document, they find their foundation in a different set of facts. As such, the merger doctrine does not apply." 2012 WL 1057311, at *4 (emphasis added).

the merger doctrine will not be allowed to undermine benefits inhering in the claim merely because it has gone to judgment.”).

“Merger” does not “extinguish” other contract provisions in contract cases, as Grenada argues. Grenada Reply Mem. of Law at 1-2. Many cases have held that actions brought for breach of a contract are not precluded by a judgment in a prior proceeding on that contract. This principle applies for subsequent actions based on debt contracts of extended duration. For example, in *Prime Mgmt. Co., Inc. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990), a plaintiff was permitted to sue for rent, after judgment had entered in a prior action under the same lease. In reaching this conclusion, the Second Circuit did not even consider whether the contract provided “clear” and “unambiguous” language that the plaintiff could do so. *See also Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 919 (2d Cir. 2010) (suit for conversion of funds did not bar later suit for trust assets when note reached maturity). In *Old Forge Const. Co. v. City of Syracuse*, 464 N.Y.S. 2d 67, 68, 94 A.D.2d 937, 937 (4th Dep’t 1983), the court found no “merger” issue when the plaintiff initiated a second suit to recover a retainer after it had recovered a judgment for work performed under the contract. The contract contained no explicit provision permitting the retainer obligation to survive judgment.

Many other cases consider whether a second claim on the same contract is barred by claim preclusion without even looking to “merger,” or considering whether a contract contains “clear, unambiguous and unequivocal language” providing that other contractual rights continue after judgment. *See, e.g.*, *Union Trust Co. of Rochester v. Kaplan*, 292 N.Y.S. 152, 156-59, 249 A.D. 280, 281-84 (4th Dep’t 1936) (contract that provided for payment of interest and taxes as separate obligations from payment of principal permitted separate suits for interest and taxes apart from an action for principal); *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250

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N.Y. 304, 306-09, 165 N.E. 456, 457-58 (1929) (Cardozo, C.J.) (rejecting "stricter" reading of *res judicata* precedent and holding that prior actions bar subsequent ones only where rights in the first action "will be destroyed or impaired by prosecution of the second"). If the claim was not viable at the time of the first action, and if it is not sufficiently related to the cause of action underlying the original judgment so as to constitute the "same transaction," it will not be barred in a subsequent proceeding.

The proposition that contract rights are lost without "clear" and "unambiguous" reservation language arises from cases about the quantum of a debt -- and whether it includes post-judgment interest or attorneys' fees. *See Westinghouse Credit Corp v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004); *Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals Grps., Inc.*, No. 11-1835, 2012 WL 6622708, at *5 (4th Cir. Dec. 20, 2012); *In re A & P Diversified Techs. Realty, Inc.*, 467 F.3d 337, 344 (3d Cir. 2006); *O'Brien v. Young*, 95 N.Y. 428, 430-31, 50 Sickels 428, 430-31 (1884). In those cases, plaintiffs contended that the contract interest rate -- rather than the federal rate under 28 U.S.C. § 1961 -- should govern post-judgment interest. Courts often reject this argument, for the sensible reason that litigants need a conclusive understanding of what judgments are worth. *See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 269 (2d Cir. 1989). Thus statutory post-judgment interest rates will apply, unless the parties unambiguously agree that other rates will survive judgment. *See Westinghouse Credit Corp.*, 371 F.3d at 101.[11]

[11] In its reply, Grenada relies on *In re Olick*, 221 B.R. 146, 152 (Bankr. E.D. Pa. 1998) (applying Pennsylvania law), but *Olick* is simply another "interest rate" case, and dictum at that. A lender obtained a "confessed judgment," -- a contractual device under Pennsylvania law that involves no adjudication -- upon which the obligor defaulted. In subsequent proceedings, the court held, again under Pennsylvania law, that the "confession of judgment" was not a final judgment, and thus doctrines of claim preclusion did not apply at all. 221 B.R. at 151-52. In dictum, the opinion characterizes merger as "a rule of *res judicata* which holds that all of a plaintiff's claims

In re A & P Diversified applies the same concept to the component of a debt obligation consisting of attorneys' fees. Plaintiff foreclosed on a mortgage, securing a judgment that included attorneys' fees up to the maximum permitted under state law. 467 F.3d at 340 & n.4. The mortgagor commenced bankruptcy proceedings, and plaintiff again sought attorneys' fees in connection with the bankruptcy proceedings. Rejecting the claim, the court of appeals explained that permitting the plaintiff to recover attorneys' fees during bankruptcy would have rendered the statutory cap "ineffective." *Id.* at 344.

The rationale of the interest and attorneys'-fee cases is that courts can fix the *quantum* of debt only in a single judgment. The debtor's promise to pay interest and attorneys' fees is intrinsically tied to its promise to repay principal. *See Union Trust Co.*, 292 N.Y.S. at 158, 249 A.D. at 283 ("[I]nterest is a mere incident of the debt . . . and as one cannot exist without the other, the two are inseparable . . . ."). But the promise to maintain priority is not intrinsically linked: it will apply whatever the quantum of debt, and whether payment is made before or after that quantum is fixed in a judgment. Sovereign debt instruments contain many clauses that survive judgment without any express reservation. The sovereign's waiver of immunity is an example: given the perpetual nature of a sovereign's debt (it cannot be discharged in bankruptcy), its waiver of immunity, just like its promise to maintain rank, must certainly survive.

The bare fact that a judgment was obtained on a contract will not cause all rights appurtenant to that contract to be forfeited under the rubric of "merger." Courts must rather

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are merged into a plaintiff's judgment at the end of a legal proceeding thereby preventing the plaintiff from ever again being able to bring an action based on the same claims." *Id.* at 151. But given the case's holding, *Olick* does not illuminate the question when a judgment arising from breach of one contractual obligation could ever bar a suit on breach of another.

apply the rules of *claim preclusion*, and consider whether the facts of the case show that a later action asserts the same cause of action as the first.

C. Application of Claim Preclusion to Ex-Im Bank's Contract Claims

On the current record, which includes only the allegations of Ex-Im Bank's complaint and admissions in the answer, Ex-Im Bank's claim is not barred by application of the doctrine of claim preclusion.

First, the suit Ex-Im Bank has now brought was not viable on March 29, 2006, when the original action was commenced. Ex-Im Bank's theory of breach of *Pari Passu* Clauses alleges actions by Grenada over a course of six years, including payments as recently as October, 2012, in support of its claims. The majority of the acts claimed to be wrongful occurred after -- most many years after -- the original action was filed. In *NML Capital*, the Court of Appeals affirmed a judgment (entered after an extensive factual record was developed) finding a violation of a *pari passu* clause in a sovereign debt instrument based on the sovereign debtor's "course of conduct" over a period of six years. 699 F.3d at 258-60, 264-65. The court explicitly relied not upon any particular action -- i.e., "any non-payment that is coupled with payment on other debt" -- but rather on the sovereign's "course of conduct." *Id.* at 264 n.16. Here, Grenada had made only a single discriminatory payment by the time Ex-Im Bank filed its complaint in March, 2006. Even if Grenada's acts in this case today constitute a course of conduct sufficient to violate the *Pari Passu* Clauses and negative covenants -- and Intervenors believe they do not -- there was no colorable basis for bringing suit on that course of conduct when the original action was filed.

Second, the claim brought in this action is not sufficiently similar to the default claim on which judgment entered to constitute the same "cause of action" or "transaction." The original action was for liquidation of a debt. A judgment entered, defining the sum owed by Grenada to Ex-Im Bank as a result of its payment default. The second action implicates independent

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provisions of the Loan Agreements -- covenants with respect not to the existence or amount of the debt but rather its ranking and priority, and the relations between Ex-Im Bank and Grenada's other creditors who were not parties in the first action. Those provisions expressly contemplate a separate, continuing obligation. The *Pari Passu* Clauses provide that "[Grenada's] obligations under this Agreement and the Note *will at all times* rank at least pari passu with [Grenada's other External Indebtedness]." Summit Decl. Exs. B, C (emphasis added); *see also* Summit Decl. Exs. D, E. Whether the debt obligations remain as contract obligations, or are reduced to a judgment, the phrase, "at all times," expresses the parties' intent that the priority rule in the *Pari Passu* Clauses was independent, and would survive.

Grenada's mere failure to pay is not at issue in the second suit. Rather Ex-Im Bank theorizes that Grenada's payment of other debt, coupled with nonpayment of the Ex-Im Bank debt (and latterly, judgment) created an independent breach that gives rise to this litigation. Like the plaintiff in *Leibowitz* who later maintained an action for claimed breach of the forum selection clause, Ex-Im Bank has *pleaded*[12] a separate claim: an entitlement to press its rights under the separate contractual covenants that Grenada undertook in connection with the rank and priority of payment.

Grenada's cited authorities do not support a different result. None involves contract obligations distinct from calculation of the sum due, and in each, grounds for the later action existed at the time of the first, and arose by virtue of the same core facts. *Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.*, 600 F.3d 190 (2d Cir. 2010), one of Grenada's principal cases, illustrates the point. There plaintiff obtained an award against its insurer for losses caused by the destruction of its store. When the insurer failed to pay, plaintiff brought a second action

[12] *See* n. 2, *supra*.

to compel payment in connection with the same destruction, but under a different provision under the same policy that would have provided additional *sums owed under the policy*. *Res judicata* barred the later action, for plaintiff had a right to claim all sums due under the policy in the first action. 600 F.3d at 198-99. Plaintiff sought the additional relief merely because, the Court concluded, it regretted its earlier litigation strategy, and was "dissatisfied with the amount awarded." *Id*. at 199. *Ellis v. Abbey & Ellis*, 742 N.Y.S.2d 225, 294 A.D.2d 168 (1st Dep't 2002), is distinguishable for the same reason. Plaintiff first sought an accounting of a decedent's purported partnership interest in a law firm. Upon dismissal of the action, plaintiff brought a second suit for breach of the partnership agreement to recover from the firm for services rendered by the decedent. This was a suit for the same relief -- compensation for unpaid legal services -- under a different name. *Res judicata* barred "'what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single factual grouping.'" 742 N.Y.S.2d at 228, 294 A.D.2d at 169 (quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357-58, 429 N.E.2d 1158, 1160 (1981)). Regardless of the legal theory, "plaintiff seeks to recover for services provided." 742 N.Y.S.2d at 227, 294 A.D.2d at 169; s*ee also Baker v. General Motors Corp.*, 522 U.S. 222, 237 (1998) (noting in dicta that plaintiff may not raise the same claims in a subsequent action "to recover more"); *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 30-31, 379 N.E.2d 172, 176-77 (1978) (barring second suit for unlawful termination and back pay where in first suit plaintiff brought claim only for appointment to a substitute position and no new facts gave rise to the later claims); *In re Stendardo*, 991 F.2d 1089, 1097 (3d Cir. 1993) (barring second action on mortgage that would permit creditor "to obtain double recovery"). Grenada's cases simply stand for the proposition that a plaintiff cannot bring a second suit on the same contract to obtain more damages.

Craven v. Rigas, 926 N.Y.S.2d 693, 85 A.D.3d 1524 (3d Dep't 2011), *appeal dismissed*, 17 N.Y.3d 932, 959 N.E.2d 511 (2011), is similarly distinguished. A lender reduced a promissory note secured by shares of a corporation to a money judgment. The court held that he could not bring a second action seeking that stock certificates be delivered to him, which would in effect satisfy the judgment, 926 N.Y.S.2d at 696-97, 85 A.D.3d at 1527-28, in part because he was required to bring any action to enforce a judgment under a separate New York procedure under CPLR 5014. In *Craven*, plaintiff brought his later action not to enforce a separate right in the same contract, but to enforce the judgment, by seeking a mirror-image remedy for the same wrong that underlay the original judgment. "To the extent that he seeks to enforce the prior judgment," the court said, "plaintiff's recourse is an action on the judgment . . . ." 926 N.Y.S.2d at 697, 85 A.D.3d at 1528. By contrast, Ex-Im Bank's complaint alleges a separate right under the original contract, arising from the relationship of that debt to the debts of other creditors. Restoring rank pursuant to the *Pari Passu* Clauses is simply not the equivalent of payment. In *NML Capital*, the Second Circuit made clear that Argentina's breach of its *pari passu* obligations there was distinct from Argentina's breach of its repayment obligations. 699 F.3d at 263. Indeed, the Second Circuit emphasized that Argentina could comply with its *pari passu* obligations without paying any bondholder. *Id.*

None of Grenada's cases addresses head-on whether a judgment creditor may bring a later action for a breach of a contractual obligation that (a) had not been breached at the time of the original action, and (b) does not involve the same transaction as the obligation underlying the judgment. None involves a *pari passu* clause that expressly applies "at all times." Thus none precludes Ex-Im Bank from pleading a theory that rests on the *Pari Passu* Clauses. Intervenors believe that, on a factual record, Ex-Im Bank will not prevail, but that is not the issue presented today.

II. Granting Grenada's Motion Would Greatly Complicate Suits on Notes

Prudential concerns weigh strongly against extending claim preclusion doctrine in the manner sought by Grenada. A suit on a note generally is a routine, two-party affair. When suits are brought on defaulted notes, judgments may be entered with relative speed. Such judgments serve an important commercial purpose. They give reliability and predictability to financial transactions, helping to drive down the cost of credit.

Frequently, the same contracts that give rise to such a suit also contain provisions that impact third parties. A lender's debt may be secured by collateral (which, absent perfected security interests, might be available to other creditors). A lender might also be harmed through preferential arrangements between the debtor and another creditor. And that lender might benefit from a "*pari passu*" clause, *i.e.*, the borrower's covenant to treat the lender as well as it treats other creditors. Because these rights implicate the rights of third parties, judicial enforcement requires courts to consider the rights of those parties before it fashions relief, and may, as in this case, require joinder of the affected party. If a lender's rights vis-a-vis third parties necessarily "merged" into every routine judgment on the debt, then every lender would have to assert all such rights in every default, however routine the circumstances or premature the claim. That would greatly complicate collection and enforcement mechanisms, enlarge court dockets, and raise a host of problems for courts. Even plaintiffs lacking confidence in the merit of an ancillary claim would be forced to bring it; and the bringing of the claim would cause once simple controversies to become complicated. Questions of intervention by third parties, jurisdiction over third parties, ripeness, and the proper scope of equitable remedies in a multiparty environment would all arise. An area of the law that has always been straightforward would suddenly become complex.

After *NML Capital*, such complex suits may be brought from time to time. Ex-Im Bank seeks to bring one here. But the proposition of Grenada's motion is that every judgment creditor who came to court would have to start such a suit, or lose its rights.

III. <u>The Court Should Deny Ex-Im Bank's Cross-Motion</u>

Ex-Im Bank cross-moved for "partial" judgment on the pleadings, requesting judgment that the *Pari Passu* Clauses and negative pledge covenants have been breached. [Docket No. 17]. Intervenors were advised by the parties that the cross-motion has not been scheduled for hearing on May 29. Accordingly, Intervenors have not briefed the issues raised by the cross-motion, but reserve the right to do so when those issues become ripe. Briefly, the complaint does not establish breach on its face, and Grenada in its pleadings denies that breach has occurred. In *NML Capital*, where breaches of *pari passu* clauses were alleged by holders of Argentinian debt, the district court based its injunction on an extensive factual record concerning a course of conduct by Argentina that thwarted the contractual rights of the noteholders. 699 F.3d at 258-60. That record included "the combination of Argentina's executive declarations and legislative enactments" that "ensured" subordination of plaintiffs' debt. *Id*. at 260. Overwhelming evidence of subordination by government fiat led the Second Circuit to "little difficulty concluding that Argentina breached the Pari Passu Clause of the [agreement]." *Id*.

No such conduct by Grenada has even been alleged here. There is no allegation of subordination by executive, legislative, or judicial decree. And Grenada's denial in any event would render such an assertion insufficient to support relief. Intervenors believe that the evidence will show none of the extreme behavior on which the injunction in *NML Capital* was based. Under *NML Capital*, payments to other debt holders do not by themselves constitute a *pari passu* breach. Even if a breach existed, Intervenors believe that none of the grounds for injunction or specific performance could be made out here. Intervenors reserve all of their other objections to the cross-motion, and expect to show, at the appropriate time, that it should be denied.

CONCLUSION

Grenada's motion for judgment on the pleadings should be denied.

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