UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TIER REIT, INC.,	§	
	§	
Plaintiff,	§	
vs.	§	
	§	CASE NO. 3:15-CV-03831-M
UVEST FINANCIAL SERVICES GROUP, INC., a/k/a and d/b/a UVEST FINANCIAL SERVICES, INC.,	§	
	§	
	§	
Defendant.	§	

PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND INCORPORATED BRIEF

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Plaintiff TIER REIT, Inc. ("Plaintiff" or "TIER REIT") files this Motion to Dismiss the Counterclaim (the "Counterclaim") of Defendant UVEST Financial Services Group, Inc., a/k/a and d/b/a UVEST Financial Services, Inc. ("UVEST") and Incorporated Brief (this "Motion"), and, in support, states as follows:

I. Summary of Argument

UVEST's Counterclaim seeks to recover on agreements that provide for TIER REIT's indemnity liability where TIER REIT has made a misstatement or omission in its securities filings, such as a prospectus. However, the underlying investor lawsuits that UVEST contends resulted from TIER REIT's alleged breach of these agreements were demonstrably not based upon any misstatement or omission in TIER REIT's securities filings. To the contrary, each of those lawsuits specifically claimed that the investor had not even received or reviewed TIER REIT's prospectus or any other written description of TIER REIT at the time they invested. The investors' complaints, instead, were with the alleged misrepresentations made about TIER REIT to the investors by UVEST. Had UVEST provided the investors with the prospectus about which UVEST complains, the investors would have been able to learn that each of the alleged misstatements that UVEST made about the investments was untrue: the prospectus discloses in detail the basis of the share price, the source of distributions, and the illiquidity of the investment that the investors claimed had been misrepresented by UVEST to them in their lawsuits. Indeed, TIER REIT includes such information in its prospectus and requires broker/dealers like UVEST to provide such prospectuses to investors before investment precisely so the investors will have the type of information the investors alleged in their lawsuits UVEST did not provide them and can make an appropriate decision regarding whether TIER REIT is the right investment for them.

UVEST attempts to escape the effect of the contract it signed and the pleadings of the underlying lawsuits on which UVEST's Counterclaim is based by including in its Counterclaim broad statements about the claims outside the pleadings in the lawsuits themselves, but those conclusory allegations fail to establish the plausibility of UVEST's claim as required by Rule 8. Accordingly, UVEST's counterclaims should be dismissed in their entirety.

II. Factual Background

UVEST's Counterclaims are brought under two agreements: the Selected Dealer Agreements ("SDA") and the Dealer Manager Agreements ("DMA").[1] Copies of the SDA and DMA are attached to TIER REIT's First Amended Complaint as Exhibits 1-A, 1-B, 2-A, and 2-B and are incorporated by reference herein as though attached hereto. *See* TIER REIT's First Amended Complaint, Exhibits 1-A, 1-B, 2-A, and 2-B [Record Doc. 15-1 – 15-4, Page ID 308-348]. UVEST bases its claims upon four provisions of those agreements, each of which involve only TIER REIT's Prospectus[2] and offering documents:

Section 4.1 of the DMA provides that TIER REIT agrees to indemnify and hold harmless UVEST as follows:

> **from and against any losses,** claims, damages or liabilities, joint or several, to which [UVEST] … may become subject, under the Securities Act or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or are **based upon (a) any untrue statement or alleged untrue statement of a material fact contained (i) in any Registration Statement (including the Prospectus as a part thereof)** … or (ii) in any blue sky application or other document executed by [TIER REIT] … specifically for the purpose of qualifying any or all of the Shares for sale … or (b) the omission or alleged omission to state

[1] The SDA and DMA in effect at the time the various investors purchased TIER REIT shares include two slightly different versions. The agreements signed were not materially different in any respect affecting this Motion. Accordingly, those abbreviations will be used to refer to both versions of the agreements.

[2] Two different prospectuses were in effect at the time various of the plaintiffs purchased TIER REIT shares, one issued on February 11, 2005 and one issued on October 6, 2006. The prospectuses will be collectively referred to herein as the "Prospectus," but where there are differences between them, they will be cited to as the 2005 Prospectus and the 2006 Prospectus, respectively.

> in the Registration Statement (including the Prospectus as a part thereof) … a material fact required to be stated therein or necessary to make the statements therein not misleading, or (c) any untrue statement or alleged untrue statement of a material fact contained in any preliminary prospectus … and will reimburse [UVEST] … for any legal or other expenses reasonably incurred by [UVEST] … in connection with investigating or defending such loss, claim, damage, liability or action[.]

DMA, Section 4.1 (emphasis added); UVEST Counterclaim, ¶ 8 [Record Doc. 38, Page ID 765].

Similarly, UVEST seeks to recover under Section 1.3 of the DMA based upon the following representation and warranty by TIER REIT:

> [The] Registration Statement and Prospectus comply with the Securities Act and the Rules and Regulations and do not contain any untrue statements of material facts or omit to state any material fact required to be stated therein or necessary in order to make the statements therein not misleading[.]

DMA, Section 1.3; UVEST Counterclaim, ¶ 10 [Record Doc. 38, Page ID 766]. UVEST also alleges breaches of representations and warranties contained in Section 1.9 of the DMA:

> At the time of issuance of the Shares, the Shares will have been duly authorized and validly issued, and upon payment therefor, will be fully paid and nonassessable and will conform to the description thereof contained in the Prospectus.

DMA, Section 1.9; UVEST Counterclaim, ¶ 11 [Record Doc. 38, Page ID 766]. Finally, UVEST alleges that TIER REIT breached its agreement under Section 2.4 of the DMA:

> If at any time when a Prospectus is required to be delivered under the Securities Act any event occurs as a result of which … the Prospectus or any other prospectus then in effect would include an untrue statement of a material fact or, in view of the circumstances under which they were made, omit to state any material fact necessary to make the statements therein not misleading, [TIER REIT] will promptly notify [Behringer Securities] thereof … and will effect the preparation of an amended or supplemental prospectus which will correct such statement or omission.

DMA, Section 2.4; UVEST's Counterclaim, ¶ 12 [Record Doc. 38, Page ID 766-767].

UVEST alleges in its Counterclaim that TIER REIT's breach of these provisions resulted in a series of lawsuits and arbitrations filed against UVEST, TIER REIT, and Jose Vasquez in Louisiana. Those lawsuits and arbitrations (the "Underlying Lawsuits" and the "Underlying Arbitration Claims") are the ones identified in Paragraph 14 of UVEST's Counterclaim. Copies of the Underlying Lawsuits are attached to TIER REIT's First Amended Complaint as Exhibit 3 and are incorporated by reference herein as though attached hereto. *See* TIER REIT's First Amended Complaint, Exhibit 3 [Record Doc. 15-5, Page ID 349-386]. Copies of the Underlying Arbitration Claims are attached to TIER REIT's First Amended Complaint as Exhibit 4 and are incorporated by reference herein as though attached hereto. *See* TIER REIT's First Amended Complaint, Exhibit 4 [Record Doc. 15-6, Page ID 387-421].

The two prospectuses in effect at the time of the filing of various of the Underlying Lawsuits were the 2005 Prospectus and the 2006 Prospectus. Copies of those Prospectuses are attached in the appendix to this Motion; the 2005 Prospectus is attached as APP 1-218, and the 2006 Prospectus is attached as APP 219-779. Each of these Prospectuses is publicly filed and available from the Securities and Exchange Commission's EDGAR site. *See* "Edgar Search Results,"https://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001176373&owner=exclude&count=40, retrieved on October 8, 2016. TIER REIT is a publicly traded company listed on the New York Stock Exchange under the abbreviation "TIER."[3]

III. Argument and Authorities

A. Dismissal Standard

"To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig.*, 495

[3] Notably, the fact that TIER REIT has gone public after years of paying distributions to its shareholders proves false UVEST's allegation in its Counterclaim that there was a "collapse" of TIER REIT.

F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citations, quotation marks, and brackets omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal,* 495 F.3d at 205 (quoting *Twombly,* 550 U.S. at 555 (internal quotation marks omitted)). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Katrina Canal,* 495 F.3d at 205 (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464, 467 (5th Cir. 2004)) (internal quotation marks omitted).

The Supreme Court has prescribed a two-pronged approach to determine whether a complaint fails to state a claim under Rule 12(b)(6). *See Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). The court begins "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* The court should then assume the veracity of any well-pleaded allegations and "determine whether they plausibly give rise to an entitlement of relief." *Id.* The plausibility principle does not convert the Rule 8(a)(2) notice pleading requirement to a "probability requirement," but "a sheer possibility that a defendant has acted unlawfully" will not defeat a motion to dismiss. *Id.* at 678. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[4] *Id.* "[W]here the well-pleaded facts do not permit the court to

[4] The bulk of this Motion addresses the specific factual claims made by UVEST. UVEST also vaguely asserts TIER REIT is liable for misstatements in its Registration Statement, Prospectus, or Blue Sky Application without specifically identifying all such statements. *See, e.g.,* Counterclaim, ¶ 57 [Record Doc 38, Page ID 779]. For

infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)). The court, drawing on its judicial experience and common sense, must undertake the "context-specific task" of determining whether the plaintiff's allegations "nudge" his claims against the defendants "across the line from conceivable to plausible." *See id.* at 680.

B. UVEST's Counterclaims Should Be Dismissed Because Each Allegation Is Conclusively Disproven by the Documents Upon Which UVEST's Counterclaim Relies

1. SDA, DMA, Securities Filings, and Underlying Lawsuits and Arbitrations Are Appropriately Considered in This Motion to Dismiss Because They Are Central to UVEST's Counterclaim

The SDA, DMA, relevant securities filings, the Underlying Lawsuits, and the Underlying Arbitration Claims (collectively, the "Central Documents") are referred to extensively in UVEST's Counterclaim and form the basis of its claims, and they are therefore appropriately considered in evaluating this Motion to Dismiss. In considering a motion to dismiss, the Court's review is typically limited to the allegations in the complaint (or counterclaim) and to those documents attached to a defendant's motion to dismiss to the extent those documents are referred to in the complaint and are central to the claims. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004).

Here, UVEST relies upon each of the Central Documents in asserting its Counterclaim. The contracts it alleges were breached are the SDA and the incorporated terms of the DMA. *See* UVEST's Counterclaim, ¶¶ 46-53, 56-62 [Record Doc. 38, Page ID 776-780]. The breaches UVEST alleges arise from statements made in TIER REIT's prospectus. *See* UVEST's Counterclaim, ¶¶ 47-50 [Record Doc. 38, Page ID 776-777]. The indemnification UVEST seeks

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statements not identified, UVEST has failed to provide the factual content that would allow the Court to draw a reasonable inference TIER REIT is liable, and such claims must also be dismissed. *See Iqbal*, 556 U.S. at 678.

arises out of statements made in TIER REIT's Registration Statement, Prospectus, or blue sky application. *See* UVEST's Counterclaim, ¶ 57 [Record Doc. 38, Page ID 779]. UVEST alleges that the alleged harm it has suffered as a result of the alleged breach of contract are its attorneys' fees and expenses incurred in defending the Underlying Lawsuits and Arbitration Claims and are based upon UVEST's allegation that it would not have had to defend the allegations contained in those Underlying Lawsuits and Arbitration Claims but for TIER REIT's alleged breach. *See* UVEST's Counterclaim, ¶ 51 [Record Doc. 38, Page ID 777]. UVEST's indemnification claim is for its defense against those Underlying Lawsuits and Arbitration Claims. *See* UVEST's Counterclaim, ¶ 58 [Record Doc. 38, Page ID 779]. Accordingly, together, the Central Documents form the entire basis of UVEST's claims. In fact, UVEST specifically references each of the Central Documents and incorporates the SDA and DMA by reference. *See* UVEST's Counterclaim, ¶¶ 6-13 (referencing and quoting the SDA and DMA) [Record Doc. 38, Page ID 764-767], ¶ 14 (specifically referencing each of the Underlying Lawsuits) [Record Doc. 38, Page ID 767], ¶ 21 (referencing TIER REIT's offering documents, including its prospectus) [Record Doc. 38, Page ID 770], and ¶¶ 28-29 (referencing the Underlying Arbitration Claims) [Record Doc. 38, Page ID 772].

A movant may attach and rely upon documents in its motion to dismiss, and such documents are properly considered part of the pleadings if the documents are referenced in the claimant's pleading and central to its claim. *See Katrina Canal*, 495 F.3d at 205 (considering the contracts on which a breach of contract action was based); *Berry v. Indianapolis Life Ins. Co.*, 600 F.Supp.2d 805, 811-812 (N.D. Tex. 2009) (same). It is therefore appropriate for the Court to consider the Central Documents in analyzing whether UVEST's Counterclaim can survive this Motion to Dismiss.

2. Securities Filings, Underlying Lawsuits and Underlying Arbitration Claims Are Appropriately Considered in This Motion to Dismiss Because They Are Subject to Judicial Notice

The securities filings, Underlying Lawsuits, and Underlying Arbitration Claims referenced in UVEST's Counterclaim may also support a motion to dismiss because they are subject to judicial notice. Facts and documents subject to judicial notice are appropriately considered in evaluating a motion to dismiss. *Funk v. Stryker,* 631 F.3d 777, 783 (5th Cir. 2011). Judicial notice is appropriate where facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201. Among the documents of which courts may appropriately take judicial notice are documents that are publicly available, matters of public record and relevant to the matter at hand. *Id.* It is "clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Norris v. Hearst Trust,* 500 F.3d 454, 461 n.9 (5th Cir. 2007) (considering publicly-filed documents from a separate state court case).

Here, the lawsuits and arbitration claims that the investors filed in the Underlying Lawsuits and Underlying Arbitration Claims are the core of UVEST's Counterclaim—it is the cost of defending these Underlying Lawsuits that UVEST contends is the harm it suffered as a result of TIER REIT's alleged breach of contract, and UVEST's indemnification claim is based upon the filing of those Underlying Lawsuits. The Underlying Lawsuits were publicly filed in Louisiana state court and are publicly available from the court clerk in Calcasieu Parish, Louisiana, where the Underlying Lawsuits were filed. The Fifth Circuit has specifically held that pleadings filed in a Louisiana state court case that are relevant to the claims asserted are subject to judicial notice. *See Joseph v. Bach & Wasserman, L.L.C.,* 487 Fed. Appx. 173, 178 n.2 (5th Cir. 2012). Courts have applied a similar rule to arbitrations, accepting filings in arbitration claims as proof of the fact of such filings. *See Weizmann Inst. of Science, v. Neschis,* 229 F.

Supp. 2d 234, 244 n.14 (S.D. N.Y. 2002). As noted, both the Underlying Lawsuits and Underlying Arbitration Claims are attached to TIER REIT's First Amended Complaint and are part of the Court's record. It is appropriate to take judicial notice of the claims made in both.

Courts have similarly admitted securities filings when such filings are required to be filed and are filed with the SEC. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996); *see also Hohenstein v. Behringer Harvard REIT I, Inc.*, Civ. Act. Nos. 3:12–CV–3772–G, 3:12–CV–4842–G, 2014 WL 1265949, *9 (N.D. Tex. Mar. 27, 2014) (considering one of the prospectuses referred to here for the purpose of determining on a motion to dismiss whether matters alleged not to have been disclosed were in fact disclosed). Such documents may only be considered in proving what statements the documents contain, not the truth of those statements. *See id.* Like the securities fraud cases where such filings have been judicially noticed in considering motions to dismiss, the filings here are introduced not to prove that the facts contained in the prospectuses are true but rather that they were disclosed. *See id.* UVEST's Counterclaim depends entirely upon proving that there was a misstatement or omission in TIER REIT's securities filings, and the fact that TIER REIT's prospectus specifically discloses each of the facts that UVEST claims were omitted or misstated defeats UVEST's claims. Accordingly, the Court should take judicial notice of the prospectuses that were relevant to each of the investors' claims.

3. The Agreements UVEST Bases Its Suit Upon Provide for Liability Only for Misstatements or Omissions from Securities Filings

UVEST seeks to recover on four provisions, and each of those provisions provides for TIER REIT liability only based upon misstatements in or omissions from TIER REIT's Registration Statement, including its Prospectus. *See* UVEST's Counterclaim, ¶¶ 8, 10-12

[Record Doc. 38, Page ID 765-767]. Section 4.1 of the DMA provides that TIER REIT agrees to indemnify and hold harmless UVEST as follows:

> **from and against any losses**, claims, damages or liabilities, joint or several, to which [UVEST] … may become subject, under the Securities Act or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or are **based upon (a) any untrue statement or alleged untrue statement of a material fact contained (i) in any Registration Statement (including the Prospectus as a part thereof)** … or (ii) in any blue sky application or other document executed by [TIER REIT] … specifically for the purpose of qualifying any or all of the Shares for sale … or (b) the omission or alleged omission to state in the Registration Statement (including the Prospectus as a part thereof) … a material fact required to be stated therein or necessary to make the statements therein not misleading, or (c) any untrue statement or alleged untrue statement of a material fact contained in any preliminary prospectus … and will reimburse [UVEST] … for any legal or other expenses reasonably incurred by [UVEST] … in connection with investigating or defending such loss, claim, damage, liability or action[.]

DMA, Section 4.1 (emphasis added); UVEST Counterclaim, ¶ 8 [Record Doc. 38, Page ID 765]. Under this provision, untrue statements or alleged untrue statements only trigger indemnification if they are contained in the Registration Statement (including the Prospectus) or a blue sky application or document executed by TIER REIT for the specific purpose of qualifying its shares for sale. Fatally, UVEST does not, and cannot, allege that any of the alleged misstatements or omissions UVEST identifies in its Counterclaim were made in these documents. *See, generally,* UVEST's Counterclaim.

Similarly, UVEST seeks to recover under Section 1.3 of the DMA based upon the following representation and warranty by TIER REIT:

> [The] Registration Statement and Prospectus comply with the Securities Act and the Rules and Regulations and do not contain any untrue statements of material facts or omit to state any material fact required to be stated therein or necessary in order to make the statements therein not misleading[.]

DMA, Section 1.3; UVEST Counterclaim, ¶ 10 [Record Doc. 38, Page ID 766]. Again, the representation and warranty apply only to the Registration Statement and Prospectus, and none of the allegations made by UVEST allege any untrue statements or omissions contained in that Registration Statement or Prospectus. *See, generally,* UVEST's Counterclaim.

UVEST also alleges breaches of representations and warranties contained in Section 1.9 of the DMA:

> At the time of issuance of the Shares, the Shares will have been duly authorized and validly issued, and upon payment therefor, will be fully paid and nonassessable and will conform to the description thereof contained in the Prospectus.

DMA, Section 1.9; UVEST Counterclaim, ¶ 11 [Record Doc. 38, Page ID 766]. UVEST makes no allegations regarding the authorization or payment for the shares, and it identifies no provision of the Prospectus to which the shares do not conform. *See, generally,* UVEST's Counterclaim.

Finally, UVEST alleges that TIER REIT breached its agreement under Section 2.4 of the DMA:

> If at any time when a Prospectus is required to be delivered under the Securities Act any event occurs as a result of which … the Prospectus or any other prospectus then in effect would include an untrue statement of a material fact or, in view of the circumstances under which they were made, omit to state any material fact necessary to make the statements therein not misleading, [TIER REIT] will promptly notify [Behringer Securities] thereof … and will effect the preparation of an amended or supplemental prospectus which will correct such statement or omission.

DMA, Section 2.4; UVEST's Counterclaim, ¶ 12 [Record Doc. 38, Page ID 766]. Yet again, UVEST identifies no untrue or misleading statement or omission contained in the Prospectus that TIER REIT has failed to correct. *See, generally,* UVEST's Counterclaim [Record Doc. 38, Page ID 763-781.

These are the only provisions on which UVEST seeks to recover, yet UVEST's allegations are noticeably devoid of any reference to any provision of any prospectus or registration statement that is misleading or untrue and devoid of any material fact that TIER REIT omitted from its Prospectus. Instead, UVEST is attempting to sue TIER REIT for the consequences of UVEST's own misstatements to the investors. The only obligations TIER REIT undertook in the DMA and SDA were those it had the ability to control—the information contained in its Registration Statement and Prospectus. Unsurprisingly, TIER REIT did not agree to protect UVEST from UVEST's own conduct or the conduct of its broker-dealers in failing to provide investors with the prospectuses TIER REIT prepared or making misrepresentations about the information contained in those prospectuses.

4. UVEST's Breach of Contract and Indemnity Claims Fail Because the Underlying Lawsuits Were Not Based upon Misstatements or Omissions from TIER REIT's Securities Filings

The only obligations UVEST alleges TIER REIT has breached are based upon misrepresentations or omissions contained in TIER REIT's securities filings, but the claims in the Underlying Lawsuits were not based upon those securities filings but instead on UVEST's alleged misrepresentations to the investor plaintiffs. Critically, the claims in the Underlying Lawsuits could not have been based upon misstatements or omissions in TIER REIT's Prospectus because each of those Underlying Lawsuits **contended in the lawsuits that the investor had not even received or reviewed a prospectus**:

> At no time prior to the investment in [TIER REIT] real estate investment trust did Mrs. Dronet receive or review a prospectus or any other written description of the trust.

Dronet Lawsuit, ¶ 16 [Record Doc. 15-5, Page ID 353].[5]

[5] *See also* Dronet Arbitration Claim, ¶ 12 [Record Doc. 15-6, Page ID 390].

> At no time prior to the investment in [TIER REIT] did any of the Plaintiffs receive or review a prospectus or any other written description of the trust.

Webb Lawsuit, ¶ 10 [Record Doc. 15-5, Page ID 360].[6]

> At no time prior to the investment in [TIER REIT] did the Plaintiff receive or review a prospectus or any other written description of the trust.

Galyn Montgomery Lawsuit, ¶ 9 [Record Doc. 15-5, Page ID 367].[7]

> At no time prior to the investment in [TIER REIT] did the Plaintiff receive or review a prospectus or any other written description of the trust.

James Montgomery Lawsuit, ¶ 9 [Record Doc. 15-5, Page ID 372].[8]

> At no time prior to the investment in [TIER REIT] did the Plaintiff receive or review a prospectus or any other written description of the trust.

Gallien Lawsuit, ¶ 9 [Record Doc. 15-5, Page ID 378].[9]

> At no time prior to the investment in [TIER REIT] did Mr. Lowenthal receive or review a prospectus or any other written description of the trust.

Price Lawsuit, ¶ 9 [Record Doc. 15-5, Page ID 382].

The remainder of each of the Underlying Lawsuits makes clear that the claims are not based upon some misrepresentation made by TIER REIT in its securities filings but upon alleged misrepresentations and omissions made by UVEST and its agents in describing the investment to the investors. *See, generally,* the Underlying Lawsuits [Record Doc. 15-5, Page ID 349-386].[10] In fact, the allegations that the investors were not provided a prospectus is the only mention at all of the prospectus or any other securities filing contained in any of the Underlying Lawsuits. *See*

[6] *See also* Webb Arbitration Claim, ¶ 7 [Record Doc. 15-6, Page ID 397].
[7] *See also* Montgomery Arbitration Claim, ¶ 7 [Record Doc. 15-6, Page ID 403].
[8] *See also* Montgomery Arbitration Claim, ¶ 7 [Record Doc. 15-6, Page ID 403]. Galyn and James Montgomery consolidated their claims when they were moved to arbitration. Thus, the reference to the arbitration provision above is applicable to both.
[9] *See also* Gallien Arbitration Claim, ¶ 7 [Record Doc. 15-6, Page ID 409].
[10] *See also* the Underlying Arbitration Claims [Record Doc. 15-6, Page ID 387-421].

id. Given that the provisions on which UVEST seeks to recover address only misstatements in or omissions from the prospectus, Registration Statement, and certain other securities filings, the fact that the lawsuits are not based upon statements made in those documents conclusively establish that UVEST cannot recover on its claims. UVEST has not, and cannot, plead factual content that would allow a factfinder to draw a reasonable inference that TIER REIT has breached the SDA or the DMA, as would be required for UVEST to survive a motion to dismiss. *Iqbal,* 556 U.S. at 679. Accordingly, UVEST's claims must be dismissed.

5. UVEST's Breach of Contract and Indemnity Claims Fail Because the Securities Filings Specifically Refute the Alleged Misstatements and Omissions Alleged by UVEST

The provisions of the SDA and DMA upon which UVEST bases its claim for breach of contract provide for liability only for statements made in or omitted from TIER REIT's securities filings, and those securities filings conclusively show that TIER REIT did not make any of the misrepresentations or omissions alleged by UVEST. To the contrary, the securities filings directly contradict and fully explain the misrepresentations UVEST is alleged to have made to the investors upon which the Underlying Lawsuits were based. UVEST alleges five categories of alleged misstatements or omissions by TIER REIT that UVEST contends violated TIER REIT's obligations under the DMA and SDA:

a) Overstating its share price;

b) Artificially maintaining high share prices;

c) Making false assurances and statements about the investments in order to induce investors;

d) Failing to disclose the true dividend structure, whereby TIER REIT actually made distributions from capital and were not true dividends; and

e) Failing to amend its prospectus to correct any of the untrue statements or omissions.

UVEST Counterclaim, ¶¶ 50, 58 [Record Doc. 38, Page ID 777, 779]. These allegations boil down to essentially three categories: 1) allegedly misstating share prices, 2) allegedly misstating the nature of the investments and 3) allegedly failing to disclose that distributions were paid from capital. While it does not include the allegation as one of the bases for its claims for indemnity or breach, UVEST also alleges vaguely elsewhere in its Counterclaim that TIER REIT made decisions that conflicted with its fiduciary duties and had conflicts of interest in its Board of Directors. *See* UVEST Counterclaim, ¶¶ 16, 28 [Record Doc. 38, Page ID 768, 772]. TIER REIT fully disclosed each of these conflicts in its Prospectus.

a. Share Price

The first two categories of alleged misstatements through which UVEST alleges TIER REIT breached its obligations to UVEST concern TIER REIT's share price. Certain of the Underlying Lawsuits alleged that the value of TIER REIT was overstated with the intent of inducing investors. Each investor specifically alleges in the Underlying Lawsuits they never received or read the prospectus. *See, e.g.*, Webb Lawsuit, ¶ 15 [Record Doc. 15-5, Page ID 361]. However, no credible argument can be made that such overstatement of value was contained in the Prospectus or Registration Statement. It fact, the Prospectus contains quite the contrary disclosure as to how the share price was calculated:

> ***We established the offering price on an arbitrary basis; as a result, your subscription price for shares is not related to any independent valuation.***
>
> Our board of directors arbitrarily determined the selling price of the shares, which is the same offering price as in our initial public offering and such price bears no relationship to our book or asset values, or to any other established criteria for valuing issued or outstanding shares.

2005 Prospectus, p. 33, APP 38; 2006 Prospectus, p. 40, APP 289 (emphasis in original). Elsewhere in the Prospectus, TIER REIT disclosed information further belying UVEST's allegation that TEIR REIT overstated its value:

> Until three fiscal years after the later of this or any subsequent offering of our shares, we intend to use the offering price of shares in our most recent offering as the per share net asset value; provided, however, that if we have sold property and have made one or more special distributions to stockholders of all or a portion of the net proceeds from such sales, the net asset value per shares will be equal to the offering price of shares in our most recent offering less the amount of net sale proceeds per share distributed to investors prior to the redemption date as a result of the sale of such property. Beginning three full fiscal years after the last offering of our shares, the value of the properties and our other assets will be based on valuations of our properties or of our enterprise as a whole as our board determines appropriate. Such valuations will be performed by persons independent of us and of Behringer Advisors.
>
> . . .
>
> There can be no assurance, however, with respect to any estimate of value that we prepare, that:
>
> - the estimated value per share would actually be realized by our stockholders upon liquidation, because these estimates do not necessarily indicate the price at which properties can be sold;
> - our stockholders would be able to realize estimated net asset values if they were attempt to sell their shares because no public market for our shares exists or is likely to develop; or
> - that the value, or method used to establish value, would comply with ERISA or Code requirements described above.

2005 Prospectus, p. 128, APP 133; 2006 Prospectus, p. 192, APP 526. There can be no allegation that the disclosures contained in the Prospectus of share price were false or misleading or contained omissions. UVEST also cannot link this purported falsity to any of the investors' claims in the Underlying Lawsuits given each investor specifically pleads they never received or read a prospectus or any other written description of the TIER REIT trust. As such, UVEST has

failed to allege facts that would allow a reasonable factfinder to conclude that TIER REIT misstated or omitted material information regarding its share price in its Prospectus or Registration Statement, and its claims based upon share price must therefore be dismissed. *See Iqbal*, 556 U.S. at 679.

b. Nature of Investments

The second category of alleged misrepresentations UVEST alleges is as to the nature of the investment. *See* UVEST Counterclaim, ¶¶ 48, 58 [Record Doc. 38, Page ID 777, 779]. The Underlying Lawsuits complained that UVEST did not disclose to the investors the risk of REITs like TIER REIT or the lack of liquidity of the investment. *See, e.g.*, Dronet Lawsuit, ¶ 26 [Record Doc. 15-5, Page ID 355. Though UVEST's Counterclaim is vague, it appears the liquidity issue is the basis of its allegation of misrepresentation or omission. *See* UVEST Counterclaim, ¶ 29 [Record Doc. 38, Page ID 772].[11] At the very start of the prospectus, on the first page following the table of contents, the Prospectus clearly disclosed the nature of the TIER REIT investment, including its risk and illiquidity:

> An investment in our common stock involves significant risk and is suitable only for persons who have adequate financial means, desire a relatively long-term investment and who will not need immediate liquidity from their investment.

2005 Prospectus, p. 1, APP 6; 2006 Prospectus, p. v, APP 228. The Prospectus goes on to disclose the illiquidity of the investment, leaving no ambiguity:

> No public market currently exists for shares of our common stock. Our shares cannot be readily sold, and if you are able to sell your shares, you would likely have to sell them at a substantial discount. If the shares are not listed for trading on a national securities exchange or included for quotation on the Nasdaq National Market System (or any successor market or exchange) by February 20,

[11] The Dronet Lawsuit also included an allegation related to an alleged breach of fiduciary duty by TIER REIT in leasing space from another Behringer REIT. *See* Dronet Lawsuit, ¶ 28 [Record Doc. 15-5, Page ID 355]. This allegation is wholly unrelated to information contained in the Prospectus and, in any event, does not appear to be the basis of UVEST's vaguely-worded claim.

> 2017,[12] we intend to liquidate our assets and distribute the proceeds unless such date is extended by our board of directors, including a majority of our independent directors

2005 Prospectus, cover page, APP 1; 2006 Prospectus, cover page, APP 219. This difficulty is disclosed in even more detail:

> There is no public trading market for the shares, and we cannot assure you that one will ever develop. Until our shares are publicly traded, you will have difficulty selling shares, and even if you are able to sell shares, you will likely have to sell them at a substantial discount.

2005 Prospectus, p. 4, APP 9; 2006 Prospectus, p. 2, APP 234. The Prospectus even cautions investors who need liquidity or guaranteed income that TIER REIT is not an appropriate investment for them:

> [W]e caution persons who require immediate liquidity or guaranteed income, or who seek a short-term investment not to consider an investment in our common stock as meeting these needs.

2005 Prospectus, p. 1, APP 6; 2006 Prospectus, p. v, APP 228. The Prospectus also contains a chart that, among other things, describes "Persons for Whom Investment in Shares Is Not Recommended." It describes such persons as, "Persons who require immediate liquidity or guaranteed income, or who seek a short-term investment." 2005 Prospectus, p. 13, APP 18; 2006 Prospectus, p. 16, APP 253. The lack of liquidity is detailed repeatedly in the Prospectus:

> Q: If I buy shares in this offering, how may I later sell them?
>
> A: Our shares are not listed for trading on any national securities exchange or for quotation on The Nasdaq Market. There is no public market for the shares, and we cannot be sure if one will ever develop. As a result, you may find it difficult to sell your shares. If you are able to find a buyer for your shares, you may sell your shares to that buyer unless the buyer does not satisfy the suitability standards applicable to him or her, or unless such sale would cause the buyer to own more than 9.8% of the outstanding common

[12] The 2006 Prospectus omits the specific date, referring only to the year 2017. Notably, TIER REIT beat this projection, becoming listed on the New York Stock Exchange in 2015.

> stock. See the "Suitability Standards" and "Description of Shares—Restriction on Ownership of Shares" sections of this prospectus.
>
> . . .
>
> If we have not listed the shares for trading on a national securities exchange or for quotation on The Nasdaq Market by February 20, 2017, unless a majority of our board of directors (including a majority of our independent directors) extends such date, our charter requires us to begin selling our properties and other assets and return the net proceeds from these sales to our stockholders through distributions.

2005 Prospectus, p. 23, APP 28; 2006 Prospectus, p. 29, APP 270.[13]

Accordingly, the issues about which the Underlying Lawsuits complained with respect to the nature of the investment, liquidity and risk, were fully disclosed in the Prospectus. UVEST's claim that the Underlying Lawsuits were based upon a misstatement of such information or failure to disclose it in the Prospectus is contradicted by the Prospectus itself. UVEST again has failed to identify any statement in the Prospectus with respect to the nature of the investment that it contends is false or any matter that TIER REIT failed to disclose. Moreover, UVEST cannot directly relate this purported falsity or nondisclosure to any of the investors' claims in the Underlying Lawsuits given each investor specifically pleads they never received or read a prospectus or any other written description of the TIER REIT trust. Accordingly, it has not pled facts that would allow a reasonable factfinder to conclude that TIER REIT breached the DMA or SDA, and its claims must be dismissed. *See Iqbal*, 556 U.S. at 679.

c. Distributions from Capital

The third category of alleged misrepresentation UVEST identifies concerns distributions from capital. UVEST alleges that TIER REIT "failed to disclose the true dividend structure,

[13] The 2006 Prospectus contains the same language except that The Nasdaq Market is referred to as the Nasdaq National Market System and the deadline for listing omits the specific date and is simply 2017.

whereby TIER REIT actually made distributions from capital and were not true dividends." Here again, however, UVEST allegations are defeated by the very document upon which it must rely to support such a claim. The Prospectus, in fact, describes the nature of the dividends in plain language and much detail:

> We currently are paying distributions based upon our current cash flow and the future operating cash flow we project to generate from our real estate assets. Some or all of our distributions have been paid from sources other than operating cash flow, such as offering proceeds, cash advanced to us by, or reimbursements for expenses from, our advisor and proceeds from loans including those secured by our assets.

2006 Prospectus, p. 5, APP 239. The Prospectus even includes a description of this process in bold and italicized letters:

> ***Distributions may be paid from capital, and there can be no assurance that we will be able to achieve expected cash flows necessary to continue to pay currently established distributions or maintain distributions at any particular level, or that distributions will increase over time.***

2005 Prospectus, p. 34, APP 39; 2006 Prospectus, p. 41, APP 291 (emphasis in original). The consequence of this method is also made clear in the Prospectus:

> Accordingly, the amount of distributions paid at any time may not reflect current cash flow from our investments.

2005 Prospectus, p. 35, APP 40; 2006 Prospectus, p. 43, APP 294. In the 2006 Prospectus, TIER REIT even goes so far as to provide a numerical example, describing how the distributions were paid in 2005:

> Until proceeds from our offerings are invested and generating operating cash flow sufficient to make distributions to stockholders, we intend to pay all or a substantial portion of our distributions from the proceeds of such offerings or from borrowings in anticipation of future cash flow. Of the amounts distributed by us in 2005, 72% represented a return of capital and 28% were distributions from the taxable earnings of real estate operations. In 2005, we made cash distributions aggregating $22.4 million to our stockholders. Of this amount, approximately 28%, or

> $6.3 million, was paid using cash generated from our operations. The remaining portion was paid from sources other than operating cash flow, such as offering proceeds, cash advanced to us by, or reimbursements for expenses from, our advisor and proceeds from loans including those secured by our assets.

2006 Prospectus, p. 120, APP 419.

UVEST's claim that TIER REIT violated its obligations to UVEST by failing to disclose that distributions were paid from capital demonstrates the baselessness of UVEST's Counterclaim. The allegation makes clear that UVEST is seeking to recover for something other than statements made in the Prospectus because even a cursory reading of the Prospectus would have revealed to UVEST (and the investors who allege UVEST never provided them the Prospectus) that the distribution method was fully disclosed. Notably, this Court has analyzed the 2006 Prospectus before and, based upon one of the statements quoted from that 2006 Prospectus here, found that TIER REIT "repeatedly disclosed that distributions came from new offerings and loans." *Hohenstein,* 2014 WL 1265949, at *9. There, this Court dismissed on a Rule 12(b)(6) motion a claim based on an allegation TIER REIT had not disclosed that distributions were made from capital. In addition, here, UVEST does not and cannot tie the alleged falsity in the Prospectus to any of the investors' claims in the Underlying Lawsuits or Underlying Arbitration Claims given each investor specifically pleads they never received or read a prospectus or any other written description of the TIER REIT trust. Given UVEST fails to identify misstatements or omissions in the Prospectus related to the distribution method, or any other issue, the Court could not reasonably conclude from the facts pled by UVEST that TIER REIT has violated its obligations to UVEST or owes UVEST indemnity. *See Iqbal,* 556 U.S. at 679. Accordingly, UVEST's Counterclaim must be dismissed.

d. Conflicts of Interest

The final category of UVEST's allegations involved conflicts of interest. Notably, UVEST does not allege that TIER REIT made any misrepresentation in or omission from its Prospectus regarding conflicts of interest, as would be required for UVEST to prevail on its breach of contract or indemnity claims given the language of the SDA. Even had UVEST alleged such a misrepresentation or omission, though, TIER REIT fully disclosed the conflicts of interest inherent in its structure in its Prospectus. TIER REIT discloses such conflicts beginning on the first page of the 2006 Prospectus:

> Behringer Advisors and its affiliates face conflicts of interest, such as competing demands for their time, their involvement with other entities and the allocation of opportunities among affiliated entities and us.

2006 Prospectus, cover page, APP 220. TIER REIT also discloses in the Prospectus conflicts related to its directors:

> Each of our executive officers, including Mr. Behringer, who also serves as the chairman of our board of directors, also serve as officers of our advisor, our property manager, our dealer manager and other affiliated entities, including the advisor(s) to and general partners of other Behringer Harvard sponsored programs, and as a result they will face conflicts of interest relating from their duties to these other entities.

2005 Prospectus, p. 5, APP 10; 2006 Prospectus, p. 4, APP 237. The Prospectus also discloses conflicts its advisor may have:

> Our advisor faces various conflicts of interest resulting from its activities with affiliated entities, such as conflicts related to allocating the purchase and leasing of properties between us and other Behringer Harvard programs, conflicts related to any joint ventures, tenant in common investments or other co-ownership arrangements between us and any such other programs and conflicts arising from time demands placed on our advisor in serving other Behringer Harvard programs. These conflicts may not be resolved in our favor.

2005 Prospectus, p. 4, APP 9; 2006 Prospectus, p. 3, APP 236. As with UVEST's other allegations, UVEST has failed to identify any statement in the Prospectus with respect to conflicts of interest that it contends is false or any matter that TIER REIT failed to disclose. UVEST also fails to link this purported falsity to any of the investors' claims in the Underlying Lawsuits given each investor specifically pleads they never received or read a prospectus or any other written description of the TIER REIT trust. Accordingly, UVEST has failed to plead facts that would allow the Court to reasonably conclude that TIER REIT breached the DMA or SDA, and its claims must be dismissed. *See Iqbal*, 556 U.S. at 679.

C. All UVEST's Counterclaims Should Be Dismissed Because They Fail to Provide Sufficient Notice to TIER REIT of the Basis of the Cause of Action

Apparently recognizing that its claims would be subject to a motion to dismiss such as this one, UVEST includes in its Counterclaim broad, conclusory statements that it presumably hopes will salvage its claim from its inability to identify any misstatement or omission from TIER REIT's Prospectus or offering documents. Such conclusions are not sufficient to satisfy UVEST's obligation to plead ***facts*** that would allow a reasonable factfinder to conclude that TIER REIT has violated its obligations to UVEST. UVEST's first attempt to plead a misstatement or omission in the Prospectus where none exists addresses pricing, liquidity, and distributions (which, as discussed above, TIER REIT disclosed in substantial detail):

> For a claimant to have asserted the claims it did against TIER REIT individually, and UVEST as a dealer of those shares, the claims could only have been based upon alleged untrue statements of material fact in the prospectus or other TR documents, or alleged omissions of material fact regarding pricing, liquidity, and distributions required to be stated in the prospectus or other TR documents.

UVEST Counterclaim, ¶ 29 [Record Doc. 38, Page ID 772]. UVEST makes a similarly conclusory allegation with respect to share price (which, as also discussed above, TIER REIT disclosed in substantial detail):

> For claimants to have asserted those claims they did could only have been based upon alleged untrue statements of material fact regarding the price in the prospectus or other TR documents, or alleged omissions of material fact in public documents or other TR documents, regarding TIER REIT's share price.

UVEST Counterclaim, ¶ 30 [Record Doc. 38, Page ID 772].

These broad allegations are exactly the type that the Supreme Court described as "no more than conclusions" that "are not entitled to the assumption of truth." UVEST does not explain why allegations that UVEST failed to disclose certain details about the investment—in pleadings that allege UVEST never provided the investors a prospectus—"could only have" been based upon misstatements or omissions from that prospectus. *Iqbal,* 556 U.S. at 679. These are nothing more than the "labels and conclusions" the Supreme Court has held are inadequate to survive a motion to dismiss. *Twombly*, 550 U.S. at 555. UVEST has therefore not satisfied its obligation, pursuant to Federal Rule of Civil Procedure 8(a)(2), that it "show" that it is entitled to relief as opposed to merely alleging that it is entitled to that relief. *Iqbal*, 556 U.S at 679. The plaintiffs in the Underlying Lawsuits did not allege that TIER REIT misstated or omitted information from its Prospectus, and UVEST's attempts to re-characterize those lawsuits as having been about the disclosures in the Prospectus when the pleadings reveal they were about UVEST's alleged misconduct cannot support UVEST's claim, especially when UVEST cannot allege a single ***fact*** that supports its conclusion.

Similarly, UVEST's broad and conclusory statements that TIER REIT made a misstatement of material fact in its Prospectus or offering documents or omitted a material fact from those documents are insufficient to survive a motion to dismiss when UVEST fails to

identify what material facts were misstated or omitted. There is no factual content to this allegation that would allow a court to draw a reasonable inference that TIER REIT is liable for the misconduct alleged. *See Iqbal,* 556 U.S. at 678. Again, these broad statements do not "show" that UVEST is entitled to relief, as required by Rule 8(a)(2) and, therefore, UVEST's Counterclaim must be dismissed. *See id.* at 679.

IV. Conclusion

TIER REIT respectfully requests that the Court dismiss each of the claims in UVEST's Counterclaim with prejudice. Given TIER REIT is contractually entitled to attorneys' fees under the SDA, TIER REIT reserves the right to petition for fees upon the dismissal of UVEST's Counterclaim. TIER REIT further requests such relief to which it may be entitled or which justice may require.

Dated: October 10, 2016

Respectfully submitted,

By: *s/Dana G. Bruce*

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October 2016, a copy of the foregoing has been electronically filed with the Clerk, United States District Court, Northern District of Texas by using the CM/ECF system and has been furnished by electronic notification via the CM/ECF system to John W. Joyce, BARRASSO USDIN KUPPERMAN FREEMAN & SARVER, L.L.C., 909 Poydras Street, Suite 2400, New Orleans, Louisiana 70112 and Neil R. Burger, CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P., 901 Main Street, Suite 5500, Dallas, Texas 75202.

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