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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LEHMAN BROTHERS HOLDINGS INC., et al., Debtors.	Chapter 11 Case No. 08-13555 (JMP)
ARCHSTONE LB SYNDICATION PARTNER LLC, et al., Plaintiffs, v. BANC OF AMERICA STRATEGIC VENTURES, INC., et al., Defendants.	Adv. Proc. No. 11-02928 (JMP) **SECOND AMENDED COMPLAINT**
ERP OPERATING LIMITED PARTNERSHIP, Intervenor, v. ARCHSTONE LB SYNDICATION PARTNER LLC, et al., Defendants.	

Plaintiffs ARCHSTONE LB SYNDICATION PARTNER LLC ("Lehman Archstone"), LEHMAN BROTHERS HOLDINGS INC. ("Lehman Brothers"), REPE ARCHSTONE GP HOLDINGS, LLC ("Lehman REPE"), LUXEMBOURG TRADING FINANCE S.a.r.l. ("Lehman Luxembourg"), LUXEMBOURG RESIDENTIAL PROPERTIES LOAN FINANCE S.a.r.l. ("Lehman Luxembourg 1"), LUXEMBOURG RESIDENTIAL PROPERTIES LOAN FINANCE 2 S.a.r.l. ("Lehman Luxembourg 2"), and LEHMAN COMMERCIAL PAPER INC. ("Lehman Commercial Paper") (collectively "Plaintiffs" and collectively with their debtor and non-debtor affiliates "Lehman"), for their complaint against defendants BANC OF AMERICA STRATEGIC VENTURES, INC. ("BofA Strategic"), BANK OF AMERICA, N.A. ("BANA" and together with BofA Strategic, "Bank of America"); BIH ASN LLC ("Barclays BIH"), BARCLAYS CAPITAL REAL ESTATE INC. ("Barclays Capital"), ARCHSTONE EQUITY HOLDINGS INC. ("Barclays Equity"; and together with Barclays BIH and Barclays Capital, "Barclays"; and together with Bank of America, the "Banks"); and ERP OPERATING LIMITED PARTNERSHIP ("Equity Residential") collectively "Defendants") allege, upon knowledge as to themselves and their own actions and upon information and belief as to all other matters, as follows:

NATURE OF THE CASE

1. Plaintiffs and the Banks are the holders of virtually all of the equity interest in the group of companies that operate as "Archstone" (the "Archstone Entities"). In December 2011, the Banks notified Plaintiffs in separate "Notices of Intent to Sell Interests" (the "Notices") that they had contracted to sell one-half of their interests in the Archstone Entities (the "Transfer") to Equity Residential – Archstone's largest competitor in the apartment business. At the same time, the Banks notified Plaintiffs that they also had granted Equity

Residential an option (styled as an "Other Interest Agreement") to buy the balance of their interests in Archstone (the "Option").

2. On December 14, 2011, Plaintiffs delivered to the Banks their Notices of Intent to exercise their "Right of First Offer" (or "ROFO Right") with regard to the above-referenced Transfer. On January 11, 2012, this Court granted Plaintiffs' motion for authority to exercise their ROFO Right [Docket No. 24197.] The parties closed the transaction on January 20, 2012 (the "ROFO Acquisition Date") and Lehman acquired one-half of the Banks' Archstone interests. Following that transaction, Lehman now owns approximately 73.5% of Archstone and the Banks continue to hold approximately 26.5%.

3. Under the Option, Equity Residential had the right, subject to Lehman's ROFO Right, to purchase the Banks' remaining interests in Archstone within 30 days after the ROFO Acquisition Date at a price equal to or greater than $1.325 billion. On February 17, 2012, instead of delivering a notice, as expected, that the Option had been exercised by Equity Residential, the Banks served Lehman with a First Amendment to the Other Interest Agreement (the "First Amendment").

4. Among other things, the First Amendment provides that:

(a) the expiration date of the Option is extended by 60 days to April 19, 2012;

(b) the minimum Option exercise price is increased from $1.325 billion to $1.485 billion;

(c) Equity Residential is required to refund the Break-Up Fee to the Banks if Equity Residential makes an Archstone Acquisition within one hundred twenty days after the Banks sell the second tranche of their Archstone Interests pursuant to the exercise of a ROFO Right by Lehman;

(d) the expiration date of the Other Interest Purchase Agreement is extended from June 2, 2012 to June 29, 2012;

(e) Equity Residential is prohibited from discussing any transaction with respect to Archstone with Lehman other than an asset purchase from Archstone or a purchase by Equity Residential of Lehman's Archstone Interests; and

(f) the Banks are committed to use commercially reasonable efforts to provide Equity Residential, Archstone's largest competitor, with virtually unlimited access to Archstone's books, records and employees.

5. On April 19, 2012, the Banks served Lehman with a Second Amendment to the Other Interest Agreement (the "Second Amendment").

6. Among other things, the Second Amendment provides that:

(a) the expiration date of the Option is extended to May 21, 2012;

(b) the minimum Option exercise price is increased from $1.485 billion to $1.5 billion; and

(c) the expiration date of the Other Interest Purchase Agreement is extended from June 29, 2012 to July 31, 2012.

7. In this adversary proceeding, Plaintiffs seek, among other things, (i) an order that the Banks specifically perform their obligations under the relevant agreements (the "Archstone Agreements") to include in their Notices all material terms of the proposed Transfers, including the rights under the Option that the Banks granted to Equity Residential to purchase the balance of the Banks' Archstone interests for $1.325 billion; (ii) an injunction against the Banks consummating any Transfer to Equity Residential, including any proposed Transfer pursuant to the First Amendment or the Second Amendment; (iii) an order divesting the Banks of their voting and governance rights in the Archstone Entities; (iv) an order declaring that the Option constituted a Transfer of a portion of the Banks' Partnership Interests, in breach of the agreements between Plaintiffs and the Banks; and (v) damages and attorneys' fees.

8. Archstone holds one of the largest residential real estate portfolios in the nation. Plaintiffs, the Banks and certain other parties acquired Archstone in 2007 for a purchase

price of approximately $22.2 billion. Since the acquisition, the parties' interests in Archstone have been restructured on several occasions including, most recently, pursuant to a motion approved by this Court by Order dated November 18, 2010 [Docket No. 12894]. Since the summer of 2011, the Banks have been attempting to sell their interests in Archstone, and in the process have committed numerous material breaches of the Archstone Agreements.

9. In violation of several significant contractual provisions, the Banks have conspired to sell their combined approximately 53% previously and presently held interests in Archstone to Archstone's largest competitor – Equity Residential. The Banks have been in negotiations concerning their sale with Equity Residential, and others, for months. Any such sale, however, is subject to Plaintiffs' Right of First Offer under the Archstone Agreements.

10. During the course of the Banks' negotiations to sell their interests in Archstone, the Banks failed to perform the duties required of them under the Archstone Agreements relating to the sale of their interests (i) to provide Plaintiffs with a ROFO Notice containing all material terms of the proposed Transfer, (ii) to provide Plaintiffs with a ROFO Notice with respect to the Transfer effected by the grant of the Option, (iii) to provide information about the sale process to Plaintiffs on a regular basis and in a commercially reasonable manner, and (iv) to refrain from acting in concert to deprive Plaintiffs of their rights under the Archstone Agreements.

11. After Plaintiffs notified the Banks, in November 2011, of their material breaches of the Archstone Agreements, the Banks purported to deliver ROFO Notices (the "Notices") late in the evening on Friday, December 2, 2011, offering Plaintiffs the opportunity to purchase one-half of the Banks' interests in Archstone. The Banks' Notices purported to provide Plaintiffs ten calendar days following receipt to decide whether (i) to purchase the Banks'

interests on the terms offered to Equity Residential, (ii) to sell Plaintiffs' proportional interests to Equity Residential, or (iii) to do nothing and allow the admission of Equity Residential as an Archstone partner. The Banks subsequently agreed, due to the deficiencies in the Notices, that the ten days for Plaintiffs to act would not begin to run until December 6, 2011. Plaintiffs sent their Notices of Intent to exercise their ROFO Right on December 14, 2011. This Court granted Plaintiffs' motion for authority to exercise their ROFO Right on January 11, 2012 and the parties closed the transaction on the first half of the Banks' interests on January 20, 2012.

12. The Notices themselves are incomplete and breach the Archstone Agreements because they fail to include a "material term" of the proposed Transfer which is required to be included in the Notices pursuant to the Archstone Agreements – the rights under the Option (before its amendment by the First Amendment and the Second Amendment) the Banks granted to Equity Residential to purchase the remaining 50% of the Banks' Archstone interests if Plaintiffs exercised their ROFO Right on the first half of the Banks' interests. That Option is contained in the "Other Interest Agreement," which was delivered to Plaintiffs under separate cover from, and was not made part of, the Notices. The intentional exclusion of the Option from the Notices is the result of collusion among the Banks and Equity Residential to deprive Plaintiffs of their rights under the Archstone Agreements. The Option, however, must be made part of the Transfer subject to Plaintiffs' ROFO Right because the Archstone Agreements require that a Notice shall include all material terms, including the relevant economic terms, of a proposed Transfer, and the Option is a material term of the proposed Transfer to Equity Residential embodied in the Interest Purchase Agreement (defined below). The Archstone Agreements contemplate that Plaintiffs would have the first opportunity to acquire the Banks' Interests which the Banks are prepared to sell. Including the rights under the Option in the

Notices, and allowing Plaintiffs to exercise their option rights before any other person, is consistent with the Archstone Agreements.

13. Moreover, the Option itself was a Transfer of a portion of the Banks' interest in Archstone. As such, the Banks were required to provide Lehman with a ROFO Notice before the Option was vested in Equity Residential. The broad definition of "Transfer" under the Archstone Agreements easily encompasses the Option, as the term Transfer includes any disposition of all or any portion of the Banks' interest in Archstone, whether by transfer of title, pledge, hypothecation or other encumbrance, and can be effected directly or indirectly, including by "any swap, derivative or similar transaction" – which terms are broad enough to include an option.

14. The terms of the proposed Transfer to Equity Residential also violate the Archstone Agreements. For example, the Interest Purchase Agreement attached to the Notices shows that the Banks entered into a "voting trust or agreement" with Equity Residential. The Banks effectively have given Equity Residential, a major competitor that is adverse to Archstone's interests, a veto right over Archstone's budget and retention of management. The plain terms of the Archstone Agreements, as well as the implied duty of good faith and fair dealing, specifically prohibit such "voting agreement" and collusion.

15. The Banks and Equity Residential's entry into the First Amendment and the Second Amendment, and their conduct in connection therewith, has compounded the material breaches of the Archstone Agreements and the harm to Lehman and Archstone. Lehman anticipated that the Option would have been exercised within thirty days after the closing on the first half of the Banks' interests, which would have led to the removal of the Banks from the ownership and management of Archstone.

16. The Archstone governance regime is ill-suited to owners with divergent interests. The continued cloud of uncertainty hanging over Archstone, further exacerbated by the extension of time in the First Amendment and the Second Amendment to exercise the Option, has the potential to damage Lehman, and Archstone, in ways that are not readily susceptible to redress by a damages award, especially if followed by additional extensions. The continued disproportionate influence over material issues of corporate governance which the Banks' 26.5% stake affords them is detrimental to Archstone's operations in several ways:

- The Banks' refusal to approve long term incentive compensation for Archstone senior management interferes with Archstone's ability to properly compensate and retain its management team.
- The Banks substantially delayed approval of a 2012 Archstone Budget, making it impossible to manage toward identifiable operating targets or measure whether new initiatives will achieve the forecasted results.
- The Banks' blocking position with respect to Major Matters and Special Major Matters interferes with the company's ability to take advantage of favorable market conditions by selling assets and reducing debt, or by undertaking new development projects.
- The Banks have a veto over Archstone's ability to raise equity or debt financing, including refinancing a credit facility that matures in June.
- Continued uncertainty around the status of Archstone's ownership has adversely impacted the company's ability to obtain the third party loans and equity investments essential to Archstone's business.

17. Compounding the uncertainties caused by the Banks' retention of a measure of control over operations is the fact that the Banks apparently have ceded significant influence over their Archstone interests to one of Archstone's largest competitors, whose Chairman has previously publicly commented on the redundancy of Archstone's management.

18. In addition, the delay occasioned by the First Amendment and the Second Amendment exposes Lehman to risks that current favorable conditions in the multifamily residential markets might not continue, or that global geopolitical issues might roil the credit markets. The prospect of additional extensions of the Option exercise date fosters continued uncertainty in connection with the management of Archstone and efforts to stabilize and maximize the value of that company. None of these harms caused by the delay in resolution of issues of ownership of the balance of the Banks' Archstone interests is measurable by money damages, but the harms to Archstone and to Plaintiffs, its 73.5% owners, are manifest.

19. As a result, the Banks have breached the Archstone Agreements and the covenant of good faith and fair dealing implied therein, and the Banks, therefore, should not be allowed to benefit from the terms of those agreements. The Banks deprived Plaintiffs of their contractual right to information required to make an informed choice concerning Lehman's largest real-estate investment. The Banks issued plainly incomplete Notices which did not comply with the Archstone Agreements, intended to or with the effect of depriving Plaintiffs of their rights under the Bridge Equity Providers Agreement. Accordingly, the Banks must be directed to specifically perform their obligations under the Bridge Equity Providers Agreement, and allow Plaintiffs the opportunity to acquire the rights under the Option (prior to its amendment) as part of the purchase by Plaintiffs on January 20, 2012, of the first half of the Banks' Archstone Interests. The Court should declare the First Amendment and the Second Amendment to be null and void because the original Option to which it relates should have been part of the original ROFO Notice to Plaintiffs in December 2011. In addition, the Banks must be enjoined from consummating any Transfer to Equity Residential, including any proposed Transfer pursuant to the First Amendment or the Second Amendment, until Plaintiffs' rights to

the Option are determined. The Banks should also be divested of their voting and governance rights in Archstone. Further, Defendants must pay damages and/or a refund if Plaintiffs must pay more than $1.325 billion to acquire the second half of the Banks' Archstone interests, or alternatively pay damages equal to the value of the Option of which Plaintiffs were wrongfully deprived, as well as Plaintiffs' attorneys' fees.

PARTIES

20. Plaintiff ARCHSTONE LB SYNDICATION PARTNER LLC is a Delaware limited liability company with its principal place of business in New York, New York.

21. Plaintiff LEHMAN BROTHERS HOLDINGS INC. is a Delaware corporation with its principal place of business in New York, New York.

22. Plaintiff REPE ARCHSTONE GP HOLDINGS, LLC is a Delaware limited liability company with its principal place of business in New York, New York.

23. Plaintiff LUXEMBOURG TRADING FINANCE S.a.r.l. is a Luxembourg société à responsabilité limitée with its principal place of business in Luxembourg.

24. Plaintiff LUXEMBOURG RESIDENTIAL PROPERTIES LOAN FINANCE S.a.r.l. is a Luxembourg société à responsabilité limitée with its principal place of business in Luxembourg.

25. Plaintiff LUXEMBOURG RESIDENTIAL PROPERTIES LOAN FINANCE 2 S.a.r.l. is a Luxembourg société à responsabilité limitée with its principal place of business in Luxembourg.

26. Plaintiff LEHMAN COMMERCIAL PAPER INC. is a New York corporation with its principal place of business in New York, New York.

27. Defendant BANC OF AMERICA STRATEGIC VENTURES, INC. is a Delaware corporation with its principal place of business in New York, New York.

28. Defendant BANK OF AMERICA, N.A. is a bank national association with its principal place of business in Charlotte, North Carolina.

29. Defendant BIH ASN LLC is a Delaware limited liability company with its principal place of business in New York, New York.

30. Defendant BARCLAYS CAPITAL REAL ESTATE INC. is a Delaware corporation.

31. Defendant ARCHSTONE EQUITY HOLDINGS INC. is a Delaware corporation with its principal place of business in New York, New York.

32. Defendant ERP OPERATING LIMITED PARTNERSHIP is an Illinois limited partnership with its principal place of business in Chicago, Illinois.

JURISDICTION AND VENUE

33. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 157(c) because this adversary proceeding and the claims asserted by Plaintiffs arise under, arise in and/or relate to the Chapter 11 proceedings of the above-captioned Debtors Lehman Brothers Holdings Inc. *et al.* This Court entered an Order [Docket No. 9229], on May 25, 2010, granting the Debtors' Motion for Authorization to Restructure Certain Terms of the Archstone Credit Facilities (the "Authorization Order"), and an Order [Docket No. 12894] on November 18, 2010, granting the Debtors' Motion for Authorization to Modify Certain Terms of the Restructuring of the Archstone Credit Facilities (the "Modification Order"), as being "in the best interests of the Debtors, their respective estates and creditors, and all parties in interest," and retaining jurisdiction "with respect to all matters arising from or related to the implementation of

[those] Order[s]." The Archstone Agreements were amended pursuant to the Authorization Order and the Modification Order, and this action arises from or relates to the amendments to those agreements effectuated pursuant to the Court's Orders. Pursuant to the standing order of reference of the United States District Court for the Southern District of New York, dated July 10, 1984, all proceedings arising in, arising under and/or related to cases under Title 11 of the United States Code (as amended, the "Bankruptcy Code") are referred to this Court for adjudication.

34. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district and pursuant to 28 U.S.C. § 1409(a) because this adversary proceeding and the claims asserted by Plaintiffs arise in and/or relate to the Chapter 11 proceedings of Debtors Lehman Brothers Holdings, Inc. *et al.*, Chapter 11 Case No. 08-13555 (JMP). In addition, the parties have agreed that venue of any matter concerning the enforcement of the parties' contracts should lie exclusively in the courts of New York.

RELEVANT FACTS

A. Acquisition of Archstone

35. For most of 2007, Archstone was the second largest publicly-traded residential real estate investment trust in the United States. Archstone owns more than 400 apartment communities that contain more than 70,000 residential units, including units under construction. In October 2007, a joint venture led by a Lehman affiliate and Tishman Speyer Real Estate Venture VII, L.P. took Archstone private through a leveraged buyout in which other Lehman affiliates and affiliates of Bank of America and Barclays provided secured financing and made bridge-equity investments that they intended to syndicate to other investors.

36. In total, the acquisition of Archstone was financed by more than $16

billion in secured financing either assumed or provided by Lehman, Bank of America, and Barclays (collectively, the "Lenders"), and certain third party lenders. Such secured financing included a combination of mortgage loans, mezzanine loans, term loans, and revolving loans.

37. The Lenders provided approximately $6.4 billion of such financing to Archstone according to the following proportions: Lehman contributed approximately 47%; Bank of America contributed approximately 28%; and Barclays contributed approximately 25%. Lehman's roughly 47% stake in the various secured loans to Archstone amounted to more than $3 billion. In addition, certain non-Debtor affiliates of Lehman invested approximately $2.39 billion in equity or bridge equity of Archstone.

38. Commencing on September 15, 2008 and periodically thereafter (as applicable, the "Commencement Date"), LBHI and certain of its subsidiaries filed with this Court voluntary petitions under Chapter 11 of the Bankruptcy Code. Certain other Lehman affiliates commenced their voluntary cases under Chapter 11 of the Bankruptcy Code on October 5, 2008, and January 7, 2009, respectively. The Debtors' Chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

39. On September 17, 2008, the United States Trustee for the Southern District of New York ("U.S. Trustee") appointed the statutory committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code ("Creditors' Committee").

40. On December 6, 2011, the Bankruptcy Court signed an Order Confirming the Modified Third Amended Joint Chapter 11 Plan of Lehman (the "Plan"). The Effective Date

of the Plan occurred on March 6, 2012.

B. Archstone's Restructuring

41. The Lenders originally contemplated that Archstone would generate sufficient funds to repay the financing through property sales and operations. Due to challenging conditions in the capital markets and property sales markets, it proved difficult for Archstone to generate the funds necessary to meet its liabilities, resulting in Archstone's need for additional liquidity.

42. In order to preserve the value of their debt and equity investments, commencing in January 2009, the Lenders modified the terms of the financing pursuant to this Court's order dated January 28, 2009 [Docket No. 2677]. As part of the modification of the financing, the Lenders committed an additional $485 million, plus available letters of credit, as new priority financing to provide necessary operating liquidity. Among other things, the modification was intended by the Lenders to provide Archstone with additional time to generate proceeds through asset sales, and to preserve the Lenders' sizeable investment in Archstone.

43. Subsequently, in light of difficult economic conditions and the state of the real estate market, the Lenders effectuated a more comprehensive restructuring of the financing to improve Archstone's cash flow and liquidity on a long term basis by converting approximately $5.2 billion of debt, plus accrued interest, into new equity interests entitled to a preferred return, converting the priority financing into a new revolving facility, and extending the maturity dates of certain financing. That comprehensive restructuring was authorized by this Court in Orders dated May 25, 2010 [Docket No. 9229] and November 18, 2010 [Docket No. 12894], and was completed in December 2010.

C. Current Archstone Structure

44. The current structure of the Archstone Entities is complicated. The

discussion below describes only those aspects of Archstone's structure that are relevant to this action.

45. Two of the primary entities relevant to this action are Archstone Multifamily JV LP (the "Fund") and Archstone Multifamily (Governance) LLC ("Fund Governance").

46. The Fund is the principal vehicle for the bridge equity investments by Lehman, Bank of America and Barclays. The limited partners of the Fund include Plaintiff Lehman Archstone and Defendants BofA Strategic and Barclays BIH.

47. Fund Governance, as its name suggests, controls the governance of the Fund. The members of Fund Governance include Plaintiff Lehman REPE and Defendants BANA and Barclays BIH.

D. The Archstone Agreements

48. The following Archstone Agreements, among others, govern the relationship among the parties with respect to Archstone:

(i) The Second Amended and Restated Bridge Equity Providers Agreement, dated as of December 1, 2010 (the "Bridge Equity Providers Agreement");

(ii) The Amended and Restated Syndication and Modification Agreement, as amended as of December 2, 2010 (the "Syndication Agreement");

(iii) The Limited Liability Company Agreement of Archstone Multifamily (Governance) LLC, as amended as of December 2, 2010 (the "Fund Governance LLC Agreement");

(iv) The Voting Agreement, as amended as of December 2, 2010 (the "Voting Agreement");

(v) The Limited Partnership Agreement of Archstone Multifamily JV LP as amended (the "Fund LP Agreement"); and

(vi) The Archstone Enterprise LP First Amended and Restated Limited Partnership Agreement.

49. Each of the above-referenced agreements has its own purpose, but they collectively reflect a single, comprehensive agreement of the parties, as reflected, for example, in Section 6.08 of the Bridge Equity Providers Agreement, titled "Entire Agreement," which states that the Archstone Agreements identified in that section collectively "constitute the final agreement between the parties . . . and are the complete and exclusive expression of agreement of the parties . . . with respect to the subject matter hereof."

1. General Provisions

50. The Archstone Agreements and the parties' rights thereunder are all governed by and interpreted, construed and enforced in accordance with the internal laws of the State of Delaware, without giving effect to the conflicts of laws provisions thereof.

51. All disputes among the parties relating to the Archstone Agreements are subject to the exclusive jurisdiction of the state and federal courts of New York.

52. Further, the parties to the Archstone Agreements are "entitled to an injunction or injunctions to prevent breaches [of the Archstone Agreements] by the other parties and to specifically enforce the terms and provisions of [the Archstone Agreements] against such other parties." Bridge Equity Providers Agreement § 6.07.

53. Section 6.04 of the Bridge Equity Providers Agreement provides that "no Bridge Equity Provider shall be personally liable in any manner hereunder for breach or otherwise (absent gross negligence, willful misconduct or fraud) except to the extent of such

Bridge Equity Provider's Partnership Interest." Bridge Equity Providers Agreement § 6.04. The term "Partnership Interest" is defined in the Fund LP Agreement as "all of the right, title and interest of [a] Partner in, to and against the [Fund] (including, without limitation, such Partner's share of profits and losses of the [Fund] and the right to receive distributions of [Fund] assets)." Fund LP Agreement art. II. The Banks, through their counsel in open court in January 2012, have waived the application of Section 6.04 of the Bridge Equity Providers Agreement to Plaintiffs' claims in this action.

54. Section 2.01(b) of the Bridge Equity Providers also provides that "[n]one of the Bridge Equity Providers nor any of their respective members, partners, owners, directors, officers, agents, servants, counsel or employees shall be liable to any other Bridge Equity Provider for any action taken or omitted to be taken by it hereunder or under the Syndication Agreement, except for its own gross negligence or willful misconduct." Bridge Equity Providers Agreement § 2.01(b). The Banks, through their counsel in open court in January 2012, have waived the application of Section 2.01(b) of the Bridge Equity Providers Agreement to Plaintiffs' claims in this action.

55. Even assuming that the Banks had not waived the application of Sections 6.04 and 2.01(b) or that their waiver was somehow limited, the Banks' conduct, described more fully below, constitutes "gross negligence" because their actions constitute a gross deviation from what a reasonable, ordinary person would do in the same situation. The Banks' conduct also constitutes "willful misconduct" because their actions were done with an intent, or a conscious decision, to disregard the rights of Plaintiffs or were done with a conscious choice to ignore consequences when it was reasonably apparent that Plaintiffs probably would be harmed.

2. Management Provisions

56. The business and affairs of the Fund (and thus the business and affairs of Archstone) are conducted and managed solely by the Fund's indirect general partner, Fund Governance. The business and affairs of Fund Governance (and thus the business and affairs of the Fund and Archstone) were managed by the Managing Member, Plaintiff Lehman REPE, until the Banks removed it as Managing Member on May 5, 2011.

57. The Managing Member may "be removed as Managing Member (but shall continue to be a Member), upon the written request of Barclays and [Bank of America] at any time." Fund Governance Agreement § 9(b)(ii). In such event, Fund Governance becomes "member managed" and the actions of Fund Governance (and thus the Fund and Archstone) require a majority vote of its Members. This is how Archstone has been managed since the Banks removed Lehman REPE as Managing Member of Fund Governance.

58. Pursuant to the Voting Agreement, the parties were allocated the following voting percentages prior to Lehman's January 20, 2012 purchase of the first half of the Banks' Archstone interests:

Plaintiff Lehman REPE:	47.29565%
Defendant Bank of America:	27.70435%
Defendant Barclays:	25%

59. Following Lehman's purchase of the first half of the Banks' Archstone interests, the parties are allocated the following voting percentages;

Plaintiff Lehman REPE:	73.647825%
Defendant Bank of America:	13.852175%
Defendant Barclays:	12.5%

60. Notwithstanding the Managing Member's authority or whether the Managing Member has been removed, certain specified actions require either a majority vote as well as the vote of two of the three Members (a "Major Matter") or a super-majority vote of 76% of the voting interests as well as the votes of all three Members (a "Special Major Matter"). Due to the various parties' respective interests in Archstone, the 76% voting interest requirement effectively requires a unanimous vote of Plaintiff Lehman REPE, Bank of America and Barclays for a Special Major Matter to be approved.

61. Special Major Matters that are required to be approved unanimously include, for example, approving "the merger, equity recapitalization (other than pursuant to the Syndication), reorganization, [or] public or private offering" of any Archstone-related entities, and the termination or determination of "the terms of employment" of "the CEO, COO or CFO of Archstone," and approval of the Archstone Budget, defined in the Voting Agreement as the annual business plan and operating capital expenditure budget for Archstone. Voting Agreement, Schedule C.

62. Major Matters that are blocked without the Banks' consent include, for example, approving any "financing or refinancing," sales or dispositions of "any direct or indirect interests in any Subsidiary," and "any new development of any Property in any fiscal year." Voting Agreement, Schedule B.

3. <u>Transfer Restrictions</u>

63. The Archstone Agreements prohibit Transfers of interests in Archstone that are not in compliance with those agreements. The term "Transfer" is expansively defined as follows: Any "Partnership Interest [or] portion of any Partnership Interest (or the proceeds thereof) . . . *directly or indirectly*, sold, *transferred*, assigned, distributed, contributed, *pledged*,

hypothecated or otherwise disposed of, whether by way of transfer of contract or by exit from the Partnership of a transferring Partner and entry by a new Partner to the Partnership or by means of any swap, derivative or similar transaction . . . ." Fund LP Agreement § 9.01 (emphasis added).

64. The parties' right to Transfer their interests is governed and restricted by the terms of the Bridge Equity Providers Agreement, which "supersede" any "conflicting or inconsistent terms" in any of the other Archstone Agreements. For example, any Transfer of a party's interest in one portion of Archstone (such as a party's equity interest in a specific Archstone-related entity or its voting interests relating to Archstone's governance) must be linked to a Transfer of the same proportion of that party's interest in all of its other Archstone-related equity interests. In addition, Section 4.05 and 4.06 of the Bridge Equity Providers Agreement prohibit Transfers in breach or default of any of the other Archstone Agreements.

65. Further, before a party to the Bridge Equity Providers Agreement can Transfer its interests, it must give the other parties an opportunity to exercise either their "Right of First Offer" or their "Tag-Along Right."

66. Specifically, if a party wishes to Transfer its Archstone-related interests, it must "provide not less than ten (10) Business Days' (the 'ROFO Notice Period') prior written notice (the 'ROFO Notice')" to the other parties. A ROFO Notice "*shall set forth all of the material terms of the proposed Transfer*" including the price payable in cash and "*any other economic terms relevant to the proposed Transfer*." Upon receipt of a ROFO Notice, each non-transferring party "*will have the right to purchase" the transferring party's interest "on the terms set forth in the ROFO Notice* (the 'ROFO Right'), which right may only be exercised with respect to all of the [interests] being offered pursuant to the ROFO Notice." Bridge Equity Providers Agreement § 4.02(a) (emphasis added).

67. The transferring party also is required to provide to the other parties, not less than ten business days prior to a proposed Transfer, a "Tag-Along Notice." A Tag-Along Notice also must include all economic terms relevant to such proposed Transfer. Upon receipt of a Tag-Along Notice, each non-transferring party has "the right (but not the obligation) to participate in such Transfer . . . , pro-rata and pari passu." Bridge Equity Providers Agreement § 4.02(b).

68. Once a party receives a ROFO Notice or Tag-Along Notice, it must elect its rights promptly. In Plaintiffs' case, so long as there is an Ongoing Lehman Bankruptcy they must

> (x) (1) *deliver[] a non-binding written preliminary indication* of such Non-Transferring Bridge Equity Provider's interest in exercising its ROFO Right (a 'Notice of Intent to Purchase') *within ten (10) calendar days after receipt of the applicable ROFO Notice* or (2) . . . deliver[] a non-binding written preliminary indication of its interest to exercise a potential Tag-Along Right in a transaction consistent with the terms of the ROFO Notice (a 'Notice of Intent to Sell'),
>
> (y) . . . , mak[e] a *filing with the bankruptcy court in the Lehman Bankruptcy Case, within ten (10) calendar days of its delivery of a Notice of Intent to Purchase* or Notice of Intent to Sell with respect to the applicable ROFO Notice, requesting that approval be granted to the debtor entities of Lehman, as applicable, to exercise its ROFO Right and/or Tag-Along Right (a 'Bankruptcy Court Approval Request'), and
>
> (z) *deliver[] a binding Election Notice within fifty (50) calendar days after receipt of the applicable ROFO Notice*, together with 5% of the purchase price as a deposit and *close on the purchase within two business days thereof.*

Bridge Equity Providers Agreement § 4.02(a) (emphasis added).

69. On March 27, 2012, Plaintiffs and the Banks entered into an agreement to supplement to the Bridge Equity Providers agreement. That agreement provides that from and after the Effective Date:

> (a) each reference in Section 4.02(a) of the Bridge Equity Providers Agreement to "five (5) Business Days" or "ten (10) Business Days", as such relates to the ROFO Right, shall be deemed to refer instead to "fifteen (15) calendar days", and
>
> (b) no Ongoing Lehman Bankruptcy shall be deemed to exist for purposes of the Bridge Equity Providers Agreement.

70. The March 27, 2012 agreement further provides:

> For the avoidance of doubt, so long as no Ongoing Lehman Bankruptcy shall be deemed to exist for purposes of the Bridge Equity Providers Agreement, (i) no ROFO Notice shall be deemed to also be a Tag-Along Notice, and (ii) no Tag-Along Notice may be delivered with respect to any Transfer until each Non-Transferring Bridge Equity Provider has waived (or been deemed to have waived) its ROFO Right with respect to such Transfer.

E. <u>The Banks' Material Breaches of the Archstone Agreements</u>

71. The Banks' conduct following the December 2010 restructuring demonstrates their disregard of the Archstone Agreements and their material breaches of those agreements. As discussed more fully below, the Banks have breached several provisions of the Archstone Agreements by, among other things, (i) failing to include all material terms of their proposed Transfer to Equity Residential in the Notices, (ii) failing to provide a ROFO Notice with respect to the Transfer of a portion of their interests that arose from the grant of the Option to Equity Residential, (iii) entering into a voting agreement with respect to "Special Major Matters" of Archstone not contemplated by the Archstone Agreements, (iv) colluding to deny Plaintiffs their rights under the Archstone Agreements and (v) failing to uphold the implied covenant of good faith and fair dealing contained in the Archstone Agreements. The Banks' prior material breaches prevent them from enforcing the terms of, and benefiting from, the Archstone Agreements.

72. In the late spring of 2011, the markets presented a potential opportunity for the parties to exit their investment in Archstone, while maximizing the value of their

investment. Plaintiffs and the Banks together initially considered both an initial public offering ("IPO") and a private sale of Archstone or their Archstone interests.

73. After continuing down the parallel paths of exploring both an IPO and a private sale for some time, however, the Banks informed Plaintiffs in August 2011 that they would refuse to even consider the IPO option, were only interested in a private sale of their interests in Archstone, and intended to proceed to effectuate such a private sale. In or about late August, Plaintiffs and the Banks received three proposals for the sale of Archstone. Plaintiffs declined to proceed with the sale of Archstone because the value of the proposals received did not reflect the value of Archstone, the offers received had execution risk, and the composition of the consideration offered was unsatisfactory. The Banks thereafter determined to proceed to sell their interests in Archstone without Plaintiffs.

74. Once they began focusing exclusively on a private sale of their interests, the Banks failed to comply with the terms of the Archstone Agreements. For example, despite Plaintiffs' repeated requests, the Banks failed to provide Plaintiffs with information pertaining to the Banks' efforts to market their interests, which they are obligated to provide to Plaintiffs under the Bridge Equity Providers Agreement.

75. Moreover, the Banks' conduct related to their marketing efforts has put the value of Archstone itself in peril. Notwithstanding their execution of a letter to management, dated June 29, 2011, agreeing to work diligently to complete retention agreements, the Banks have refused to conclude those retention agreements with key management personnel of Archstone. Plaintiffs have the highest regard for the Archstone infrastructure, including the quality of its management team, which provides significant value to Archstone and is essential to preserve. As of the end of July 2011, nearly complete drafts of the retention agreements were

prepared, but since then the Banks have failed to address these agreements or to complete them. Indeed, on December 13, 2011, the Banks rejected Plaintiffs' proposal to proceed with approval of the retention agreements. Inaction with respect to the management retention agreements is not a viable alternative, however, since it not only risks the loss of Archstone's key personnel, it also threatens to violate covenants contained in one or more of Archstone's material loan agreements.

1. The Banks Have Continually Failed To Provide Plaintiffs With Required Information

76. As discussed above, while there is an Ongoing Lehman Bankruptcy, the Bridge Equity Providers Agreement requires Plaintiffs to make a final, binding decision within fifty days of receipt of a ROFO Notice as to whether they will purchase the transferring parties' interest (*i.e.*, exercise its ROFO Right), "Tag-Along" with the transfer, or do nothing and retain their interest, and then be fully prepared to close the appropriate transaction within two business days if it makes the final binding election to purchase. To meet this deadline, the Bridge Equity Providers Agreement requires that during the marketing period the parties keep each other informed. This transparency requirement was one of the benefits the parties agreed to in exchange for agreeing to the timetable in that agreement.

77. Section 3.01(g) of the Bridge Equity Providers Agreement provides, in relevant part, as follows:

> With respect to any Transfers or potential Transfers by a Bridge Equity Provider of its Syndication Equity[1] in accordance with the provisions of Article 4, such Bridge Equity Provider shall, on a weekly basis or such other period as may be agreed to by all of the Bridge Equity Providers, report to each of the other Bridge Equity Providers in a commercially reasonable manner with respect to material matters and activities directly related to the marketing of the Syndication Equity of such Bridge Equity Provider, including the identity of any potential Syndication Investors, amounts of

[1] Syndication Equity is defined as "the Partnership Interests (with respect to each Partnership) held by the Bridge Equity Providers, but excluding any Retained Equity held by any Bridge Equity Provider."

> potential syndication investments, report as to the status of negotiations, and such other information as shall be reasonably requested by the Bridge Equity Providers.

78. The Banks had been marketing potential Transfers of their Syndication Equity for several months prior to their delivery of the Notices in December 2011. The Banks, however, never supplied Plaintiffs with the reports and information required by the above-quoted provision concerning their individual and concerted efforts to market their Syndication Equity that are within their individual or collective control.

79. In this instance, these reporting and cooperation requirements were intended to avoid an impairment of Plaintiffs' rights and to ensure that Plaintiffs have sufficient information to be in a position to promptly and meaningfully exercise their rights in response to potential Transfers within the short time frames set forth in the Archstone Agreements. The Banks' failure to provide the required periodic marketing reports is one example of a pattern by the Banks to deprive Plaintiffs of information to which they are entitled in connection with a proposed Transfer.

80. On November 19, 2011, Plaintiffs notified the Banks of their non-compliance with the Archstone Agreements' requirements to provide information concerning their marketing efforts and demanded that the Banks immediately provide the following:

- a summary of all discussions held by Barclays and Bank of America with potential purchasers of Syndication Equity, including the identity of such potential purchasers and the status of such discussions;
- the amount of Transfer Securities[2] of each class to be purchased by any such purchaser and the proposed purchase price (including the breakdown between cash and non-cash consideration, if any), the timing of any proposed sale (including the timing for the entry into definitive agreements, receipt of any

[2] Transfer Securities are defined as any "Syndication Equity, together with JMB Partnership Interests, Retained Equity, Fund Governance Voting Interests, Lakes Voting Membership Interests and Voting Percentage proposed to be transferred by any Bridge Equity Provider."

required consents or approvals and anticipated closing date) and all other material economic terms relating to such proposed sale; and

- copies of any term sheets and other documentation prepared in connection with any such sale, or the most current draft documentation to the extent definitive documents are not available.

81. In the November 19 letter, Plaintiffs also informed the Banks that they would regard any ROFO Notice delivered by the Banks as improperly delivered prior to (i) full compliance by the Banks with their obligations under the Archstone Agreements, and (ii) a reasonable time for Plaintiffs to adequately review the material provided under such provisions. Since the Archstone Agreements do not allow for the cure of defaults once they are declared, Plaintiffs decided to allow the Banks an opportunity to conform with the agreements and expressly declined to declare the Banks in default in the November 19 letter.

82. After three days passed without any response – much less disclosure of the required information – from the Banks, Plaintiffs reiterated their demand for information on November 22, 2011, and notified the Banks that they were in material breach of several provisions of the Archstone Agreements, including the provisions identified in this Complaint.

83. On November 23, 2011, the Banks supplied a sparse three-line summary and one-page PowerPoint described as "relevant information with respect to the current status of the syndication process."

84. On November 25, 2011, Plaintiffs informed the Banks that the information they provided was woefully inadequate and did not come close to approaching the scope of the information that Plaintiffs "reasonably requested," and to which they were entitled, pursuant to Section 3.01(g) of the Bridge Equity Providers Agreement, in their November 19, 2011 and November 22, 2011 notices. Plaintiffs further demanded that the Banks, at the very least,

provide Plaintiffs with the current draft of the purchase and sale agreement with the potential purchaser.

85. The Banks again did not comply with Plaintiffs' requests for information, as required by the Archstone Agreements. Instead, the Banks sent the Notices by email to Plaintiffs' representatives at 10:52 p.m. Eastern Time on Friday night, December 2, 2011. The Notices also attached an "Execution Version" of an eighty-four page "Interest Purchase Agreement" among the Banks and Equity Residential, providing for the sale of the first half of the Banks' Archstone interests for aggregate consideration of $1,325,000,000. This Interest Purchase Agreement obviously had been negotiated for some time.

86. On December 2, 2011, the Banks also transmitted a separate letter attaching the "Other Interest Agreement" (which included the Option, as defined above) which grants Equity Residential an option to acquire the balance of the Banks' Archstone interests that are not covered by the Interest Purchase Agreement, for a price not less than $1,325,000,000 if Plaintiffs exercise their ROFO Right on the first half of the Banks' Archstone interests.

87. The Notices as sent were incomplete, as the Banks later acknowledged. Continuing their practice of being less than forthcoming with relevant information, the Banks did not supply the Disclosure Schedules to the Interest Purchase Agreement (even though the Interest Purchase Agreement states that the schedules are an integral part of that agreement), nor did they supply the other information identified by Plaintiffs' November 19 and 22, 2011 Notices.

88. Accordingly, on December 4, 2011, Plaintiffs notified the Banks of their failure to provide these Disclosure Schedules and other previously demanded information. Plaintiffs also stated that because of these failures, among others, Plaintiffs considered the

Notices not validly delivered, and demanded that the missing information be provided by 5:00 p.m. Eastern Time on December 5, 2011.

89. On December 5, 2011, at approximately 7:00 p.m., Bank of America and Barclays responded by providing the 300 page Disclosure Schedules to the Interest Purchase Agreement, undertaking to provide additional information by separate cover, and stating that they will not deem the 10-day period to respond to the Notices to begin running until December 6, 2011. The Banks also began providing additional information concerning their efforts to market their Archstone interests "under separate cover" on December 6, although it is unclear whether they have completed that process. One of the items requested by Plaintiffs in their December 4 letter was any side agreements between the Banks or their affiliates and Equity Residential. The Banks claim that other than the Option, there are no side agreements. On information and belief, despite the Banks' denials, such side deals must exist, since shortly after the Notices were delivered, Plaintiffs learned of the Banks' prominent participation in a $1 billion Equity Residential bond issuance.

90. On December 14, 2011, Plaintiffs delivered their Notices of Intent to Purchase in accordance with Section 4.02(a) of the Bridge Equity Providers Agreement. On January 11, 2012, this Court granted Plaintiffs' motion for authority to exercise their ROFO Right. On January 20, 2012, the parties closed the transaction.

91. Following the closing, the Banks also failed to provide Plaintiffs with any substantive information beyond statements that they were in negotiations with Equity Residential. Nothing the Banks provided following the closing gave even the slightest hint that the Banks and Equity Residential would amend the Other Interest Agreement.

2. Breach of the Bridge Equity Providers Agreement by Failing to Include the Option in the Notices

a. The Option is a Material Term of the Proposed Transfer to Equity Residential

92. A fundamental requirement of a ROFO Notice under the Bridge Equity Providers Agreement is that it "shall set forth all of the material terms of the proposed Transfer . . . [including] . . . any other economic terms relevant to such proposed Transfer." Bridge Equity Providers Agreement § 4.02(a). The Option is a material term of the proposed Transfer to Equity Residential of the first half of the Banks' Archstone Interests. Not only was the Option material to the buyer (EQR), it was also material to the sellers (the Banks). EQR would not have executed the Interest Purchase Agreement if the Other Interest Agreement, including the Option, was not executed concurrently. The Banks would not have executed the Other Interest Agreement if the Interest Purchase Agreement was not executed concurrently. The Option is part of the consideration to the buyer under the Interest Purchase Agreement, is a material term as well as a relevant economic term of the proposed Transfer and the rights under the Option should be part of the consideration to Plaintiff in connection with their purchase of the first half of the Banks' interests proposed to be sold by the Notices.

93. However, the Notices do not make reference to and do not include the material term of the Option. The failure to include the Option in the Notices should be remedied by an Order requiring specific performance of the Banks' obligations under the Bridge Equity Providers Agreement to include all material terms of the Transfer in a ROFO Notice, including the Option. Alternatively, the breach of the Bridge Equity Providers Agreement caused by the failure to include all material terms of the proposed Transfer in the ROFO Notice should be remedied by an award of damages against the Banks.

94. The Banks' failure to include the original Option in the Notices is further

exacerbated by their entry into the First Amendment and the Second Amendment, which constitute a material changes to the terms of the Option. Had the Banks included the Option in the Notices, Plaintiffs would have had the right, pursuant to Section 4.02(a) of the Bridge Equity Providers Agreement to purchase the interests to be sold under the Option "on the terms set forth in the ROFO Notice." Therefore, Plaintiffs would have been entitled to exercise rights under the Option on its original terms, including the minimum purchase price of $1.325 billion ($160 million less than the minimum provided for in the First Amendment and $175 million less than the minimum provided for in the Second Amendment). Accordingly, the Court should declare that the First Amendment and the Second Amendment are null and void.

b. <u>The Banks' Grant of the Option was a "Transfer"</u>

95. In addition to being a material term of the proposed Transfer, the Banks' grant of the Option to Equity Residential was itself a Transfer of a portion of the Banks' Archstone Interests. That Transfer violated the Bridge Equity Providers Agreement because the Banks did not give Plaintiffs a ROFO Notice or permit Plaintiffs the opportunity to exercise their ROFO Right with respect to that Transfer before it was completed. The term "Transfer" is expansively defined: "No Partnership Interest [or] portion of any Partnership Interest (or the proceeds thereof) . . . may be *directly or indirectly*, sold, *transferred*, assigned, distributed, contributed, *pledged*, *hypothecated* or otherwise disposed of, whether by way of transfer of contract or by exit from the Partnership of a transferring of a transferring Partner and entry by a new Partner to the Partnership *or by means of any swap, derivative or similar transaction* (collectively 'Transfer') . . . ." Fund LP Agreement § 9.01. (emphasis added.) Before any party may Transfer its Archstone-related interests, it must "provide not less than ten (10) Business Days' (the 'ROFO Notice Period') prior written notice (the 'ROFO Notice')" to the other parties. Bridge Equity Providers Agreement § 4.02(a).

96. The Option allows the holder of the Option to set the purchase price at which the Banks will be obligated to sell the second half of their Archstone interests. The minimum Option price is $1.325 billion (notwithstanding the Banks' and Equity Residential's attempt to increase the purchase price to $1.485 billion pursuant to the First Amendment and to $1.5 billion pursuant to the Second Amendment). The Option has substantial value to its holder.

97. The Banks have encumbered a "portion" of their ownership interests in Archstone to Equity Residential by means of the Option. Examples of the ownership rights and interests which the Banks have parted with include:

(a) Their rights to receive the full appreciation in value of their interests in Archstone from $1.325 billion up to $1.365 billion, and half of the appreciation in value between $1.365 to $1.445, from December 2, 2011 until the Option expires;

(b) Their rights to decide to whom to sell the second half of their interests and on what terms;

(c) Their right not to sell the second half of their interests until the Option expires; and

(d) Their ROFO rights with respect to each other's Archstone interests in the event the Option is exercised.

98. It is important to note that a Transfer can be effected by a Bridge Equity Provider without conveying title to the interests in question. The definition of Transfer includes *pledges, hypothecations or other dispositions* of a portion of one's Partnership Interests. In a pledge or a hypothecation, the pledgor retains title to the pledged asset but encumbers that asset to the pledgee. By signing the Other Interest Agreement, the Banks have encumbered the second half of their ownership interests in Archstone, by restricting their rights to deal with their interests in the manner identified above, as part of their obligations under the Interest Purchase Agreement. Even if the Banks retain title to those interests until exercise of the Option, their present encumbrance falls within the definition of a Transfer under the Archstone Agreements.

99. Because the Option constitutes a Transfer, the Banks were required to provide Plaintiffs with a ROFO Notice and Tag-Along Notice with respect to the Option, and their failure to do so constitutes a breach of the Bridge Equity Providers Agreement. That breach should be remedied by a decree of specific performance, including an order that the Banks include the Option in their Notices.

3. Breach of the Bridge Equity Providers Agreement By Entering Into A Prohibited Agreement

100. Section 5.01(c) of the Bridge Equity Providers Agreement contains three interrelated limitations on activities of the parties to that agreement:

> *Each Bridge Equity Provider represents and agrees that it shall not*
>
> (i) grant any proxy or *enter into* or agree to be bound by *any voting trust or agreement* with respect to any of its Syndication Equity . . . except as expressly contemplated by this Agreement. . .
>
> (ii) *enter into any agreement or arrangement of any kind with any Person* with respect to its Syndication Equity, JMB Partnership Interests, Retained Equity, Fund Governance Voting Interests, Lakes Voting Membership Interests or Voting Percentage *inconsistent with the provisions of this Agreement or for the purpose or with the effect of denying or reducing the rights of any other Bridge Equity Provider under this Agreement*. . . or
>
> (iii) *act*, for any reason, *as a member* of a group or *in concert with any other* Person in connection with the Transfer or voting of its Syndication Equity . . . *in any manner that is inconsistent with this Agreement.* (emphasis added)

101. As set forth below, the Interest Purchase Agreement contained a provision at odds with the prohibitions in Section 5.01(c) of the Bridge Equity Providers Agreement by restricting the Banks' voting on all Special Major Matters that have not been pre-approved which effect a material change in the asset composition or capital structure of Archstone. While the original Equity Residential Interest Purchase Agreement has been terminated by virtue of

Lehman's exercise of its ROFO Right and closing on the first half of the Banks' interests, the Other Interest Agreement requires the next interest purchase agreement that may be executed after Equity Residential's exercise of the Option be substantially similar to the original Equity Residential Interest Purchase Agreement. The list of Special Major Matters in Schedule C to the Voting Agreement is extensive and virtually all could have effects that materially impact the asset composition or capital structure of Archstone, such as purchases or sales of assets over $100 million, modifications to organizational documents, and entry into contracts in excess of $50 million. At least two Special Major Matters are of particular relevance at this time – Archstone's annual business plan and annual operating and capital expenditure budget (the "Budget") and the management retention agreements, which, under the Voting Agreement, require unanimous approval by the Members before implementation. Neither the Budget nor the management retention agreements are identified as pre-approved Special Major Matters on the Disclosure Schedules to the Interest Purchase Agreement. Accordingly, the Banks effectively have given Archstone's largest competitor a veto right over Archstone's Budget, retention of its management and possibly compliance with certain of its loan documents.

102. Section 8.4 of the Interest Purchase Agreement provides that except for matters to which Equity Residential has failed to object or which are set forth on the Disclosure Schedules to the Interest Purchase Agreement, Equity Residential's obligation to close is conditioned on compliance with the covenant that "*[n]o Archstone Entity shall have taken action that constitutes a Special Major Matter under the Voting Agreement*," which "in the reasonable judgment of [Equity Residential]" would result in "a material change in the asset composition or capital structure . . . of the Archstone Entities." (emphasis added) Moreover, the Banks have

agreed in Section 11.1 of the Interest Purchase Agreement to use "Commercially Reasonable Efforts to take . . . all actions" to cause the sale to Equity Residential to occur.

103. In addition, Section 13.3 of the Interest Purchase Agreement provides a material financial incentive to the Banks to cause the conditions in Section 8.4 to be satisfied. Section 13.3 requires the Banks to pay Equity Residential 3.5% of the price received by the Banks for their Archstone interests (or approximately $45 million) if Equity Residential terminates that agreement for the failure of the conditions in Section 8.4 to be satisfied and the Banks sell an equal or greater amount of their Archstone interests within six months of the date of termination. Since the Banks have agreed to use their Commercially Reasonable Efforts to close, and must satisfy Section 8.4 as a condition to closing under the Intent Purchase Agreement, the Banks have in substance agreed not to approve any Special Major Matters except in accordance with the Interest Purchase Agreement. This provision violates Section 5.01(c)(i) of the Bridge Equity Providers Agreement as a voting agreement with respect to their Archstone interests which is not expressly contemplated by the Bridge Equity Providers Agreement.

104. Moreover, since early 2010, the parties have been working on development and subsequent documentation of a management incentive plan for the retention of Archstone management (the "Retention Agreements"), the approval of which would also constitute a Special Major Matter by virtue of (i) Section (xiv) of Schedule C to the Voting Agreement (relating to the terms of employment of executive employees of Archstone), and (ii) Section (v) of Schedule C (due to the nature of the consideration to be granted to management in accordance with these agreements).

105. As discussed above, Plaintiffs have been requesting that the Banks take action to complete the Retention Agreements for some time without success. Counsel for

Archstone reminded the parties of the deadline under the Archstone loan documents for acting on the Retention Agreements in two emails dated November 22 and December 7, 2011. By agreeing not to approve the Retention Agreements without the Buyer's consent, the Banks have in essence handed Equity Residential a veto right over Archstone's ability to retain its valuable management personnel, and possibly even to comply with certain of its loan agreements. The likelihood that Equity Residential will approve Retention Agreements in not high, since Equity Residential has made known that it does not place significant value in Archstone's infrastructure. Equity Residential's chairman, Sam Zell, was recently quoted in the Wall Street Journal on December 5, 2011, as follows: "Lehman believes that their quote-unquote platform is very valuable, Mr. Zell said as the deal was being finalized. 'It may in fact be very valuable to them, but it ain't so valuable to us, because it's a redundancy.'" *Zell's Archstone Deal Upsets Lehman Plan, Equity Residential Wants All of Firm; Lehman Prefers an IPO*, Wall St. Journal, (Dec. 5, 2011). Absent approval by Equity Residential, the Banks' agreement to implement the Retention Agreements would breach the condition to closing in Section 8.4 of the Interest Purchase Agreement.

106. To that end, on December 7, 2011, Lehman delivered to the Banks a Notice pursuant to Section 2.01(c) of the Voting Agreement calling for a vote of the Special Major Matter of approving the Retention Agreements. On December 13, 2011, the Banks declined to approve the Retention Agreements.

107. Since then, the Banks have refused to approve the Retention Agreements, which has interfered with Archstone's ability to properly compensate and retain its management team. The Banks also have delayed implementation of a 2012 Archstone Budget, which has made it impossible to manage toward identifiable operating targets or measure whether new

initiatives will achieve forecasted results. Further, the Banks' blocking position with respect to Major Matters and Special Major Matters interferes with Archstone's ability to take advantage of favorable market conditions by selling assets or reducing debt, or by undertaking new development projects and Archstone's ability to raise equity or debt financing, including refinancing a credit facility that matures in June. The continued uncertainty, resulting from the Banks' conduct pursuant to their prohibited agreement has adversely impacted the company's ability to obtain the third party loans and equity investments that are essential to Archstone's business.

108. In addition, the First Amendment and the Second Amendment each constitute "an agreement or arrangement . . . with the effect of denying or reducing the rights of [Plaintiffs] under [the Bridge Equity Providers Agreement]." Bridge Equity Providers Agreement § 5.01(c)(ii). Before the execution of the First Amendment and the Second Amendment, Plaintiffs had the right to purchase the Banks' interests "on the terms set forth in the ROFO Notice[s]," which Notices should have included the Option. The First Amendment and the Second Amendment purport to change not only the price term, but also the term with respect to the exercise date. This delay alone reduces Plaintiffs' rights by exposing them to risks that current favorable conditions in the multifamily residential markets might not continue, or that global geopolitical issues might roil the credit markets. The prospect of one or more extensions of the Option exercise date fosters continued uncertainty in connection with the management of Archstone and efforts to stabilize and maximize the value of that company.

109. The First Amendment also contains an "agreement or arrangement . . . inconsistent with the provisions of [the Bridge Equity Providers] Agreement." Bridge Equity Providers Agreement § 5.01(c)(ii). Pursuant to Section 10 of the First Amendment, the Banks

have agreed to grant Equity Residential access with respect to Archstone confidential information as follows:

(a) during normal business hours and upon reasonable prior notice, give Equity, and its Affiliates and their respective Representatives (the "Equity Group") reasonable access to the books, records, Contracts and other documents of or pertaining to the Archstone Entities and the Joint Ventures;

(b) furnish to the Equity Group such financial and operating data and other information relating to the Archstone Entities and the Joint Ventures (to the extent available to any Owner) and the Business as the Equity Group may reasonably request;

(c) instruct the employees, counsel, financial advisors and other Representatives of Owners, the Archstone Entities and the Joint Ventures to cooperate with the Equity Group's reasonable requests in its investigation of the Archstone Entities and the Joint Ventures; and

(d) permit the Equity Group to discuss the business of the Archstone Entities and the Joint Ventures with members of management, officers, directors and employees of, and advisors to and counsel and accountants for, the Archstone Entities and the Joint Ventures.

110. Under Section 5.01(a) of the Bridge Equity Providers Agreement, the parties are permitted to disclose "Confidential Information" to potential purchasers only "on a confidential basis." Even under the strictest of confidentiality agreements, the disclosure contemplated to Equity Residential – Archstone's major competitor – cannot be accomplished "on a confidential basis." Moreover, Section 10 of the First Amendment provides for access to confidential information by not only the "potential purchaser[]," Equity Residential, but to the whole of the "Equity Group."

4. <u>Breach of the Implied Covenant of Good Faith and Fair Dealing</u>

111. Making approval of certain Special Major Matters contingent on the Buyer's approval also constitutes a breach of the covenant of good faith and fair dealing. That covenant is reaffirmed in Section 12(a) of the Fund Governance LLC Agreement. The Fund

Governance LLC Agreement also incorporates the Voting Agreement, by reference, in Section 10.

112. By agreeing to Section 8.4 of the Interest Purchase Agreement, the Banks have effectively put their desire to sell a portion of their Archstone interests to Equity Residential in direct conflict with the interests of Archstone in remaining a viable going concern, including maintaining its current management team intact, in performing a covenant in certain of its loan agreements respecting a material amount of its project debt and in being able to operate pursuant to an approved budget, which is in the best interests of Archstone and not Equity Residential. The uncertainties generated by the sale process, including the Equity Residential's public suggestion that management is redundant, exacerbates the risk that without Retention Agreements members of management may leave Archstone, which threatens Archstone's viability as a going concern.

113. The Banks' conduct deprives Plaintiffs of their bargained-for rights under the Voting Agreement by restricting approval of Special Major Matters in a manner not contemplated by the Voting Agreement and by vesting approval over those actions in a competitor. In order for the Banks to perform their covenant to satisfy the conditions to closing under the Interest Purchase Agreement, they are requiring Archstone to bear the risk that Equity Residential will not consent to important matters, including to the execution of the Retention Agreements that are required to retain critical senior management as well as comply with certain Archstone loan documents and to the adoption of a Budget. In order to protect their own interests as sellers, the Banks have effectively given Archstone's largest competitor control over Archstone's future while they are still co-venturers with Plaintiffs in that company.

114. This action by the Banks is arbitrary and unreasonable, and deprives Plaintiffs from receiving the benefits of their bargain contained in the Fund Governance LLC Agreement, where the covenant of good faith and fair dealing resides, and in which the Voting Agreement is incorporated by reference. The parties to the Voting Agreement did not agree to any restriction on approval of certain Special Major Matters, but the Interest Purchase Agreement restricts the Banks' ability to approve certain Special Major Matters at risk of violating their covenant to cause conditions to the sale to Equity Residential to occur and potentially exposing themselves to "Buyer Liquidated Damages" under Section 13.3 of that agreement.

115. Section 2.02 of the Voting Agreement provides that the "Members shall be entitled to approve or not approve of any proposed Budget submitted to them, in their sole discretion." Two of the Members have placed their right to approval of the Budget in a Person not a Member, violating the Voting Agreement. Accordingly, Plaintiffs request (i) an injunction against the proposed Transfer to Equity Residential, including the transfer of the Option, as being a breach of the implied covenant of good faith and fair dealing in the Fund Governance LLC Agreement and the Voting Agreement, (ii) a declaratory judgment that Plaintiffs are not required to accept such Transfers, and (iii) an order divesting the Banks of their voting rights with respect to their Archstone interests.

5. Breach By Collusive Activities

116. The Banks jointly marketed their interests without complying with the reporting requirement of the Bridge Equity Providers Agreement. The Banks negotiated and entered into the Interest Purchase Agreement, Other Interest Agreement, First Amendment and Second Amendment. The Banks, in conjunction with Equity Residential, issued virtually

identical but incomplete ROFO Notices at the same time, both of which omitted the material term of the Option and failed to include the Schedules to the Interest Purchase Agreement, in violation of Section 4.02(a) of the Bridge Equity Providers Agreement. The Banks also jointly determined not to provide Plaintiffs with a ROFO Notice prior to granting Equity Residential the Option, even though the Option constitutes a Transfer. This coordinated and collusive activity breaches both Section 5.01(c)(ii) and (iii) of the Bridge Equity Providers Agreement, which prohibit any party from (a) entering into "*any agreement or arrangement of any kind with any Person*" with respect to its Archstone interests which is *inconsistent with* the Bridge Equity Providers Agreement, *or for the purpose or with the effect of denying or reducing the rights of any other Bridge Equity Provider*, or (b) *acting "in concert* with any other Person in connection with the transfer" of its Archstone interests *in a manner inconsistent* with the Bridge Equity Providers Agreement. (Emphasis added.)

117. The Banks (a) have engaged in collusive action in connection with the Transfers in a manner inconsistent with the Bridge Equity Providers Agreement by providing incomplete and misleading Notices lacking, *e.g.*, the Option (in violation of Section 5.01(c)(iii)) and (b) by their course of conduct over several months have manifested that they are parties to an agreement or arrangement with each other (and possibly Equity Residential) inconsistent with or for the purpose or with the effect of denying or reducing Plaintiffs' rights under the Bridge Equity Providers Agreement to receive information reports and both a complete ROFO Notice, as well as a ROFO Notice identifying the Transfer effected by the Option (in violation of Section 5.01(c)(ii)). Pursuant to Section 6.07 of the Bridge Equity Providers Agreement, Plaintiffs are entitled to specific performance by the Banks requiring them to include the rights under the Option as part of the Notices.

6. Need For Declaratory Relief With Respect to Lehman's Rights Under the Option

118. Plaintiffs seek a declaratory judgment determining that the ROFO Notices must include the rights under the Option, and that the grant of the Option constituted a Transfer.

119. In addition, Plaintiffs seek a declaratory judgment that the following provision of the Interest Purchase Agreement violates the Archstone Agreements:

> the Parties acknowledge and agree that the Archstone Entities are required to pay all fees and expenses of Sellers and the Archstone Entities, including legal expenses, Transfer Taxes, lender consent fees and change of control fees and similar payments, in connection with the *Contemplated Transactions* or any other potential sale of interests in or the assets of any of the Archstone Entities (the "Seller Expenses").

Interest Purchase Agreement § 11.10 (emphasis added).

120. Section 1.1 of the Interest Purchase Agreement defines "Contemplated Transactions" as "the sale of the Purchased Interests and the related covenants contemplated by this Agreement or any of the other Transaction Documents." Interest Purchase Agreement § 1.1. "Purchased Interests," under the Interest Purchase Agreement, "constitute 50% of all interests held by each such Seller in the Archstone Entities" and are set forth in Schedule I to the Interest Purchase Agreement. Interest Purchase Agreement 2nd Recital.

121. The Banks contend that the provision in Section 11.10 of the Interest Purchase Agreement requiring the Archstone Entities (and therefore Plaintiffs for the most part) to pay the Seller Expense was done in accordance with Section 2.03 of the Syndication Agreement. Section 2.03 of the Syndication Agreement provides, in relevant part, as follows:

> All out-of-pocket costs and expenses of the Partnership, the General Partner, the direct or indirect partners in the General Partner, [and] each Bridge Equity Provider . . . paid to non-Affiliated third parties (including, without limitation, fees and disbursements of accountants and attorneys retained by the Partnership or any Bridge Equity Provider) *incurred in connection*

> *with the Syndication* and the preparation, negotiation, execution and delivery of any and all documents related thereto . . . shall be paid by the Partnership. . . . Without limiting the foregoing, *any transfer tax or similar liability arising out of any sale of Syndication Equity pursuant to the Syndication shall be paid by the Partnership*, and . . . the Partnership shall reimburse . . . each Bridge Equity Provider for all reasonable non-Affiliated third-party out-of-pocket expenses incurred by such party in connection with the transactions contemplated by this Agreement and the Syndication but in no event shall any party be reimbursed for its internal general administrative and overhead costs.

Syndication Agreement § 2.03. (emphasis added.)

122. The term "Syndication" is defined in Section 2.01 of Syndication Agreement as "a sale of the Syndication Equity to Syndication Investors." Syndication Agreement § 2.01. "Syndication Equity" is defined in Section 1.01 of the Syndication Agreement as

> [T]he Partnership Interests (with respect to each Partnership) held by the Bridge Equity Providers and the Senior Limited Partners and the principal balance of the Priority Junior Mezzanine Loan and/or Junior Mezzanine Loan, including any portion of the Priority Junior Mezzanine Loan and/or Junior Mezzanine Loan converted to Partnership Interests pursuant to the Partnership Agreement, but excluding any Retained Equity held by any Bridge Equity Provider or Senior Limited Partner.

Syndication Agreement § 1.01.

123. Although the respective ROFO Prices for *all* of the interests to be sold pursuant to the Interest Purchase Agreement are $696,494,004 (for Bank of America) and $628,505,996 (for Barclays), both of the Banks' ROFO Notices state that the respective "portion[s] of the purchase price payable for the *Syndication Equity*" is $800,000 (for Bank of America) and $400,000 (for Barclays). Section 11.10 of the Interest Purchase Agreement, however, purports to require the Archstone Entities to pay for Seller Expenses not only in connection with the sale of the Banks' Syndication Equity, but also in connection with the sale of

all of the Banks' other interests in the Archstone Entities. This is improper given that the Syndication Equity portion of the purchase price reflects a fraction of a percentage point of the entire transaction. At most, the Banks are entitled to provide in Section 11.10 that Archstone shall be liable for those costs and expenses that arise from the sale of Syndication Equity, not those costs and expenses that arise from the sale of the "Purchased Interests" in the "Contemplated Transactions."

124. While maintaining their objection to Section 11.10 remaining in the Interest Purchase Agreement, on January 20, 2012, Plaintiffs entered into an interest purchase agreement with terms identical to Section 11.10 of the Interest Purchase Agreement and simultaneously closed with the Banks. Plaintiffs did so to prevent jeopardizing the transaction and because the bulk of the expense identified by the Banks were not expected to result until a second transaction was consummated. Lehman also repeatedly reserved its rights to dispute the appropriateness of Section 11.10. Pursuant to the Other Interest Agreement, any second transaction is required to be "on substantially the same terms and conditions as those contained in the Interest Purchase Agreement."

125. Accordingly, Plaintiffs request that the Court declare that the Archstone Entities are responsible only for those Seller Expenses arising from the sale of Syndication Equity.

126. Finally, the material breaches of the Banks described above, including of the covenant of good faith and fair dealing, should not only prevent them from exercising their right to Transfer their interests to Equity Residential (including the rights under the Option), but also should be held to divest them of any management, governance or voting rights pursuant to the Archstone Agreements.

CLAIMS FOR RELIEF

COUNT I
(Breach of Contract – Injunction)
(Against the Banks)

127. Plaintiffs repeat and reallege each of the allegations contained in the previous paragraphs above as though fully set forth herein.

128. Plaintiffs and the Banks entered into the Archstone Agreements.

129. The Archstone Agreements constitute a valid and binding contract.

130. Plaintiffs have performed their obligations under the Archstone Agreements.

131. The Banks have materially breached the Archstone Agreements as alleged herein.

132. The Banks have materially breached the implied duty of good faith and fair dealing.

133. Section 6.07 of the Bridge Equity Providers Agreement provides, in relevant part, as follows:

> Each party hereto acknowledges and agrees that irreparable damage would occur to the other parties hereto and that the other parties hereto will not have an adequate remedy at law in the event that any of the provisions of this Agreement to be performed by such party were not performed in accordance with their specific terms or were otherwise breached. Therefore, each party hereto is entitled to an injunction or injunctions to prevent breaches of this Agreement by the other parties and to specifically enforce the terms and provisions of this Agreement against such other parties hereto in any court of competent jurisdiction, without bond or other security being required, and appropriate injunctive relief may be applied for by such parties and granted in connection therewith.

134. Even absent the contractual acknowledgment as to irreparable harm, Plaintiffs have suffered and will suffer irreparable harm as a result of the Banks' breaches.

Archstone is a unique asset, the loss of which cannot be compensated by money damages, and the loss of the rights under the Option is not quantifiable.

135. Plaintiffs have no adequate remedy at law.

136. Plaintiffs seek an injunction or injunctions against the Banks to prevent breaches of the Archstone Agreements, including an injunction against the Banks consummating any "Transfer" (as defined in the Archstone Agreements) to Equity Residential, including any proposed Transfer pursuant to the Option.

137. In addition, due to the Banks' material breaches of contract and breaches of the covenant of good faith and fair dealing, Plaintiffs are entitled to an injunction which bars the Banks from voting their interests in Archstone, and for such other and further relief as the Court deems just.

COUNT II
(Breach of Contract – Specific Performance)
(Against the Banks)

138. Plaintiffs repeat and reallege each of the allegations contained in the previous paragraphs above as though fully set forth herein.

139. Plaintiffs and the Banks entered into the Archstone Agreements.

140. The Archstone Agreements constitute a valid and binding contract.

141. Plaintiffs have performed their obligations under the Archstone Agreements.

142. The Banks have materially breached the Archstone Agreements as alleged herein.

143. The Banks have materially breached the implied duty of good faith and fair dealing.

144. Section 6.07 of the Bridge Equity Providers Agreement provides, in relevant part, as follows:

> Each party hereto acknowledges and agrees that irreparable damage would occur to the other parties hereto and that the other parties hereto will not have an adequate remedy at law in the event that any of the provisions of this Agreement to be performed by such party were not performed in accordance with their specific terms or were otherwise breached. Therefore, each party hereto is entitled to an injunction or injunctions to prevent breaches of this Agreement by the other parties and to specifically enforce the terms and provisions of this Agreement against such other parties hereto in any court of competent jurisdiction, without bond or other security being required, and appropriate injunctive relief may be applied for by such parties and granted in connection therewith.

145. As a result of the Banks' breaches, Plaintiffs have suffered and will suffer irreparable harm.

146. Plaintiffs have no adequate remedy at law.

147. Plaintiffs seek an order that the Banks specifically perform their obligations under the Archstone Agreements, including an order (i) that the Banks specifically perform their obligations under the Archstone Agreements to include all material terms of the proposed Transfer in their Notices, including the rights under the Option that the Banks granted to Equity Residential, (ii) compelling the Banks to observe and perform their obligations under the covenant of good faith and fair dealing in the Fund Governance Agreement by approving the Retention Agreements on a timely basis, and (iii) for such other and further relief as the Court deems just.

COUNT III
(Breach of Contract – Declaratory Judgment)
(Against the Banks)

148. Plaintiffs repeat and reallege each of the allegations contained in the previous paragraphs above as though fully set forth herein.

149. Plaintiffs and the Banks entered into the Archstone Agreements.

150. The Archstone Agreements constitute a valid and binding contract.

151. Plaintiffs have performed their obligations under the Archstone Agreements.

152. The Banks have materially breached the Archstone Agreements as alleged herein.

153. The Banks have materially breached the implied duty of good faith and fair dealing.

154. As a result of the Banks' prior material breaches, they are in no equitable position to invoke or enforce the terms of the Archstone Agreements.

155. Plaintiffs are entitled to a judgment:

a. Declaring that the Banks have committed prior material breaches of the Archstone Agreements;

b. Declaring that the Banks are not entitled to enforce or invoke the provisions of the Archstone Agreements;

c. Declaring that the Notices should include the Option as a material term;

d. Declaring that until Plaintiffs determine whether to exercise the Option, Equity Residential may not exercise the Option and the Banks may not grant an option to any other Person;

e. Declaring that the Option was a Transfer and should have been subject to a ROFO Notice before it was granted;

f. Declaring that Plaintiffs are entitled to all of the rights of Equity Residential under the Interest Purchase Agreement and the Option, except such rights or duties that are inapplicable to Plaintiffs;

g. Declaring Plaintiffs' rights and duties, and the status of the parties under the Notices;

h. If the ROFO Right does not include all of the rights of Equity Residential under the Option, declaring the value of the Option and the purchase price payable by Plaintiffs if they exercise their rights under the Notices;

i. Declaring that the Banks have ceased to hold any management, governance or voting rights under the Archstone Agreements and are remitted to holding merely the economic interest of an assignee of a members' or partners' interest in the Archstone-related entities

j. Declaring that the First Amendment and the Second Amendment are null and void;

k. Declaring the parties rights under Section 11.10; and

l. For such other and further relief as the Court deems just.

COUNT IV
(Breach of Contract – Damages)
(Against the Banks)

156. Plaintiffs repeat and reallege each of the allegations contained in the previous paragraphs above as though fully set forth herein.

157. Plaintiffs and the Banks entered into the Archstone Agreements.

158. The Archstone Agreements constitute a valid and binding contract.

159. Plaintiffs have performed their obligations under the Archstone Agreements.

160. The Banks have materially breached the Archstone Agreements as alleged herein.

161. The Banks have materially breached the implied duty of good faith and fair dealing.

162. In addition to suffering irreparable harm, Plaintiffs have suffered and/or will, in the future, suffer damages as a result of the Banks' breaches.

163. Plaintiffs are entitled to damages in an amount to be proven at trial as a result of the Banks' breaches.

COUNT V
(Unjust Enrichment – Restitution for Overpayment)
(Against the Banks and Equity Residential)

164. In the alternative, the Defendants have been enriched at Plaintiffs' expense.

165. In the event Equity Residential exercises the Option for a purchase price greater than $1,325,000,000, and Plaintiffs exercise their ROFO Right and close on the interests subject to the Option at the price offered by Equity Residential, the Banks will have been unjustly enriched to the extent Plaintiffs' payment exceeds $1,325,000,000. Similarly, Equity Residential will have been unjustly enriched to the extent it receives a break-up fee funded by Plaintiffs and not by the Banks.

166. Plaintiffs will have been prejudiced to the extent that Plaintiffs' overpayment exceeds $1,325,000,000.

167. Plaintiffs' prejudice is directly related to the Defendants' enrichment given that the Defendants' enrichment results from Plaintiffs' overpayment.

168. The Banks granted, and Equity Residential received, the Option with full knowledge of the terms of the Bridge Equity Providers Agreement. As such, there is no

justification for the Defendants' unjust enrichment and it would be unconscionable to allow them to retain that benefit.

169. If Defendants are determined not to have any contractual obligation to Plaintiffs in this regard, there will be no adequate remedy at law to cure the unjust enrichment resulting from Plaintiffs' overpayment.

170. Plaintiffs have suffered damages as a result of the Defendants' unjust enrichment, in an amount to be determined at trial.

COUNT VI
(Tortious Interference with Contract)
(Against Equity Residential)

171. Plaintiffs and the Banks entered into the Archstone Agreements.

172. The Archstone Agreements constitute a valid and binding contract.

173. Plaintiffs have performed their obligations under the Archstone Agreements.

174. Equity Residential knew of the existence of and the terms of the Archstone Agreements.

175. Equity Residential intentionally and wrongfully interfered with the Archstone Agreements by procuring and inducing breaches of those agreements by the Banks without justification.

176. The Banks have in fact breached the Archstone Agreements as alleged herein.

177. Plaintiffs have been directly and proximately damaged as a result of these breaches.

178. As a direct and proximate result of Equity Residential's tortious interference with the Archstone Agreements, Plaintiffs have suffered and/or will, in the future, suffer damages in an amount to be proven at trial.

179. Plaintiffs are entitled to damages in an amount to be proven at trial as a result of the Equity Residential's tortious interference.

COUNT VII
(Attorneys' Fees)
(Against the Banks)

180. Plaintiffs repeat and reallege each of the allegations contained in the previous paragraphs above as though fully set forth herein.

181. Section 6.05 of the Bridge Equity Providers Agreement incorporates Section 4.16 of the Syndication Agreement "as if set out" in the Bridge Equity Providers Agreement.

182. Section 4.16 of the Syndication Agreement provides, in relevant part, as follows:

> In the event of any litigation . . . , between or among the parties to enforce or interpret any provision or right hereunder, the unsuccessful party to such litigation covenants and agrees to pay the successful party all costs and expenses reasonably incurred, including, without limitation, reasonable attorneys' fees and disbursements, it being understood and agreed that the determination of the "successful party" shall be included in the matters which are the subject of such litigation.

183. As a result of the Banks' breaches of contract, Plaintiffs were required to initiate this proceeding to enforce their rights under the Bridge Equity Providers Agreement.

184. Accordingly, Plaintiffs are entitled to an award of costs, expenses and attorneys' fees incurred in connection with this proceeding.

WHEREFORE, Plaintiffs demand judgment as follows:

A. On Count I, a preliminary and final injunction against the Banks to prevent their breaches of the Archstone Agreements, including an injunction against the Banks consummating any "Transfer" (as defined in the Archstone Agreements) to Equity Residential, including any proposed Transfer pursuant to the Option;

B. On Count II, an order that the Banks specifically perform their obligations under the Archstone Agreements, including an order (i) that the Banks specifically perform their obligations under the Archstone Agreements to include all material terms of the proposed Transfer in their Notices, including the rights under the Option that the Banks granted to Equity Residential; and (ii) compelling the Banks to observe and perform their obligations under the covenant of good faith and fair dealing in the Fund Governance Agreement by approving the Retention Agreements on a timely basis;

C. On Count III, a judgment (i) declaring that the Banks have committed prior material breaches of the Archstone Agreements; (ii) declaring that the Banks are not entitled to enforce or invoke the provisions of the Archstone Agreements; (iii) declaring that the Notices should include the Option as a material term; (iv) declaring that until Plaintiffs determine whether to exercise the Option, Equity Residential may not exercise the Option and the Banks may not grant an option to any other Person; (v) declaring that the Option was a Transfer and should have been subject to a ROFO Notice before it was granted; (vi) declaring that Plaintiffs are entitled to all of the rights of Equity Residential under the Interest Purchase Agreement and the Option, except such rights or duties that are inapplicable to Plaintiffs; (vii) declaring Plaintiffs' rights, duties and the status of the parties under the Notices; (viii) if the ROFO Right does not include all of the rights of Equity Residential under the Option, declaring the value of the Option and the purchase price payable by Plaintiffs if they exercise their rights under the

Notices; (ix) declaring that the Banks have ceased to hold any management, governance or voting rights under the Archstone Agreements and are remitted to holding merely the economic interest of an assignee of a members' or partners' interest in the Archstone-related entities; and (x) declaring that the First Amendment and the Second Amendment are null and void;

D. On Count IV, damages in an amount to be proven at trial;

E. On Count V, an award of restitution for Defendants' unjust enrichment;

F. On Count VI, damages in an amount to be proven at trial;

G. On Count VII, and award of costs, expenses and attorneys' fees incurred in connection with this proceeding; and

H. On all Counts, such other and further relief that the Court deems just and proper.

Dated: New York, New York,
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Respectfully submitted,

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