**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| VELERON HOLDING, B.V., Plaintiff, - against - BNP PARIBAS SA; MORGAN STANLEY; MORGAN STANLEY CAPITAL SERVICES, INC.; MORGAN STANLEY & CO., INCORPORATED; MORGAN STANLEY & CO.; CREDIT SUISSE INTERNATIONAL; NEXGEN/NATIXIS CAPITAL LIMITED; and THE ROYAL BANK OF SCOTLAND N.V., Defendants. | Index No.: 12-cv-5966 (CM) **FIRST AMENDED COMPLAINT** (JURY TRIAL DEMANDED) |

Plaintiff Veleron Holding, B.V. ("Plaintiff" or "Veleron"), by and through its undersigned attorneys, Kasowitz, Benson, Torres & Friedman LLP and Fox Rothschild LLP, for its First Amended Complaint against defendants BNP Paribas SA ("BNP"), Morgan Stanley, Morgan Stanley Capital Services, Inc., Morgan Stanley & Co., Incorporated, Morgan Stanley & Co. (collectively, "Morgan Stanley"), Credit Suisse International ("Credit Suisse"), Nexgen/Natixis Capital Limited ("Nexgen"), and The Royal Bank of Scotland N.V. ("RBS"), upon knowledge as to itself and upon information and belief as to all other matters, alleges as follows:

## NATURE OF THE CASE

1. This case arises out of BNP's, Morgan Stanley's and the other defendant banks' improper breaches of, and tortious interference with, four separate agreements concerning a $1.5 billion dollar investment that plaintiff Veleron made in Magna International, Inc.

("Magna"), one of the world's leading auto parts manufacturers. Veleron's investment was to enable its parent OJSC Russian Machines ("Russian Machines"), a major company with extensive auto manufacturing operations, and Magna to develop the auto industry in Russia. On October 3, 2008, in an egregious violation of its contractual obligations and promised forbearance, BNP, as orchestrated and led by its agent Morgan Stanley, caused Veleron's 20,000,000 shares of Magna stock to be sold in an off-market private sale at artificially low prices. Morgan Stanley, which had also secretly taken substantial short positions in Magna stock in the days leading up to October 3, 2008, committed serious violations of the United States securities laws in connection with this massive sell-off.

2. In the summer of 2007, Russian Machines announced that it would be making a strategic investment in Magna by purchasing 20,000,000 Magna Class A shares -- a 20% stake in the company -- for $1.5 billion.

3. BNP, a bank with a deep history and extensive relationship with Russian Machines and its parent, Basic Element ("BasEl"), provided Veleron with approximately $1.2 billion to finance its purchase of the Magna shares pursuant to a credit agreement (the "Credit Agreement"). As security for the loan, Veleron pledged its shares in Magna to BNP pursuant to a pledge and security agreement (the "Pledge Agreement").

4. The Credit Agreement and Pledge Agreement afforded Veleron a number of protections with respect to its relationship with BNP, decision-making authority, and any potential liquidation of the collateral. Chief among these protections were that:

- Veleron would have to deal only with BNP, unless BNP syndicated the loan to other financial institutions in compliance with the syndication requirements of the Credit Agreement;

- In the event BNP granted participations to other institutions that did not assume rights and obligations pursuant to the Credit Agreement, such institutions (i) would not be entitled to vote on matters pertinent to the Credit Agreement, such as amendments, waivers, forbearance and extensions of time, and (ii) would be prohibited from directing the voting rights of lenders with respect to these same matters; and
- In the event of a default, absent certain conditions not present here, any liquidation of Veleron's Magna shares would have to be through a public sale which, given the volume of shares to be sold, would take weeks to complete.

5. Each of these protections was ignored and overrun in the days leading up to the liquidation and in connection with the liquidation itself.

6. While Veleron and Russian Machines were deeply committed to the strategic investment in Magna -- and had funded over $700 million of equity through the initial purchase, margin call payments and principal payments -- by September 2008, the financial landscape had changed dramatically. On September 29 and 30, 2008, at the height of the collapse of the credit markets, BNP demanded that Veleron make additional margin payments totaling approximately $100 million dollars. As a result of the turmoil in the markets, Veleron recognized that a margin payment would be little more than a stop-gap measure and that a mutually beneficial global solution, which would ensure that Veleron maintained its Magna investment and that the loan was repaid in full, was a far more sensible approach.

7. Accordingly, Veleron proposed a global restructuring of the loan involving (i) refinancing through an emergency fund created by the Russian government that would have resulted in full repayment of the loan in a matter of weeks, and/or (ii) an infusion of $300 million

in cash from Magna. In order to allow Veleron sufficient time to put this restructuring in place, Veleron negotiated with BNP for a waiver of margin calls and forbearance from the exercise of remedies in exchange for a guarantee of Veleron's obligations by an entity in the BasEl group.

8. Although BNP was prepared to agree to the waiver and forbearance, it insisted that Veleron also obtain consents from other banks -- defendants Credit Suisse, Morgan Stanley and Nexgen, as well as ABN Amro Bank, N.V., predecessor-in-interest to defendant RBS -- with whom BNP apparently had entered into synthetic derivative transactions to disperse its risk. In so doing, BNP breached the Credit Agreement: although Veleron was led to believe otherwise, the other banks had not assumed the rights and obligations of the Credit Agreement and, as such, they should have been prohibited from (i) voting on forbearance and waiver and (ii) directing BNP's vote with respect thereto. The decision whether to pursue remedies or to grant any forbearance should have remained solely with BNP.

9. On October 2, 2008, in connection with the restructuring, Russian Machines executed and delivered a guarantee to BNP in exchange for a waiver of margin calls and forbearance from the exercise of remedies against Veleron.

10. Despite the additional security that the guarantee provided, a mere few hours later, BNP and Morgan Stanley took steps to breach the applicable agreements, including the agreement to waive and forbear. Morgan Stanley, which had entered into a separate agreement to act as BNP's agent in connection with the disposal of the Magna shares in the event of a liquidation, terminated its derivative transaction with BNP and directed BNP to liquidate the collateral (even though Morgan Stanley had no right to do so under the Credit Agreement). Morgan Stanley's motives were obvious: it was perversely incentivized to favor a sale of the collateral because it was facing an unprecedented liquidity crisis and had been promised a hefty

fee for its services in connection with any disposal. Further, using its knowledge of the margin calls and the impending disposal of the collateral, Morgan Stanley had sought to further capitalize on any liquidation by taking three separate short positions with respect to 360,000 shares of Magna's stock.

11. At BNP's direction, Morgan Stanley carried out the liquidation through a private, off-market sale, during a roughly two hour window before the markets opened on October 3, 2008. By disposing of the collateral through a private sale -- rather than in a public sale as mandated by the Pledge Agreement -- Morgan Stanley was able to complete the sale of Veleron's 20 million Magna shares in a matter of hours not weeks, ensuring prompt payment of its over $9 million fee and depriving Veleron of the opportunity to raise funds to re-purchase the shares. Moreover, although under an obligation to maximize the value of the collateral in any liquidation, Morgan Stanley carefully controlled the prices paid for Magna shares in the private sale to ensure that BNP purchased the largest block of shares at the absolutely lowest price and that Morgan Stanley was able to cover its short positions at a significant profit.

12. As set forth below, despite the guarantee and the agreed-upon forbearance and waiver, Veleron was deprived of a real and meaningful opportunity to refinance the loan and thus was deprived of the opportunity to retain its investment in Magna (which is now worth in excess of $1.6 billion dollars). Instead, defendants' actions caused Veleron to lose its Magna shares and wiped out the more than $700 million that Veleron had invested. Morgan Stanley improperly orchestrated a private sale of the shares and then failed to maximize the value of the collateral, as it was required to do. Finally, Morgan Stanley unjustly profited from risk-free trades based on inside information, reaping tens of millions of dollars in profits and fees, while causing Veleron to be damaged in an amount in excess of $800 million.

## JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa; and 28 U.S.C. §§ 1331 and 1332. Moreover, there is diversity of citizenship between the parties, and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

14. This Court also has supplemental jurisdiction over the claims asserted under state law pursuant to 28 U.S.C. § 1367.

15. Venue is proper in this District pursuant to 28 U.S.C. § 1391, Section 27 of the Securities Exchange Act of 1934, and 15 U.S.C. § 78aa, in that many of the acts, transactions and occurrences alleged herein occurred in this District, and all of defendants conducted business here, including, but not limited to in connection with the events described herein. Additionally, certain of the contractual agreements relevant to this action are governed by and required to apply New York law.

## PARTIES

16. Plaintiff Veleron is a company organized and operated pursuant to the laws of The Netherlands, with its principal place of business at Haaksbergweg 31, Suite 4, 1101 DP Amsterdam, The Netherlands. Veleron is wholly-owned by Russian Machines, a company organized and operated pursuant to the laws of the Russian Federation. At all relevant times, Russian Machines was a wholly-owned subsidiary of BasEl.

17. Defendant BNP is a bank organized and operated pursuant to the laws of the French Republic. BNP maintains its U.S. headquarters at 787 Seventh Avenue, New York, New York 10019.

18. Defendant Credit Suisse is a bank organized and operated pursuant to the laws of the Swiss Confederation, with its principal place of business at Paradeplatz 8, 8070 Zurich, Switzerland. Credit Suisse maintains its U.S. headquarters at Eleven Madison Avenue, New York, New York 10010.

19. Defendant Morgan Stanley is a corporation organized and operated pursuant to the laws of the State of Delaware. Morgan Stanley maintains its U.S. headquarters at 1585 Broadway, New York, New York 10020.

20. Defendant Nexgen is a company organized and operated pursuant to the laws of the French Republic, with its principal place of business at Immeuble Arc de Seine, 30, Avenue Pierre Mendès France, 75013 Paris. Nexgen maintains a New York office at 9 West 57th Street, 35th Floor, New York, New York 10019.

21. Defendant RBS is a bank organized under the laws of the Kingdom of the Netherlands. RBS maintains a U.S. office at 101 Park Avenue, New York, New York 10178. In October 2007, ABN Amro Bank, N.V. ("ABN") was acquired by a consortium of banks, including RBS, Fortis Bank (Nederland) N.V., and Banco Santander. ABN was divided into three parts, each owned by one of the consortium banks. RBS is the successor-in-interest to ABN with respect to the transactions, agreements and acts at issue in this litigation. ABN maintains a registered agent for service of process in New York, said agent being CT Corporation System with an address of 111 Eighth Avenue, New York, New York 10011.

# FACTS

## I. The Strategic Investment in Magna

### A. BasEl Makes A Strategic Investment In Magna

22. BasEl is a diversified industrial group made up of over 100 companies and facilities located in 21 countries, across five continents, operating in a range of sectors including energy, metals and mining, machinery, aviation, financial services and agriculture. Many companies in the BasEl group hold leading positions across their respective sectors including RUSAL, the world's largest producer of aluminum; EuroSibEnergo, Russia's largest private power generating company; and Glavstroy, one of the largest construction companies in Moscow and Saint Petersburg.

23. BasEl's nationwide operations contribute significantly to Russia's industrial, economic and social growth, and account for about 1% of Russia's GDP. The group makes significant contributions to Russia's regions, with investments in the country's social and economic infrastructure totaling over $500 million. In all, over 15% of the Russian population depends directly or indirectly on BasEl's businesses.

24. With 250,000 employees, BasEl is one of Russia's largest employers. In the last five years alone, BasEl has created over 15,000 new jobs, with plans to create tens of thousands more by 2025.

25. Russian Machines, one of the companies under the BasEl umbrella, is itself a major Russian diversified holding company with industrial and engineering assets in industries including automotive OEM, automotive components, the rail industry, aircraft OEM, military vehicles, and road construction machinery. It is the largest Russian machine-building corporation, employs over 130,000 people and operates across 14 different regions of Russia.

The company prides itself on being a strategic investor, focused on long-term ownership horizons to maximize asset value and on controlling businesses in strategically prioritized sectors of the machinery building industry.

26. Consistent with that approach, on or about May 10, 2007, BasEl and Magna (one of the most diversified automotive suppliers in the world) announced that, subject to shareholder and regulatory approvals, Russian Machines would make a strategic investment in Magna totaling approximately $1.54 billion. In exchange, Russian Machines would receive 20 million Class A Subordinate Voting Shares from Magna's treasury ("Magna Class A Shares").

27. The investment was intended by all parties as the first step in a long-term strategic alliance between Russian Machines and Magna which would include the sharing of technology and management, as well as additional opportunities for joint projects in the future.

28. Because of Russian Machines' interest in GAZ Group, Russia's second-largest automotive company, the partnership between Russian Machines and Magna was intended to create synergies and important growth potential for Russian Machines, both within Russia as well as in neighboring markets. Moreover, the strategic investment reflected Russian Machines' desire to make a long-term commitment to the development and growth of the automobile manufacturing industry in Russia.

29. At the same time, Russian Machines' strategic investment created an opportunity for Magna to significantly increase its presence and market share in Russia and Eastern Europe. At the time of the strategic investment, the Russian automotive market was one of the fastest growing in the world, while the local automotive supply base was underdeveloped. Accordingly,

in partnering with Russian Machines, Magna saw the potential for rapid growth in an underserved region, while, at the same time, minimizing the risks of investing in those markets.

30. More broadly, Russian Machines' investment in Magna was of national significance for Russia, given the boost it would bring to the Russian automotive manufacturing sector. Indeed, less than a year after Russian Machines' strategic investment in Magna, Magna had already funded or committed to fund $600 million to the launch of vehicles with GAZ. The added value of Magna's activities in Russia was estimated to exceed $5 billion in the subsequent ten years. Accordingly, it was widely understood that the Russian government appreciated the significance of the strategic investment to the Russian economy and would take all reasonable steps to protect the investment and, with it, the development of the Russian automotive industry.

31. On or about August 28, 2007, Magna announced that its shareholders had approved Russian Machines' investment, and that, subject to certain regulatory approvals, the arrangement would be finalized with an effective date in late September 2007.

**B. BNP Agrees To Finance Russian Machines' Investment In Magna**

32. Prior to Russian Machines' strategic investment in Magna, BNP had an extensive relationship with both Russian Machines and BasEl, as well as with Oleg Deripaska, the sole owner and CEO of BasEl. Indeed, BasEl considered BNP to be a "relationship bank" -- the parties enjoyed a close working relationship based on mutual trust fostered through a large volume of business.

33. BNP's status as a relationship bank had several key benefits: (i) BNP would regularly extend BasEl favorable terms and conditions and demonstrated significant flexibility in addressing any issues that arose; (ii) BasEl had access to several key decision-makers at BNP,

and the parties could often resolve issues through conversations at the management level; and (iii) BNP was extremely familiar with the relative strengths and weaknesses of BasEl.

34. Based on this relationship, from the time Russian Machines' strategic investment in Magna was announced, BasEl and/or Russian Machines were in constant communication with BNP regarding financing for the transaction. Based on the parties' track record -- which had been extremely profitable for BNP -- BNP was looking to expand its relationship with BasEl, to whom it was "significantly and happily exposed." At the same time, BasEl and Russian Machines were looking for a lender who understood its financial history and commitment to its portfolio of companies.

35. As a result of these discussions and their prior relationship, BNP agreed to underwrite Russian Machines' strategic investment in Magna -- which BNP considered to be a robust company -- and to provide approximately $1.2 billion in financing for the investment. The remainder of the investment -- $340 million -- would be made as a direct infusion of equity.

36. Importantly for Russian Machines, BNP's agreement to provide financing was unconditional and not dependent on its ability to syndicate the loan. Indeed, in early August 2007, Andrey Yashchenko ("Yashchenko"), the Head of Corporate Finance at BasEl and a Russian Machines board member, requested confirmation that BNP still intended to finance the arrangement and that such financing was not contingent on BNP's ability to syndicate the loan. In response, BNP confirmed that its commitment to the transaction was without condition.

### C. The Structure Of Russian Machines' Investment In Magna

37. On September 20, 2007, Magna announced that Russian Machines' strategic investment was complete. Russian Machines became a 20% shareholder in Magna and Magna was given a position on Russian Machines' board of directors.

38. Veleron was established as the vehicle for Russian Machines' investment and entered into a credit agreement with BNP (the "Credit Agreement") as "Borrower." *See* Exhibit 1. The only two parties to the Credit Agreement were BNP and Veleron. *See id.*

39. Pursuant to the Credit Agreement, BNP agreed to advance the sum of approximately $1.229 billion (the "Loan") to Veleron. *See id.* § 1.1(58). The remaining $340 million of Russian Machines' investment in Magna was funded by equity.

40. As security for the Loan, Veleron agreed to pledge the Magna Class A Shares as collateral (the "Pledged Collateral") pursuant to the Pledge Agreement. *See* Exhibit 1 at B-1, B-4. No additional security was provided for the Loan. In particular, no guaranty of Veleron's obligations was provided by Russian Machines, BasEl or any other entity or person. Therefore, in the event of a payment default with respect to the Loan, BNP's only recourse was to the Pledged Collateral and to seek payment from Veleron for any deficiency after the sale thereof.

## II. <u>The Credit Agreement</u>

### A. BNP's Ability To Hedge Its Exposure Under The Credit Agreement

41. Consistent with BNP's previous representations, BNP funded the full amount of the Loan and did not syndicate the Loan or otherwise mitigate its risk prior to the closing of the transaction. However, in the event that BNP chose to disperse its risk to other institutions in the future, the Credit Agreement provided specified mechanisms to do so.

42. Pursuant to Section 13.1(3)(b) of the Credit Agreement, BNP was permitted to assign a portion of its rights and obligations pursuant to the Credit Agreement, subject to certain restrictions, including that the institution to which the rights and obligations were assigned was an "Eligible Institution." *See* Credit Agreement § 13.1(3)(b).

43. The Credit Agreement defines Eligible Institution as "a financial institution or other legal entity that is (i) organized under the laws of a jurisdiction other than the United States of America or any subdivision or territory thereof and (ii) is not subject to regulation under the US Margin Regulation or under the Canadian Loan Margin Regulation." *Id.* § 1.1(40).

44. Any assignment pursuant to Section 13.1(3)(b) of the Credit Agreement was to become effective when the parties to the Credit Agreement received an executed assignment and assumption agreement in the form of Schedule 13.1(3)(b) attached to the Credit Agreement (the "Assignment Agreement"). Among other things, the Assignment Agreement provided that the assignee was an Eligible Institution and agreed to be "bound by all the terms, conditions and covenants" of the loan documents, including the Credit Agreement. *Id.*, Schedule 13.1(3)(b) at 2.

45. Once an Assignment Agreement was executed and delivered, the assignee would be a "Lender" pursuant to the Credit Agreement, and assume a portion of the assigning lender's rights, title and interest to and in, and its obligations in connection with the Credit Agreement and other loan documents. *See id.* § 13.1(3)(b).

46. In the event that, in addition to BNP, Eligible Institutions became Lenders pursuant to the Credit Agreement, the provisions thereof nonetheless protected Veleron's right to deal directly with BNP. Specifically, Section 12.14 of the Credit Agreement provided that "[u]nless otherwise required hereunder . . . [Veleron] shall be entitled to deal exclusively with the Agent [BNP] and to rely on discussions with and instructions from the Agent in order to fulfil [*sic*] its obligations hereunder."

47. In addition to a true syndication pursuant to Section 13.1(3)(b), the Credit Agreement provided an alternate means for BNP to hedge its risk. Section 13.1(3)(a) of the

Credit Agreement allowed BNP to grant a participation to one or more Eligible Institutions, subject to a monetary threshold (each a "Participant" pursuant to the Credit Agreement). If BNP chose to pursue a participation in accordance with Section 13.1(3)(a), BNP would nonetheless "remain fully liable for all of its obligations and responsibilities under [the Credit Agreement] to the same extent as if the participation had not been granted . . . ." *Id.* §13.1(3)(a).

48. In the event of a participation, Section 13.1(3)(a) explicitly provided that Veleron, as Borrower, shall not "be required to deal directly with" any Participant. Further, the Credit Agreement explicitly provided that "Participants . . . shall have no voting rights as 'Lenders' under [the Credit Agreement] nor direct the voting rights of Lenders [under the Credit Agreement]." *Id.*

49. Thus, through Sections 13.1(3)(a) and (b), Veleron assured itself that (i) it would be able to deal directly with and rely upon BNP, (ii) it would not have to deal with any institutions that did not assume both the rights and obligations pursuant to the Credit Agreement, and (iii) institutions that did not assume obligations pursuant to the Credit Agreement would not have the same rights as Lenders and would not be able to direct the voting rights of Lenders.

**B. Confidentiality Obligations Under The Credit Agreement**

50. Pursuant to Section 14.12 of the Credit Agreement, BNP was required to "keep confidential any information obtained in relation to the [Credit Agreement]." Credit Agreement § 14.12.

51. Further, to the extent that it was necessary for BNP to disclose confidential information in connection with discharging its responsibilities under the Credit Agreement, the Credit Agreement required "recipients of such information [to] sign[] a confidentiality and non-

disclosure agreement for the benefit of [Veleron] and in form and substance reasonably satisfactory to [Veleron] in advance of receiving such information[.]" *Id.* § 14.12(1)(a).

**C. Repayment And Margin Provisions Pursuant To The Credit Agreement**

52. The Credit Agreement provided that Veleron was to repay the principal, interest and any other fees on the Loan's maturity date, September 20, 2009. *See id.* § 1.1(76).

53. The Credit Agreement also included a "Mandatory Repayment" clause, providing that if the closing price of Magna Class A Shares on the New York Stock Exchange ("NYSE") fell below a threshold level -- $43.8974 per share -- BNP could immediately require Veleron to pay the outstanding principal and all accrued interest. *See id.* § 5.3.

54. The Credit Agreement also required Veleron to maintain a required margin between the outstanding amount owed on the Loan and the Collateral. Pursuant to Section 7.5 of the Credit Agreement:

> [i]f on any Business Day after the Initial Loan Date, the Coverage Ratio is less than the product of 0.925 and the Required Coverage Ratio, then, no later than two (2) Business Days following receipt by the Borrower of a written demand by the Agent, the Borrower shall Transfer to the Agent's Account for Payments an amount of Cash Margin such that the Coverage Ratio is equal to the appropriate required Coverage Ratio.

*Id.* § 7.5(1).

55. Therefore, if the price of the Magna Class A Shares fell below $54.79 per share, BNP would have the right to make a margin call, and Veleron would be obligated to transfer cash to BNP's account in an amount sufficient to ensure an appropriate coverage ratio between the amount of the Loan outstanding and the value of the Pledged Collateral.

56. The Credit Agreement also contemplated the occurrence of an Accelerated Margin Call Event in Section 7.6:

> [i]f at any time on any Business Day, the Coverage Ratio is less than the product of 0.875 and the Required Coverage Ratio, then no later than the Business Day following receipt by the Borrower of a written demand by the Agent, the Borrower shall Transfer to the Agent's Account for Payments an amount of Cash Margin such that the Coverage Ratio is equal to the appropriate Required Coverage Ratio.

*Id.* § 7.6.

## III. The Pledge Agreement

57. The Pledged Collateral was provided as security for the performance of Veleron's obligations under the Credit Agreement. *See* Credit Agreement § 1.1(76); Pledge Agreement § 2.1.

58. Pursuant to the Pledge Agreement, upon the occurrence of particular events (each a "Realization Event"), BNP was vested with the right to sell the Pledged Collateral, subject to the terms of the Pledge Agreement and other loan documents. *See* Pledge Agreement § 4.3.

59. The proceeds of any sale of the Pledged Collateral were required to be applied in accordance with Section 6.4 of the Credit Agreement: after any fees owing to BNP pursuant to the fee letter, the proceeds were then to be applied to the payment of principal due under the Credit Agreement and then to the payment of accrued and unpaid interest. *See* Pledge Agreement § 4.6; Credit Agreement § 6.4. Thus, the proceeds of any sale of the Pledged Collateral would reduce Veleron's outstanding payment obligations to BNP.

60. The Pledge Agreement provided that, following the occurrence of a Realization Event, BNP could sell the Pledged Collateral through a public sale. *See* Pledge Agreement § 4.4(4). However, BNP could only conduct a private sale of the Pledged Collateral in limited circumstances. *See id.*

61. Specifically, only if BNP was "unable to effect a public sale of any or all of such Pledged Collateral within a reasonable period of time by reason of certain prohibitions contained in the Securities Act (Ontario) or [other securities laws or regulations]," was BNP permitted to sell the Pledged Collateral through a private sale. *Id.* Moreover, any private sale was required to be conducted "in a commercially reasonable manner for private sales[.]" *Id.* § 4.4(6).

62. The default requirement of a public sale provided substantial benefit to Veleron. Because the Pledged Collateral would have to be disposed of on the public market, a large block of the Pledged Collateral could not be sold at the same time. In the event a disposition of the Pledged Collateral were to occur, the length of time that a public sale would take would give Veleron some time to raise cash to buy back the shares on the public market. Further, because a public sale would not provide immediate access to large amounts of cash, the Lender or Lenders would be disincentivized from rashly and irrationally disposing of the Pledged Collateral.

63. Pursuant to Section 4.1 of the Pledge Agreement, BNP and any nominee on its behalf were "bound to exercise in the holding of the Pledged Collateral the same degree of care as it would exercise with respect to similar property of its own of similar value held in the same place."

64. Further, the Pledge Agreement provided that BNP or its nominee could be held liable for its gross negligence or willful misconduct in taking actions or omitting to take actions under the Pledge Agreement. *See* Pledge Agreement § 4.1(2). Moreover, the Pledge Agreement provided that, to the extent that BNP or its nominee committed gross negligence or willful misconduct, or breached the Pledge Agreement, and such actions resulted in depreciation or loss of value of the Pledged Collateral, BNP and/or its nominee were liable for such depreciation or loss of value. *See id.*

## IV. BNP's Risk Dispersion Strategy

### A. The Participant Bank Group

65. While BNP followed through on its commitment to lend, even in the absence of a syndication arrangement, BNP remained anxious to hedge its risk and transfer some of the liability to others.

66. Accordingly, in late 2007 and through the early part of 2008, BNP dispersed its risk in connection with the Loan through a series of synthetic credit derivative transactions:

a) On or about December 21, 2007, through a credit derivative transaction, BNP transferred approximately 25% of the credit risk associated with the Loan to Nexgen, *see* Exhibit 2;

b) On or about March 20, 2008, through a credit derivative transaction, BNP transferred approximately 20.34% of the credit risk associated with the Loan to ABN, predecessor-in-interest to defendant RBS, *see* Exhibit 3 (the "ABN Confirmation");

c) On or about March 28, 2008, through a credit derivative transaction, BNP transferred approximately 8.1% of the credit risk associated with the Loan to Morgan Stanley, *see* Exhibit 4 (the "Morgan Stanley Confirmation"); and

d) Finally, on or about April 22, 2008, through an equity swap transaction, BNP transferred approximately 12.2% of the credit risk associated with the Loan to Credit Suisse, *see* Exhibit 5.

67. While Nexgen, ABN, Morgan Stanley and Credit Suisse (together, the "Participant Bank Group" and each a "Participant Bank") took on 65.64% of the risk associated with the Loan, none of them executed an Assignment Agreement in the form annexed to the

Credit Agreement. Thus, none of the Participant Banks became "Lenders" pursuant to the Credit Agreement. Rather, the Participant Banks were necessarily "Participants" pursuant to Section 13.1(3)(a) of the Credit Agreement.

68. Therefore, even after implementing its risk dispersion strategy, BNP remained the sole "Lender" pursuant to the Credit Agreement. As a result, any decision under the Credit Agreement or related documents -- including to declare an event of default, to enforce rights, to pursue remedies or to grant any forbearance with respect thereto -- rested squarely with BNP. *See* Credit Agreement § 13.1(3)(a). Further, BNP remained "fully liable for all of its obligations and responsibilities under [the Credit Agreement] to the same extent as if the participation[s] had not been granted[.]" *Id.*

69. Indeed, given their status as "Participants" under the Credit Agreement, Veleron could not be required to transact directly with any of the Participant Banks. *See id.* Moreover, none of the Participant Banks were accorded any voting rights as "Lenders" pursuant to the Credit Agreement, and the Participant Banks were prohibited from directing the voting rights of any Lender under the Credit Agreement. *See id.*

70. The fact that the Participant Banks were "Participants" and not "Lenders" pursuant to the Credit Agreement was concealed from Veleron. Indeed, as discussed more fully below, on numerous occasions, BNP made representations which led Veleron to believe that each of the Participant Banks was formally a "Lender" -- with the attendant rights and obligations of a Lender -- pursuant to the Credit Agreement. However, during the course of the pending arbitration in London involving Veleron's parent, Russian Machines, Veleron learned that no Assignment Agreements were ever executed and that the Participant Banks were not "Lenders" pursuant to the Credit Agreement.

### B. BNP's Insurance Coverage

71. In addition to entering into the credit derivative transactions, to minimize its risk with respect to the Loan, BNP procured several insurance policies.

72. On or about October 29, 2007 and May 23, 2008, BNP purchased two comprehensive credit insurance policies underwritten by a Lloyds of London syndicate and brokered by RK Harrison Insurance Brokers Limited. *See* Exhibits 6 and 7.

73. Through the second credit risk insurance policy, BNP increased its insurance coverage from $70,000,000 to $120,000,000, thus, raising its insurable interest to 28.42% of the Loan. Because, at the time, BNP's exposure was equal to 34.36% of the Loan, with the purchase of this second policy, BNP's exposure to loss from any potential default under the Loan was virtually non-existent.

## V. <u>Morgan Stanley is Retained as Disposal Agent</u>

74. In the event a Realization Event occurred, BNP understood that, to obtain the benefit of the Pledged Collateral, it would have to sell the Class A Magna Shares. As such, BNP engaged in a lengthy process to secure an entity to "dispose" of the collateral.

75. On or about January 18, 2008, prior to its agreement to take on 8.1% of the risk with respect the Loan, Morgan Stanley verbally agreed to be the disposal agent in connection with the Pledged Collateral. Morgan Stanley's verbal commitment was memorialized in a January 31, 2008 agency disposal agreement between BNP and Morgan Stanley (the "Agency Disposal Agreement"). *See* Exhibit 8.

76. In the initial recitals in the Agency Disposal Agreement, Morgan Stanley acknowledged that it was being engaged, pursuant to BNP's rights under the Pledge Agreement,

"to act as [BNP]'s agent in respect of certain disposals of the [Magna Class A Shares.]" Agency Disposal Agreement, WHEREAS clauses (C), (D).

77. Further, Morgan Stanley explicitly acknowledged that "[BNP], [i]n enforcing its Security under the Pledge Agreement, is obligated to seek the best price available in the market for transactions of a similar size and nature at the time of sale, and Morgan Stanley agrees to use all reasonable [efforts] to comply with such terms." *Id.* § 2.

78. Morgan Stanley's obligation to maximize the value of the Pledged Collateral in any disposal was a direct and substantial benefit to Veleron: Veleron was liable for any deficiency after the Pledged Collateral was sold, and any deficiency would be reduced dollar-for-dollar by the proceeds generated by a disposal of the Pledged Collateral. Therefore, the requirement that Morgan Stanley use its best efforts to maximize the proceeds of the disposal protected Veleron's interest in minimizing the difference between the proceeds of a disposal and its outstanding obligations under the Loan. Although the Agency Disposal Agreement does not expressly specify that Veleron is a third party beneficiary thereof, due to the nature of the Agency Disposal Agreement, Veleron clearly was a third party beneficiary.

79. Finally, Morgan Stanley covenanted that "it w[ould] use all reasonable efforts in the execution of the duties arising under [the Agency Disposal Agreement]." *Id.* § 8.

80. Pursuant to the Agency Disposal Agreement, after receiving a disposal event notice from BNP, Morgan Stanley was required "for a period of up to 30 Business Days from and including the date of the relevant Disposal Event Notice (the 'Disposal Period'), [to] endeavour (in compliance with legal or regulatory requirements applicable to it) to procure a person or persons (each a 'Buyer' and, together, the 'Buyers') to purchase for cash consideration

the Securities identified in the Disposal Event Notice or to sell Securities identified in the Disposal Event Notice into the relevant market for cash consideration." *Id.* § 2(b).

81. In connection with a disposal, BNP authorized Morgan Stanley to determine the price at which and the manner in which to liquidate the Magna Class A Shares, provided that the price would be determined in accordance with the relevant disposal strategy. *See id.* § 2. Additionally, Morgan Stanley retained "sole discretion, as to whether or not such potential purchaser shall be a successful purchaser in the relevant Disposal." *Id.*

82. In exchange for its services as disposal agent, Morgan Stanley was entitled to receive a commission equal to 1.25% of the Gross Realized Proceeds, defined as "the aggregate gross amount in USD received by Morgan Stanley in respect of the Disposal[.]" *Id.* § 3.

83. The Agency Disposal Agreement was governed by the laws of the state of New York, and both BNP and Morgan Stanley consented to jurisdiction in this Court regarding any conflict arising from the Agency Disposal Agreement. *See id.* § 14.

## VI. Veleron's and Russian Machines' Continued Commitment to the Strategic Investment in Magna

84. Demonstrating a strong commitment to the strategic investment in Magna, from December 6, 2007 through and including July 2, 2008, Veleron made a series of margin call payments totaling in excess of $400,000,000. Accordingly, as of July 2, 2008, BNP was holding a margin call balance of approximately $400,000,000 that could be used for payments under the Credit Agreement.

85. On or about July 21, 2008, BNP drew down on this balance and applied $140,000,000 as a partial Loan repayment.

86. As of September 18, 2008: (a) the total amount outstanding on the Loan was $1.089 billion; (b) BNP's share of the risk was $267,851,154.14, which was largely covered by

the insurance policies it had procured; (c) the maturity date on the Loan was September 21, 2009; and (d) the margin call balance stood at $259,725,729.81, with $63,874,849.96 earmarked for BNP.

87. In late September 2008, the equity markets in the United States -- and, indeed, worldwide -- were facing serious dislocations. As a result, there was downward price pressure on virtually all equities, and Magna was no exception.

88. That said, the fundamental strengths of Veleron's investment in Magna remained largely unchanged:

- Magna was still a financially solid company;
- Russian Machines and BasEl both remained strong and solvent; and
- The opportunity to develop the automobile market in Russia and Eastern Europe remained potentially lucrative.

89. Further, BNP, the sole Lender under the Credit Agreement, appeared better able to weather the financial storm than most U.S. institutions.

90. However, certain members of the Participant Bank Group were not as well-positioned. In particular, Morgan Stanley and ABN were in the midst of a liquidity crisis that threatened their very existence. Lehman Brothers, one of Wall Street's leading institutions, had just collapsed and, by all accounts, Morgan Stanley was generally viewed as the next investment bank in line to fail. Thus, Morgan Stanley was under significant pressure to generate liquidity by whatever means it could.

## VII. The Margin Calls

91. Through late September 2008, Magna's stock price continued to decline. As a result of that decline, on Monday, September 29, 2008, at or around 8:38 p.m. G.M.T., Fabrice

Cohen, Vice President of Equity Financing Trading at BNP in New York, sent several BasEl employees a demand for a margin call payment (the "First Margin Call") by Veleron. *See* Exhibit 9. The notice stated that the coverage ratio, a Loan covenant under the Credit Agreement, had declined to 1.269255 and that a payment of $92,458,716 was required to restore the ratio to 1.4285. *See id.* Per the notice, Veleron was required to make this payment to BNP Paribas New York by 1:00 p.m. EST on Wednesday, October 1, 2008. *See id.*

92. Recognizing that, due to Magna's declining stock price, margin calls would keep coming, on Tuesday, September 30, 2008, a high-level representative of BasEl and Russian Machines requested, on behalf of Veleron, that BNP waive the margin call requirement and forbear from enforcing its rights under the Credit Agreement for a period of at least two weeks to allow for a broader restructuring effort to take place. *See* Exhibit 10. In return, the high-level representative offered to issue a letter of indemnity backed by BasEl. *See id.*

93. As the representative informed BNP, a broader restructuring that would result in repayment of the Loan was imminent. *See id.* An authorized instrumentality of the Government of the Russian Federation, the Bank for Development of Foreign Economic Affairs Vnescheconombank (the "VEB"), had established a $50 billion emergency fund to assist Russian companies having difficulty meeting their commitments to their lenders. *See id.* If two weeks of assured forbearance could be obtained, Veleron, Russian Machines and BasEl were confident that they could secure emergency financing and, subject to further negotiations with BNP, repay the entire outstanding balance of the loan at the end of the forbearance period. *See id.*

94. On or about September 30, 2008, BNP's credit committee, known as the Coime de Credit de la Direction Generale or "CDCG," approved the margin call waiver with one condition -- that all members of the Participant Bank Group also agree to the waiver. Exhibit 11.

In this connection, BNP insisted that Veleron would have to "put pressure on" all members of the Participant Bank Group. *See id.* Further, BNP advised that, in the event one or more of the Participant Banks refused to waive, Veleron would "have to know the name responsible for the collateral execution." *Id.*

95. While, at the time, Veleron believed that all members of the Participant Bank Group were "Lenders" pursuant to the Credit Agreement, that was not the case. In fact, BNP was the only Lender pursuant to the Credit Agreement, and, thus, with respect to the requested forbearance, the only party from whom consent was required. The Credit Agreement explicitly provided that the Participant Bank Group did not have any rights and, indeed, were prohibited from directing BNP's voting rights. *See* Credit Agreement § 13.1(3)(a). Moreover, pursuant to the Credit Agreement, Veleron could not be required to deal with any Participant Bank. *See id.*

96. While Veleron and its parent were considering the best way to approach the Participant Banks, BNP contacted the group directly to discuss Veleron's request for a waiver and forbearance pending refinancing. *See* Exhibit 12. In particular, BNP informed each of the Participant Banks that Veleron was seeking a waiver through October 15, 2008, and was offering a guarantee from BasEl, in exchange for the waiver. *See id.* Further, BNP indicated to the Participant Banks that BNP was prepared to waive, but it was up to each Bank Participant to decide individually whether they would accept the waiver. BNP cautioned that "if one bank declined the waiver, it would blow-up the entire structure and force a sale in the market." *Id.*

97. Again, these conversations among BNP and the Participant Banks took place notwithstanding that, pursuant to the Credit Agreement, the Participant Banks could have no say in whether a waiver was granted. Under the Credit Agreement, it was BNP's decision and BNP's decision alone.

98. During a telephone conference on September 30, 2008, at approximately 6:49 p.m. G.M.T., BNP and representatives of Veleron's parent organization discussed the Participant Banks' positions regarding the waiver request. During this call, BNP informed Veleron that both BNP and Credit Suisse were comfortable with a waiver and forbearance through October 15, 2008, provided additional information could be obtained regarding the likelihood of a VEB refinancing.

99. Notwithstanding the ongoing discussions, on or about September 30, 2008 at 8:44 p.m. G.M.T., BNP issued a second accelerated margin call demand ("Second Margin Call"). *See* Exhibit 13. Under the Second Margin Call, BNP increased the demand for payment from $92 million as set forth in the First Margin Call to $113,825,691, payable by 1:00 p.m. EST on Wednesday, October 1, 2008 -- less than 24 hours from when the notice was received. *See id.* Again, per the notice, Veleron was required to make this payment to BNP Paribas New York. *See id.*

**VIII. Russian Machines Provides a Guarantee in Exchange For Forbearance**

100. On September 30, 2008 at 8:04 p.m. G.M.T., after receiving notice that the Second Margin Call was forthcoming, on behalf of Veleron and Russian Machines, Yashchenko emailed BNP explaining:

> "We are prepared to provide a guarantee by Russian Machines covering full [*sic*] amount of the loan (net of margin calls already delivered to you). The guarantee will be issued until 30 October - by this date we are confident in that we will be able to fully refinance the loan with a Russian bank. Of course, based on this we expect that the banks will waive not only the current margin call (which I understand have [sic] increased today to over $100 mln) but also all potential margin calls that might occur by the times [sic] of refinancing."

*See* Exhibit 14.

101. Yashchenko further informed BNP of two other positive developments: (i) he and Deripaska had met with the President of the VEB that day and the President "provided full support of the refinancing of this and certain other loans by Basic Element"; and (ii) "Magna . . . would be prepared to provide an $830 mln loan to Russian Machines secured by the Magna stake but without margin call requirements." *Id.*

102. In a post-script to his email, Yashchenko thanked BNP for its support and explained that "[i]t would not be unusual for a relationship bank to support its client in difficult times, especially given that this support will allow all banks to exit the facility without any financial losses as a result of exercising the pledge and without losing face vis a vis an important client." *Id.*

103. An internal BNP email later that night indicated that BNP had informed the Participant Banks that BNP would grant a waiver premised on repayment in full of the financing on October 15, 2008 and a guaranty given by a company in the BasEl group. *See* Exhibit 15. Further, the email stated that a consensus had emerged among the group that Russian Machines should be the entity to provide the guarantee. *See id.* The email confirmed that Russian Machines' accounts would be provided to BNP the following morning. *See id.*

104. Thereafter, BNP instructed its counsel, Clifford Chance LLP, to prepare a guarantee to be signed by Veleron's parent organization, Russian Machines, in exchange for a waiver and forbearance (the "Guarantee").

105. On or about October 1, 2008 at 7:19 p.m. G.M.T., after the deadlines for the First and Second Margin Calls has passed, BNP sent Yashchenko a first draft of the Guarantee. All of the Participant Banks were copied on the email. *See* Exhibit 16.

106. BNP's final execution version of the Guarantee was presented to Veleron's parent organization at 11:27 p.m. G.M.T. on October 1, 2008 (3:27 a.m. on October 2, 2008 Moscow time). *See id.*

107. The next morning, October 2, 2008, the Guarantee was executed by Mr. Valery Lukin, the CEO of Russian Machines, Ms. Nadezhda Boriuk, and Russian Machines' Chief Accountant and immediately delivered to BNP. *See* Exhibits 16 and 17.

108. Pursuant to the Guarantee, Russian Machines -- who previously had no liability for Veleron's obligations pursuant to the Credit Agreement -- agreed to "irrevocably and unconditionally guarantee[] to [BNP] the due and punctual observance and performance by [Veleron] of all of its obligations under or pursuant to the [Credit] Agreement" and "to pay to [BNP] from time to time on demand all sums of money which [Veleron] is at any time liable to pay to [BNP] under or pursuant to the [Credit] Agreement . . . ." Guaranty § 1.1.1.

109. Thus, the Guarantee transformed the Loan from an obligation with limited recourse (*i.e.*, recourse only to Veleron) into an obligation that was fully recourse to a solvent, well-established and profitable entity with a track record of supporting Veleron's investment in Magna.

110. In exchange for the Guarantee and the substantial benefit conferred upon BNP thereby, the parties agreed that Veleron would obtain the benefit of a waiver of the margin calls and forbearance from enforcement of remedies through, at least, October 15, 2008, while the broader restructuring was put into place (the "Forbearance Agreement").

## IX. <u>The Restructuring Discussions Continue</u>

111. Discussions concerning the restructuring and repayment of Veleron's obligations continued after the Guarantee was executed in exchange for the Forbearance Agreement.

112. At the time the Guarantee was executed, Deripaska had already written to the Russian Prime Minister requesting financial assistance from the VEB to protect Russian Machines' strategic investment in Magna. Given the importance of the Russian Machines-Magna partnership to the Russian economy, BNP knew or should have known that a VEB-backed early repayment was, in fact, a viable and realistic probability.

113. Indeed, BNP executives recognized the catastrophic consequences that a disposal could have on the Russian economy. Specifically, on an internal BNP call which occurred at 11:27 p.m. G.M.T. on October 1, 2008, BNP executives noted that a disposal of the Pledged Collateral would be detrimental to the Russian market as a whole, as a result of the "contagion effect" of defaulting a "billion dollar loan with a Russian entity like Basic Element." Exhibit 18 at 2-3.

114. At or around 11:49 a.m. G.M.T. on October 2, 2008 -- after the Guarantee was executed and delivered to BNP -- BNP and the other defendants contacted BasEl, in its capacity as Veleron's ultimate parent company, with a restructuring proposal. *See* Exhibit 19. The proposal included additional terms that BNP and the Participant Banks wanted to impose while Veleron explored refinancing options. *See id.*

115. These additional terms -- which were never communicated to Veleron or Russian Machines prior to execution of the Guarantee -- included the following:

a) The receipt of a comfort letter, by 6:00 p.m. London time on October 2, 2008 (*i.e.*, in less than 7 hours), signed by the Chairman of the VEB (who then had to obtain approval of the Supervisory Board headed by then-Prime Minister Vladimir Putin) confirming that the Russian government would implement a

"bailout plan" and funds from the "bailout plan" would be made available to refinance Russian Machines' investment in Magna;

b) The receipt of a second guarantee signed by another BasEl company, in addition to the Guarantee already executed by Russian Machines, by Friday, October 3, 2008;

c) The receipt of a third guarantee signed by Mr. Oleg Deripaska in his personal capacity;

d) A payment of a $30 million margin call by 6:00 p.m., London time, on October 2, 2008;

e) A payment of a $22 million "up front fee" to be made immediately; and

f) A promise to provide BNP "access" to "VEB senior officers" during the refinancing process.

*See id.*

116. The terms proposed, purportedly reflecting the "common agreement" of defendants -- including the Participant Banks who had no right to impose any terms on BNP's forbearance or the restructuring -- were never agreed upon, contrary to what had previously been agreed to, and impossible to meet, especially under the imposed time restrictions.

117. Rather than abide by the Forbearance Agreement, with the Guarantee of Russian Machines already in hand, defendants attempted to extract additional terms and procure additional security, all the while planning an immediate disposal of the Pledged Collateral.

## X. The Disposal of the Pledged Collateral

### A. Morgan Stanley Determines to Dispose of the Pledged Collateral

118. Some or all of defendants, including, in particular, Morgan Stanley, had no intention of abiding by the agreement to waive the margin call requirement or forbear from disposing of the Pledged Collateral.

119. As discussed above, Morgan Stanley was facing a liquidity crisis of its own and was under significant pressure to generate cash wherever possible. As such, Morgan Stanley was perversely incentivized to liquidate the Pledged Collateral: even though holding the Pledged Collateral would have made more long-term economic sense, in the short-term, a disposal event would entitle Morgan Stanley to a significant (and commercially unreasonable) fee pursuant to the Agency Disposal Agreement.

120. Moreover, Morgan Stanley's dual roles -- as Participant Bank and as disposal agent -- placed it in a position unique from the other Participant Banks: any loss on the sale of the Pledged Collateral would be offset by the large disposal fee it stood to receive under the Agency Disposal Agreement. Specifically, while the breakeven for the other banks was $42 per share, Morgan Stanley's breakeven was only $36 per share because of the disposal fee. *See* Exhibit 20.

121. As a result of its disposal fee, and its higher breakeven point, Morgan Stanley, more than any other defendant, stood to benefit from a liquidation of the Pledged Collateral. Based on these perverse incentives, Morgan Stanley determined to liquidate the Pledged Collateral.

122. Throughout the day on October 2, 2008, BNP and the Participant Banks held numerous telephone calls to discuss disposal of the Pledged Collateral.