

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Alesco Preferred Funding XV, Ltd., and
Alesco Preferred Funding XVI, Ltd.,

Civil File No.: 13-cv-2963

Plaintiffs,

vs.

COMPLAINT

American Bancorporation,

Defendant.

Plaintiffs Alesco Preferred Funding XV, Ltd. (“Alesco XV”) and Alesco Preferred Funding XVI, Ltd. (“Alesco XVI”) by and through their successor collateral manager, ATP Management LLC (“ATP”), for their Complaint against American Bancorporation, allege as follows:

Nature of the Action

1. Plaintiffs bring this action to recover more than \$40 million in principal and interest due as a result of American Bancorporation’s default and failure to make the required payments on issued Debt Securities.¹ This is an action for breach of contract and an action for declaratory judgment pursuant to 28 U.S.C. § 2201.

¹ Capitalized terms not defined in this Complaint are defined in that certain Indenture, dated April 30, 2007 between American Bancorporation and U.S. Bank National Association (as successor in interest to LaSalle Bank National Association) (the “Indenture”) and that certain Amended and Restated Declaration of Trust, dated April 30, 2007 (the “Declaration of Trust”), as applicable. True and correct copies of the Indenture and the Declaration of Trust are attached to this Complaint as Exhibit A and Exhibit B and both are expressly incorporated herein.

Parties

2. Plaintiff Alesco Preferred Funding XV, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands. Alesco Preferred Funding XV, Ltd. has its registered office in the Cayman Islands. ATP, in its capacity as successor collateral manager pursuant to the terms of that certain collateral management agreement by and between Alesco Preferred Funding XV, Ltd., as issuer, and Cohen & Company Financial Management, LLC, as collateral manager, dated as of September 29, 2005, is acting for, on behalf of, and with the consent of Alesco Preferred Funding XV.

3. Plaintiff Alesco Preferred Funding XVI, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands. Alesco Preferred Funding XVI, Ltd. has its registered office in the Cayman Islands. ATP, in its capacity as successor collateral manager pursuant to the terms of that certain collateral management agreement by and between Alesco Preferred Funding XVI, Ltd., as issuer, and Cohen & Company Financial Management, LLC, as collateral manager, dated as of June 28, 2007, is acting for, on behalf of, and with the consent of Alesco Preferred Funding XVI.

4. Defendant American Bancorporation is a bank holding company incorporated in Minnesota with its principal place of business located at 1578 University Avenue West, St. Paul, Minnesota 55104.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction under 28 U.S.C. § 1332, because the parties are of diverse citizenship and the amount in controversy is over \$75,000,

exclusive of interest and costs. Neither Alesco XV nor Alesco XVI is a citizen of Minnesota and neither has a principal place of business in this State.

6. Venue is proper in the District of Minnesota under 28 U.S.C. § 1391(b).

Facts

AMERICAN BANCORPORATION ISSUES DEBT SECURITIES

7. On April 30, 2007, American Bancorporation issued Debt Securities with a maturity date of June 15, 2037 in the principal amount of \$30,928,000 (the “Debt Securities”).

8. American Bancorporation issued the Debt Securities pursuant to an Indenture, dated April 30, 2007 (the “Indenture”), between American Bancorporation and U.S. Bank National Association (as successor in interest to LaSalle Bank National Association), in its capacity as trustee under the Indenture (the “Debt Securities Trustee”). A true and correct copy of the Indenture is attached to this Complaint as Exhibit A, and is expressly incorporated herein. The Indenture and Debt Securities are governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles other than Section 5-1401 of the New York General Obligations Law. Ex. A at § 14.05.

9. The Debt Securities are held by U.S. Bank National Association (successor in interest to LaSalle Bank National Association) in its capacity as Institutional Trustee under an Amended and Restated Declaration of Trust, dated April 30, 2007 (the “Declaration of Trust”). A true and correct copy of the Declaration of Trust is attached to this Complaint as Exhibit B, and is expressly incorporated herein.

10. The Declaration of Trust governs the Dakota Capital Trust IV (the “Trust”), a Delaware statutory trust established by American Bancorporation to facilitate the issuance of the Debt Securities. Contemporaneously with the issuance of the Debt Securities to the Trust, the Trust issued Capital Securities with a \$30 million aggregate liquidation value. The Declaration of Trust and Capital Securities are governed by and interpreted in accordance with the law of the State of Delaware, without regard to the principles of conflict of laws of the State of Delaware. Ex. B at § 13.2.

11. Alesco XV obtained its portion of the Capital Securities in exchange for payment of \$20 million to the Trust. A true and correct copy of the Cross-Receipt between the Trust and Alesco XV is attached to this Complaint as Exhibit C, and is expressly incorporated herein. A third party, PFW III, Ltd., obtained the remainder of the Capital Securities in April 2007 in exchange for its payment of \$10 million to the Trust. A true and correct copy of the Cross-Receipt between the Trust and PFW III, Ltd. is attached to this Complaint as Exhibit D, and is expressly incorporated herein. By agreement dated June 28, 2007, Alesco XVI purchased the Capital Securities obtained by PFW III, Ltd. for \$10 million. A true and correct copy of the Purchase Agreement between the Alesco XVI and PFW III, Ltd. is attached to this Complaint as Exhibit E, and is expressly incorporated herein.

12. Alesco XV and Alesco XVI are the holders of record of the Capital Securities, and collectively hold 100% of the Capital Securities issued by the Trust.

13. American Bancorporation agreed to recognize Alesco XV and Alesco XVI, as holders of the Capital Securities issued by the Trust, as owning an undivided beneficial

interest in the Debt Securities issued by American Bancorporation to the Trust. Ex. A at § 3.09(c).

14. Alesco XV and Alesco XVI, as holders of 100% of the Capital Securities, have the absolute right, following an event of default under the Indenture, to institute a suit directly against American Bancorporation to enforce the terms of the Indenture and Debt Securities. Ex. A at §§ 5.02, 5.07, 14.12; Ex. B at Annex I § 5(b).

AMERICAN BANCORPORATION DEFAULTS ON ITS PAYMENT OBLIGATIONS

15. Under the terms of the Indenture, interest accrues on the Debt Securities and American Bancorporation must pay the accumulated interest to the Trust each quarter. The payable interest, however, may be deferred for a limited period of time under certain circumstances.

16. American Bancorporation first failed to pay interest in June 2008.

17. American Bancorporation breached the Indenture in June 2013 by failing to make an interest payment on the Debt Securities during twenty consecutive quarterly periods. Ex. A at § 5.01(c).

18. As a result of American Bancorporation's June 2013 default, the Debt Securities Trustee issued a Notice of Event of Default ("Notice of Default") to American Bancorporation on July 12, 2013. A true and correct copy of the Notice of Default is attached to this Complaint as Exhibit F, and is expressly incorporated herein.

19. As the holders of 100% of the Capital Securities issued by the Trust, Alesco XV and Alesco XVI may, after an event of default, "declare the entire principal of the Debt Securities and any premium and interest accrued, but unpaid, thereon, if any, to be

due and payable immediately, and upon any such declaration the same shall become immediately due and payable.” Ex. A at § 5.01. *See also* Ex. B at § 6.8(b).

20. On September 9, 2013, Alesco XV and Alesco XVI jointly exercised their powers to accelerate the Debt Securities obligations of American Bancorporation by written notice (the “Notice of Acceleration”). A true and correct copy of the Notice of Acceleration is attached to this Complaint as Exhibit G, and is expressly incorporated herein.

21. Accordingly, the entire principal of the Debt Securities issued by American Bancorporation to the Trust, and the interest accrued due under the Indenture became immediately due and payable on September 9, 2013.

22. In addition to its June 2013 default and ongoing failure to make quarterly interest payments, American Bancorporation has also failed, and is continuing to fail, to pay the entire principal and the interest accrued under the terms of the Indenture.

23. In such a circumstance, American Bancorporation acknowledged in Section 14.12 of the Indenture that “a holder of record of Capital Securities of the Trust may directly institute a proceeding against [American Bancorporation] for enforcement of payment to such holder directly of the principal of (or premium, if any) or interest on the Debt Securities having an aggregate principal amount equal to the aggregate Liquidation Amount of the Capital Securities of such holder on or after the respective due date specified in the Debt Securities.”

24. The outstanding principal of the Capital Securities is \$30 million.

25. As of today's date, the outstanding interest accrued on the Capital Securities is \$10,117,794.41.

26. As of today's date, the sum total of the principal of the Capital Securities and accrued interest is \$40,117,494.41.

27. Despite demand, American Bancorporation has failed or refused to pay all obligations due and owing or to otherwise honor the terms of the Indenture and the Debt Securities.

28. By letter agreement on September 9, 2013 (the "Trustee's Letter Agreement"), the Debt Securities Trustee "decided to defer to the" Plaintiffs and agreed that Alesco XV and Alesco XVI, as holders of 100% of the Capital Securities issued by the Trust, are the proper parties to "exercise the Trustee's remedies under Section 5.01 of the Indenture" and to take "such other actions or remedies as may be available under applicable law in respect of the existing defaults." Ex. H at 3. *See also* Ex. A at §§ 5.04, 5.07, 14.12; Ex. B at Annex I § 5(b). A true and correct copy of the Trustee's Letter Agreement is attached to this Complaint as Exhibit H, and is expressly incorporated herein.

29. Alesco XV and Alesco XVI thus bring this action individually by exercising the rights and remedies granted them as holders of 100% of the Capital Securities, which also includes those granted to the Trustee.

First Cause of Action
(Breach of Contract)

30. Plaintiffs restate the allegations contained above in paragraphs 1-29, as if fully set forth herein.

31. The Indenture, Debt Securities and Deed of Trust represent valid, enforceable agreements that bind American Bancorporation.

32. American Bancorporation received valuable consideration in return for its execution of the Indenture, Debt Securities and Deed of Trust.

33. Plaintiffs, the Trust, and the Debt Securities Trustee performed all of their obligations, if any, pursuant to the Indenture and Debt Securities.

34. American Bancorporation is obligated to perform under the Indenture and Debt Securities for the benefit of the holders of the Capital Securities, among others.

35. American Bancorporation has a duty to make payments as promised in the Indenture and Debt Securities for the benefit of the holders of the Capital Securities issued by the Trust, among others.

36. Alesco XV and Alesco XVI cumulatively hold 100% of the Capital Securities issued by the Trust.

37. American Bancorporation therefore owes a duty to Alesco XV and Alesco XVI.

38. American Bancorporation has failed to perform its obligations as stated in the Indenture and Debt Securities.

39. Specifically, American Bancorporation has breached the Indenture by defaulting in the “payment of any interest upon any Debt Security when it became due and payable following the nonpayment of any such interest for 20 or more consecutive quarterly periods.” *See* Ex. A at § 5.01(c).

40. American Bancorporation defaulted under the Indenture when it failed to pay interest on June 17, 2013. *See* Ex. A at §§ 2.08, 5.01(c), 14.07.

41. American Bancorporation’s default is continuing and has not been cured, waived, released, extinguished or compromised.

42. Alesco XV and Alesco XVI properly accelerated American Bancorporation’s obligations under the terms of the Indenture and Debt Securities.

43. American Bancorporation further breached the Indenture when it failed to pay the entire principal of the Debt Securities and interest accrued when those amounts became immediately due and payable on September 9, 2013.

44. This failure is also continuing and has not been cured, waived, released, extinguished or compromised.

45. American Bancorporation also breached other provisions of the Indenture and Debt Securities.

46. Despite acceleration and demand, American Bancorporation has failed and refused to pay all outstanding obligations due under the Indenture and Debt Securities.

47. As a direct and proximate result of American Bancorporation’s breach of the Indenture and Debt Securities, the Capital Security holders, Alesco XV and Alesco XVI, have been harmed and are entitled to an award of damages.

Second Cause of Action
(Declaratory Judgment)

48. Plaintiffs restate the allegations contained above in paragraphs 1-47, as if fully set forth herein.

49. Pursuant to 28 U.S.C. § 2201(a), Plaintiffs seek a declaration from this Court that: (1) American Bancorporation breached its obligations under the Indenture and Debt Securities; (2) American Bancorporation is currently in default according to the Indenture and Debt Securities; (3) American Bancorporation's obligations under the Indenture and Debt Securities have been properly accelerated according to the Indenture; (4) Capital Securities issued by the Trust own an undivided beneficial interest in the Debt Securities issued by American Bancorporation; (5) American Bancorporation is obligated to pay the Plaintiffs \$40,117,494.41, the total principal of the Capital Securities and accrued interest; and (6) that Alesco XV and Alesco XVI are entitled to a judgment against American Bancorporation for \$40,117,494.41.

50. Despite demand, American Bancorporation has failed or refused to pay all obligations due and owing or to otherwise honor the terms of the Indenture and the Debt Securities.

51. Accordingly, there is an actual justiciable controversy between the parties of sufficient immediacy to justify the relief sought.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that the Court enter a judgment:

- (a) declaring the obligations of American Bancorporation and the rights of Alesco XV and Alesco XVI under the Indenture, Debt Securities and applicable law;
- (b) awarding Plaintiffs \$40,117,494.41, the total principal of the Capital Securities and interest accrued as of the date of the Complaint;
- (c) awarding Plaintiffs interest, including prejudgment interest calculated at the applicable rate in the Indenture, and statutory post-judgment interest pursuant to 28 U.S.C. § 1961;
- (d) awarding Plaintiffs all costs associated with bringing this action, including, but not limited to, attorneys' fees; and
- (e) such other and further relief as the Court may deem proper.

BASSFORD REMELE
A Professional Association

Date: October 29, 2013

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**To be admitted Pro Hac Vice*

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