No. _____

IN THE

Supreme Court of the United States

ROBERT CROMWELL AND SARIT L. ROZYCKI,

Petitioners,

v.

WILLIAM TACON, AS ADMINISTRATOR OF CARRIBEAN COMMERCIAL INVESTMENT BANK LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 19, 2025

QUESTION PRESENTED

Under Federal Rule of Civil Procedure 41, a plaintiff may withdraw a case voluntarily until the defendant answers or moves for summary judgment. Thereafter, the plaintiff may only dismiss its case with the defendant's consent or leave of the district court, which may dismiss the case with or without prejudice. In that context, this Court instructed in *Cone* v. *W. Virginia Pulp & Paper Co.*, a district court must dismiss a case with prejudice if a without-prejudice dismissal would cause the defendant "plain legal prejudice." 330 U.S. 212, 217 (1947).

The question presented, which has divided the courts of appeals, is whether and (if so) under what circumstances a district court may dismiss a plaintiff's case without prejudice under Rule 41, if the defendant has a time-bar defense in the forum where the case is pending, and that without-prejudice dismissal would permit refiling in another forum where a longer limitations period potentially applies.

PARTIES TO THE PROCEEDING

Petitioners Robert Cromwell and Sarit L. Rozycki were defendants in the district court and appellants below.

Respondent William Tacon was plaintiff in the district court and appellee below.

RELATED PROCEEDINGS

- *Tacon* v. *Cromwell*, No. 23-cv-8100, U.S. District Court for the Southern District of New York. Opinion and Order entered September 24, 2024.
- *Tacon* v. *Cromwell*, No. 23-cv-8100, U.S. District Court for the Southern District of New York. Order of dismissal entered on November 4, 2024.
- *Tacon* v. *Cromwell*, No. 24-3138, U.S. Court of Appeals for the Second Circuit. Judgment entered on May 15, 2025.

There are no other proceedings in state or federal courts, or in this Court, that are directly related to this case within the meaning of this Court's Rule 14(b)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit is unreported but available at 2025 WL 1409747, and is reproduced at page 1a of the Appendix ("Pet. App."). The opinion and order of the District Court for the Southern District of New York dated September 24, 2024 is unreported, but is available at 2024 WL 4275625, and is reproduced beginning at Pet. App. 17a. The order of dismissal entered by the District Court for the Southern District of New York dated November 4, 2024 is unreported, but is available at 2024 WL 5695952, and is reproduced beginning at Pet. App. 14a.

JURISDICTION

The Second Circuit issued its decision on May 15, 2025. Pet. App. 1a. On June 25, 2025, the Second Circuit denied rehearing and rehearing en banc. *Id.* at 66a. This petition is timely, and the Court has jurisdiction under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 41 provides, in relevant part:

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 —operates as an adjudication on the merits.

STATEMENT OF THE CASE

This case concerns whether district courts acting under Federal Rule of Civil Procedure 41 can dismiss cases subject to limitations defenses on a without-prejudice basis at the plaintiff's request so that the plaintiff can refile in another jurisdiction and potentially benefit from a longer limitations period in that other jurisdiction. The Fifth, Seventh, Eighth, and Ninth Circuits have correctly held that district courts may not do so, because loss of the limitations defense would cause the defendant "plain legal prejudice." *Cone*, 330 U.S. at 217. The Sixth Circuit follows a similar approach, at least when the limitations defense is clear. The Second Circuit, however, would permit refiling, as do the Eleventh and Fourth Circuits. The decision below implicates an important issue of civil procedure and, if permitted to stand, will incentivize forum shopping and other gamesmanship, all of which ultimately increases litigation costs and burdens the federal-court system.

I. Legal Background

A. Under Rule 41(a)(1), a plaintiff may voluntarily dismiss its action via "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment," or via "a stipulation of dismissal signed by all parties who have appeared." The first such dismissal is without prejudice unless the operative notice or stipulation states otherwise.

After the defendant answers or moves for summary judgment, then the plaintiff may only dismiss an action with the defendant's consent or the court's leave. In the latter situation, under Rule 41(a)(2), "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper," with voluntary dismissals being "without prejudice" unless the court orders otherwise.

Federal Rule 41(b) governs involuntary dismissals not requested by the plaintiff, and applies where a plaintiff "fails to prosecute" a lawsuit, or "to comply with the[] rules [of procedure] or a court order." Rule 41(b) dismissals "operate[] as an adjudication on the merits" unless the court orders otherwise.

B. While court-ordered dismissals under Rule 41 are generally subject to judicial discretion, 9 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2364 (4th ed.), this Court has held that a district court abuses its discretion as a *per se* matter if an order of dismissal without prejudice would cause "plain legal prejudice" to the defendant; that standard

was articulated in *Pleasants* v. *Fant*, 89 U.S. 116 (1874), and *Cone*, the latter of which recognized that the judicial authority to permit voluntary dismissals without prejudice under Federal Rule 41 is not unlimited. *Cone*, 330 U.S. at 217 (citing *Pleasants*, 89 U.S. at 122, and *Jones* v. *Sec. & Exch. Comm'n*, 298 U.S. 1, 19 (1936)).

II. Factual and Procedural Background

A. In 2005, Petitioners Robert Cromwell and Sarit Rozycki entered into a guaranty agreement (the "2005 Guaranty") with the Caribbean Commercial Investment Bank ("CCIB"). Pet. App. 24a. In the 2005 Guaranty, Petitioners guaranteed a debt incurred by Indigo Holdings Ltd. under a loan agreement with CCIB. *Id.* at 24a–25a. Indigo allegedly defaulted on that loan agreement in 2012. *Id.* at 25a.

On September 15, 2023—approximately 11 years after the first alleged default—Respondent William Tacon, acting as administrator of the CCIB, sued Petitioners in the United States District Court for the Southern District of New York, asserting a single breach-of-guaranty claim against them for allegedly failing to satisfy their obligations under the 2005 Guaranty, and invoking the district court's diversity jurisdiction. *Id.* at 30a. After Respondent amended his complaint, Petitioners moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) or alternatively for summary judgment under Rule 56, arguing that Respondent's claim was barred by New York's six-year statute of limitations. *Id.* at 31a, 34a.

B. On September 24, 2024, the district court dismissed the case. The court found that Respondent conceded New York's six-year statute of limitations applied under New York's choice-of-law rules, *id.* at 38a, and rejected Respondent's argument that the amended complaint plausibly alleged any exception (such as waiver or tolling) making the case timely. *Id.* at 41a–62a. Still, the district court gave Respondent permission to amend its complaint once again within 30 days of the district court's September 2024 order. *Id.* at 64a–65a.

Respondent did not file a second amended complaint within the time allotted by the district court, and Petitioners then requested that the district court dismiss the case with prejudice. *Id.* at 5a.

On October 28, 2024, the district court ordered Respondent to show cause why his amended complaint should not be dismissed under Federal Rule of Civil Procedure 41(b) for failure to prosecute or comply with a court order.

That same day, Respondent filed a letter with the district court, informing it that he was in the process of refiling his lawsuit in Anguilla; Respondent unabashedly claimed that the statute of limitations there would be 12 years and had not run. Pet. App. 5a–6a.

The district court then dismissed Respondent's amended complaint without prejudice under Federal

Rule of Civil Procedure 41(b) by order dated November 4, 2024. Pet. App. 15a.

C. Petitioners timely appealed, and the Second Circuit affirmed in a ten-page reasoned (but unpublished) decision on May 15, 2025.

Citing its own precedent, the Circuit began by noting that "[t]wo lines of authority have developed" on the propriety of a without-prejudice dismissal requested by the plaintiff. Pet. App. 8a.[1] Citing *Cone*, the Second Circuit explained that "[o]ne line [of authority] indicates that such a dismissal would be improper if 'the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit.'" Pet. App. 8a. "Another line indicates that the test for dismissal without prejudice involves consideration of various factors, known as the *Zagano* factors," set forth in a prior Circuit decision. Pet. App. 9a (citing *Zagano* v. *Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990)). It noted that these "factors are not necessarily exhaustive and no one of them, singly or in combination with another, is dispositive," Pet. App. 9a–10a, and proceeded to apply those factors.

Doing so, the Second Circuit "discern[ed] no abuse of discretion" and rejected Petitioners' argument that the loss of their limitations defense in New York and

[1] In a footnote, the Second Circuit explained that this Rule 41(a) analysis was appropriate here despite the district court having dismissed the case under Rule 41(b) because "dismissal without prejudice was requested by the plaintiff." Pet. App. 9a n.3.

Respondent's ability to refile his case in Anguilla (which Respondent contends has a very generous statute of limitations) constituted "legal prejudice." This is because, the Second Circuit held, "reliance on that single factor would deprive the district court of its discretionary authority to dismiss the case without prejudice" under the Second Circuit's longstanding multi-factor balancing test. Pet. App. 12a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided On The Question Presented

As Wright & Miller explain, "[t]he courts of appeals are divided on whether a dismissal should be allowed to permit the plaintiff to sue in a forum where the statute of limitations has not run or that would deprive the defendant of some other defense." 9 Fed. Prac. & Proc. Civ. § 2364 (4th ed.) (collecting cases); see, *e.g.*, *Mitchell* v. *Roberts*, 43 F.4th 1074, 1084 (10th Cir. 2022) ("There is some disagreement among the federal courts of appeal as to whether loss of a statute of limitations defense constitutes per se legal prejudice."); *Arias* v. *Cameron*, 776 F.3d 1262, 1274 (11th Cir. 2015) ("[W]e acknowledge that both the Fifth and Eighth Circuits have expressly announced their disagreement with our decision."); *Metro. Fed. Bank of Iowa, F.S.B.* v. *W.R. Grace & Co.*, 999 F.2d 1257, 1263 (8th Cir. 1993) (noting disagreement among the circuits). The Second Circuit's decision indeed conflicts with the decisions of at least four circuits holding that the potential loss of a statute of

limitations defense is *per se* legal prejudice requiring a with-prejudice dismissal under Rule 41.

A. On one side of the divide, the Fifth, Seventh, Eighth, and Ninth Circuits have held that the threat of a defendant facing a second suit on the same claims in another jurisdiction with a longer statute of limitations is *per se* "plain legal prejudice" that mandates dismissals *with* prejudice under *Cone*.

In the Fifth Circuit, "loss of a statute of limitations defense constitutes the type of clear legal prejudice that precludes the granting of an unconditional dismissal" under Rule 41. *Elbaor* v. *Tripath Imaging, Inc.*, 279 F.3d 314, 318 (5th Cir. 2002). This was so in *Elbaor* even though the plaintiffs there contended "that the statute of limitations defense would not succeed [in the pending case] because [plaintiffs] could utilize Texas' discovery rule to plead around the statute of limitations." *Ibid.* The "potential ability to plead around the statute of limitations [in the pending suit] is irrelevant," the Fifth Circuit explained, because dismissal would deprive the defendant of its nonfrivolous defense in that lawsuit (whether it ultimately prevails or not). *Id.* at 319. Indeed, the point of the "legal prejudice" inquiry is to determine whether the defendant "will be stripped of [a] defense entirely." *Ikospentakis* v. *Thalassic S.S. Agency*, 915 F.2d 176, 179 (5th Cir. 1990); see also *Phillips* v. *Illinois Cent. Gulf R.R.*, 874 F.2d 984, 986–87 (5th Cir. 1989). If that test is met, then in the Fifth Circuit a plaintiff's requested dismissal must be entered with prejudice.

The Seventh Circuit, like the Fifth Circuit, has concluded that the potential loss of a limitations defense precludes a court from entering a without-prejudice dismissal under Rule 41. In *Wojtas* v. *Cap. Guardian Tr. Co.*, 477 F.3d 924, 926 (7th Cir. 2007), the Seventh Circuit concluded that forcing a defendant to face a second suit in another state involving the same transaction, occurrence, and claims due to the second forum having a longer limitations period would be plain legal prejudice that would "deprive [the defendant] of its statute of limitations defense," and that dismissal of such a suit without prejudice would be an abuse of discretion, expressly joining the Fifth and Eighth Circuits. *Id.* at 927–28 (citing *Phillips*, 874 F.2d 984 (5th Cir. 1989), and *Metro. Fed. Bank of Iowa*, 999 F.2d at 1263).

Likewise, as just noted, the Eighth Circuit has announced the rule that it is "an abuse of discretion for a district court to find no legal prejudice, and thus to grant voluntary dismissal, where the nonmoving party has demonstrated a valid statute of limitations defense." *Metro. Fed. Bank of Iowa*, 999 F.2d at 1263. As the court explained in that case, "[v]oluntary dismissal under Rule 41(a)(2) should not be granted if a party will be prejudiced by the dismissal"; the Eighth Circuit further explained, citing the Fifth Circuit's decision in *Phillips*, that "there is clear legal prejudice where a Rule 41(a)(2) dismissal is granted in the face of a valid statute of limitations defense." *Id.* at 1262–63. The Eighth Circuit also acknowledged that the Eleventh Circuit had come out differently, and added that, "[t]o the extent the Eleventh Circuit

would hold that the loss to the defendant of a proven, valid statute of limitations defense does not constitute legal prejudice that would bar voluntary dismissal, we respectfully disagree." *Id.*[2] See also *Beavers* v. *Bretherick*, 227 F. App'x 518, 521 (8th Cir. 2007) (holding that district court abused discretion in dismissing case without prejudice in view of legal defenses).

The Ninth Circuit has followed the same rule as the Fifth, Seventh, and Eighth Circuits. Affirming a district court's denial of a plaintiff's motion to dismiss without prejudice under Rule 41(a)(2), the Ninth Circuit held in *Tibbetts By & Through Tibbetts* v. *Syntex Corp.* that there was no abuse of discretion in denying the plaintiff's motion, because the defendant would have been prejudiced by being forced to defend the suit in another forum where the statute of limitations had not run. 996 F.2d 1227 (9th Cir. 1993) (Tbl.); see also *Westlands Water Dist.* v. *United States*, 100 F.3d 94, 97 (9th Cir. 1996) ("[I]n determining what will amount to legal prejudice, courts have examined whether a dismissal without prejudice would result in the loss of a . . . statute-of-limitations defense.").

B. Next, the Sixth Circuit follows a similar approach, at least when dismissal based on the application of a limitations defense in the pending suit is "clearly dictated." In *Grover ex rel. Grover* v. *Eli*

[2] The court went on to find that the defendant had not established the predicate limitations defense in the pending case.

Lilly & Co., the court held that a district court should generally apply a multi-factor test, but that dismissal without prejudice is unwarranted as a matter of law "where the defendant would suffer 'plain legal prejudice' as a result of a dismissal without prejudice." 33 F.3d 716, 719 (6th Cir. 1994). The Sixth Circuit later confirmed that this "plain legal prejudice" test applies to limitations defenses that clearly dictate dismissal. *Burns* v. *Taurus Int'l Mfg., Inc.*, 826 F. App'x 496 (6th Cir. 2020). Applying that test to a statute of repose, the Circuit held that a district court abused its discretion in dismissing a case without prejudice, because "Tennessee's ten-year statute of repose clearly dictate[d] a result in Defendants' favor," and dismissal therefore caused defendants "plain legal prejudice," namely, the loss of their defense. *Id.* at 503; cf. *Rosenthal* v. *Bridgestone/Firestone, Inc.*, 217 F. App'x 498, 500 (6th Cir. 2007) (reiterating that plain legal prejudice exists "where dismissal [without prejudice] results in stripping a defendant of an absolute defense," but holding that the test was not met in that case).

C. By contrast, the Second, Fourth, and Eleventh Circuits (wrongly) apply a multi-factor test that permits cases to be dismissed without prejudice even when those are subject to a limitations defense in the forum—and even when the plaintiff seeks dismissal to refile elsewhere for the purpose of trying to invoke a longer limitations period.

To begin, as noted above, the Second Circuit in the decision below rejected the notion that the loss of a

limitations defense requires dismissal with prejudice. It cited earlier Second Circuit decisions confining *Cone*'s "plain legal prejudice" ruling to the facts of that case (where the "defendant [was] ready to pursue a [counter]claim against the plaintiff *in the same action* that the plaintiff is seeking to have dismissed"). *Camilli* v. *Grimes*, 436 F.3d 120, 124 (2d Cir. 2006), cited at Pet. App. 9a. Addressing the limitations defense under Circuit precedent that applied a multi-factor test, the Second Circuit considered this to be just one factor among many. Pet. App. 9a–10a. And it held that, under this test, the district court did not abuse its discretion in dismissing the case without prejudice despite plaintiff having sought dismissal for the express purpose of seeking to evade New York's limitations period (which plaintiff had conceded to apply in the pending case, and which the district court had ruled to bar the suit) by refiling elsewhere.

Similarly, in the Fourth Circuit, "the loss of a valid statute of limitations defense does not constitute a bar to dismissal under Rule 41(a)(2)," and the fact that dismissal without prejudice would subject the defendant to the law of a different forum is not prejudicial. *Davis* v. *USX Corp.*, 819 F.2d 1270, 1275–76 (4th Cir. 1987). But see *Shortt* v. *Richlands Mall Assocs., Inc.*, 922 F.2d 836 (4th Cir. 1990) (Tbl.) (voluntary dismissals that would "inflict undue hardship upon the defendant" are inappropriate). Following this logic, the Fourth Circuit has affirmed a district-court decision holding that "the possibility that the defendant may lose a statute of limitations defense creates insufficient prejudice to the defendant

to bar voluntary dismissal." *Dean* v. *WLR Foods, Inc.*, 204 F.R.D. 75, 78 (W.D. Va.), *aff'd sub nom. Dean* v. *Gilmer Indus., Inc.*, 22 F. App'x 285 (4th Cir. 2001).

The Eleventh Circuit takes the same approach, holding that the loss of a limitations defense does not constitute plain legal prejudice precluding a dismissal without prejudice. *McCants* v. *Ford Motor Co., Inc.*, 781 F.2d 855, 858–59 (11th Cir. 1986). The Eleventh Circuit later acknowledged that other circuits have reached the opposite conclusion and found clear legal prejudice to exist when dismissal without prejudice is granted in the face of a valid statute-of-limitations defense. *Arias* v. *Cameron*, 776 F.3d 1262, 1274 (11th Cir. 2015). But it nonetheless reaffirmed that "the loss of a statute-of-limitations defense alone does not amount to *per se* prejudice requiring denial of a voluntary dismissal without prejudice." *Id.* at 1272.

* * * *

In applying its non-exhaustive multi-factor test to determine whether Respondent's case must be dismissed with or without prejudice, the Second Circuit reaffirmed an existing circuit split that has been acknowledged by other circuit courts and Wright & Miller. At least eight circuits have weighed in and are starkly divided. The Court should grant certiorari to resolve the divide among the courts of appeals.

II. The Question Presented Is Important

As noted, the decision below reaffirms and deepens an entrenched and recognized circuit split, and it

creates uncertainty in how Federal Rule of Civil Procedure 41 applies. The question presented is important and warrants the Court's review.

The Court has granted review to rectify a lack of uniformity in the courts of appeals' interpretation of the federal rules. *E.g.*, *Becker* v. *Montgomery*, 532 U.S. 757, 762 (2001) ("We granted certiorari . . . to assure the uniform interpretation of the governing Federal Rules."); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 387 (1993) (resolving split among circuit courts regarding interpretation of Fed. R. Bankr. P. 9006(b)(1)); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 251 (1957) ("The importance of the question in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals, led to our grant of a writ of certiorari."); *Waetzig* v. *Halliburton Energy Servs., Inc.*, 604 U.S. 305, 310 (2025) ("We granted certiorari to decide whether Rule 60(b) permits a court to reopen a case that was voluntarily dismissed without prejudice.").

Moreover, the question at issue here, whether a case can be dismissed with or without prejudice, implicates important concerns. "A plaintiff should not be allowed to 'maneuver' the[ir] litigation to strip a defendant of an existing advantage." Danielle Calamari, *Voluntary Dismissal of Time-Barred Claims*, 85 Fordham L. Rev. 789, 799 (2016). Yet that is precisely what the ruling below incentivizes. Among other things, the ruling below encourages forum shopping by opportunistic plaintiffs. If the ruling

stands, plaintiffs initiating suit in the Second Circuit (and Fourth and Eleventh Circuits) will be able to evade limitations bars—even adjudicated ones—by filing in other circuits, or other countries, as here. The law does not endorse that sort of gamesmanship. Cf. *Trump* v. *CASA, Inc.*, 606 U.S. 831, 855 (2025) (noting that universal injunctions encourage forum shopping); *id.* at 899–900 (Sotomayor, J., dissenting) (observing same concern); *Atl. Marine Const. Co.* v. *U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 65 (2013) (venue provision "should not create or multiply opportunities for forum shopping" (quoting *Ferens* v. *John Deere Co.*, 494 U.S. 516, 523 (1990))).

The decision below also undermines judicial economy, which Federal Rule 41 was meant to promote. See, *e.g.*, *Link* v. *Wabash R. Co.*, 370 U.S. 626, 630 (1962) (discussing Fed. R. Civ. P. 41(b)). Under the Second Circuit's rule, plaintiffs might dismiss and refile cases for tactical advantage, consuming judicial resources in cases that, like this one, should be resolved in the first forum where plaintiff decided to commence litigation.

III. This Case Presents An Ideal Vehicle To Decide The Question Presented

The decision below is an ideal vehicle for resolving the acknowledged split that this case presents. The question presented is squarely implicated and outcome-dispositive, as the decision below did not provide any alternate or secondary holding.

Indeed, if the case had proceeded in the Fifth Circuit, there can be no question that the Circuit would have reversed: plaintiff agreed New York law applied and the district court ruled that New York law barred the case. Plaintiff sought dismissal precisely to permit refiling in another forum so that he could argue that a longer limitations period applied. The plaintiff's sought-after "loss of a statute of limitations defense" is precisely "the type of clear legal prejudice that precludes the granting of an unconditional dismissal" in the Fifth Circuit. *Elbaor*, 279 F.3d at 318. And although the district court in this case left open the possibility for plaintiff to amend the complaint, that would not have been enough in the Fifth Circuit because, as noted above, the "potential ability to plead around [a] statute of limitations [in the pending case] is irrelevant" in that Circuit. *Id.* at 319.

Finally, the fact that the decision below is an unpublished decision does not make this a poor vehicle. The circuit split was entrenched and recognized before the Second Circuit issued its decision, and persists even if one ignored the Second Circuit's decision, and regardless, the Second Circuit relied on established precedent of the Second Circuit. See Pet. App. 8a–10a (following *Zagano* v. *Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990)). And this Court has reviewed other unpublished decisions issued by the Second Circuit. *E.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 15, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-3138-cv

WILLIAM TACON, AS ADMINISTRATOR OF CARIBBEAN COMMERCIAL INVESTMENT BANK LTD.,

Plaintiff-Appellee,

v.

ROBERT CROMWELL, SARIT L. ROZYCKI,

Defendants-Appellants.

May 15, 2025, Decided

Appeal from an order of dismissal of the United States District Court for the Southern District of New York. (Kenneth M. Karas, *Judge*).

PRESENT:

GERARD E. LYNCH,
JOSEPH F. BIANCO,
STEVEN J. MENASHI,
Circuit Judges.

Appendix A

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of dismissal, entered on November 6, 2024, is **AFFIRMED**.

Defendants-Appellants Robert Cromwell and Sarit L. Rozycki (together, the "Defendants") appeal from the district court's order of dismissal insofar as it dismissed Plaintiff-Appellee William Tacon's amended complaint, asserting one claim for breach of guaranty, without prejudice. Although Defendants prevailed below, they argue on appeal that the district court committed legal error, or alternatively abused its discretion, by dismissing Tacon's breach of guaranty claim without prejudice rather than with prejudice, as requested by Defendants. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.[1]

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1. As a threshold matter, we note that the district court did not enter judgment on a separate document after entering the dismissal order, as is required by Federal Rule of Civil Procedure 58(a). Fed. R. Civ. P. 58(a) (stating that apart from certain exceptions not relevant to this appeal "[e]very judgment . . . must be set out in a separate document.") However, "[a] failure to set forth a judgment or order on a separate document when required by [Rule] 58(a) does not affect the validity of an appeal from that judgment or order." Fed. R. App. P. 4(a)(7)(B). Here, it is clear that the district court's dismissal order, entered at the request of the Plaintiff, ended the case. Indeed, in the dismissal order, the district court directed the Clerk of Court to close the case. Therefore, under 28 U.S.C. § 1291, we have jurisdiction to

Appendix A

BACKGROUND[2]

In 2005, Defendants entered into a guaranty agreement with Caribbean Commercial Investment Bank ("CCIB"), which obligated Defendants to pay any debt incurred by their company, Indigo Holdings Ltd. ("Indigo"), up to a certain amount. Shortly thereafter, Indigo entered into a loan agreement with CCIB to finance Indigo's construction of a villa in Anguilla. Indigo allegedly defaulted on the loan in 2012 and, in 2016, Tacon, as CCIB's court-appointed administrator, demanded that Defendants pay Indigo's outstanding balance. Defendants allegedly acknowledged the debt, made assurances over several years that they were taking steps to repay it, and attempted to negotiate that repayment. However, the debt was not repaid.

In 2023, Tacon initiated the instant action against Defendants in the Southern District of New York, where Defendants are citizens, and brought a single claim for breach of guaranty pursuant to the court's diversity

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review that order on appeal because it constituted a final decision, meaning it "end[ed] the litigation on the merits and [left] nothing for the court to do but execute the judgment." *Leftridge v. Conn. State Trooper Officer No. 1283*, 640 F.3d 62, 66-67 (2d Cir. 2011) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)). Moreover, the judgment became final 150 days after the order was entered on the docket, *see* Fed. R. Civ. P. 58(c)(2)(B), and we deem Defendants' notice of appeal to have been timely filed as of that date, *see* Fed. R. App. P. 4(a)(2).

2. The following allegations are drawn from the amended complaint.

jurisdiction. After Tacon filed an amended complaint, Defendants filed a motion to dismiss, under Federal Rule of Civil Procedure 12(b)(6), on the ground that Tacon's breach of guaranty claim was barred by New York's six-year statute of limitations. The district court granted the motion (the "Rule 12(b)(6) Order"). *See generally Tacon v. Cromwell*, No. 23-CV-8100 (KMK), 2024 U.S. Dist. LEXIS 172270, 2024 WL 4275625 (S.D.N.Y. Sept. 24, 2024). In doing so, the district court declined to consider many of the documents Tacon submitted in furtherance of his arguments, to the extent those documents were not incorporated explicitly, or by reference, in the amended complaint. The district court determined that Tacon had conceded, through his briefing, that Anguilla's twelve-year statute of limitations did not apply under New York's choice-of-law provision. The district court also rejected Tacon's argument that the amended complaint plausibly alleged exceptions to the statute of limitations, namely that (1) through the guaranty, Defendants waived their statute of limitations defense; (2) Defendants' acknowledgment of their breach and partial repayment tolled the statute of limitations; and (3) Defendants should be equitably estopped from raising a statute of limitations defense. With respect to Tacon's arguments for equitable estoppel based on Defendants' alleged bad faith conduct during settlement discussions that "duped [Tacon] into refraining from bringing this Action sooner," the district court noted that it would not consider additional allegations asserted by Tacon for the first time in his sur-reply. 2024 U.S. Dist. LEXIS 172270, [WL] at *16-17.

However, the district court dismissed the amended complaint without prejudice and gave Tacon thirty days to file a second amended complaint. In doing so, the district court explicitly rejected Defendants' request to dismiss the amended complaint with prejudice, stating, "[n]otwithstanding Defendants' argument to the contrary, the Court is not convinced that the flaws in the Amended Complaint are incurable, particularly given Defendants' protracted settlement discussions with Plaintiff, which, as alleged, do not necessarily evince good-faith negotiations." 2024 U.S. Dist. LEXIS 172270, [WL] at *17 n.22 (alterations adopted) (internal quotation marks and citations omitted). The district court also noted that the Rule 12(b)(6) Order was the first adjudication of Plaintiff's claim and that courts "will afford [a plaintiff] an opportunity to amend if, after reviewing [the relevant order of dismissal] and the law therein, [a court] still believes that [the plaintiff] can plausibly state claims against [the defendants]." 2024 U.S. Dist. LEXIS 172270, [WL] at *17 (internal quotation marks and citation omitted). Although the district court warned that a failure to amend "may" result in dismissal with prejudice, it did not state that its dismissal without prejudice would automatically convert to a dismissal with prejudice upon a failure to refile. *See id.*

Tacon did not file a second amended complaint within the time provided, and shortly after that deadline expired, Defendants filed a letter asking the district court to dismiss the amended complaint with prejudice. Tacon promptly responded, indicating that he planned to refile the lawsuit in Anguilla "[r]ather than file another amended complaint in [the New York district court] that would

simply serve as a basis to further litigate defenses to the statute of limitations prior to ever reaching the merits of the action." App'x at 226. Tacon also opposed Defendants' request to dismiss with prejudice, characterizing it as "an attempt to bootstrap defenses to the enforcement of an inevitable judgment against them in Anguilla." *Id.* Tacon argued that dismissal without prejudice would be "in the interest of justice," as the breach of guaranty claim "ha[d] not been adjudicated on the merits." *Id.*

That same day, possibly before receiving Tacon's letter, the district court ordered Tacon to show cause why the amended complaint should not be dismissed *sua sponte* under Federal Rule of Civil Procedure 41(b) for failure to prosecute or comply with a court order. The district court again warned Tacon that a failure to respond "may" result in dismissal with prejudice. *Id.* at 227. A few days later, the district court, having acknowledged receipt of Tacon's letter, dismissed the amended complaint without prejudice for failure to prosecute under Rule 41(b) (the "Rule 41(b) Order"). Defendants timely appealed the Rule 41(b) Order.

DISCUSSION

As a threshold matter, although Defendants prevailed in obtaining dismissal of the case, we conclude that they may appeal the district court's decision to dismiss without prejudice rather than with prejudice. "Ordinarily, a prevailing party cannot appeal from a district court judgment in its favor." *In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1993). However, a prevailing party may appeal if it is "aggrieved" by "the collateral estoppel effect of [the]

district court's ruling" or "some [other] aspect of [its] judgment or decree." *Id.* at 23, 25. Here, the "ultimate relief [Defendants] requested" was a dismissal of Tacon's amended complaint with prejudice, but instead the district court ordered dismissal without prejudice, which allows Tacon to refile the action in the future. *Concerned Citizens of Cohocton Valley, Inc. v. N.Y. State Dep't of Env't Conservation*, 127 F.3d 201, 204 (2d Cir. 1997) (explaining that a party is not aggrieved if they receive the "ultimate relief requested"). We therefore conclude that Defendants have been "aggrieved" by the Rule 41(b) Order insofar as it dismissed Tacon's claim without prejudice, and therefore Defendants may challenge on appeal that aspect of the district court's decision. *See Camilli v. Grimes*, 436 F.3d 120, 123 (2d Cir. 2006) (allowing a defendant to appeal the dismissal of a complaint without prejudice).

"We review a court's dismissal under Rule 41(b) for an abuse of discretion," including whether such a dismissal should be with or without prejudice. *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014) (per curiam); *see also Camilli*, 436 F.3d at 123 (reviewing a Rule 41(a) dismissal without prejudice, rather than with prejudice, for abuse of discretion). "A district court has abused its discretion if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *United States ex rel. Weiner v. Siemens AG*, 87 F.4th 157, 161 (2d Cir. 2023) (per curiam) (internal quotation marks and citation omitted).

In its dismissal order, the district court noted that, on the same day that it issued its order to show cause directing Tacon to "either file a second amended complaint or show cause as to why there would be no such filing," Tacon's counsel filed a letter advising the district court that, instead of filing a second amended complaint, Tacon was "in the process of pursuing a separate suit against Defendants in a different forum." App'x at 229-30. Thus, under those circumstances, the district court determined that the case should be "dismissed without prejudice." *Id.* at 30.

Defendants assert that the district court erred in declining to dismiss the case with prejudice. We are unpersuaded. "When imposed, the sanction of dismissal 'operates as an adjudication upon the merits,' but may be without prejudice if so specified by the court imposing it." *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982) (quoting Fed. R. Civ. P. 41(b)). "[B]ecause the sanction of dismissal with prejudice has harsh consequences for [parties], who may be blameless, we have instructed that it should be used only in extreme situations." *Baptiste*, 768 F.3d at 217 (internal quotation marks and citation omitted). As we have explained,

> Two lines of authority have developed with respect to the circumstances under which a dismissal without prejudice might be improper. One line indicates that such a dismissal would be improper if "the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Cone v. West*

> *Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S. Ct. 752, 91 L. Ed. 849 (1947). Another line indicates that the test for dismissal without prejudice involves consideration of various factors, known as the *Zagano* factors, including (1) the plaintiff's diligence in bringing the motion, (2) any undue vexatiousness on the plaintiff's part, (3) the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial, (4) the duplicative expense of relitigation, and (5) the adequacy of the plaintiff's explanation for the need to dismiss.

Camilli, 436 F.3d at 123 (citing *D'Alto v. Dahon Cal., Inc.*, 100 F.3d 281, 283 (2d Cir.1996); *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir.1990)) (internal citation omitted).[3] "These factors are not necessarily exhaustive

3. We have utilized these factors in the context of motions for voluntary dismissal by plaintiffs under Federal Rule of Civil Procedure 41(a)(2), which provides that, "[e]xcept as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Although the district court invoked Rule 41(b), which addresses a failure to prosecute, we conclude that the *Zagano* factors provide a helpful framework for analyzing the district court's determination in light of the fact that the dismissal without prejudice was requested by the plaintiff. We also note that Tacon does not argue that the district court should have addressed his request under Rule 41(a)(1)(A)(i), and thus we do not address that issue here. *See* Fed. R. Civ. P. 41(a)(1)(A)(i) (stating that "the plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment").

and no one of them, singly or in combination with another, is dispositive." *Kwan v. Schlein*, 634 F.3d 224, 230 (2d Cir. 2011).

Applying the *Zagano* factors here, Tacon's non-compliance with the district court's deadline for filing the second amended complaint, before advising the court of his desire to discontinue the action without prejudice, was relatively brief—less than a week—and, as noted above, Tacon filed a letter indicating that he intended to pursue the litigation in Anguilla before the district court entered its order to show cause. Thus, Tacon was reasonably diligent in requesting dismissal, and Defendants do not point to any prejudice from his brief delay. Moreover, although the motion to dismiss had been adjudicated, the district court determined that the pleading defects (including on the statute of limitations issue) were potentially curable in an amended complaint and that the lawsuit, in which an answer had not yet been filed, was still in its early stage. In addition, there is no indication of any undue vexatiousness on Tacon's part, and Tacon sufficiently explained the reason for the request. In short, under these circumstances, we discern no abuse of discretion in the district court's determination that the dismissal should be without prejudice. *See Kwan*, 634 F.3d at 231 (holding that dismissal of counterclaims without prejudice at defendants' request, as opposed to with prejudice, was not an abuse of discretion where, *inter alia*, plaintiff "failed to show that consideration of the *Zagano* factors would have altered the outcome on the [defendants'] motion").

Defendants argue that "the dismissal without prejudice severely prejudices them by negating the district court's ruling that the claim was time-barred, thus causing [Defendants] to lose the preclusive, *res judicata* effect of the judgment, and potentially exposing them to further liability." Appellants' Reply at 14. However, as noted above, the district court did not make a final determination on the statute of limitations issue; indeed, it explicitly stated that it was "not convinced that the flaws in the Amended Complaint [were] incurable" and indicated that it believed that Tacon could still "plausibly state [his breach of guaranty] claim[] against Defendants," including potentially overcoming the statute of limitations defense. *Tacon*, 2024 U.S. Dist. LEXIS 172270, 2024 WL 4275625, at *17 & n.22 (alteration adopted) (internal quotation marks and citations omitted). While dismissals for failure to state a claim are generally with prejudice, "[i]t is nevertheless permissible to dismiss for failure to state a claim without prejudice . . . to enable a party to seek to amend its complaint." *Miller v. Brightstar Asia, Ltd.*, 43 F.4th 112, 126 (2d Cir. 2022).

Having received that initial ruling, Tacon decided that, rather than attempt to amend the complaint, he would prefer to "fil[e] suit against Defendants in Anguilla, which is the forum whose laws apply to the loan and guaranty documents underlying Defendants' debt and where the applicable statute of limitations indisputably has not run." App'x at 226. To the extent Defendants suggest that the possibility of the initiation of a new lawsuit in a different forum *necessarily* constitutes legal prejudice

requiring a dismissal with prejudice, we disagree. Such reliance on that single factor would deprive the district court of its discretionary authority to dismiss the case without prejudice under the *Zagano* factors. *See generally Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1, 19, 56 S. Ct. 654, 80 L. Ed. 1015 (1936) (emphasizing, in the context of a voluntary dismissal, that "[t]he general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint . . . unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter"); *see also D'Alto*, 100 F.3d at 283 ("In *Zagano*, this Court delineated a number of factors that are relevant in determining whether a case has proceeded so far that dismissing it in order for plaintiff to start a separate action would prejudice the defendant.").

Finally, we are equally unpersuaded by Defendants' contention that, because the Rule 12(b)(6) Order converted into a "final judgment" when Tacon elected not to file a second amended complaint, the district court had no authority to dismiss the case without prejudice. It is true that, when a plaintiff "disclaim[s] intent to amend, she render[s] the district court's otherwise non-final order 'final' and therefore immediately appealable." *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 87 (2d Cir. 2013). However, Defendants ignore that, at the same time Tacon indicated an intent not to file another amended complaint, he requested that the district court dismiss the case without prejudice because he intended to pursue the lawsuit in another forum. Under these circumstances,

the district court had the discretion to address Tacon's request notwithstanding any ramifications regarding the appealability of the district court's Rule 12(b)(6) Order before that request was resolved.[4]

* * *

We have considered the Defendants' remaining arguments and conclude that they are without merit. Accordingly, the order of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

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4. To the extent that Defendants also attempt to support their position by relying on the Supreme Court's decision in *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001), that reliance is misplaced. In *Semtek*, the Supreme Court held that, when a case is dismissed with prejudice on statute of limitations grounds by a federal court sitting in diversity in one state, and then brought again in state court in a second state, the court in the second state should apply the claim preclusion rules of the state of the first-filed case. That holding in *Semtek* places no legal constraints on the district court's discretionary authority here in the first-filed case—namely, where the district court dismissed a claim without prejudice on statute of limitations grounds in the first instance and determined, after the plaintiff decided not to pursue the claim in that forum through another amended complaint, that the dismissal should remain as one without prejudice. The effect, if any, of the district court's Rule 12(b)(6) Order in a future lawsuit in another forum, which was the subject of *Semtek*, is not before this Court and any effort to analyze that issue at this juncture would constitute an impermissible advisory opinion. *See Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1973).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 4, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 23-CV-8100 (KMK)

WILLIAM TACON, AS ADMINISTRATOR OF CARIBBEAN COMMERCIAL INVESTMENT BANK LTD.,

Plaintiff,

v.

ROBERT CROMWELL, AND SARIT L. ROZYCKI,

Defendants.

ORDER OF DISMISSAL

KENNETH M. KARAS, United States District Judge:

On September 24, 2024, the Court issued an Opinion and Order granting Defendants' Motion to Dismiss Plaintiff's Amended Complaint without prejudice. (*See generally* Opinion & Order (Dkt. No. 47).) The Court instructed Plaintiff that if he wished to file a second amended complaint, he must do so within thirty days of the Opinion & Order, and that failure to properly and timely amend would likely result in dismissal of the claims

against Defendants with prejudice. (*Id*. at 35–37.) Plaintiff did not file a second amended complaint with the thirty days following the issuance of the Opinion & Order. (*See generally* Dkt.)

On October 28, 2024, the Court issued an Order to Show Cause directing Plaintiff to, within thirty days, either file a second amended complaint or show cause as to why there would be no such filing. (Dkt. No. 50.) That same day, Plaintiff's counsel filed a letter with the Court advising that Plaintiff would not be filing a second amended complaint, as Plaintiff is instead in the process of pursuing a separate suit against Defendants in a different forum. (*See* Dkt. No. 49.)

Accordingly, it is hereby:

ORDERED that Plaintiff's Complaint is dismissed without prejudice. *See Turk v. Rubbermaid Inc.*, No. 21-CV-270, 2022 WL 1228196, at *1 (S.D.N.Y. Apr. 26, 2022) ("The Court has the authority to dismiss a case . . . if a plaintiff 'fails to prosecute. . . .'"); *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001) (recognizing that a district court has the inherent authority to dismiss for failure to prosecute sua sponte).

The Clerk of Court is respectfully directed to close the case and mail a copy of this Order to Plaintiff's address.

SO ORDERED.

Appendix B

DATED: November 4, 2024
White Plains, New York

/s/ Kenneth M. Karas
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 24, 2024

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 23-CV-8100 (KMK)

WILLIAM TACON, AS ADMINISTRATOR OF CARIBBEAN COMMERCIAL INVESTMENT BANK LTD.,

Plaintiff,

v.

ROBERT CROMWELL, AND SARIT L. ROZYCKI,

Defendants.

KENNETH M. KARAS, United States District Judge.

September 24, 2024, Decided
September 24, 2024, Filed

OPINION & ORDER

KENNETH M. KARAS, United States District Judge:

Plaintiff William Tacon ("Plaintiff"), as administrator of Caribbean Commercial Investment Bank Ltd. ("CCIB"), brings this Action against Robert Cromwell

("Cromwell") and Sarit L. Rozycki ("Rozycki," and together with Cromwell, "Defendants"), alleging that Defendants breached a guaranty agreement pursuant to which they were obligated to pay Plaintiff a certain amount due under a loan for a villa in Anguilla. (*See* Am. Compl. ¶¶ 28-32 (Dkt. No. 21).)[1] Before the Court is Defendants' Motion To Dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion"). (*See* Not. of Mot. (Dkt. No. 27).) For the reasons that follow, Defendants' Motion is granted.

I. BACKGROUND

A. Materials Considered

In connection with the instant Motion, the Parties chose to submit numerous exhibits, apparently believing that such a document dump at this early stage of the case would bolster their arguments. (*See, e.g.*, Declaration of Robert Cromwell ("Cromwell Decl.") (attaching eighteen exhibits) (Dkt. No. 28); Declaration of William Tacon ("Tacon Decl.") (attaching five exhibits) (Dkt. No. 35); Declaration of Cassandra Porsch ("Porsch Decl.") (attaching four exhibits) (Dkt. No. 36); Reply Declaration of Robert Cromwell ("Cromwell Reply Decl.") (attaching four exhibits) (Dkt. No. 41).) Thus, as a threshold matter, the Court must decide what documents it may consider in deciding the Motion.

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1. Unless otherwise noted (as here), the Court cites to the ECF-stamped page number in the upper-right corner of each page in cites from the record.

Generally, "[w]hen considering a motion to dismiss, the Court's review is confined to the pleadings themselves" because "[t]o go beyond the allegations in the Complaint would convert the Rule 12(b)(6) motion into one for summary judgment pursuant to [Rule] 56." *Thomas v. Westchester Cnty. Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002); *accord Doe v. Cnty. of Rockland*, No. 21-CV-6751, 2023 U.S. Dist. LEXIS 169608, 2023 WL 6199735, at *1 (S.D.N.Y. Sept. 22, 2023). "Nevertheless, the Court's consideration of documents attached to, or incorporated by reference in the Complaint, and matters of which judicial notice may be taken, would not convert the motion to dismiss into one for summary judgment." *Thomas*, 232 F. Supp. 2d at 275; *see also Bellin v. Zucker*, 6 F.4th 463, 473 (2d Cir. 2021) (explaining that "when ruling on Rule 12(b)(6) motions to dismiss," courts may "consider the complaint in its entirety . . . , documents incorporated into the complaint by reference, and matters of which a court may take judicial notice" (quotation marks omitted)); *Hu v. City of New York*, 927 F.3d 81, 88 (2d Cir. 2019) ("In deciding a Rule 12(b)(6) motion, the court may consider 'only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which judicial notice may be taken.'" (alteration adopted) (quoting *Samuels v. Air Transp. Loc. 504*, 992 F.2d 12, 15 (2d Cir. 1993))).

"Generally, a court may incorporate documents referenced where (1) [the] plaintiff relies on the materials in framing the complaint, (2) the complaint clearly and substantially references the documents, and (3) the document's authenticity or accuracy is undisputed."

Stewart v. Riviana Foods Inc., No. 16-CV-6157, 2017 U.S. Dist. LEXIS 146665, 2017 WL 4045952, at *6 (S.D.N.Y. Sept. 11, 2017) (emphasis omitted) (collecting cases); *see also Dunkelberger v. Dunkelberger*, No. 14-CV-3877, 2015 U.S. Dist. LEXIS 133814, 2015 WL 5730605, at *5 (S.D.N.Y. Sept. 30, 2015) ("To be incorporated by reference, the complaint must make a clear, definite, and substantial reference to the documents, and to be integral to a complaint, the plaintiff must have (1) actual notice of the extraneous information and (2) relied upon the documents in framing the complaint." (alterations adopted) (quoting *Bill Diodato Photography Llc v. Avon Prods. Inc.*, No. 12-CV-847, 2012 U.S. Dist. LEXIS 135688, 2012 WL 4335164, at *3 (S.D.N.Y. Sept. 21, 2012))).

To start, Plaintiff has attached two exhibits to the Amended Complaint—a Continuing Guaranty dated November 11, 2005 (the "Guaranty"), (*see* Am. Compl. Ex. A ("Guaranty") (Dkt. No. 21-1)), and a Loan Agreement dated December 20, 2005 (the "Loan"), (*see id.* Ex. B ("Loan") (Dkt. No. 21-2)). Defendants do not dispute that the Court may properly consider these exhibits, nor could they, because "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c); *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (explaining that a complaint is "deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference" (citation omitted)); *Citibank, N.A. v. Aralpa Holdings Ltd. P'ship*, No. 22-CV-8842, 2023 U.S. Dist. LEXIS 163524, 2023 WL 5971144, at *6 (S.D.N.Y. Sept. 14, 2023)

(considering a loan agreement and guaranty that were attached to the complaint in connection with deciding a motion for judgment on the pleadings).

For their part, Defendants have submitted eighteen exhibits with their opening papers and another four exhibits with their Reply. (*See generally* Cromwell Decl.; Cromwell Reply Decl.) At this juncture, the court will focus its analysis on: (1) a copy of an email chain dated May 13, 2019 to October 24, 2019, (*see* Cromwell Decl. Ex. Q (Dkt. No. 28-17)); and (2) a copy of an email chain dated May 13, 2019 to December 10, 2019, (*see id.* Ex. R (Dkt. No. 28-18)).

With respect to these email chains, the Court notes that Plaintiff does not dispute the authenticity or accuracy of those exhibits. (*See generally* Pl's Mem. of Law in Opp'n to Mot. ("Pl's Opp'n") (Dkt. No. 33).) *See also Stewart*, 2017 U.S. Dist. LEXIS 146665, 2017 WL 4045952, at *6 (setting forth the factors for determining whether a document may be incorporated by reference). Additionally, the Amended Complaint makes clear reference to specific emails from these chains, (*see* Am. Compl. ¶ 18 ("On October 24, 2019, [] Cromwell sent a signed email to [Plaintiff] and his colleague Aaron Gardner explaining the steps he had taken to list the [p]roperty for sale in furtherance of generating proceeds to pay towards the [l]oan indebtedness."); *see also id.* ("On December 10, 2019, [] Cromwell sent a signed email to Mr. Gardner and [Plaintiff] stating that the Property had been listed for sale.")), and Plaintiff clearly relied upon those emails in framing the Amended Complaint; indeed, as his

Opposition makes clear, Plaintiff relied on those emails with an eye toward avoiding a finding that his claim was time barred, (*see* Pl's Opp'n 13-14). Thus, the Court will consider Exhibits Q and R to the Cromwell Declaration. *See Garcia v. Dezba Asset Recovery, Inc.*, 665 F. Supp. 3d 390, 397 (S.D.N.Y. 2023) (concluding that an email was incorporated by reference where that email was "quoted from directly" in the operative complaint); *Cromwell-Gibbs v. Staybridge Suite Times Square*, No. 16-CV-5169, 2017 U.S. Dist. LEXIS 95762, 2017 WL 2684063, at *1 n.2 (S.D.N.Y. June 20, 2017) (holding that an email chain was incorporated by reference when the complaint made "direct reference to the e-mail chain [and] the contents of the e-mails exchanged").[2]

Finally, the Court considers one of the exhibits that Plaintiff submitted—a November 25, 2022 letter from D. Michael Bourne to Eustella Fontaine. (*See* Tacon Decl. Ex. E (Dkt. No. 35-5).)[3] The November 25, 2022 letter is plainly referenced in the Amended Complaint, (*see* Am. Compl. ¶ 23 ("On November 25, 2022, on behalf of [] Cromwell, Mr. Bourne sent a signed letter to Ms. Fontaine offering all of the fixtures, fittings[,] and equipment . . . on the [p]roperty in exchange for $40,000 to be put towards the

2. To be clear, the Court will consider the specific emails referenced in the Amended Complaint, not the entirety of the chains reflected in Exhibits Q and R to the Cromwell Declaration.

3. Because they are not referenced in the Amended Complaint and the Parties do not otherwise provide a basis for the Court to consider their remaining exhibits at the motion-to-dismiss stage, the Court declines to do so.

auction expenses and the remaining indebtedness.'")), and Defendants do not dispute the authenticity or accuracy of this document, (*see* Defs' Reply Mem. of Law in Supp. of Mot. ("Defs' Reply") 11 (Dkt. No. 40)). And, again, Plaintiff "relie[d] on the [letter] in framing the [Amended C]omplaint," *Stewart*, 2017 U.S. Dist. LEXIS 146665, 2017 WL 4045952, at *6, given that he depends on it in connection with his indispensable allegations that Defendants' actions reset the applicable statute of limitations, (*see* Pl's Opp'n 15). Thus, the Court concludes that the November 25, 2022 letter is incorporated by reference and that it may properly consider that letter in deciding Defendants' Motion. *See Tyson v. Town of Ramapo*, No. 17-CV-4990, 2019 U.S. Dist. LEXIS 48875, 2019 WL 1331913, at *2 (S.D.N.Y. Mar. 25, 2019) (finding that two letters were incorporated by reference where they were cited and discussed in the operative complaint, and they "relate[d] to [the plaintiff's] termination, which [was] a matter at the core of th[e] case").

B. Factual Background

Unless otherwise stated, the following facts are drawn from the Amended Complaint and the above-referenced Exhibits that the Parties submitted in connection with their Motion papers. The facts alleged are assumed true for the purpose of resolving the instant Motions. *See Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. N.Y.C. Dep't of Educ.*, 9 F.4th 91, 94 (2d Cir. 2021) (per curiam).

Appendix C

1. The Parties

Plaintiff is the court-appointed administrator of CCIB, an Anguillan corporation with its principal place of business in Anguilla. (Am. Compl. ¶ 1.) He was appointed to that position by the High Court of Justice (Anguilla Circuit) on February 22, 2016. (*Id.*) As the administrator of CCIB, he took control over all of CCIB's operations, and has continuously pursued and recovered assets for the benefit of CCIB's creditors. (*Id.*)

Defendants are both citizens of New York. (*Id.* ¶ 2.) Together, Defendants are the sole shareholders of non-party Indigo Holdings Ltd. ("Indigo"), a corporation organized under the laws of Anguilla. (*Id.* ¶ 3.)

2. The Guaranty and Loan

On November 11, 2005, Defendants entered into the Guaranty with CCIB. (*Id.* ¶ 7; *see also* Guaranty.) Pursuant to the Guaranty, Defendants were made guarantors and undertook to "jointly and severally unconditionally guarantee[] and promise[] to pay to [CCIB] . . . any and all indebtedness of" Indigo to CCIB up to $667,000. (Am. Compl. ¶ 7; *see also* Guaranty §§ 1-2.) Section 2 of the Guaranty provided that any payment by Indigo would not reduce the guarantors' maximum obligation under the Guaranty. (Am. Compl. ¶ 7; *see also* Guaranty § 2.)[4]

4. As noted in the Amended Complaint, (*see* Am. Compl. ¶ 8), Section 3 of the Guaranty provides, among other things, that "obligations hereunder are joint and several, and independent of the obligations of [Indigo], and a separate action or actions may

Appendix C

On December 20, 2005, Indigo entered into a loan with CCIB in the principal amount of $667,000, and a term of 246 months commencing on March 10, 2006 and maturing on November 10, 2025. (Am. Compl. ¶ 10; *see also* Loan 2.) The stated purpose of the Loan was to finance the construction of a villa, and the Loan was secured by real property Registration Section West End, Block 17709B, Parcel 177, Anguilla (the "Property"). (Am. Compl. ¶ 11; *see also* Loan 2-3.) In addition, the Loan specifically references the Guaranty as part of the "operative instrument" for the transaction. (Loan 8; *see also* Am. Compl. ¶ 13.)

In February 2012, Indigo defaulted on the terms of the Loan by failing to make required payments. (Am. Compl. ¶ 14.) Under the Loan, if a default occurs in connection with the payment of "any part or installment of principle [sic] or on interest, then its whole sum of principal and interest shall become immediately due and payable at the option of [CCIB] without notice." (Loan 6; *see also* Am. Compl. ¶ 14.) Further, Indigo was subject to a delinquency charge "for each installment in default 10 days[,] in an amount equal to 5% of each installment and any amount payable at the same time." (Loan 6; *see also* Am. Compl. ¶ 14.)

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be brought and prosecuted against Guarantors whether action is brought against [Indigo] or whether [Indigo] be joined in any such action or actions; and *Guarantors waive the benefit of any statute of limitations affecting their liability hereunder or the enforcement thereof*[,]" (Guaranty § 3 (emphasis added)).

3. Plaintiff's Efforts to Collect on the Debt from 2016 to 2019

By letter dated July 19, 2016, Plaintiff made a demand on Defendants to pay Indigo's outstanding debt on the Loan pursuant to the Guaranty. (Am. Compl. ¶ 15.) Thereafter, from August 2016 through July 2017, Defendants corresponded by email with Plaintiff's colleague, Ian Morton ("Morton"), about obtaining a valuation of the Property and putting it up for sale to generate proceeds towards the debt. (*Id.* ¶ 16.) Cromwell is also alleged to have told Morton that he would attempt to convert the Property from a leasehold to fee simple ownership to assist in realizing a higher sale price. (*Id.*)

Following that series of correspondence, the Property was damaged during Hurricane Irma. (*Id.* ¶ 17.) Thus, further correspondence between Defendants and Morton from that time until the spring of 2018 concerned repairing the damage to the Property and obtaining an updated valuation. (*Id.*)

From the middle of 2018 until the end of 2019, the Parties continued communicating about the amount due on the Loan. (*See generally id.* ¶ 18.)[5] Specifically, on July 3,

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5. Plaintiff specifically avers that, "[a]s time stretched on," Defendants "continued to acknowledge the debt owed to CCIB." (Am. Compl. ¶ 18.) However, this conclusory allegation, without more, cannot defeat Defendants' Motion. *See Porter v. Bunch*, No. 16-CV-5935, 2019 U.S. Dist. LEXIS 55088, 2019 WL 1428431, at *10 (S.D.N.Y. Mar. 29, 2019) ("Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to

2018, Cromwell sent a signed letter to Plaintiff indicating that he desired to amicably resolve the debt under the Loan and stating that Indigo was willing to seek a separate loan from a non-bank lender to place towards that debt. (*Id.*) In that letter, Cromwell also mentioned Indigo's obligations under the Loan, as well as the associated obligations of the guarantors (i.e., Defendants). (*Id.*)

Then, on August 2, 2019, Cromwell sent another letter to Plaintiff offering to make two lump-sum payments towards the debt—one at that time and another three years later. (*Id.*) Around two months later—on October 4, 2019—Cromwell sent yet another letter to Plaintiff, stating that he wished to market the Property for sale to put the proceeds towards a resolution of the Loan debt. (*Id.*)

On October 24, 2019, Cromwell sent an email to Plaintiff's colleague, Aaron Gardner ("Gardner"), in which he copied Plaintiff and explained the steps he had taken to list the Property for sale. (*Id.; see also* Cromwell Decl. Ex. Q at 1.) More specifically, Cromwell explained, among other things, that "[w]e have provisionally selected Properties in Paradise as the broker with whom we will list the [P]roperty" and "[w]e have had discussion with the

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prevent a motion to dismiss." (alteration adopted) (quoting *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002)); *see also Lombardo v. Freebern*, No. 16-CV-7146, 2019 U.S. Dist. LEXIS 39355, 2019 WL 1129490, at *9 (S.D.N.Y. Mar. 12, 2019) (same). In any event, as discussed below, Plaintiff has failed to plausibly plead that Defendants acknowledged their debt under the Loan. *See infra* Section II.B.3.

broker about the listing price and how this fits into a 'sales strategy' in the context of the Anguilla market, which is a unique market." (Cromwell Decl. Ex. Q at 1.) Cromwell also noted that he anticipated finalizing the relevant details with the broker the following week. (*See id.*)

Later, on December 10, 2019, Cromwell sent another email to Gardner, copying Plaintiff and stating that the Property had been listed for sale. (Am. Compl. ¶ 18; *see also* Cromwell Decl. Ex. R at 1.) Cromwell indicated that the Property was listed for $895,000, and that he expected "the listing [to] appear on the Properties in Paradise website in the next couple of days." (Cromwell Decl. Ex. R at 1.)

4. Developments Relating to Plaintiff's Collection on the Debt After 2020

As of April 2021, the Property had still not been sold. (Am. Compl. ¶ 19.) Thus, at that time Plaintiff sent a letter to Cromwell, stating that he was no longer willing to forbear on enforcing the Loan and that any sale of the Property would likely leave a shortfall on the total amount due under the Loan. (*Id.*) Cromwell also requested that Indigo begin making repayments on the Loan. (*Id.*) As alleged, however, Indigo failed to do so and Defendants likewise failed to make any payments toward the debt notwithstanding their status as guarantors, and despite having been reminded of their obligations under the Guaranty by Plaintiff. (*Id.* ¶ 20.)

Over eighteen months later, on November 4, 2022, Plaintiff conducted an auction of the Property in accordance with Anguillan law, which resulted in a successful credit bid of $644,000 on behalf of CCIB. (*Id.* ¶ 21.) According to Plaintiff, by November 2022, the unpaid principal, interest and penalties on the Loan amounted to over $1.1 million. (*Id.*)

By letter dated November 7, 2022, Eustella Fontaine ("Fontaine"), Anguillan counsel for Plaintiff, notified D. Michael Bourne ("Bourne"), Anguillan counsel for Defendants, of the results of the auction. (*Id.* ¶ 22.) Fontaine also reminded Defendants' counsel that Defendants were both liable as guarantors for the shortfall between the amount of the sale of the Property and the total amount that Indigo owed under the Loan at that time. (*Id.*)

On November 25, 2022, Bourne sent a letter on behalf of Indigo to Fontaine, offering all of the fixtures, fittings, and equipment ("FFE") on the Property in exchange for $40,000 to be put towards the auction expenses and the remaining indebtedness. (*Id.* ¶ 23; *see also* Tacon Decl. Ex. E at 1 (explaining that Bourne's client, Indigo, was offering "to sell and convey to [Plaintiff] for the sum of US$40,000.00 all the [FFE] which were not part of the public auction [of the Property]").) In the letter, Bourne stated that, in the event that Plaintiff accepted Indigo's offer, the $40,000 "is anticipated to be paid as a credit by or on behalf of Indigo . . . against the auction expenses with any surplus therefrom applied as an addition to the purchase price obtained at the public auction [of the Property]." (Tacon Decl. Ex. E at 1.) In December 2022, Plaintiff agreed to accept the FFE in exchange

for a $35,000 reduction in the outstanding debt amount. (Am. Compl. ¶ 23.) Since that time, neither Indigo nor Defendants have made any payments on the remaining amount due under the Loan. (*See id.* ¶ 24.)

By letters dated July 28, 2023 and August 28, 2023, Plaintiff, through counsel, demanded that Defendants satisfy their obligation under the Guaranty to pay Indigo's unresolved debt under the Loan. (*Id.* ¶ 25.) As of November 15, 2023, taking into account the amount of the credit bid on the Property and the $35,000 credit for the FFE, the total amount still due on the Loan was $582,915.11, which represents $533,457.06 in unpaid principal and $49,458.05 in unpaid interest and late fees. (*Id.* ¶ 26.)[6]

C. Procedural History

Plaintiff filed the initial Complaint in this Action on September 15, 2023. (*See* Compl. (Dkt. No. 10).)[7] On

6. The Court acknowledges that the Amended Complaint states that the amount due on the Loan as of November 15, 2023 was $582,915.10, (*see* Am. Compl. ¶ 26), but based on the figures alleged to still be due in unpaid principal and unpaid interest and late fees, the Court assumes that amount was the result of an arithmetic error.

Separately, the Court notes that Plaintiff asserts Defendants sold their home in Westchester County in January 2022 for $3.5 million, and purchased their current home in August 2022 for $1.65 million. (*Id.* ¶ 27.)

7. Plaintiff attempted to file the Complaint on September 13 and 14, 2023, but those filings were flagged as deficient by the Clerk of Court. (*See* Dkt. Nos. 1, 7.)

October 10, 2023, Defendants submitted a pre-motion letter seeking leave to file a motion to dismiss, (*see* Letter from Steven A. Weg, Esq. to Court (Oct. 10, 2023) (Dkt. No. 18)), and Plaintiff filed a response in which he sought leave to file an amended complaint on October 17, 2023, (*see* Letter from Geoffrey T. Raicht, Esq. to Court (Oct. 17, 2023) (Dkt. No. 19)). The Court granted Plaintiff leave to file an amended complaint on October 27, 2023. (*See* Memo Endorsement (Dkt. No. 20).)

On November 17, 2023, Plaintiff filed the Amended Complaint. (*See* Am. Compl.) The Amended Complaint contains one cause of action in which Plaintiff alleges that Defendants breached the Guaranty by failing to pay the amount due under the Loan in place of Indigo. (*See id.* ¶¶ 28-32.)

Defendants filed another pre-motion letter requesting leave to file the instant Motion on December 5, 2023, (*see* Letter from Steven A. Weg, Esq. to Court (Dec. 5, 2023) (Dkt. No. 22)), to which Plaintiff responded on December 12, 2023, (*see* Letter from Geoffrey T. Raicht, Esq. to Court (Dec. 12, 2023) (Dkt. No. 24)). The Court held a pre-motion conference on December 18, 2023, during which it adopted a briefing schedule. (*See* Dkt. (minute entry for Dec. 18, 2023); *see also* Scheduling Order (Dkt. No. 26).)

Pursuant to that briefing schedule, Defendants filed their Motion on January 23, 2024. (*See* Not. of Mot.; Cromwell Decl.; Mem. of Law in Supp. of Mot. ("Defs'

Mem.") (Dkt. No. 29).)[8] On March 15, 2024, Plaintiff filed his Opposition. (*See* Pl's Opp'n; Tacon Decl.; Porsch Decl.) Defendants filed their Reply on April 1, 2024. (*See* Defs' Reply; Cromwell Reply Decl.)[9]

But the Parties did not see fit to leave it at that. On April 3, 2024, Plaintiff sought leave to file a "very brief sur-reply declaration" and the Court granted that request that same day. (*See* Dkt. Nos. 42-43.) Plaintiff filed that document on April 5, 2024. (*See* Tacon Sur-Reply Decl. (Dkt. No. 44).) Also on April 5, 2024, Defendants filed a letter asking that the Court strike certain paragraphs from Plaintiff's Sur-Reply on the grounds that it went beyond the scope of the purpose for which the Court had granted leave to file that document and because it raised arguments that should have been raised in Plaintiff's Opposition. (*See* Letter from Steven A. Weg, Esq. to Court (Apr. 5, 2024) (Dkt. No. 45).)

II. DISCUSSION

A. Standard of Review

The Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a

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8. Plaintiff requested an extension of time to file his Opposition, as well as a corresponding extension of time for Defendants to file their Reply, on February 21, 2023, and the Court granted that application that same day. (*See* Dkt. Nos. 30-31.)

9. Defendants had requested leave to file an oversized brief on Reply on March 25, 2024, and the Court granted that request the next day. (*See* Dkt. Nos. 38-39.)

motion to dismiss, "a plaintiff's obligation to provide the grounds of [its] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (alteration and quotation marks omitted). Indeed, Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotation marks omitted). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (alteration and quotation marks omitted). Instead, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Although "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, and a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570, if a plaintiff has not "nudged [his or her] claims across the line from conceivable to plausible, the[] complaint must be dismissed," *id.; see also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (citation omitted) (second alteration in original) (quoting

Fed. R. Civ. P. 8(a)(2))); *id.* at 678-79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and "draw[] all reasonable inferences in favor of the plaintiff," *Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 304 n.1 (S.D.N.Y. 2014) (citing *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)). Additionally, "[i]n adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (citation and quotation marks omitted); *see also Gamboa v. Regeneron Pharms., Inc.*, F. Supp. 3d , 719 F. Supp. 3d 349, 2024 U.S. Dist. LEXIS 33585, 2024 WL 815253, at *3 (S.D.N.Y. Feb. 27, 2024) (same).

B. Analysis

Defendants move to dismiss Plaintiff's breach of guaranty claim, arguing that it is time barred in light of New York's six-year statute of limitations for such claims. (*See* Defs' Mem. 11-24.) "Although the statute of limitations is ordinarily an affirmative defense that must be raised in the answer, a statute of limitations defense may be decided

on a Rule 12(b)(6) motion if the defense appears on the face of the complaint." *Ahmed v. Cigna Health Mgmt., Inc.*, No. 23-CV-8094, 2024 U.S. Dist. LEXIS 119471, 2024 WL 3345819, at *3 n.1 (S.D.N.Y. July 8, 2024) (quoting *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 n.12 (2d Cir. 2014)). As the next section of this Opinion & Order makes clear, Defendants' statute of limitations defense does appear on the face of the Amended Complaint. *See infra* Section II.B.1.

1. Applicable Statute of Limitations

At the outset, the Court must decide which statute of limitation applies in this case. "In diversity cases, a federal court located in New York will generally apply the choice-of-law rules and statute of limitations of the law of the forum state, not the law of the state in which the action accrued." *Kleiman v. Kings Point Cap. Mgmt. LLC*, No. 18-CV-4172, 2020 U.S. Dist. LEXIS 186424, 2020 WL 7249441, at *8 (E.D.N.Y. Sept. 30, 2020) (quoting *SOCAR (Societe Cameroonaise d'Assurance et de Reassurance) v. Boeing Co.*, 144 F. Supp. 3d 391, 395 (E.D.N.Y. 2015)), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 223473, 2020 WL 7021648 (E.D.N.Y. Nov. 30, 2020); *see also Segarra v. Delta Airlines, Inc.*, No. 18-CV-8135, 2020 U.S. Dist. LEXIS 103659, 2020 WL 3127879, at *2 (S.D.N.Y. June 12, 2020) ("Federal courts sitting in diversity apply the forum state's statutes of limitations. And 'New York courts generally apply New York's statutes of limitations, even when the injury giving rise to the action occurred outside New York.'" (citation omitted) (quoting *Stuart v. Am. Cyanamid Co.*,

158 F.3d 622, 627 (2d Cir. 1998))).[10] "Under New York's borrowing statute, [N.Y. C.P.L.R.] 202, which governs the choice of law analysis for statutes of limitation, 'when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the court must apply the shorter limitations period, including all relevant tolling provisions, of either: (1) New York; or (2) the state where the cause of action accrued." *Kravitz v. Binda*, No. 17-CV-7461, 2020 U.S. Dist. LEXIS 10893, 2020 WL 927534, at *14 (S.D.N.Y. Jan. 21, 2020) (ultimately quoting *Thea v. Kleinhandler*, 807 F.3d 492, 497 (2d Cir. 2015)), *report and recommendation adopted sub nom. Kravitz as Tr. of Creditor Tr. of Advance Watch Co., Ltd. v. Binda*, 2020 U.S. Dist. LEXIS 33262, 2020 WL 917212 (S.D.N.Y. Feb. 26, 2020); *accord Stuart*, 158 F.3d at 627 (same); *Kidder v. Hanes*, No. 21-CV-1109, 2023 U.S. Dist. LEXIS 11126, 2023 WL 361200, at *4 (W.D.N.Y. Jan. 23, 2023) (same); *see also In re Coudert Bros. LLP*, 673 F.3d 180, 190 (2d Cir. 2012) ("To mitigate against abusive statute-of-limitations shopping, some states have created mechanisms—binding on the local federal courts via [*Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)]—that discriminate against claims accruing out of state. New York's borrowing statute . . . guards against forum shopping by out-of-state plaintiffs by mandating use of the shortest statute of limitations available." (emphasis omitted)).[11]

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10. There is no dispute that the Court may exercise diversity jurisdiction over Plaintiff's single breach-of-guaranty claim. *See* 28 U.S.C. § 1332(a).

11. To be clear, N.Y. C.P.L.R. 202 applies equally where the competing statute of limitations is based upon the law of a country

The Parties appear to agree that Anguilla's statute of limitations for breach-of-guaranty claims is twelve years. *See Nat'l Bank of Anguilla (Priv. Banking & Tr.) Ltd. v. Considine*, 268 F. Supp. 3d 825, 828-29 (D.S.C. 2017) (noting that the statute of limitations for contractual claims in Anguilla is twelve years). It is also undisputed that New York's statute of limitations for a claim arising out of a breach of a guaranty is six years. *See, e.g., Encore Nursing Ctr. Partners Ltd. P'ship-85 v. Schwartzberg*, 172 A.D.3d 1166, 102 N.Y.S.3d 218, 221 (App. Div. 2019) (explaining that the statute of limitations applicable to breach-of-guaranty claims in New York is six years (citing, inter alia, N.Y. C.P.L.R. 213)); *see also Cadlerock Joint Venture, L.P. v. Trombley*, 189 A.D.3d 1157, 134 N.Y.S.3d 236, 237 (App. Div. 2020) (same); *Chi. Title Ins. Co. v. Brookwood Title Agency, LLC*, 179 A.D.3d 887, 114 N.Y.S.3d 703, 704 (App. Div. 2020) (same). Accordingly, given that: (1) New York's statute of limitations for breach-of-guaranty claims is six years shorter than that of Anguilla; (2) Plaintiff is a not a New York resident; and (3) this claim arose in Anguilla, it is clear that New York's six-year statute of limitation applies in this case. *See, e.g., Wang v. Palmisano*, 157 F. Supp. 3d 306, 318-19 (S.D.N.Y. 2016) (applying the N.Y. C.P.L.R. 202 analysis and determining that the relevant statutes of limitations of Massachusetts governed over New York's statute of limitations as to certain claims because "Plaintiff's claim

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other than the United States. *See, e.g., Petroholding Dominicana, Ltd. v. Gordon*, No. 18-CV-1497, 2019 U.S. Dist. LEXIS 92421, 2019 WL 2343658, at *4-8 (S.D.N.Y. June 3, 2019) (determining whether the New York statute of limitations or the statute of limitations under the law of the Dominican Republic applied to the plaintiff's claim under N.Y. C.P.L.R. 202).

accrued in Massachusetts because Massachusetts was where Plaintiff resided at the time his injuries, which were economic, occurred" and "Massachusetts' limitations periods of three and two years" were "shorter than New York's six-year period for equivalent claims").[12]

The Court also notes that, although Plaintiff argued that Anguilla's twelve-year statute of limitations applied to this Action in a pre-motion letter, (*see* Letter from Geoffrey T. Raicht, Esq. to Court 2 (Oct. 17, 2023)), he conceded that New York's six-year statute of limitations applied in his Opposition and exclusively cited cases applying New York law therein, (*see* Pl's Opp'n 12-16; *see also id.* at 12 (stating that New York's "six[-]year statute of limitations" applied to his breach-of-guaranty claim)). Thus, he has waived his choice-of-law argument. *Reed Constr. Data Inc. v. McGraw-Hill Cos. Inc.*, 49 F. Supp. 3d 385, 423 (S.D.N.Y. 2014) ("A party can waive a choice-

12. Lest there be any doubt as to where Plaintiff's claim arose, the Court notes that New York has a general rule that "a foreign plaintiff's cause of action for economic damages accrues 'where the plaintiff resides and sustains the economic impact of the loss.'" *Petroholding Dominicana, Ltd*, 2019 U.S. Dist. LEXIS 92421, 2019 WL 2343658, at *6 (quoting *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 715 N.E.2d 482, 485, 693 N.Y.S.2d 479 (N.Y. 1999)); *see also IKB Int'l S.A. v. Bank of Am.*, No. 12-CV-4036, 2014 U.S. Dist. LEXIS 45813, 2014 WL 1377801, at *5 (S.D.N.Y. Mar. 31, 2014) ("Where . . . a claim is based on financial injury, the claim accrues where the plaintiff resides and sustains the economic impact of the loss." (quotation marks omitted)), *aff'd*, 584 F. App'x 26 (2d Cir. 2014) (summary order). Here, CCIB—on whose behalf Plaintiff brought this Action—is an Anguillan corporation with a principal place of business in Anguilla, and it is undisputed that it suffered its alleged loss in Anguilla. (Am. Compl. ¶ 1.)

of-law argument."); *accord Travelers Cas. Ins. Co. of Am. v. Blizzard Busters Snowplowing Corp.*, No. 21-CV-8220, 2023 U.S. Dist. LEXIS 51949, 2023 WL 2648772, at *4 (S.D.N.Y. Mar. 27, 2023); *see also Tesla Wall Sys., LLC v. Related Cos., L.P.*, No. 17-CV-5966, 2018 U.S. Dist. LEXIS 144578, 2018 WL 4360777, at *2 (S.D.N.Y. Aug. 15, 2018) ("When a party assumes in its briefs that a particular jurisdiction's law applies, it gives implied consent sufficient to establish choice of law." (alteration adopted) (quotation marks omitted)).

Next, for purposes of calculating the timeliness of Plaintiff's claim, the law is clear that the applicable six-year limitations period "begins to run when the principal is in default." *Cadlerock*, 134 N.Y.S.3d at 237; *see also Chi. Title Ins. Co.*, 114 N.Y.S.3d at 704 (same); *Haber v. Nasser*, 289 A.D.2d 199, 733 N.Y.S.2d 720, 721 (App. Div. 2001) ("The six-year [s]tatute of [l]imitations applicable to a guaranty begins to run when the debtor defaults on the underlying debt."). Here, Plaintiff's claim accrued as early as February 2012, when Indigo first defaulted on the Loan, and certainly no later than July 19, 2016, when "Plaintiff made a [] demand on Defendants to pay the outstanding indebtedness of Indigo pursuant to the Guaranty." (Am. Compl. ¶¶ 14-15.) Drawing all reasonable inferences in Plaintiff's favor and concluding that his claim accrued on July 19, 2016, his claim is prima facie untimely, because he did not attempt to file a complaint until September 13, 2023—over a year *after* the limitations period expired on July 19, 2022. (*See* Dkt. No. 1.)[13]

13. Defendants assert that this Action commenced on September *15*, 2023 for statute-of-limitations purposes,

In light of the foregoing, the Court must turn to considering whether Plaintiff has met his burden of "plausibly alleg[ing] that [he] fall[s] within an exception to the applicable statute of limitations." *Bloom v. AllianceBernstein L.P.*, No. 22-CV-10576, 725 F. Supp. 3d 325, 2024 U.S. Dist. LEXIS 54196, 2024 WL 1255708, at *12 (S.D.N.Y. Mar. 25, 2024) (quoting *Roeder v. J.P. Morgan Chase & Co.*, 523 F. Supp. 3d 601, 611-12 (S.D.N.Y. 2021)); *see also Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 436 (S.D.N.Y. 2014) ("[A]ll of the claims in the [c]omplaint are prima facie time-barred. Accordingly, the claims survive the defendants' statute-of-limitations-based defense only if the plaintiffs have plausibly alleged that they fall within an exception to the applicable statutes of limitations."), *aff'd*, 579 F. App'x 7 (2d Cir. 2014) (summary order).[14]

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presumably because the complaints filed on September 13 and 14, 2023 were flagged by the Clerk of Court as deficient. (*See* Defs' Mem. 13; *see also* Dkt. Nos. 1, 7.) However, such deficiencies "do[] not invalidate the timely filing of [a c]omplaint." *Rodriguez v. City of New York*, No. 10-CV-1849, 2011 U.S. Dist. LEXIS 102725, 2011 WL 4344057, at *3 (S.D.N.Y. Sept. 7, 2011) (explaining that a deficient complaint filed before the statute of limitations had run constituted valid commencement of the action); *see also Byars v. City of Waterbury*, No. 93-CV-1329, 1993 U.S. Dist. LEXIS 17336, 1993 WL 513273, at *1 (D. Conn. Dec. 2, 1993) (similar and collecting cases); Fed. R. Civ. P. 5(d)(4) ("The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.").

14. On this score, Plaintiff failed to address whether certain New York executive orders issued during the COVID-19 pandemic operate to extent the limitations period applicable to his claim. (*See* Defs' Mem. 13 n.2.) As Defendants pointed out, courts are clearly split on the import of those executive orders. *See, e.g.*,

2. Waiver of the Statute of Limitations Defense

As noted above, Section 3 of the Guaranty provides that "Guarantors[, i.e., Defendants,] waive the benefit of any statute of limitations affecting their liability hereunder or the enforcement thereof." (Guaranty § 3.) Defendants assert that such a clause is unenforceable. (*See* Defs' Mem. 13-14.) The Court agrees.

New York General Obligations Law § 17-103 provides that:

> A promise to waive[] . . . the statute of limitation applicable to an action arising out of a contract

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Uzoigwe v. Charter Commc'ns, LLC, No. 23-CV-7383, 2024 U.S. Dist. LEXIS 60583, 2024 WL 1311525, at *4 (E.D.N.Y. Mar. 18, 2024) (explaining that "some courts strictly interpret the word 'toll' in [the original executive order] to mean a 228-day extension on limitations periods for *all* claims," whereas other courts "have found that [the executive orders] *only* applied to limitations periods for claims that would have otherwise expired during the time when these [executive orders] were in effect, between March 20, 2020 and November 3, 2020" (emphases in original) (collecting cases)), *report and recommendation adopted*, 2024 U.S. Dist. LEXIS 74902, 2024 WL 1756503 (E.D.N.Y. Apr. 24, 2024). This Court, however, need not delve any deeper into this morass at this juncture, because the effect of those executive orders (if any) on limitations periods generally has no bearing on the Court's analysis with respect to the instant Motion given that—as pled—this case would be time barred even assuming that the most generous interpretation of the executive orders applied. That is so because 228 days after July 19, 2022 is March 4, 2023, and the initial Complaint was not filed until more than *six months* later. (*See* Dkt. No. 1.)

> express or implied in fact or in law, *if made after the accrual of the cause of action* and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise.

N.Y. Gen. Oblig. Law § 17-103(1). Thus, under certain circumstances, parties can agree to waive a statute of limitations defense. *See id.* Crucially, however, "for an agreement that extends the statute of limitation to be valid, § 17-103(1) 'requires that the agreement be made after the accrual of the cause of action.'" *Xerox State & Loc. Sols., Inc. v. Xchanging Sols. (USA), Inc.*, 216 F. Supp. 3d 355, 361 (S.D.N.Y. 2016) (quoting *Lifset v. W. Pile Co.*, 85 A.D.2d 855, 446 N.Y.S.2d 487, 489 (App. Div. 1981)); *see also John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 389 N.E.2d 99, 103, 415 N.Y.S.2d 785 (N.Y. 1979) (explaining that agreements under § 17-103 "made prior to the accrual of the cause of action continue to have *no effect*" (emphasis added) (quotation marks omitted)).

Here, there is no question that the purported statute-of-limitations waiver in the Guaranty is of no effect. The Amended Complaint is clear that the Guaranty was executed in *2005*, (*see* Am. Compl. ¶¶ 7-8); however, as noted above, Plaintiff's cause of action did not accrue until

years later—2012 at the earliest and 2016 at the latest, (*see id.* ¶¶ 14-15). Therefore, Plaintiff cannot rely on Section 3 of the Guaranty to get around Defendants' statute-of-limitations defense. *See Deutsche Bank Nat'l Tr. Co. Tr. for Harborview Mortg. Loan Tr. v. Flagstar Cap. Mkts. Corp.*, 32 N.Y.3d 139, 88 N.Y.S.3d 96, 112 N.E.3d 1219 (N.Y. 2018) (stating that § 17-103 "*requires* an agreement [thereunder] to be made 'after the accrual of the cause of action[']" (quoting N.Y. Gen. Oblig. Law § 17-103(1)).[15]

3. Acknowledgment of and Partial Payment Toward the Debt

Plaintiff attempts to meet his burden to plausibly plead that this case falls within an exception to the applicable statute of limitations, *see Twersky*, 993 F. Supp. 2d at 436, by arguing that Defendants' alleged acknowledgement of

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15. Separate and apart from the fact that Section 3 of the Guaranty is unenforceable as a matter of law, Plaintiff fails to address this argument in his Opposition, (*see generally* Pl's Opp'n,), and therefore has effectively conceded it, *see Cardoso v. Wells Fargo Bank, N.A.*, No. 21-CV-8189, 2022 U.S. Dist. LEXIS 171105, 2022 WL 4368109, at *9 (S.D.N.Y. Sept. 20, 2022) ("The plaintiff's opposing memorandum of law does not respond to th[ese] argument[s], and effectively concedes [them] by his failure to respond to them." (alterations adopted) (citation omitted)); *Di Pompo v. Mendelson*, No. 21-CV-1340, 2022 U.S. Dist. LEXIS 26969, 2022 WL 463317, at *2 (S.D.N.Y. Feb. 15, 2022) ("A plaintiff effectively concedes a defendant's arguments by his failure to respond to them." (quoting *Felske v. Hirschmann*, No. 10-CV-8899, 2012 U.S. Dist. LEXIS 29893, 2012 WL 716632, at *3 (S.D.N.Y. Mar. 1, 2012))), *on reconsideration in part*, 2022 U.S. Dist. LEXIS 65106, 2022 WL 1093500 (S.D.N.Y. Apr. 7, 2022).

their debt under the Loan, as well as an alleged partial payment toward that debt, functionally restarted the limitation period such that it began "running anew," (*see* Pl's Opp'n 12-16).

It is true that "[u]nder New York law, a debtor's acknowledgement of indebtedness may toll the statute of limitations for claims on that debt." *Bainbridge Fund Ltd. v. Republic of Argentina*, 37 F.4th 847, 852 (2d Cir. 2022) ("This doctrine treats the recognition of debt as 'a new promise to pay.'" (quoting *Batavia Townhouses, Ltd. v. Council of Churches Hous. Dev. Fund Co.*, 189 A.D.3d 20, 133 N.Y.S.3d 133, 137 (App. Div. 2020)). This rule is codified under N.Y. General Obligations Law § 17-101, which provides as follows:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

N.Y. Gen. Oblig. Law § 17-101.

For this doctrine to be effective, "[t]he acknowledgement must be [1] in writing, [2] made under such circumstances that an express promise to pay the debt may be fairly implied, and [3] must contain nothing inconsistent with an

intention on the part of the debtor to pay it[.]" *Bainbridge Fund Ltd.*, 37 F.4th at 852 (quotation marks and citation omitted); *see also Wizara, LLC v. Smartlink Commc'n, SpA*, No. 17-CV-424, 2024 U.S. Dist. LEXIS 38814, 2024 WL 964227, at *3 (N.D.N.Y. Mar. 6, 2024) (same); *Faulkner v. Arista Recs. LLC (Faulkner I)*, 602 F. Supp. 2d 470, 478 (S.D.N.Y. 2009) ("To toll effectively or restart the running of the statute of limitations under § 17-101, an acknowledgment or promise must be in writing, be signed by the debtor party, recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it." (quotation marks omitted) (citing, inter alia, *Lew Morris Demolition v. Bd. of Educ.*, 40 N.Y.2d 516, 355 N.E.2d 369, 371, 387 N.Y.S.2d 409 (N.Y. 1976)).

This doctrine is not without limitations. For instance, "[b]oth the acknowledgement of the existing debt, and the intent to repay the same, must be *unconditional*." *Bild v. Konig*, No. 09-CV-5576, 2011 U.S. Dist. LEXIS 14205, 2011 WL 666259, at *4 (E.D.N.Y. Feb. 14, 2011) (citing *In re Brill*, 318 B.R. 49, 55 (S.D.N.Y.2004)); *see also Faulkner I*, 602 F. Supp. 2d at 479 (same). In fact, "[i]f any condition must be satisfied prior to payment being made, the creditor must show that the condition has been satisfied before application of the toll embodied in § 17-101." *Faulkner I*, 602 F. Supp. 2d at 479; *see also Costa v. Deutsche Bank Nat'l Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1*, 247 F. Supp. 3d 329, 349 (S.D.N.Y. 2017) (explaining that, insofar as "a written promise or acknowledgement is not unconditional but instead is contingent upon some future event, the creditor has the burden of proving that the condition has been met" (citation omitted)).

Further, "[a]n offer to settle for less than a plaintiff's outstanding claim does not constitute an acknowledgment because it is conditioned on the plaintiff's agreement to accept less than the full amount of the outstanding debt." *Lucesco Inc. v. Republic of Argentina*, No. 16-CV-7638, 2017 U.S. Dist. LEXIS 128245, 2017 WL 3741342, at *5 (S.D.N.Y. Aug. 8, 2017) (citing *Hakim v. Peckel Fam. Ltd. P'ship*, 280 A.D.2d 645, 721 N.Y.S.2d 543, 544 (App. Div. 2011)); *see also Callahan v. Credit Suisse (USA), Inc.*, No. 10-CV-4599, 2011 U.S. Dist. LEXIS 93864, 2011 WL 4001001, at *7 (S.D.N.Y. Aug. 18, 2011) ("[T]olling [under § 17-101] does not apply here because [the d]efendants' acknowledgments contained in [a s]eparation [a]greement were clearly conditioned on the p]laintiff's acceptance. Accordingly[,] the intent to pay cannot be considered unconditionally acknowledged.").

In connection with his § 17-101 argument, Plaintiff expressly disclaims reliance upon most of the communications between himself and Defendants that are alleged in the Amended Complaint, many of which occurred more than six years before the expiry of the statute of limitations. (*See* Pl's Opp'n 13 n.1; *see also* Am. Compl. ¶¶ 15-18.) Instead, Plaintiff relies upon three emails—dated October 24, 2019, November 8, 2019, and December 10, 2019, respectively—as well as an alleged partial payment by Defendants toward their debt under the Loan. (*See* Pl's Opp'n 13-16.) The Court will assess these two arguments in turn below.[16]

16. The Court rejects Defendants' prefatory argument that it cannot consider the Parties' communications in connection with this analysis because such communications concern possible

Appendix C

a. The Emails

First, the Court considers whether the emails upon which Plaintiff relies meet the requirements of § 17-101. Again, Plaintiff points to emails dated October 24, 2019, November 8, 2019, and December 10, 2019. (*See* Pl's Opp'n 13-14.)

As an initial matter, the Court notes that the Amended Complaint makes no allegation whatsoever regarding the November 8, 2019 email. (*See generally* Am. Compl.) Thus, there is no basis for the Court to consider it, as it cannot be said to be incorporated by reference or otherwise integral to the Amended Complaint. *See supra* Section I.A. Further, to the extent Plaintiff seeks to amend his pleading through his Opposition, he simply cannot do so. *See Cortese v. Skanska Koch, Inc.*, No. 20-CV-1632, 2021 U.S. Dist. LEXIS 24152, 2021 WL 429971, at *18 n.4 (S.D.N.Y. Feb. 8, 2021) ("[The p]laintiffs' argument fails for the simple reason that it was not pleaded and a party

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settlement and are therefore inadmissible pursuant to Federal Rule of Evidence 408. (*See, e.g.*, Defs' Mem. 15-16.) Putting aside the fact that "the admissibility of documents incorporated in the complaint is [generally] irrelevant at the dismissal stage[,]" *Westwide Winery, Inc. v. SMT Acquisitions, LLC*, 511 F. Supp. 3d 256, 265 (E.D.N.Y. 2021) (quoting *Cerni v. J.P. Morgan Sec., LLC*, 208 F. Supp. 3d 533, 540-41 (S.D.N.Y. 2016)), settlement communications may be admissible for "another purpose," Fed. R. Evid. 408(b), such as resolving disputes over whether a statute of limitations bars a plaintiff's claims, *see, e.g., Faulkner v. Arista Recs. LLC (Faulkner II)*, 797 F. Supp. 2d 299, 317 (S.D.N.Y. 2011) (holding that Rule 408 did not preclude the court from considering a settlement communication for purposes of its § 17-101 analysis).

cannot amend its complaint through a brief."); *see also Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (finding that a plaintiff may not amend its complaint through its opposition brief); *Schulz v. Medtronic, Inc.*, No. 21-CV-414, 2022 U.S. Dist. LEXIS 29393, 2022 WL 503960, at *2 (D. Conn. Feb. 18, 2022) ("[I]t is axiomatic that [a] [c]omplaint cannot be amended by the briefs in opposition to a motion to dismiss.") (quoting *Weir v. City of New York*, No. 05-CV-9268, 2008 U.S. Dist. LEXIS 61542, 2008 WL 3363129, at *9 (S.D.N.Y. Aug. 11, 2008)); *Red Fort Cap., Inc. v. Guardhouse Prods. LLC*, 397 F. Supp. 3d 456, 476 (S.D.N.Y. 2019) (same). The Court therefore declines to consider the November 8, 2019 email.

In the Amended Complaint, Plaintiff does aver that, on October 24, 2019, "Cromwell sent a signed email to [Plaintiff] and his colleague [] Gardner explaining the steps he had taken to list the Property for sale in furtherance of generating proceeds to pay towards the Loan indebtedness." (Am. Compl. ¶ 18.) In reality, however, Cromwell wrote the October 24, 2019 email to Gardner, copying Plaintiff, stating in relevant part:

> In his letter dated 9 October 2019, [Plaintiff] suggested we retain an agent and obtain an outline of the sales strategy together with an estimated achievable sale price from the agent.
>
> We have provisionally selected Properties in Paradise as the broker with whom we will list the property. This will be an exclusive listing (it is open to being co-brokered with other

> brokers). The broker has sent to us their form of broker/agent agreement and we are in the process of negotiating this document and expect to finalize it when [Rozycki] is in Anguilla next week. [Rozycki] will be in Anguilla commencing October 29. We have had discussion with the broker about the listing price and how this fits into a "sales strategy" in the context of the Anguilla market, which is a unique market. We expect to finalize this and any other details with the broker, and sign the listing agreement, when [Rozycki] is in Anguilla next week.

(Cromwell Decl. Ex. Q at 1.)

As to the December 10, 2019 email, Plaintiff alleges that "Cromwell sent a signed email to [] Gardner and [Plaintiff] stating that the Property had been listed for sale." (Am. Compl. ¶ 18.) And as the email itself reveals, Cromwell in fact emailed Gardner, copying Plaintiff, and said:

> The property is listed with Properties in Paradise at $895,000. The broker still needs to choose photographs to be put on the website. We have been communicating on this with the broker, and we expect that the listing will appear on the Properties in Paradise website in the next couple of days.

(Cromwell Decl. Ex. R at 1.)

Defendants argue that neither of these emails constitutes the requisite unconditional acknowledgement of their debt under the Loan that is consistent with an intention by Defendants to pay that debt. (Defs' Mem. 22; Defs' Reply 7-11.) The Court agrees. On their face, the October 24, 2019 and December 10, 2019 emails do not explicitly acknowledge the debt under the Loan, nor do they say anything from which the Court can fairly imply "an express promise to pay the debt[,]" in whole or part. *See Bainbridge Fund Ltd.*, 37 F.4th at 852 (quotation marks and citation omitted). Put differently, this is not a case where Defendants' writings indicated that they would "honor and pay the total amount of the[ir] debt." *Wizara, LLC*, 2024 U.S. Dist. LEXIS 38814, 2024 WL 964227, at *3 (quotation marks omitted) (concluding that the applicable statute of limitations had reset where, among other things, the defendant had sent the plaintiff two letters, one asking for an extension of time to pay an acknowledged debt, and another stating that it would "honor and pay the total amount of the debt by the end of year 2015[]" (quotation marks omitted)).

To be sure, accepting Plaintiff's allegations as true, he does allege that Cromwell "sent a signed letter to [Plaintiff] stating that he wished to market the Property for sale to put the proceeds towards a resolution of the Loan debt" on October 4, 2019. (Am. Compl. ¶ 18.) However, that allegation, coupled with the October 24, 2019 and December 10, 2019 emails, at most implies an offer to make a partial payment toward the debt, or, perhaps, to settle the loan. But insofar as Defendants sought to make a partial payment, Plaintiff is required to demonstrate

that "[any] payment was 'accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder.'" *U.S. Bank Nat. Ass'n v. Martin*, 144 A.D.3d 891, 41 N.Y.S.3d 550, 552 (App. Div. 2016) (quoting *Lew Morris Demolition*, 355 N.E.2d at 371). Far from plausibly alleging "circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due," *id.*, Plaintiff only alleges that the Property was ultimately put up for sale at an auction in 2022, "which resulted in a successful credit bid of $644,000 on behalf of CCIB[,]" and he further makes clear that, at that time, "the unpaid principal, interest, and penalties on the Loan [was] over $1.1 million[,]" (Am. Compl. ¶ 21). But he makes no allegation that there was any sort of acknowledgment by Defendants that they still owed Plaintiff under the Loan, let alone an absolute and unqualified one. (*See generally id.*)

And to the extent the October 24, 2019 and December 10, 2019 emails could be construed as an offer from Defendants to settle their debt, the Court reiterates that "[a]n offer to settle for less than a plaintiff's outstanding claim does not constitute an acknowledgment [under § 17-101] because it is conditioned on the plaintiff's agreement to accept less than the full amount of the outstanding debt." *Lucesco Inc.*, 2017 U.S. Dist. LEXIS 128245, 2017 WL 3741342, at *5; *see also Hakim*, 721 N.Y.S.2d at 544 (explaining that the defendants' settlement offer letters did not renew the applicable limitations period under § 17-101, because the settlement was "conditioned on the plaintiff's acceptance of a disputed reduction in the

principal amount of the mortgage—a condition which was never accepted by the plaintiff[,]" and concluding that "[t]he letters did not constitute an unconditional and unqualified acknowledgment of a debt"); *Sitkiewicz v. County of Sullivan*, 256 A.D.2d 884, 681 N.Y.S.2d 677, 678-79 (App. Div. 1998) (holding that an "offer letter was not an unconditional promise to pay a sum certain" in satisfaction of § 17-101 because it did not acknowledge the debt but "merely made an offer of settlement which [the] plaintiff never accepted").[17] The Amended Complaint, however, is devoid of any allegation even suggesting that Plaintiff took Defendants up on their offer as set forth in the October 24, 2019 and December 10, 2019 emails. (*See generally* Am. Compl.) To the contrary, Plaintiff *himself* conducted the auction that netted far less than the amount still owing on the Loan. (*See id.* ¶ 21.)

Plaintiff's reliance on *Hawk Mountain LLC v. RAM Capital Group LLC*, 192 A.D.3d 447, 144 N.Y.S.3d 18 (App. Div. 2021), in opposition to the Motion is misplaced. (Pl's Opp'n 16.) There, the Appellate Division reversed the trial court's decision granting the defendant's motion to dismiss on statute-of-limitations grounds, and concluded that the separation and distribution agreement at issue met the requirements of § 17-101 given that it provided, in relevant part, that "[the] defendant agree[d] to make full payment and satisfaction of all of the outstanding indebtedness plus accrued interest that it owe[d the] plaintiffs, and one of

17. Plaintiff also has not alleged that any sale of the Property as discussed in the October 24, 2019 and December 10, 2019 emails would have covered the amount due under the Loan. (*See generally* Am. Compl.)

the schedules annexed to the [the agreement] includes the amount owed by [the] defendant . . . on a note, as well as accrued interest on that amount." *Hawk Mountain LLC*, 144 N.Y.S.3d at 19 (alteration adopted) (quotation marks omitted).[18]

In short, Plaintiff has not shown, much less plausibly alleged, that the October 24, 2019 and December 10, 2019 emails meet the requirements of § 17-101.

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18. To the extent that Plaintiff relies upon *Maidman Family Parking, LP v. Wallace Industries, Inc.*, 145 A.D.3d 1165, 42 N.Y.S.3d 476 (App. Div. 2016) and *GP Hemisphere Associates, L.L.C. v. Republic of Nicaragua*, No. 99-CV-10302, 2000 U.S. Dist. LEXIS 14165, 2000 WL 1457025 (S.D.N.Y. Sept. 28, 2000), the Court likewise finds those cases to be clearly distinguishable. (*See* Pl's Opp'n 12.) In *Maidman Family Parking*, the Appellate Division affirmed the trial court's conclusion that § 17-101 operated to renew the limitations period, where a defendant signed a letter "acknowledg[ing] the principal amount and maturity date for each loan and[] . . . agree[ing] to waive any statute of limitations defense." 42 N.Y.S.3d at 478. Plaintiff has not plausibly alleged here that such a signed writing exists in this case. And in *GP Hemisphere Associates*, another court in this District determined that a settlement agreement met the requirements of § 17-101, because, among other things, the agreement: "detail[ed] the principal amounts owed" to the plaintiff, which amounts the defendant "expressly acknowledge[d]" therein; and "contain[ed] an acknowledgment by [the defendant] of its obligation to pay accrued interest, along with a commitment by [the defendant] to determine the amounts of such interest." 2000 U.S. Dist. LEXIS 14165, 2000 WL 1457025, at *4. Again, Plaintiff has not plausibly alleged that Defendants' have so plainly acknowledged their alleged debt under the Loan for purposes of § 17-101.

b. The Alleged Partial Payment

The Court next addresses whether an alleged partial payment toward Defendants' debt under the Loan restarted the limitations period. Plaintiff specifically asserts that "[b]y conveying the FFE in further reduction of the loan debt, Defendants made a partial payment that restarted the statute of limitations anew." (Pl's Opp'n 15.)

Although the Parties' briefing conflates the issues somewhat, Plaintiff's argument here is not quite a § 17-101 argument. Apart from that provision—and as alluded to above—under New York common law "[a] limitations period may be extended pursuant to the 'partial payment exception,' which 'has the effect of extending or renewing the statute of limitations period' when there is 'a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgement by the debtor of more being due.'" *Navon v. Schachter Portnoy, L.L.C.*, No. 19-CV-63, 2019 U.S. Dist. LEXIS 155175, 2019 WL 4306403, at *4 (E.D.N.Y. Sept. 11, 2019) (quoting *McNeary v. Charlebois*, 169 A.D.3d 1295, 95 N.Y.S.3d 421, 424 (App. Div. 2019)); *see also In re Mallett, Inc.*, No. 21-11619, 2024 Bankr. LEXIS 71, 2024 WL 150628, at *11 (Bankr. S.D.N.Y. Jan. 12, 2024) (same); *U.S. Bank Nat. Ass'n*, 41 N.Y.S.3d at 552 (noting that "[i]n order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (quotation marks omitted)).

Appendix C

In his Amended Complaint, Plaintiff alleges that Defendants' Anguillan counsel, Bourne, offered Plaintiff, through his Anguillan counsel, "all of the [FFE] on the Property in exchange for $40,000 to be put towards the auction expenses and the remaining indebtedness." (Am. Compl. ¶ 23; *see also* Tacon Decl. Ex. E at 1 (letter from Bourne noting that he was instructed "by Indigo" and that Indigo's offer was "to sell and convey to [Plaintiff] for the sum of US$40,000.00 all the [FFE] which were not part of the public auction transaction[,]" to be "paid as a credit by or on behalf of Indigo . . . against the auction expenses with any surplus therefrom applied as an addition to the purchase price obtained at the public auction").) As alleged, Plaintiff ultimately "agreed to take the FFE in exchange for a $35,000 reduction in the outstanding indebtedness" in December 2022. (Am. Compl. ¶ 23.)

The Court has little trouble concluding that Plaintiff has failed to plausibly allege that Defendants' purported partial payment toward their debt under the Loan served to restart the statute of limitations governing his breach-of-guaranty claim. Accepting all of Plaintiff's allegations as true and drawing all reasonable inferences in his favor, the Amended Complaint merely alleges Defendants paid $35,000 toward Indigo's debt. (*See id.*) However, Plaintiff has alleged *no* circumstances "amounting to an absolute and unqualified acknowledgement by the debtor of more being due[,]'" as is required under New York common law. *See Navon*, 2019 U.S. Dist. LEXIS 155175, 2019 WL 4306403, at *4 (citation omitted); *accord U.S. Bank Nat. Ass'n*, 41 N.Y.S.3d at 552 (same); *see also RTT Holdings, LLC v. Nacht*, 206 A.D.3d 834, 170 N.Y.S.3d 201, 203 (App. Div. 2022) (affirming the trial court's decision granting

a motion to dismiss on statute-of-limitations grounds because, notwithstanding the defendant-decedent's partial payment toward her mortgage debt, there were no allegations or evidence "evince[ing] an absolute and unqualified acknowledgment of [that] mortgage debt"); *Chase v. Houghton*, 41 A.D.3d 1062, 838 N.Y.S.2d 260, 261 (App. Div. 2007) (affirming a lower court's dismissal of the plaintiff's complaint on statute-of-limitations grounds and concluding that "the evidence failed to establish an absolute and unqualified acknowledgment of more being owed" because, although the defendant made a partial payment toward their debt, the payment check "bore no notation as to its purpose and stated no remaining balance[,]" an invoice relatedly bore "no notation by [the] defendant acknowledging any additional debt[,]" and "there [was no] any other documentary evidence or testimony that defendant had acknowledged a remaining balance" (quotation marks omitted)).

In relying on *United States v. Glens Falls Insurance Co.*, 546 F. Supp. 643 (N.D.N.Y. 1982), Plaintiff misunderstands the law, (*see* Pl's Opp'n 12). There, as Plaintiff notes, the court stated that "at common law, part payment of a debt starts the statute of limitations running anew in that part payment is tantamount to a voluntary acknowledgment of the existence of the debt, from which the law implies a new promise to pay the balance." *Glens Falls*, 546 F. Supp. at 645. However, the court did not end there; in a sentence Plaintiff neglected to quote, the court explained—in accord with the cases discussed above—that "[i]t must be shown that there was part payment of an admitted debt, made and accepted in circumstances where an *unequivocal promise may be inferred to pay*

the remainder of the debt." *Id.* at 645-46 (emphasis added) (citing *Lopez Lanza v. Garco Export, Inc.*, 30 A.D.2d 955, 294 N.Y.S.2d 234 (App. Div. 1968)). Plaintiff has not made that showing here.[19]

* * *

In sum, because Plaintiff has failed to plausibly allege that Defendants acknowledged their debt within the meaning of § 17-101—or via a partial payment—he cannot rely on either to avoid the fact that, as alleged, his claim is prima facie time barred.

4. Equitable Estoppel

Finally, Plaintiff raises the alternative argument that Defendants should be equitably estopped from raising a statute of limitations defense. (*See* Pl's Opp'n 16-20.)

The doctrine of equitable estoppel, which "applies where it would be unjust to allow a defendant to assert

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19. Plaintiff also points to *Fannie Mae v. Brigandi*, No. 611415/2015, 2016 N.Y. Misc. LEXIS 5612 (Sup. Ct. May 11, 2016). (Pl's Opp'n 12, 15.) However, the Court is unpersuaded by the analysis in that case because, there, the court—like Plaintiff here—relied on *Glens Falls* for the proposition that "partial payments of [a] debt, before or after the statute's expiration, toll the statute of limitations and start it running anew[,]" *Fannie Mae*, 2016 N.Y. Misc. LEXIS 5612, at *3-4, but seemingly ignores the instruction in *Glens Falls* itself that New York common law requires such a partial payment to be "made and accepted in circumstances where an unequivocal promise may be inferred to pay the remainder of the debt," 546 F. Supp. at 646.

a statute of limitations defense[,]" *Zumpano v. Quinn*, 6 N.Y.3d 666, 849 N.E.2d 926, 929, 816 N.Y.S.2d 703 (N.Y. 2006), "is an 'extraordinary remedy[,]'" *Accent Delight Int'l Ltd.. v. Sotheby's*, No. 18-CV-9011, 2024 U.S. Dist. LEXIS 16122, 2024 WL 343171, at *1 (S.D.N.Y. Jan. 30, 2024) (quoting *Twersky*, 993 F. Supp. 2d at 442). "To benefit from equitable estoppel under New York law, [a] plaintiff must demonstrate: (1) conduct by the defendant which amounts to a false representation or concealment of material facts; (2) the defendant intended the false representation would be acted upon by the plaintiff; and (3) the defendant knew the real facts." *Chen v. Cenntro Elec. Grp. Ltd.*, No. 22-CV-7760, 2023 U.S. Dist. LEXIS 57113, 2023 WL 2752200, at *5 (S.D.N.Y. Mar. 31, 2023) (footnote omitted) (citing *In re Vebeliunas*, 332 F.3d 85, 93-94 (2d Cir. 2003)). "With respect to himself, a plaintiff must show: '(1) lack of knowledge and of the means of knowledge of the true facts; (2) reliance upon the conduct of the defendant; and (3) prejudicial changes in his position.'" *Id.* (quoting *In re Vebeliunas*, 332 F.3d at 94). Put another way, a plaintiff seeking to invoke equitable estoppel "must also demonstrate reasonable reliance on the defendant's misrepresentations, and due diligence in bringing a claim when the conduct relied upon as the basis for equitable estoppel ceases to be operational." *Twersky*, 993 F. Supp. 2d at 442-43 (citing *Putter v. N. Shore Univ. Hosp.*, 7 N.Y.3d 548, 858 N.E.2d 1140, 1142-43, 825 N.Y.S.2d 435 (N.Y. 2006); *Zumpano*, 849 N.E.2d at 929, 931).

Importantly, the Second Circuit has held that "[w]hen a plaintiff relies on a theory of equitable estoppel to save a claim that otherwise appears untimely on its face, the

plaintiff must specifically plead facts that make entitlement to estoppel plausible (not merely possible)." *Thea*, 807 F.3d at 501 (citing *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 556-57); *accord Khan v. Yale Univ.*, 85 F.4th 86, 101-02 (2d Cir. 2023); *see also Dumontet v. UBS Fin. Servs., Inc.*, No. 21-CV-10361, 2024 U.S. Dist. LEXIS 60874, 2024 WL 1348752, at *11 n.23 (S.D.N.Y. Mar. 29, 2024) (same); *Rodriguez v. Bipin*, No. 22-CV-181, 2023 U.S. Dist. LEXIS 55300, 2023 WL 3260129, at *4 (N.D.N.Y. Mar. 30, 2023) (same), *report and recommendation adopted sub nom. Rodriguez v. Bhavsar*, 2023 U.S. Dist. LEXIS 77549, 2023 WL 3251522 (N.D.N.Y. May 4, 2023).[20]

In support of his equitable estoppel argument, Plaintiff asserts that "[i]n various ongoing communications

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20. Courts are not in complete accord with respect to whether a plaintiff needs to plead the elements of equitable estoppel with *particularity* pursuant to Federal Rule of Civil Procedure 9(b). *Compare Twersky*, 993 F. Supp. 2d at 443 n.5 ("Federal courts follow New York law in requiring a plaintiff to plead each element of equitable estoppel with particularity." (collecting cases)), *with Bild*, 2011 U.S. Dist. LEXIS 14205, 2011 WL 666259, at *6 ("The equitable estoppel asserted by Plaintiff, however, while equitable in nature, is not a cause of action or a defense—it is rather an equitable bar to the assertion of the affirmative defense of statute of limitations. Accordingly, Rule 9(b), governing pleadings, should not apply." (quotation marks and citation omitted)), *on reconsideration in part*, 2011 U.S. Dist. LEXIS 44368, 2011 WL 1563576 (E.D.N.Y. Apr. 25, 2011). Here again, the Court need not take sides on this issue because Plaintiff failed to plausibly plead sufficient facts demonstrating his entitlement to rely on the doctrine equitable estoppel, regardless of whether he was required to do so with particularity. *See Twersky*, 993 F. Supp. 2d at 443 n.5 (coming to a similar conclusion).

between the [P]arties to resolve the debt, Plaintiff or his representatives told Defendants that Plaintiff required evidence of Defendants' financial status in order to continue resolution attempts and forbear from filing suit." (Pl's Opp'n 16; *see also id.* at 19 ("Plaintiff was quite clear that he would forbear from filing suit only if he had visibility into Indigo's and Defendants' (as guarantors) ability to pay the debt.") He further contends—among other things—that, although Defendants indicated on a financial statement that their home in Scarsdale, New York was worth $2.2 million and had "a total of $1,830,359 in encumbrances," they sold that home for $2.2 million just six months later. (*Id.* at 18 ("It strains credulity that Defendants believed they were accurately representing the value of their Scarsdale home in their June 2021 communication to Plaintiff and then the market value of the property just happened to increase nearly 60% in the six months in which they later sold it.").) Based on that purported misrepresentation and other potential, as-yet undiscovered misrepresentations on their financial statement, Plaintiff argues, in essence, that Defendants should not be able to rely on a statute-of-limitations defense because they duped him into refraining from bringing this Action sooner. (*See id.* at 16-20.)

Plaintiff cannot rely on the doctrine of equitable estoppel at this juncture for the simple reason that he did not "specifically plead facts that make entitlement to estoppel plausible (not merely possible)." *Thea*, 807 F.3d at 501. Indeed, apart from noting that "Defendants sold their home in Westchester in January 2022 for $3.5 million[,]" (Am. Compl. ¶ 27), Plaintiff failed to plead *any* of the facts he relies upon in connection with his equitable estoppel

argument, (*compare* Pl's Opp'n 16-20, *with* Am. Compl.). For Plaintiff's claim to survive Defendants' Motion, that simply will not do. *See Thea*, 807 F.3d at 501; *see also Nachman v. Tesla, Inc.*, No. 22-CV-5976, 2023 U.S. Dist. LEXIS 176468, 2023 WL 6385772, at *4 (E.D.N.Y. Sept. 30, 2023) ("[E]quitable estoppel . . . [is] unavailable because [the] plaintiff has not adequately pleaded in the complaint that 'the action was brought within a reasonable period of time' after the plaintiff 'was induced by fraud, misrepresentations or deception to refrain from filing a timely action.'" (quoting *Abbas v. Dixon*, 480 F.3d 636, 642 (2d. Cir. 2007)).

Relatedly, Plaintiff failed to plead facts plausibly showing that he "reasonably relied on the [D]efendants' misrepresentations." *Twersky*, 993 F. Supp. 2d at 443. The Court recognizes that Plaintiff has sought to bolster that equitable estoppel element through his Sur-Reply, in which he asserts specifically that he relied on Defendants' financial disclosures and, in doing so, refrained from filing suit in connection with the outstanding debt under the Loan, particularly in light of their representation as to the value of the Scarsdale home and Plaintiff's understanding of "the homestead exemption in New York." (Tacon Sur-Reply Decl. ¶¶ 4-5.) But it is beyond cavil that arguments raised for the first time in a sur-reply are deemed waived. *See, e.g., U.S. SEC & Exch. Comm'n v. Amah*, No. 21-CV-6694, 2024 U.S. Dist. LEXIS 113905, 2024 WL 3159846, at *2 n.2 (S.D.N.Y. June 25, 2024) (deeming waived "[the d]efendant's argument, which he raise[d] for the first time in his [s]ur-[r]eply"); *Herod's Stone Design v. Mediterranean Shipping Co. S.A.*, 434 F. Supp. 3d 142, 161 n.12 (S.D.N.Y. 2020) ("Legal arguments raised for

the first time in a sur[-]reply, like arguments raised for the first time in a reply, are [generally deemed] waived." (alteration adopted) (citation omitted)); *see also United States v. Buff*, No. 19-CV-5549, 2021 U.S. Dist. LEXIS 85357, 2021 WL 4556751, at *6 (S.D.N.Y. May 4, 2021) (finding that an argument made "for the first time in [the defendant's] sur-reply [was] improper" and therefore declining to consider it), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 173360, 2021 WL 4148730 (S.D.N.Y. Sept. 13, 2021). Further, as Defendants point out, (*see* Letter from Steven A. Weg, Esq. to Court (Apr. 5, 2024)), Plaintiff's argument in his Sur-Reply plainly went beyond the scope of the reason for which the Court permitted him to submit that filing—that is, "to clarify that he in fact read [a] letter and attachment containing Defendants' falsely stated financials at the time they were sent," (*see* Dkt. Nos. 42-43).

Accordingly, as pled (in the Amended Complaint), Plaintiff cannot rely on the doctrine of equitable estoppel to defeat Defendants' statute-of-limitations defense.

III. Conclusion

For the foregoing reasons, the Court grants Defendants' Motion.[21] Because this is the first adjudication

21. In light of its conclusion herein, the Court need not render a decision as to Defendants' alternative requests that it (1) convert the instant Motion into one for summary judgment, or (2) strike certain paragraphs from the Amended Complaint. (*See, e.g.*, Defs' Mem. 6, 10, 25.) As to the first request, the Court has "complete discretion in determining whether to convert motions to dismiss

into motions for summary judgment[,]" *Balchan v. New Rochelle City Sch. Dist.*, No. 23-CV-6202, 2024 U.S. Dist. LEXIS 83928, 2024 WL 2058726, at *4 (S.D.N.Y. May 7, 2024), but it declines to exercise that broad discretion here.

With respect to Defendants' alternative motion to strike, the Court notes its serious doubts as to the merits of that application. More specifically, through their application Defendants ask this Court to strike paragraphs 16-20 of the Amended Complaint on the ground that those paragraphs "refer to communications that are clearly settlement discussions." (*Id.* at 25.) In support of that argument, Defendants rely upon Federal Rule of Evidence 408, which, as alluded to above, provides that certain evidence from settlement negotiations is not admissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction[.]" Fed. R. Evid. 408(a).

"Federal courts have discretion in deciding whether to grant motions to strike." *Capri Sun GmbH v. Am. Beverage Corp.*, 414 F. Supp. 3d 414, 423 (S.D.N.Y. 2019) (citation omitted). Federal Rule of Civil Procedure 12(f) provides in relevant part that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "However, motions to strike under Rule 12(f) are generally disfavored and granted only if there is strong reason to do so." *Sweigert v. Goodman*, 18-CV-8653, 2021 U.S. Dist. LEXIS 28486, 2021 WL 603069, at *1 (S.D.N.Y. Feb. 16, 2021) (quotation marks omitted). Moreover, "precedent instructs against applying the Federal Rules of Evidence at the pleadings stage, including on motions to strike." *Westwide Winery, Inc.*, 511 F. Supp. 3d at 265 (citing *Ricciuti v. N.Y.C Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991); *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976)).

Given those legal principles and the early stage of this case, Defendants' assertion that paragraphs 16-20 of the Amended

of Plaintiff's claim, however, the Court's dismissal of that claim is without prejudice.[22] If Plaintiff wishes to file a

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Complaint should be stricken would seem to put the cart before the horse. Further, Rule 408 expressly provides that courts "may admit" settlement evidence "for another purpose." Fed. R. Evid. 408(b). Indeed, courts have been hesitant to grant motions to strike on Rule 408 grounds at the motion-to-dismiss stage for that very reason. *See Westwide Winery, Inc.*, 511 F. Supp. 3d at 265 (denying a motion to strike based on Rule 408 evidence at the pleading stage because the plaintiff sought "to rely on the settlement negotiations leading to [a certain settlement agreement] not to prove the validity or amount of the claims settled, but to prove the existence of [that settlement agreement]"); *see also Calise v. Casa Redimix Concrete Corp.*, No. 20-CV-7164, 2022 U.S. Dist. LEXIS 20962, 2022 WL 355665, at *4-5 & n.5 (S.D.N.Y. Feb. 4, 2022) (denying a motion to dismiss based on Rule 408 where the letter at issue "was [allegedly] deployed by [the defendant] for another purpose—a retaliatory purpose—as a threat that formed part of a series of retaliatory acts" such that the letter "would not be barred by Rule 408[,]" and noting that the outcome would be the same even if the motion had been styled as a motion to strike); *cf. Faulkner II*, 797 F. Supp. 2d at 316-17 (determining that Rule 408 did not preclude the admissibility of certain letters because they were offered to prove that § 17-101 operated to extend the applicable statute of limitations, not whether the underlying contractual claims were valid). In short, should Defendants move to strike paragraphs in a later pleading in this case on a similar basis, the Court would view such an application with skepticism.

22. Notwithstanding Defendants' argument to the contrary, (*see, e.g.*, Defs' Mem. 6-7, 9, 25 (arguing that the Court should dismiss Plaintiff's claims with prejudice); Defs' Reply 6-7, 20 (same)), the Court is not convinced that "the flaws in [the Amended Complaint] are incurable," *Kling v. World Health Org.*, 532 F. Supp. 3d 141, 154 (S.D.N.Y. 2021) (quoting *Fort Worth Emps.' Ret.*

second amended complaint alleging additional facts and otherwise addressing the various deficiencies identified above, Plaintiff must do so within thirty days of the date of this Opinion & Order. *See Tyson*, 2019 U.S. Dist. LEXIS 48875, 2019 WL 1331913, at *19 ("The Court will afford Plaintiff an opportunity to amend if, after reviewing this Order and Opinion and the law therein, he still believes that he can plausibly state claims against Defendants." (alteration adopted) (citation omitted)). There will be no extensions. Plaintiff is further advised that a second amended complaint will completely replace, not supplement, the now-dismissed Amended Complaint. Any second amended complaint must therefore contain *all* of the claims, defendants, and factual allegations that Plaintiff wishes the Court to consider. If Plaintiff fails to timely file a second amended complaint, the dismissed claims may be dismissed with prejudice.

The Clerk of Court is respectfully directed to terminate the pending Motion. (*See* Dkt. No. 27.)

SO ORDERED.

Dated: September 24, 2024
White Plains, New York

/s/ Kenneth M. Karas
KENNETH M. KARAS
United States District Judge

Fund v. Biovail Corp., 615 F. Supp. 2d 218, 233 (S.D.N.Y. 2009)), particularly given Defendants' protracted settlement discussions with Plaintiff, which, as alleged, do not necessarily evince good-faith negotiations.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 25, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 24-3138

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of June, two thousand twenty-five.

WILLIAM TACON, AS ADMINISTRATOR OF CARIBBEAN COMMERCIAL INVESTMENT BANK LTD.,

Plaintiff-Appellee,

v.

ROBERT CROMWELL, SARIT L. ROZYCKI,

Defendants-Appellants.

ORDER

Appellants, Robert Cromwell and Sarit L. Rozycki, filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/