Case No. 18-3447

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE WEITZ COMPANY, LLC,
Plaintiff - Appellant,

vs.

UMB BANK, N.A.,
Defendant - Appellee.

Appeal from the U.S. District Court, Southern District of Iowa
Honorable Robert W. Pratt, U.S. District Judge
Case No. 4:18-cv-00105-RP-HCA

REPLY BRIEF OF THE APPELLANT

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A. UMB fails to take all the facts Weitz alleged in its complaints as true and make reasonable inferences in Weitz's favor, and ignores the crucial fact that UMB unilaterally decided to stop disbursing Authority loan proceeds to Epworth and thereby prevent completion and occupancy of the Project to prevent Weitz from ever being repaid its funds loaned under the LSA.

This action concerns a Liquidity Support Agreement ("LSA") into which The Weitz Company, LLC, as contractor, entered with Epworth, as project owner, and a previous trustee for construction bonds. Weitz appeals from a judgment dismissing its action seeking a declaratory judgment that UMB Bank, N.A., the successor trustee, had abandoned the LSA and denying Weitz leave to amend its complaint to add a claim for statutory rescission of the LSA under 15 O.S. §§ 231-235.

In its first issue in its opening brief, Weitz explained that the district court erred in dismissing its request for a declaratory judgment (Brief of the Appellant ["Weitz Br."] 22-39). In its second issue, Weitz explained that the district court erred in refusing to allow Weitz to add its statutory rescission claim (Weitz Br. 40-53).

As Weitz stated, both issues have the standard of review for a dismissal under Fed. R. Civ. P. 12(b)(6) (Weitz Br. 22, 40).[1] This means

[1] In its opening brief, Weitz argued that attaching documents to UMB's motion to dismiss and Weitz's response did not transform this into a summary judgment (Weitz Br. 23-25). UMB concurs (UMB Br. 19).

that review is *de novo*, "taking all facts alleged in the complaint as true, and making reasonable inferences in favor of the nonmoving party." *Smithrud v. City of St. Paul*, 746 F.3d 391, 397 (8th Cir. 2014). If, doing this, the complaint "contain[s] sufficient factual allegations to 'state a claim for relief that is plausible on its face'", it cannot be dismissed. *Id.* (citation omitted).

In response, UMB agrees Weitz "states the correct standard of review for a motion to dismiss" (Brief of the Appellee ["UMB Br."] 37). It agrees that review is *de novo* and the complaint's factual statements must be sufficient to state a plausible claim (UMB Br. 19, 37).

But UMB heavily downplays what this standard means. Specifically, UMB argues that facts in Weitz's complaint (and proposed amended complaint) are not true and it makes inferences contrary to Weitz. Indeed, in its statement of the standard of review for Weitz's first issue, UMB never mentions the truth/inference facet of the standard at all (UMB Br. 19-20). And in its statement for the second, UMB only mentions this facet in passing while criticizing Weitz for briefly mentioning a pre-*Twombly* standard[2] toward the end of its brief

[2] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Weitz agrees this Court's statement of the *Twombly* standard from *Smithrud* in its opening brief (Weitz Br. 22) is correct and controls, as UMB acknowledges (UMB Br. 37). Despite mistakenly mentioning an older standard at the very end of its brief, Weitz confirms that its arguments are solely under the *Twombly* standard.

(Weitz Br. 44). It states, "the Court must accept only the well-pled [*sic*] facts in the [c]omplaint as true and make only 'reasonable inferences' in favor of the plaintiff" (UMB Br. 37) (citing *Smithrud*, 746 F.3d at 397).

UMB does not follow up on this distinction and argue that any facts in Weitz's complaint were not "well-pleaded" or any inferences Weitz draws in its favor are unreasonable. Instead, UMB ignores this fundamental part of the standard of review entirely, preferring its own characterization of the facts and its own inferences contrary to Weitz.

Crucially, UMB spends its entire brief ignoring Weitz's main well-pleaded fact undergirding its entire case: that it was UMB who unilaterally decided to stop disbursing Authority loan proceeds to Epworth, thereby preventing Epworth from completing construction and achieving initial occupancy of the Project, and thereby preventing Weitz from ever being repaid the funds it loaned under the LSA.

Weitz pleaded this in its complaint (Aplt.Appx. 145-47, 155-56). It alleged that UMB "advised Weitz that [UMB] does not intend to allow further distribution of Project Fund moneys to allow completion of construction of the Project" (Aplt.Appx. 156).

Weitz then pleaded this in more detail in its proposed amended complaint (Aplt.Appx. 236). It alleged that UMB "stopped approving distributions from the Project Fund (as defined in the Bond Indenture) which prevented Epworth from continuing to pay for the completion of construction of the Project" (Aplt.Appx. 236). It alleged that the LSA

did not contain any term allowing UMB to do this and "prevent initial occupancy and receipt of entrance fees from residents but nonetheless retain the loans advanced by Weitz to Epworth" (Aplt.Appx. 235).

So, taking Weitz's allegations as true and according Weitz all reasonable inferences from them, Epworth did not just stop paying contractor Weitz one day. Rather, it was UMB who was directly responsible for this by refusing to provide Epworth any further disbursements of Authority loan proceeds. The necessary inference in Weitz's favor is that *UMB*, by its direct action, prevented completion and occupancy of the Project as the parties contemplated in the LSA and the Master Indenture.

UMB's brief ignores this entirely. In its statement of the case, all it says is that "Epworth stopped paying Weitz for its work on the Project" (UMB Br. 9). Instead, UMB points to pleadings in an Oklahoma case that *it* attached to its opposition to Weitz's motion to alter or amend judgment below, in which *it* alleged that a second consultant had contested the initial feasibility study for the Project that a prior consultant prepared, and opined that the Project could have insufficient revenues to meet its obligations (UMB Br. 10) (citing Aplt.Appx. 344-46).

UMB's self-serving excuse for its decision to stop funding, which is external to Weitz's complaint, is without merit or effect. First, UMB's allegations in some foreign pleading – and only ever introduced below in

opposition to a post-judgment motion – do not control above Weitz's own allegations in its complaint. UMB did not move for summary judgment, it moved for Rule 12(b)(6) dismissal. So, the question is what the "facts alleged in the complaint", taken "as true, and making reasonable inferences in favor of" Weitz, show. *Smithrud*, 746 F.3d at 397. At the Rule 12(b)(6) stage, UMB's additional fact allegations in some other pleading somewhere cannot defeat those Weitz alleged in its complaints.

Second, even from UMB's Oklahoma material, a reasonable inference in Weitz's favor – indeed, if not UMB's outright admission – remains that it was UMB who unilaterally decided to stop paying Epworth in order to prevent construction. UMB's explanation that it made that decision based on this second opinion does not contradict Weitz's allegations, but instead confirms them.

As Weitz explained in its opening brief, and also pleaded below, nothing in the LSA or the Master Indenture allowed UMB unilaterally to declare an "event of default" on the unproven allegation of a consultant, but instead required Epworth to notify UMB of such a circumstance, which even UMB ultimately confirmed had not occurred here (Weitz Br. 37) (citing Aplt.Appx. 103, 112, 145, 153, 156, 193). UMB's Oklahoma pleading all but admits that it declared the default unilaterally, without Epworth *actually* defaulting, and instead UMB opted on its own to cancel completion of construction so as to keep both

the remaining undisbursed Authority loan proceeds and Weitz's undisbursed LSA funds (Aplt.Appx. 344-46).

Under the facts as the Court must view them at this stage, UMB's failure to acknowledge that it caused Epworth to stop paying for construction, and in so doing caused completion and occupancy of the Project to be impossible, undercuts all its arguments.

UMB wants to make it seem like this was just some standard loan agreement and standard scenario in which the borrower (Epworth) defaulted, which would not give a credit supporter (Weitz) a right to have its supporting agreement declared abandoned or rescinded. That plainly is not the situation here, as Weitz pleaded in its complaints.

Rather, under the facts and reasonable inferences as the Court must view them at this stage, UMB unilaterally abandoned the Project and, with it, the LSA (Weitz Br. 22-39). And beyond abandonment, this caused essential consideration – the use of Authority loan proceeds prior to the use of Weitz's LSA loan proceeds for the completion of construction and initial occupancy of the Project – to fail, warranting Oklahoma statutory rescission (Weitz Br. 40-53).

The district court erred in holding otherwise and both dismissing Weitz's declaratory action for abandonment and refusing Weitz leave to state a claim for statutory rescission.

B. The LSA's plain language does not defeat Weitz's claims for a declaration of abandonment or for statutory rescission, but instead supports them.

Throughout its brief, instead of obeying the standard of review, which means taking Weitz's facts as true and making all reasonable inferences in Weitz's favor, UMB nakedly tries to do the opposite.

Citing some Oklahoma and Florida district court decisions and a Tenth Circuit decision, UMB suggests that when an allegation in a complaint conflicts with language in material attached to the complaint, the language in the attachment controls (UMB Br. 19-20) (citing *Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Ass'n*, 771 F.3d 1230, 1238 (10th Cir. 2014)). It then uses this idea to argue that the LSA's plain language defeats Weitz's declaratory and statutory rescission claims (UMB Br. 20-24, 38-46).

This is without merit. First, this Court never has recognized this "contradiction" doctrine. Instead, it has held that contradictory documents simply are not considered in the Rule 12(b)(6) context. Rather, only materials that "do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion." *Couzens v. Donohue*, 854 F.3d 508, 516 (8th Cir. 2017) (citation omitted). So, if any material attached to Weitz's complaint actually did contradict its allegations, that material would be ignored in deciding whether Weitz's complaint stated a claim on which relief could be granted. *Id.*

Second, even if this "contradiction" doctrine were to be recognized in this circuit, the manner in which UMB seeks to use it violates how it is used in those jurisdictions that recognize it. The Tenth Circuit in *Gorsuch* was quoting the Seventh Circuit in *Flannery v. Recording Indus. Ass'n of Am.*, which noted that this "doctrin[e] serve[s] an important purpose of weeding out non-meritorious claims for which a trial is not necessary." 354 F.3d 632, 638 (7th Cir. 2004). But the Seventh Circuit was careful to note that it "must be applied with caution." *Id.* It is "only triggered upon a threshold determination of a 'contradiction,' which only exists when the statements are 'inherently inconsistent,' not when the later statement [in the complaint] merely clarifies an earlier statement [in the document] which is ambiguous or confusing on a particular issue." *Id.*

Here, Weitz's complaint (and proposed amended complaint) made allegations and statements about the LSA, the circumstances surrounding its creation, and the circumstances of UMB's refusal to disburse any more Authority loan proceeds to Epworth. UMB never explains how Weitz's allegations actually directly contradict any portion of the LSA – i.e., where the complaint says "the contract says 'yes'" but the LSA actually says "no." Indeed, only once in the entire argument section of its brief does UMB even *cite* Weitz's complaint or proposed amended complaint (UMB Br. 22) (citing Aplt.Appx. 157).

Instead, UMB's real argument is a quarrel with Weitz's interpretation of the LSA, not a challenge to Weitz's factual allegations, which under the actual standard of review must be taken as true and accorded the benefit of all reasonable inferences. Even if this case were in the Tenth or Seventh Circuits, the "contradiction" doctrine would not apply, because there is no direct contradiction.

UMB argues three ways in which the LSA's plain language "defeats" Weitz's declaratory and rescission claims. All are without merit. The LSA's language only amplifies Weitz's claims.

First, pointing only to Weitz's complaint, and not Weitz's opening brief, UMB argues Weitz is wrong that "the funds in the Weitz Account of the Liquidity Support Fund must in all circumstances be used for the completion of the Project before the funds can be used to pay interest on the Bonds" (UMB Br. 22). It says this is because Weitz ignores § 3.2(d) of the LSA, which

> expressly provides that '[i]f funds held in an account in the Funded Interest Fund and Debt Service Fund under the Bond Indenture are insufficient to pay the principal of or interest on a series of Bonds as the same come due, then moneys in the Working Capital Fund, the Operating Reserve Fund, the Weitz Account . . . (in that order) shall be used for that purpose."

(UMB Br. 22) (quoting Appellant's Addendum A26). UMB says Weitz "purposefully ignore[s]" this subsection and "attempt[s] to retroactively

delete Section 3.2(d)" because "Weitz does not and cannot allege that the funds in the Funded Interest Fund, the Debt Service Fund, the Working Capital Fund, and the Operating Reserve Fund are sufficient to pay the principal and interest on the Bonds" (UMB Br. 22-23).

If anything purposefully ignores language in the LSA, it is this argument. Weitz already addressed § 3.2(d) in its opening brief (Weitz Br. 31-32), and UMB gives no response to that. As Weitz pointed out, UMB's reading – like that of the district court – ignores the words "(in that order) shall be used" in § 3.2(d). That language goes to show, as Weitz stated in its complaint (and proposed amended complaint), that first use of all of the Authority loan proceeds to complete construction and allow initial occupancy and receipt of entrance fees was an essential component of the bargain. It means "the ability to draw on the Weitz Account to pay interest on bonds under § 3.2(d) only could occur **after** money in the Working Capital Fund and Operating Reserve Fund first were fully used" (Weitz Br. 32) (emphasis in the original). But "the Master Indenture provided that the Working Capital Fund and Operating Reserve Fund would not be funded until after completion of construction" (Weitz Br. 32) (quoting Aplt.Appx. 93). So, "every provision of the LSA that contemplated Weitz's funds being used to pay for something, including interest to the bondholders" under § 3.2(d), "first contemplated construction being completed" (Weitz Br. 33).

Second, UMB argues that "nothing in the LSA provides for the termination of Weitz's liquidity support obligations, or requires the return of Weitz's $2 million in liquidity support payments, in the event of a default on the Bonds or the 'abandonment' of the completion of the Project" (UMB Br. 23). But nothing in the LSA allows UMB unilaterally to refuse to disburse Authority loan proceeds to Epworth so as to prevent completion of the Project, either. UMB points to no such language, both because it does not exist and because UMB is ignoring Weitz's well-pleaded allegation of this.

This just shows UMB's failure or refusal to understand what Weitz's claims are. The Court should not follow UMB down that rabbit hole.

As Weitz emphasized in its opening brief, its claims are abandonment and rescission, which do not depend on the operation of the terms of the agreement, but rather rest on the *failure* of those terms. Under the law of Oklahoma, if UMB acted to abandon the performance of the LSA's "paramount idea and purpose" by two elements – an intention to abandon and an external act carrying it into effect – then external to the contract's language, it is rendered void *ab initio* (Weitz Br. 28-29). Similarly, under 15 O.S. § 233, if by UMB's fault the consideration for Weitz's obligation under the LSA failed or became void, including by frustration of purpose, the contract would be rescinded (Weitz Br. 45-48). Taking Weitz's allegations as true and

making all reasonable inferences in Weitz's favor, UMB abandoned the essential purpose of the LSA (Weitz Br. 35) and by its conduct the consideration for Weitz's obligation stopped existing (Weitz Br. 49-53).

So, if the LSA has been legally abandoned by UMB's own actions or must be rescinded due to UMB's own actions, then UMB cannot point to the LSA's contractual termination and modification provisions to save the LSA, *especially* to support a Rule 12(b)(6) dismissal, given that it is Weitz's facts, not UMB's, that must be taken as true, and inferences drawn in Weitz's favor, not UMB's. As Weitz explained in its opening brief (Weitz Br. 50-51), but to which UMB offers no response, abandonment and rescission are legal doctrines that do not depend on the contract's language and are not analogous to termination or modification. Put another way, if a contract is abandoned or rescinded per the law of Oklahoma, the contract disappears and there is no contractual termination or modification provision to be applied.

The LSA's language that Weitz's obligations under the LSA "shall not be affected, modified or impaired" by "any event," including any "acts on the part of" UMB or failure by Epworth (UMB Br. 23) (quoting Appellant's Addendum A30) does not change this. Again, nothing in the LSA allowed UMB unilaterally to decide to stop disbursing Authority loan proceeds to Epworth so as to prevent completion and occupancy of the Project, abandoning the LSA's essential purpose and destroying its essential consideration. This was wrongful conduct. Oklahoma's

equitable doctrine of abandonment and its statutory rescission doctrine exist to prevent UMB from profiting from that wrongful conduct to the detriment of Weitz, an innocent party (Weitz Br. 28-29, 51-52). The law of Oklahoma adds in these doctrines as extra conditions to any contract, to ensure that exactly what UMB did here cannot be allowed to pass.

Third and finally, UMB argues Weitz's requested relief would "rewrite the LSA to make Epworth's obligation to repay Weitz the $2 million superior to Epworth's obligation to repay the Bonds" (UMB Br. 24). In the ordinary course, had UMB properly first applied the Authority loan proceeds but Weitz's loan proceeds still were required to have been drawn on per the LSA's terms, UMB would be right, and the obligation to repay Weitz would be junior to Epworth's obligation to repay the bonds. But taking Weitz's facts as true and making all reasonable inferences in Weitz's favor, UMB chose to deviate from that course, abandon the LSA, and destroy its consideration. Abandonment and rescission mean there is no obligation to be senior and no obligation to be junior. They simply disappear, and Weitz must be repaid the funds it advanced but that never were used as intended.

The plain language of the LSA and the Master Indenture only solidifies Weitz's claims.

C. Taking Weitz's allegations as true and making all reasonable inferences in Weitz's favor, there was no "event of default" by Epworth within the meaning of the LSA and the Master Indenture.

In its opening brief, Weitz explained that the district court erred in holding that one reason its declaratory claim failed was that an "event of default" by Epworth existed, so under § 4.1 of the LSA this did not allow the LSA to be rescinded (Weitz Br. 36-39).

This is because, taking Weitz's alleged facts as true and making all reasonable inferences in Weitz's favor, construction ceased because of UMB's actions, not Epworth's, and there was no written notification of a default by Epworth as the Master Indenture required, but rather a notification by UMB – and then a day before UMB became successor trustee (Weitz Br. 37-38).[3] Section 4.1 of the LSA refers to a default by Epworth, not a wrongful act by the trustee. And – again taking Weitz's alleged facts as true and making all reasonable inferences in Weitz's favor – Weitz's statement in a motion to consolidate in the Oklahoma case that the claims at issue there "arise from a default by" Epworth was not an "admission" that there was, indeed, a default, and certainly not one that can support a Rule 12(b)(6) dismissal (Weitz Br. 38-39).

In response, and apparently using its invocation of the "contradiction" doctrine from the Tenth and Seventh Circuits that this Court does not recognize, *supra* at pp. 7-8, UMB delves further into

[3] UMB never addresses this date discrepancy.

documents from the Oklahoma case. It argues that Weitz stated several other times, including in a response to UMB's request for appointment of a receiver, that the Oklahoma actions at issue "arise from a default by" Epworth and did not object to the appointment of a receiver (UMB Br. 26-28) (quoting Aplt.Appx. 350). Citing no authority, it says that the meaning of these statements are "an issue of law, not fact", and that as a matter of law they mean that Weitz admitted an event of default under § 4.1 of the LSA had occurred and Weitz cannot contest this (UMB Br. 26-29).

As Weitz explained in its opening brief, this fails to take Weitz's allegations in this action as true or make reasonable inferences in Weitz's favor. In fact, Weitz never once has conceded in the Oklahoma action that there actually was an event of default by Epworth under the Authority loan or the bond documents. To the contrary, Weitz's case there, as here, has depended on its allegation that UMB stopped disbursing Authority loan funds to Epworth, not that Epworth defaulted. Weitz's claim in the Oklahoma case was to foreclose on its mechanics' liens and collect from a statutory trust fund, which a receivership would aid in doing by freezing the assets at issue. Not contesting UMB's pursuit of a receiver appointment in the Oklahoma action does not constitute an admission by Weitz of default by Epworth under the Authority loan or bond documents.

Moreover, to the extent it would be possible to view Weitz's statements in the Oklahoma case documents otherwise, that would be an inference against Weitz, which cannot be drawn at this stage. In this circuit, only documents that "do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion." *Couzens*, 854 F.3d at 516 (citation omitted). And this is true of public record documents of which the Court may take judicial notice, too. *Little Gem Life Sciences, LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916 (8th Cir. 2008) (SEC filings were proper public record of which district court could take judicial notice, and district court could consider them in Rule 12(b)(6) motion to dismiss without converting it to a motion for summary judgment *only because* they "did not contradict [the plaintiff]'s complaint"). So, if Weitz's two brief statements in the Oklahoma case documents to which UMB points somehow contradicted Weitz's complaint, they could not be considered to support a Rule 12(b)(6) dismissal.

Weitz's complaint and proposed amended complaint allege that there was no event of default by Epworth (Aplt.Appx. 156, 236). The Court must take that allegation as true and make all reasonable inferences from it in Weitz's favor. So viewed, there was no event of default by Epworth under § 4.1 of the LSA, and the district court erred in holding otherwise. UMB's self-serving inferences from brief statements in a foreign case are irrelevant.

Finally, toward the end of its discussion of the "event of default" issue, and again citing no authority, UMB again briefly argues that because Weitz consented to a receivership over the Project in the Oklahoma case, this constituted a separate event of default which again would make it impossible to complete construction under circumstances of which Weitz approved (UMB Br. 30).

This again fails to take Weitz's allegations as true and make all reasonable inferences in Weitz's favor. Regardless of what may or may not have happened later, taking Weitz's allegations as true it was UMB's actions in December 2017, and not any others by anyone else, that prevented the completion of construction and made it so that Weitz would not be repaid the funds it contributed under the LSA. That months later, Weitz did not object to a receivership in connection with it seeking to enforce its mechanic's lien rights in Oklahoma *for a project that UMB already unilaterally had stopped*, is not a waiver or release of its separate claims in this case that UMB's actions abandoned the LSA or activate Oklahoma statutory rescission.

UMB's argument that there was an "event of default" by Epworth fails the Rule 12(b)(6) standard of review. Under that standard, Weitz sufficiently alleged a cause of action for a declaratory judgment that UMB abandoned the purpose of the LSA, rendering it void *ab initio*. The district court erred in holding otherwise.

D. Weitz's allegation that UMB wrongfully declared a default by Epworth and prevented completion of construction is sufficient to support Weitz's claim for statutory rescission due to frustration of purpose and render that claim not "futile."

In its second issue on appeal, Weitz explained that the district court erred in refusing it leave to amend its complaint to state a claim for statutory rescission of the LSA under 15 O.S. §§ 231-235 (Weitz Br. 40-53).

This is because, taking Weitz's allegations in its proposed amended complaint as true and making all inferences in Weitz's favor, (1) the completion of construction and initial occupancy of the Project and receipt of entrance fees by Epworth were an essential part of Weitz's bargain for the LSA, (2) Weitz would not have entered into the LSA with that consideration omitted, (3) UMB's actions prevented the completion of construction and initial occupancy of the Project, causing Weitz's essential purpose for the LSA to fail or become void, and (4) Weitz offered to return everything it had received under the LSA, as 15 O.S. § 235 required (Weitz Br. 49-53). Accordingly, viewed as Rule 12(b)(6) requires, Weitz's proposed first amended complaint met the requirements for rescission under 15 O.S. § 233 (Weitz Br. 49-53).

In response, UMB initially rehashes its argument about § 3.2(d) of the LSA, arguing that "nothing in the LSA promises Weitz the completion and initial occupancy of the Project that would generate entrance fees to repay Weitz before the funds in the Weitz Account

could be used to pay interest on the Bonds pursuant to Section 3.2(d)" (UMB Br. 39). As Weitz explained in its opening brief and *supra* at p. 10, that is untrue. Section 3.2(d) of the LSA provided that Weitz's funds only would be used to pay interest on the bonds *after* the other accounts whose funding was dependent on completion of construction.

Indeed, every part of the LSA and the Master Indenture that contemplated Weitz's funds being used plainly contemplated that all Authority loan proceeds first were to be fully used. The plain language of the LSA and the Master Indenture supports Weitz's allegations in its complaint (and proposed amended complaint) that an essential part of the bargain was the expectation that the Authority loan proceeds first would be fully used to complete construction and occupancy of the Project. The LSA even expressly stated that the essential purpose of Weitz's LSA loan proceeds was "to provide support for the Project" (Aplt.Appx. 163), not to provide a payment source for interest on the bonds if UMB unilaterally decided to abandon the Project.

Then, UMB spends the rest of its response arguing that what the law of Oklahoma requires to activate rescission under 15 O.S. §§ 231-235 is a "material breach, by [UMB] of the terms of the LSA," which it argues Weitz did not show (UMB Br. 40, 43-46). In its opening brief, Weitz discussed a number of Oklahoma rescission cases in a bulleted list to show how its claims that consideration failed in this case are analogous (Weitz Br. 47-48). UMB parrots this in its own bulleted list,

but inserts parentheticals after each case to make it seem as if each was really about a breach of a contract (UMB Br. 41-43).

This is without merit. The law of Oklahoma does not require a material breach of contract to activate statutory rescission, but instead just that, "through the fault of the" other party, "consideration for [the plaintiff's] obligation fails in whole or in part", "becomes entirely void …", or "fails in a material respect." 15 O.S. § 233. The word "breach" does not even appear in the statute. Nor do any of UMB's quotations from any cases require a breach of contract to activate statutory rescission rights.

To the contrary, despite UMB saying otherwise (UMB Br. 41-42), many of the cases it cites as requiring this showing expressly say otherwise.

For example, UMB describes *Medlin v. Okla. Motor Hotel Corp.*, 545 P.2d 217, 222-24 (Okla. Civ. App. 1975), as holding "plaintiff sufficiently established that defendant materially breached its duties under the oral agreement, resulting in a failure of consideration" (UMB Br. 41). This is untrue. *Medlin* did not involve any breach of contract at all, which the court noted: "**there is no breach of contract**, fraud or bad faith on the part of anyone involved allowing us to press into service several settled rules of contract law." *Id.* at 223 n.5 (emphasis added). Instead, similar to this case, an innocent party to a construction agreement was harmed when the party at fault did not

obtain financing, which constituted a failure of consideration and therefore authorized statutory rescission. *Id.* at 223. Here, UMB prevented completion of the Project and therefore Weitz being repaid, equally constituting a failure of consideration.

Similarly, UMB describes *Wagstaff v. Prot. Apparel Corp. of Am.*, 760 F.2d 1074, 1076 (10th Cir. 1985), as holding, "failure of consideration sufficient to support rescission based on a breach of the terms 'memorialized' in the document setting forth the agreement between the parties" (UMB Br. 41). But the word "breach" does not appear in *Wagstaff* at all. Instead, the question there – as Weitz mentioned in its opening brief (Weitz Br. 50) – was whether the defendant had frustrated the purpose of the contract, which under the law of Oklahoma would warrant rescission. *Id.* As UMB does here, the defendant argued "frustration of purpose is not grounds for rescission of a contract." *Id.* The Tenth Circuit quickly disposed of this "argument [as] spurious." *Id.* (citing *Wright v. Fenstermacher*, 270 P.2d 625, 627 (Okla.1954) (quoting *Davis v. Hastings*, 261 P.2d 193 (Okla.1953)). Because the defendant had frustrated the purpose of the contract, even without a material breach, rescission was appropriate. *Id.* at 1076-77. Put simply, "frustration constitutes a failure of consideration and is therefore within the statutory grounds for rescission enumerated in 15 Okla.Stat. § 233." *Id.* at 1076.

Likewise, UMB describes *Davis v. Gwaltney*, 291 P.2d 820, 821-23 (Okla. 1955), as holding that "defendant committed multiple material breaches of express terms of the contract that gave rise to failure of consideration warranting rescission" (UMB Br. 42). But the word "breach" does not appear at all in *Davis*, either. Instead, there was "a partial failure of consideration, since … plaintiffs have not received everything that they contracted for." *Id.* at 823. The same is true here. Weitz contracted that its LSA money could be used after funds to be funded after completion of the Project were depleted, after which it would be repaid. By preventing completion of the Project so as to take Weitz's money now and prevent Weitz from ever being repaid, UMB prevented Weitz from receiving everything it contracted for.

Nor does the word "breach" appear anywhere in *Hurst v. Champion*, 244 P. 419, 421-22 (Okla. 1925), which UMB also cites (UMB Br. 43). *Hurst*, the first Oklahoma decision to discuss these rescission principles prominently, discusses many different reasons for rescission. *Id.* at 421-22. UMB cites one of them, stating, "where 'one party fails to perform what it is his duty to do under the contract, and the other is not in default, the latter may rescind the contract'" (UMB Br. 43) (quoting *id.* at 422). But another, which is the one on which Weitz relied both below and in its opening brief, but which UMB conspicuously ignores, is that

> rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted.

Id. at 421-11; *see also Wagstaff*, 760 F.2d at 1076

This is the ground for rescission, now enshrined in 15 O.S. § 233, that Weitz invokes (Weitz Br. 49-50). Taking Weitz's allegations as true and making all reasonable inferences in Weitz's favor,

> The purpose of Weitz providing funds under the LSA was "to provide support for the project" (Aplt.Appx. 163; Appellant's Addendum A21), its funds only would apply as a safeguard after the Authority loan proceeds were first fully distributed, and after completion of construction any draws of Weitz's LSA funds would be repaid from entrance fees received after that completion (Weitz Br. 33-35). But taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, UMB's unilateral actions prevented that from ever occurring, destroying the LSA's primary purpose (Weitz Br. 33-35).

(Weitz Br. 52-53) (internal citations updated).

This stated a proper claim for rescission due to frustration of purpose under Oklahoma law, which is exactly what Weitz pleaded below in its proposed amended complaint (Aplt.Appx. 238-39). UMB wrongfully declared a default in a manner *not* authorized under the LSA or the Master Indenture and unilaterally stopped completion of the Project, contrary to its obligations under both agreements. This was

particularly egregious under the LSA, in which the trustee agreed to accept Weitz's loan proceeds "in trust for the purposes … set forth in this Support Agreement" (Aplt.Appx. 169). The essential purpose of the LSA therefore failed, entitling Weitz under the law of Oklahoma to rescind it. UMB's argument that Weitz had to bring a breach of contract claim in order to prove rescission is without merit.

Taking Weitz's allegations in its proposed amended complaint as true and making all inferences in Weitz's favor, Weitz satisfied the requirements of Oklahoma law to state a claim for statutory rescission. The district court erred in holding otherwise.

Conclusion

The Court should reverse the district court's judgment and remand this case with instructions to grant Weitz's motion for leave to file an amended complaint and for further proceedings on all claims in Weitz's amended complaint.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Typestyle Requirements

I certify that this reply brief complies with the type-volume limitation of Fed. R. App., p. 32(a)(7)(B), because it contains 5,724 words excluding the parts exempted by Rule 32(f).

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I further certify that the electronic copy of this reply brief filed via the Court's ECF system is an exact, searchable PDF copies of the original, that it was scanned for viruses using Microsoft Windows Defender, and that according to that program it is free of viruses.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that on April 15, 2019, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

/s/Jonathan Sternberg
Attorney