UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE EXPORT-IMPORT BANK OF THE REPUBLIC OF CHINA, Plaintiff/Judgment Creditor, - against - GRENADA, Defendant/Judgment Debtor.	13 Civ. 1450 (HB)

MEMORANDUM OF LAW OF GRENADA
IN SUPPORT OF ITS MOTION FOR
JUDGMENT ON THE PLEADINGS DISMISSING PLAINTIFF'S COMPLAINT

CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for Defendant Grenada

Of Counsel:

Boaz S. Morag
Kristin A. Bresnahan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Other Authorities

Defendant Grenada submits this memorandum of law in support of its motion pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings dismissing with prejudice the complaint filed by plaintiff the Export-Import Bank of the Republic of China ("Ex-Im Bank") on March 4, 2013 (the "Action Two Complaint"), ECF No. 1.

PRELIMINARY STATEMENT

This is, by Ex-Im Bank's own admission, its "Action Two" on the same four loan agreements (the "Loan Agreements") on which it sued in its "Action One" and obtained a final money judgment from this Court in 2007. Ex. A (Mar. 7, 2013 Letter to Court ("Relatedness Letter")) at 1.[1] Having already been awarded a money judgment upon Grenada's default in the repayment of principal and interest under the Loan Agreements, Ex-Im Bank now brings this Action Two, alleging that for the last seven years, including while it was pursuing Action One, Grenada has been in breach of certain other provisions of those Loan Agreements – the *pari passu* clause and negative pledge covenant – and therefore asks the Court to adjudicate its claimed rights under those provisions and grant it additional relief. These are claims Ex-Im Bank could have pursued in Action One, but did not.

This second action must be dismissed under the doctrine of res judicata. Both New York and federal law have adopted the transactional approach to res judicata, under which a party to a prior action is precluded from bringing any claim in a subsequent proceeding that it could have raised in the prior proceeding. *See Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). Each Loan Agreement and its accompanying promissory note (the "Notes") were executed together as part of the same transaction – each for a specific loan from Ex-Im Bank to Grenada – and any and all claims brought under each Loan Agreement and its respective defaulted Note could and should

[1] All citations to "Ex. __" refer to exhibits to the Declaration of Boaz S. Morag dated April 17, 2013 submitted in support of Grenada's motion for judgment on the pleadings.

have been raised in Action One. As the master of its complaint, it was Ex-Im Bank's choice whether to voluntarily restructure its debt, whether to accelerate some or all of the loans, when to file suit, which claims to assert in Action One and what relief to seek. Its choice was to accelerate each of the loans, sue on each of them and seek a money judgment from this Court for principal, interest, attorneys' fees and costs on each loan. Having done so, Ex-Im Bank is barred from now asserting that Grenada is also violating other provisions of the Loan Agreements whose breach allegedly entitles Ex-Im Bank to injunctive relief in addition to the money judgment it has already obtained. Any and all claims arising from the transactions embodied in the Loan Agreements not brought in Action One are barred by res judicata which precludes the filing of this second suit. *Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.*, 600 F.3d 190, 195-96 (2d Cir. 2010) (money judgment obtained on business interruption insurance policy precluded second suit to recover under different provisions of the same policy).

Nor may Ex-Im Bank obtain the relief it seeks here – injunctive relief against Grenada's payment on External Indebtedness (as defined in the Loan Agreements) absent a ratable payment to Ex-Im Bank – by making a post-judgment application to that effect in Action One. Ex-Im Bank is now, and would be in any such application, seeking an interpretation of the *pari passu* clause and negative pledge covenant of the Loan Agreements, an adjudication of Ex-Im Bank's rights thereunder and a determination by the Court of the appropriate equitable relief to be afforded, assuming the covenants were in fact breached. Under the well-settled doctrine of merger, however, upon the issuance of a money judgment to Ex-Im Bank in Action One, *all* of its rights under the Loan Agreements and Notes merged into that judgment, extinguishing any other potential claims under those instruments. *Craven v. Rigas*, 85 A.D.3d 1524, 1527 (3d Dep't 2011) ("*Craven II*"), *appeal dismissed*, 17 N.Y.3d 932 (2011) (money judgment on

promissory note precluded subsequent cause of action in second suit for injunctive relief to enforce other rights under same note, because all claims under note merged into money judgment in first action).

Under the basic principles of res judicata and merger, a claimant under a contract cannot split its cause of action into multiple bits, obtain a money judgment for breach, and then choose years later to seek to enforce other alleged substantive contract terms after the contract has merged into the judgment debt, whether under the guise of "enforcing" the judgment or otherwise. Once claims for breach of contract are successfully pursued to judgment, the only available remedy is to enforce the judgment so obtained, not to seek a new judgment on the basis of other claimed rights under the contract, as both the Second Circuit and New York's appellate courts have recently reiterated. As Judge Kearse explained, "if the rights [under the Loan Agreements] already recognized [in the Judgment] have not been honored, [Ex-Im Bank's] proper course is to . . . seek enforcement of [its] judgment, not to seek a new judgment . . . ." *Farid v. Smith*, 850 F.2d 917, 927 (2d Cir. 1988) (Kearse, J. concurring). Accordingly, Ex-Im Bank's claims under the *pari passu* clause and negative pledge covenant are barred whether pursued in this Action Two or in Action One.

BACKGROUND

Between 1990 and 2000, Ex-Im Bank and Grenada executed four Loan Agreements by which Grenada borrowed a total of $28,000,000 from Ex-Im Bank, *see* Action Two Compl. ¶ 6, ECF No. 1, and contemporaneously executed four promissory notes that incorporated the terms of the Loan Agreements.[2] *See id.* ¶ 7. Grenada immediately began making timely payments on

[2] It is common, but not required, for the indebtedness incurred under a loan agreement to be evidenced by the execution of a promissory note. *See* Lee Buchheit, *How to Negotiate Eurocurrency Loan Agreements* 150-51 (2d ed. 2006).

these debts, and continued to service the debts through March 2004, repaying nearly $6.5 million in principal before suspending the payments. *See* Ex. B (Action One Compl.) ¶ 5.

Beginning in September of 2001, Grenada was struck by several major events that slowed its economic growth. First, the September 11 terrorist attacks on the United States took a major toll on Grenada's tourism industry, which triggered an economic recession in 2001 and 2002. Ex. C (Action One Answer) ¶ 4. Second, Grenada was hit by Tropical Storm Lili in September of 2002, causing substantial damage to Grenada's coast lines, fishing industry and infrastructure. *Id.* Third, and most significantly, on September 7, 2004, Hurricane Ivan stunned the nation and left tremendous devastation in its wake, including 29 deaths, damage to nearly *90%* of the houses in the country, major damage to virtually every school, and near complete destruction of the trees producing nutmeg – Grenada's principal export commodity – with approximately 70% of the nutmeg producing acreage of the country ruined. *See* Ex. D (2005 Offering Memorandum) at 10. The total damage from Hurricane Ivan was estimated to be in excess of E.C.$2.4 billion (over $800 million U.S. dollars), *twice* Grenada's gross domestic product in 2003. *Id.*

Only ten months after Hurricane Ivan, on July 14, 2005, Hurricane Emily hit Grenada and struck two of the three islands of the tri-island nation – Carriacou and Petite Martinique – causing further devastation and exacerbating the severe losses suffered as a result of Hurricane Ivan, particularly in the areas of housing, infrastructure and agriculture. *See id.* at 17. The total damage from Hurricane Emily was estimated to be E.C.$140 million (over $50 million U.S. dollars), or nearly 13% of Grenada's gross domestic product in 2004. *Id.*

Because of these devastating events, Grenada was no longer able to service its debt burden. Like many nations that have faced economic crisis and unsustainable indebtedness, Grenada was forced to seek restructuring of both its external and internal public debt.

In the absence of any bankruptcy regime for insolvent states, Grenada was required to pursue that external debt restructuring on an entirely voluntary basis. Grenada did not repudiate that debt. Instead, consistent with United States policy favoring the orderly and consensual restructuring of sovereign debt, Grenada restructured its unsustainable debt burden through a global exchange offer in 2005, in which eligible commercial creditors exchanged old, nonperforming debt interests for new, performing bond interests with the same face amount but lower interest rates and/or longer maturities. *See* Ex. D (2005 Offering Memorandum) at 6. These eligible creditors thus did not suffer any reduction in principal. *See id.* The Offering Memorandum was publicly disseminated on September 9, 2005, and payments on the restructured bonds began on March 15, 2006. Grenada also "received debt relief from the Paris Club [the organized group of state lenders] in 2006, resulting in the rescheduling of its obligations to bilateral creditors including Belgium, the United Kingdom, the United States, and France." Action Two Compl. ¶ 21, ECF No. 1.

Rather than accept a rescheduling of its debt on comparable terms, which virtually all other private and public sector creditors joined in, on June 15, 2005, Ex-Im Bank gave written "Notice of Default and Acceleration" to Grenada, effective July 1, 2005, "that certain events of default had occurred under the terms of the First, Second, Third, and Fourth Loan Agreements, and the entire unpaid balance and all other sums payable under the Loan Agreements and Notes were immediately due and payable." Ex. B (Action One Compl.) ¶¶ 32, 41, 49, 56.

Action One

On March 29, 2006, Ex-Im Bank filed its complaint in Action One, claiming that under the Loan Agreements, "Grenada failed (1) to repay certain installments of principal since April 1, 2004 and (2) to make certain interest payments since April 1, 2004 . . . causing a default on all of

the loans pursuant to cross-default provisions." Ex. B (Action One Compl.) ¶ 5. The Action One Complaint recited both the individual and common terms of the four Loan Agreements, *see id.* ¶¶ 6-27, and asserted four separate counts against Grenada – one for each Loan Agreement. *See id.* at 6 ("COUNT ONE UNDER THE FIRST LOAN AGREEMENT"); *id.* at 7 ("COUNT TWO UNDER THE SECOND LOAN AGREEMENT"); *id.* at 9 ("COUNT THREE UNDER THE THIRD LOAN AGREEMENT"); *id.* at 10 ("COUNT FOUR UNDER THE FOURTH LOAN AGREEMENT").

Specifically, Ex-Im Bank alleged that Grenada defaulted on making payments on principal and interest under the Loan Agreements in April of 2004, *id.* ¶ 5, that each Loan Agreement included a provision for "default interest" of 10% "in the event Grenada fails to make an interest or principal payment on a timely basis," and that under "the First Loan Agreement, default interest accrues on 'the principal interest, fees and other amounts which are overdue' from and including the date of such default", and that under the Second, Third and Fourth Loan Agreements, "default interest accrues on 'each installment payment of the principal amount of the Loan which is overdue, from and including the due date . . . .' On acceleration, the balance of the principal is immediately due; hence, default interest then accrues on the entire principal balance," *id.* ¶ 21. Notably, Ex-Im Bank also made, and incorporated into each of its four causes of action, the further allegation that Grenada had "warranted that its obligations to the Ex-Im Bank will at all times rank at least *pari passu* with its other External Indebtedness . . . ." *Id.* ¶¶ 24, 28, 37, 45, 53.

Ex-Im Bank demanded "judgment in its favor as follows: (a) the sum of $21,586,057.38, plus prejudgment interest at the contract default rate (*i.e.*, 10 percent) on unpaid principal from July 1, 2005 to the date of the judgment of $5,671.65 per diem, plus expenses and attorneys' fees

incurred by Ex-Im Bank in connection with enforcement of the Loan Agreements; (b) taxable disbursements and court costs; and (c) such other and further relief as this Court deems just and proper." *Id.* at 11. Ex-Im Bank did not seek any other relief in its Action One Complaint. Grenada filed its Answer to Ex-Im Bank's Action One Complaint on June 26, 2006. *See* Ex. C (Action One Answer).

Ex-Im Bank filed its Motion for Summary Judgment on December 21, 2006. As of that date, Ex-Im Bank was aware from publicly available official pronouncements that Grenada had offered to restructure its eligible commercial debt, and that as per its September 9, 2005 Offering Memorandum, Grenada did "not intend to pay any non-tendered Eligible Claims unless resources become available to do so." Ex. D (2005 Offering Memorandum) at 18.[3] It also knew or was on notice that Grenada began making payments on the restructured debt as of March 15, 2006, consistent with the terms of the Offering Memorandum. This "evidence," dating back to 2005 and 2006, is what Ex-Im Bank now relies on in Action Two to allege a breach of the *pari passu* clause of the Loan Agreements. *See* Action Two Compl. ¶¶ 19, 22, 23, ECF No. 1.

On February 6, 2007, this Court granted Ex-Im Bank's unopposed motion for summary judgment on the "entirety" of its Action One Complaint. *See* Ex. E (Order Granting Summ. J.). That same day, the Court entered a money judgment on the four Loan Agreements and Notes in

[3] Although Ex-Im Bank's contention that it held an "Eligible Claim" for purposes of the 2005 debt restructuring must be accepted as true for the purposes of this motion, Grenada disagrees that Ex-Im Bank held an Eligible Claim, which claims were individually listed in two schedules to the 2005 Offering Memorandum and do not include Ex-Im Bank's claim. Action Two Answer ¶ 19; Memo of Law in Support of Motion For An Order To Show Cause at 6, ECF No. 3. Ex-Im Bank is a "100% state-owned" bank "supervised by the Ministry of Finance" of Taiwan. *See* Ex-Im Bank, *2011 Annual Report* 12, 13 (June 2012), *available at* http://www.eximbank.com.tw/en-us/AnnualReport/Documents/2011%20ANNUAL%20REPORT.pdf. Therefore, Ex-Im Bank's debt could and should have been restructured in direct state-to-state negotiations between the governments of Taiwan and Grenada, as the members of the Paris Club did in 2006.

the amount of $21,586,057.38, plus pre-judgment interest, attorney's fees and post-judgment statutory interests. *See* Ex. F (Action One Judgment) (granting Ex-Im Bank's motion for summary judgment "in its entirety"). Ex-Im Bank moved to amend that judgment on February 20, 2007 to quantify the amount of fees and interest owed to Ex-Im Bank. *See* Ex. G (Memo of Law in Support of Motion to Amend the Judgment) at 2. Ex-Im Bank drafted the proposed amended judgment to include pre-judgment interest at the contract default rate (10%) on unpaid principal accruing from July 1, 2005 to the date of judgment of $5,671.65 per diem, post-judgment statutory interest from the date of the amended judgment forward, plus expenses and attorneys' fees. *See* Ex. H (Action One Amended Judgment) at 2. This Court entered the Amended Judgment on March 16, 2007 (the "Judgment").

The Judgment is final and is not subject to appeal. Since receiving that Judgment, Ex-Im Bank has attempted to exercise its rights as a judgment creditor and sought to attach certain of Grenada's assets in the United States which it contends are not immune from execution under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1609-1611, which governs judgment enforcement against foreign states. *See Exp.-Imp. Bank of the Republic of China v. Grenada*, 876 F. Supp. 2d 263 (S.D.N.Y. 2012), *appeal pending*, 12-2619-cv (2d Cir.).

Action Two:

On March 4, 2013, Ex-Im Bank filed its complaint in the present action, alleging a breach by Grenada of the Loan Agreements. Specifically, Ex-Im Bank contends that each of the four Loan Agreements contains a substantially similar clause to the effect that "Borrower's obligations under this Agreement and the Note will at all times rank at least *pari passu* with Borrower's any other External Indebtedness (direct or contingent) outstanding from time to time." Action Two Compl. ¶¶ 10-13, ECF No. 1. The Action Two Complaint further alleges

that the Loan Agreements contain "a negative covenant that precludes Grenada, until Ex-Im Bank is paid in full, from permitting any obligation 'to have any priority or be subject to *any preferential arrangement*, whether or not constituting a security agreement, *in favor of any creditor or class of creditors*, as to security, *the repayment of principal and interest* or the right to receive income or revenue." *Id.* ¶ 14 (emphasis in the original). "External Indebtedness" is defined by the Loan Agreements as "debt denominated in a currency other than Grenada's and payable to a nonresident of Grenada." *Id.* ¶ 15.

Ex-Im Bank alleges that "[a]ccording to their plain language, the *pari passu* clauses preclude Grenada from making a payment to a holder of External Indebtedness without making a ratable payment at the same time to Ex-Im Bank." *Id.* ¶ 16. Ex-Im Bank contends that Grenada is in breach of the Loan Agreements based on the alleged facts: (a) that since 2006 Grenada has been making substantial interest payments to holders of bonds arising from the 2005 Debt Restructuring, *see id.* ¶¶ 22, 23; (b) that Grenada has been making interest payments to other sovereign bilateral creditors in connection with the 2006 Paris Club restructurings, *id.*, and (c) that "Grenada's Offering Memorandum for [the 2005 Debt Restructuring] stated plainly that Grenada did *not intend to pay* any debt that elected not to restructure unless resources became available to do so. In addition, Grenada stated that it did *not intend to pay* any amount in respect of any debt that elected not to restructure if, at the time such payment is due, a payment default then existed under any new bond issued in the exchange." *Id.* ¶ 19.

On the basis of these factual allegations and its view of the meaning and rights conferred by the *pari passu* clause and negative pledge covenant, Ex-Im Bank sought a temporary restraining order, preliminary injunction and permanent injunction precluding Grenada from making "any payment of its External Indebtedness without also making a ratable payment at the

same time to Ex-Im Bank," or entering "into any agreement other creditors [sic] under which it prefers those creditors as to the payment of principal and interest above its obligation to pay Ex-Im Bank." *Id.* ¶¶ 30, 32.

On March 13, 2013, this Court held a hearing on the Order to Show Cause Why A Preliminary Injunction Should Not Issue. At the conclusion of that hearing, the Court entered an Order on Consent, which provides that "Grenada shall not (i) make any payment with respect to the Bonds [that were the subject of the restraining order Ex-Im Bank was seeking] or (ii) attempt to alter or amend the processes or specific transfer mechanisms (including the use of existing firms) for the making of payments under the Bonds, without first having given not less than ten (10) calendar days' prior written notice to counsel for Ex-Im Bank and the Court." Order on Consent, ECF No. 2.

Grenada now answers Ex-Im Bank's Action Two Complaint and moves for judgment on the pleadings dismissing the Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(c), on the grounds that this action is barred as a matter of law by res judicata, and the claim asserted is precluded by the doctrine of merger.

LEGAL STANDARD

"The same standard applicable to Fed. R. Civ. P. 12(b)(6) motions to dismiss applies to Fed. R. Civ. P. 12(c) motions for judgment on the pleadings." *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010). "A party may raise a defense of res judicata, collateral estoppel, or judicial estoppel on a motion to dismiss pursuant to Rule 12(b)(6) [or Rule 12(c)] where the basis for that defense is set forth on the face of the complaint or established by public record." *Feitshans v. Kahn*, No. 06 Civ. 2125 (SAS), 2006 WL 2714706, at *2 (S.D.N.Y. Sept. 21, 2006); *see also Cameron v. Church*, 253 F. Supp. 2d 611, 623 (S.D.N.Y. 2003)

(granting motion to dismiss on res judicata and collateral estoppel grounds). It is well-settled that in ruling on a motion to dismiss under Rule 12(b)(6) or 12(c), a district court may rely on documents integral to or referred to in the complaint, *Subaru Distributors Corp. v. Subaru of America Inc.*, 425 F.3d 119, 122 (2d Cir. 2005), as well as matters of public record such as court filings. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998); *In re Enron Corp.*, 379 B.R. 425, 431 n.18 (S.D.N.Y. 2007) (citing Fed. R. Evid. 201(b)(2) and *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (noting that "courts routinely take judicial notice of documents filed in other courts.")).

ARGUMENT

I. RES JUDICATA AND THE DOCTRINE OF MERGER BAR THIS ACTION AND ANY POST-JUDGMENT ATTEMPT TO ENFORCE EX-IM BANK'S CLAIMED RIGHTS UNDER THE *PARI PASSU* AND NEGATIVE PLEDGE CLAUSES OF THE LOAN AGREEMENTS

"Under both New York and federal law, the doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action. . . . If a valid and final judgment has been entered on the merits of a case, 'the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.'" *Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.*, 600 F.3d 190, 195-96 (2d Cir. 2010) (quoting Restatement (Second) of Judgments § 24(1) (1982)) (other internal citations omitted).[4] "[T]he 'general rule under New York and federal law is that a debt created by contract merges with a judgment entered on that contract.'" *FCS Advisors, Inc. v. Fair Fin. Co.,* 605 F.3d 144 (2d Cir. 2010) (quoting

[4] Because the res judicata standard is the same under New York and federal law, there is no need for this Court to conduct a choice of law analysis as between them.

Westinghouse Credit Corp. v. D'Urso, 371 F.3d 96, 102 (2d Cir. 2004)). Accordingly, "[u]nder the merger doctrine, a contract is deemed to merge with the judgment, thereby depriving a plaintiff from being able to assert claims based on the terms and provisions of the contractual instrument" once it has obtained a judgment on that instrument. *In re A & P Diversified Techs. Realty, Inc.*, 467 F.3d 337, 341 (3d Cir. 2006).

A. Res Judicata Bars Any Subsequent Action On A Claim That Arose From The Same Underlying Transaction As The Transaction In Action One

The doctrine of res judicata exists to prevent precisely the kind of action Ex-Im Bank brings in this case, which asks this Court to re-adjudicate its rights and remedies under a contractual agreement, the breach of which has already been reduced to judgment. The doctrine of res judicata precludes parties to a prior action "from raising in a subsequent proceeding any claim they could have raised in the prior one, where all of the claims arise from the same underlying transaction," *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). "It is blackletter law that a valid final judgment bars future actions between the same parties on the 'same cause of action.'" *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 27 (1978) (citing 50 CJS, Judgments, § 598). Under the Restatement's transactional approach, "demands or rights of action . . . are single and entire" when they "arise out of one and the same act or contract." *Id.* at 27-28. Accordingly, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981) (citing *Matter of Reilly*, 45 N.Y.2d at 27); *see also Hellstern v. Hellstern*, 279 N.Y. 327, 331-32 (1938) (holding plaintiff could not maintain a second suit at law to recover money damages where she secured a judgment in her first suit in equity to recover the same amount of money).

In Action One, Ex-Im Bank brought an action on the four Loan Agreements. *See* Ex. B (Action One Compl.) at 6, 7, 9, 10. The current Action Two is also on the four Loan Agreements, and Ex-Im Bank has acknowledged that "[t]he parties and *the facts underlying both actions are the same*." Ex. A (Relatedness Letter) at 2 (emphasis added). There can be no doubt that the claim Ex-Im Bank now brings in this Action Two arises out of the same series of transactions as its claims in Action One, as its claim now arises out of the very same Loan Agreements as the claims brought in Action One. Ex-Im Bank even explicitly referenced the *pari passu* clause in its Action One Complaint and incorporated the terms of that clause into each of its four causes of action for a money judgment under the Loan Agreements. *See* Ex. B (Action One Compl.) ¶¶ 24, 28, 37, 45, 53. Because Ex-Im Bank has already obtained a judgment in Action One, a second suit asserting claims arising from the same underlying transactions as those involved in Action One is barred by the doctrine of res judicata.[5]

---

[5] Ex-Im Bank implies that in Action One, it "sought a monetary judgment for Grenada's default on the *promissory notes*," whereas Action Two "seeks an order specifically enforcing the *Loan Agreements*' *pari passu* clauses and negative covenants . . . ." Ex. A (Relatedness Letter) at 1 (emphasis added). *See also* Memo of Law in Support of Motion For An Order To Show Cause at 3 n.3, ECF No. 3. Any attempt to distinguish between the promissory notes issued under the Loan Agreements and the Loan Agreements themselves is baseless.

First, Action One was not brought only on the Notes, but also on the Loan Agreements. The Action One Complaint refers to the Loan Agreements no fewer than 77 times in a 12 page pleading, and unequivocally brings each count under a Loan Agreement. *See, e.g.*, Ex. B (Action One Compl.) at 6 ("COUNT ONE UNDER THE FIRST LOAN AGREEMENT"); *id.* ¶ 30 ("Grenada has failed to make required payments and is in default under the First Loan Agreement and the First Note."); *id.* ¶ 43 ("The following chart summarizes the amounts due under the Second Loan Agreement and Second Note through the date of acceleration."). Ex-Im Bank cannot now argue that Action One was brought solely on the Notes.

Second, in any event, each Loan Agreement expressly provided for the execution of the Note, and indeed execution of the Note was a condition precedent to drawing down on the Loan Agreement, and therefore each Note was executed as part of the same transaction or series of transactions as each Loan Agreement. *See, e.g.*, Ex. N (First Loan Agreement) §§ 1.01(m), 7.01; Ex. O (Second Loan Agreement) §§ 1.01(k), 6.01; Ex. P (Third Loan Agreement) §§ 1.01(k), 6.01; Ex. Q (Fourth Loan Agreement) §§ 1.01(l), 7.01(a). "What factual grouping

The doctrine of res judicata does not allow a plaintiff "'to bring countless actions, one at a time, until plaintiff happens upon a legal theory that achieves the desired result.'" *Duane Reade*, 600 F.3d at 199 (quoting *Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.*, 503 F. Supp. 2d 699, 705 (S.D.N.Y. 2007) (Rakoff, J.)). At the time Ex-Im Bank sought entry of a judgment in Action One, it was well aware that the *pari passu* clause existed in the Loan Agreements, having cited that provision to the Court in its Action One Complaint. *See* Ex. B (Action One Compl.) ¶ 24 ("Grenada further warranted that its obligations to the Ex-Im Bank will at all times rank at least *pari passu* with its other External Indebtedness."). Also as of that time, Grenada had made clear in its publicly available 2005 Offering Memorandum for the 2005 Debt Restructuring that it was issuing new bonds, Ex. D (2005 Offering Memorandum) at 10; that it did "not intend to pay any non-tendered Eligible Claims unless resources become available to do so," *id.* at 18; and that interest payments on those new bonds began on March 15, 2006. *Id.*

---

constitutes a 'transaction', and what groups constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2) (1982). It is without question that, when viewed pragmatically and based on the expectations of the parties, each Note and its related Loan Agreement was executed as part of the same contract, and therefore part of the same transaction. *See, e.g.*, Ex. I (First Promissory Note) at 2 ("In case an Event of Default shall occur, the principal amount of this Note may be declared to become immediately due and payable *in the manner and with the effect provided in the [Loan] Agreement*") (emphasis added); *see also* Ex. J (Second Promissory Note) at 2; Ex. K (Third Promissory Note) at 2; Ex. L (Fourth Promissory Note) at 2; Ex. M (Action One Memo of Law in Support of Summ. J.) at 3 ("The Loan Agreements, together with the Notes, stipulate that they constitute the entire obligation, or understanding and agreement, of the parties and represent 'the full and exhaustive implementation' of their 'respective rights and obligations.'") (quoting First Loan Agreement, § 9.01; Second Loan Agreement, § 8.01; Third Loan Agreement, § 8.01 and Fourth Loan Agreement, § 9.01); *id.* at 2 (claiming as part of its "Undisputed Facts," the "Existence of Four Contracts" – each made up of a Loan Agreement and Note). Accordingly, any claim arising out of any Loan Agreement must have been raised in an action on the corresponding Note, or is now barred by res judicata.

at 6. All of the "facts" on which Ex-Im Bank relies in support of its claim for injunctive relief in Action Two, it knew or was on notice of, before entry of judgment in Action One.

Ex-Im Bank was able to seek injunctive relief based on the *pari passu* clause and negative pledge covenant in Action One, but chose not to do so. That failure bars its current action seeking injunctive relief, as "[i]t is irrelevant that plaintiff did not raise the contract claim in the earlier action; what is material is that it could have been raised but was not." *Ellis v. Abbey & Ellis*, 294 A.D.2d 168, 170 (1st Dep't 2002). "Where a litigant selected a litigation strategy he now regrets, placing all his eggs in a single basket, his choice of that strategy will not prevent the application of preclusion against him." *Duane Reade*, 600 F.3d at 199 (internal citation omitted).

Nor may Ex-Im Bank avoid the res judicata bar by arguing that different elements of proof are required to establish a failure of payment under the Loan Agreements and the Notes, which it established in Action One, as opposed to proving a violation of the *pari passu* clause or negative pledge covenant which it seeks to do in Action Two. Any such argument is foreclosed by the New York Court of Appeals' decision in *O'Brien v. City of Syracuse*, 54 N.Y.2d 353 (1981) which expressly overruled *Smith v. Kirkpatrick*, 305 N.Y. 66 (1953) in holding that even where alternative theories are available to recover relief for harm arising out of a single "factual grouping" and those theories "involve[] materially different elements of proof," there can be no justification for presenting the theories in two different actions. *O'Brien*, 54 N.Y.2d at 356-57. The Second Circuit has also held that "[i]n civil suits a litigant must advance all available evidence and legal arguments relating to a claim or controversy in the context of a single proceeding." *Johnson v. Ashcroft*, 378 F.3d 164, 172 n.10 (2d Cir. 2004). *See also* Restatement (Second) of Judgments § 25(a) (1982) (principles of res judicata apply even where plaintiff is

prepared in the second action to present evidence or grounds or theories of the case not presented in the first action).

Accordingly Action Two is barred by res judicata and must be dismissed with prejudice.

B. The Doctrine of Merger Bars Ex-Im Bank's Claim

For the same basic reasons that this Action Two is barred by the doctrine of res judicata, it is equally clear that Ex-Im Bank may not pursue the injunctive relief it seeks in its Action Two Complaint by making a post-judgment application to that effect in Action One. The doctrine of merger aims "to prevent successive actions on the same cause" and "is closely related to the doctrine of res judicata." *Jay's Stores, Inc. v. Ann Lewis Shops, Inc.*, 15 N.Y.2d 141, 147 (1965). "Under the merger doctrine, a contract is deemed to merge with the judgment, thereby depriving plaintiff from being able to assert claims based on the terms and provisions of the contractual instrument." *In re A & P*, 467 F.3d at 341(citing *In re Olick*, 221 B.R. 146, 152 (Bankr. E.D. Pa. 1998) (applying the Restatement (Second) of Judgments §§ 17, 18 (1982) to hold that "[i]n a contract action, the contract itself is held to merge with the judgment, thereby depriving a plaintiff from ever again being able to assert claims based on the terms and provisions of the contractual instrument.")). *See also Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 238 (1998) (citing the Restatement (Second) of Judgments and holding that where plaintiff and defendant agreed to certain injunctive relief, plaintiff's related contract claims "merged in the judgment" even though they were not joined, expressly litigated or determined in the original proceeding, preventing plaintiff from "su[ing] again to recover more."); *Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals Grps., Inc.*, No. 11-1835, 2012 WL 6622708, at *5 (4th Cir. Dec. 20, 2012) ("Under the doctrine of merger, any contractual rights are extinguished as they

are changed into a matter of record and merged in the judgment . . . .") (citation and internal quotation marks omitted).

In seeking to enforce its alleged rights under the *pari passu* clause and negative pledge covenant in the Loan Agreements, Ex-Im Bank attempts to pursue claims under contracts which have merged into its Judgment. Having sought and obtained the Judgment under each Loan Agreement, Ex-Im Bank is now barred "from ever again being able to assert claims based on the terms and provisions of the contractual instrument." *In re Olick*, 221 B.R. 146, 152 (Bankr. E.D. Pa. 1998).

This principle is illustrated by the Appellate Division's recent decision in *Craven II*, holding that the merger doctrine barred a claim seeking injunctive relief based on rights in a contract on which the plaintiff had previously sued and obtained a money judgment. In *Craven II*, the plaintiff sold his 25% interest in a company to defendant Rigas. 85 A.D.3d at 1525. Rigas paid plaintiff $500,000 in cash at the time of the sale, and executed a promissory note for the $850,000 balance of the purchase price that was secured by the shares of the company being sold. *Id.* Rigas agreed to place a restrictive legend on the stock certificates declaring plaintiff's interest in those shares until plaintiff was paid in full, but he failed to do so, and later pledged the shares as security on other indebtedness. *Id.* Ultimately, after one amendment to the promissory note that conditionally extended its maturity date, Rigas defaulted. *Id.* Plaintiff then filed suit on the promissory note and was granted summary judgment and a money judgment was entered, which was upheld by the Appellate Division. *Craven v. Rigas*, 71 A.D.3d 1220, 1221 (3d Dep't 2010) ("*Craven I*").

Plaintiff then filed a second suit asserting five new causes of action, including one in which he sought injunctive relief compelling delivery of stock certificates in the amount

equivalent to his former interest in the company, to which he claimed he was entitled because the promissory note was secured by the shares and the stock certificates should have included a restrictive legend until he was paid in full. *Craven II*, 85 A.D.3d at 1525. The Third Department rejected this claim, and held that any rights plaintiff held under the note (*i.e.*, arising from the restrictive covenant in the note) merged into the money judgment he had received in his first action, and therefore an action for injunctive relief on those separate rights was barred by the doctrine of merger. *Id.* at 1527.

Ex-Im Bank's assertion of rights to injunctive relief after having already obtained a money judgment is indistinguishable from the cause of action found to be barred by merger in *Craven II*. Ex-Im Bank contends that it holds rights under the Loan Agreements that are separate and apart from the money judgment that it already holds, and that such rights merit injunctive relief. But as made clear in *Craven II*, whatever those rights under the Loan Agreements are, they merged into the money judgment and cannot be pursued thereafter. *Id.*

In Action One, Ex-Im Bank itself recognized the operation of the merger doctrine in extinguishing certain of its rights under the Loan Agreements and Notes upon the issuance of a judgment. The Loan Agreements provide that upon a default by Grenada, interest is payable at the rate of 10% (rather than the pre-default rate of 4.5%) "on each installment payment of the principal amount of the Loan which is overdue hereunder . . . *to the date of its full payment*," which could extend past the date of the entry of judgment. Ex. O (Second Loan Agreement) § 2.03(b) (emphasis added); *see also* Ex. N (First Loan Agreement) §2.04; Ex. P (Third Loan Agreement) § 2.03(b); Ex. Q (Fourth Loan Agreement) § 2.03(b). Recognizing that by operation of the merger doctrine one consequence of obtaining a judgment was to cut off its right to continue to accrue default interest, Ex-Im Bank submitted to the Court a form of judgment that

awarded default interest through the date of the Judgment and, thereafter, awarded interest at the substantially lower federal post-judgment rate provided for in 28 U.S.C. § 1961. *See* Ex. H (Action One Amended Judgment) at 2 (ordering that plaintiff recover "post-judgment interest at the statutory rate from the date of the amended judgment forward"). In so doing, Ex-Im Bank was not being generous to Grenada. Rather, it was acknowledging the settled rule that "contract language stating that a particular interest rate will accrue on a debt until the date of payment is interpreted as applying to the debt itself, and not to any judgment into which the debt is merged." *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004); *see also O'Brien v. Young*, 95 N.Y. 428, 430-31 (1884) (statutory rate, not contract rate, determines interest owed on a judgment); *Citibank, N.A. v. Liebowitz*, 110 A.D.2d 615, 615 (2d Dep't 1985) (contract rate of interest applies until the contract is merged into a judgment).

Ex-Im Bank's choice of filing suit within a year of default and seeking a money judgment (as opposed to continuing to accrue interest at the default rate and suing just prior to the end of the six-year limitations period) thus had consequences for Ex-Im Bank's ultimate recovery in this case. Likewise, Ex-Im Bank's choice to seek a money judgment only and forego its alleged claims for injunctive relief under the same Loan Agreements bars its attempt at a second bite at the apple.

Rather than to seek a second judgment or to relitigate its rights under the Loan Agreements, Ex-Im Bank's remedy is to pursue enforcement of its first judgment. As a judgment creditor (a capacity it notes in the case caption of Action Two that it enjoys), Ex-Im Bank obtained rights unavailable to it as a lender – including the right to execute on non-immune assets to satisfy its judgment to the extent permitted by law. *See City of Harper v. Daniels*, 211 F. 57, 62 (8th Cir. 1914) (once a plaintiff acquires a judgment, "the nature of his demand was

changed and he acquired a valuable right which he could not otherwise enjoy," including the right to execute on assets). Ex-Im Bank has in fact exercised the rights of a judgment creditor by attempting to enforce the judgment by attaching assets of Grenada in the United States. *See Exp.-Imp. Bank of the Republic of China v. Grenada*, 876 F. Supp. 2d 263 (S.D.N.Y. 2012), *appeal pending*, 12-2619-cv (2d Cir.). Judgment creditors do not *also* retain contractual claims that precede the merger of those claims into their judgments.

Because Ex-Im Bank sought and received a money judgment on the Loan Agreements and Notes in Action One, any subsequent claims arising out of those contractual instruments have merged into that money judgment and have therefore been extinguished.

CONCLUSION

For the foregoing reasons, Grenada's motion should be granted and the Complaint should be dismissed with prejudice.

Dated: New York, New York
April 17, 2013

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: /s/ Boaz S. Morag
Boaz S. Morag (bmorag@cgsh.com)

Of Counsel:
Kristin A. Bresnahan

One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for Grenada