SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
HON. BERNARD J. FRIED Justice

E-FILE PART 60

Stewardship Credit Arbitrage Fund LLC, et. al.,

Plaintiffs,

- v -

Charles Zucker Culture Pearl Corp., et.al.,

Defendants.

INDEX NO. #600634-2010

MOTION DATE

MOTION SEQ. NO. ~~#001~~ 002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 5/4/2011

J.S.C.
HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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STEWARDSHIP CREDIT ARBITRAGE FUND LLC,
STEWARDSHIP CREDIT ARBITRAGE FUND LTD,
NORTHLIGHT FUND LP and PRIDECO SECURED
LOAN FUND LP,

Plaintiffs,

-against-

Index No.: 600634/2010

CHARLES ZUCKER CULTURE PEARL CORP.
d/b/a PRECIOUS STONES CO. and
BENJAMIN ZUCKER,

Defendants.

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APPEARANCES:

For Plaintiffs:

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For Defendants:

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Steven R. Schindler, Esq.
Emily A. Poler, Esq.

FRIED, J:

In this action, the plaintiffs are assignees of certain commercial loans originated by non-party Acorn Capital Group LLC (Acorn), and the defendants are Charles Zucker Culture Pearl Corp. d/b/a Precious Stone Co. and its principal, Benjamin Zucker (Zucker), who provided appraisal services in connection with the loans made by Acorn to non-party borrowers R. Esmerian Inc. (REI) and Vassal Jewels LLC (Vassal). In their amended complaint, the plaintiffs assert five causes of action against the defendants: fraud, negligent misrepresentation, professional negligence, breach of contract, and breach of General

Business Law (GBL) § 239-c. Pursuant to CPLR 3211 (a)(7), the defendants move to dismiss the amended complaint, with prejudice. For the reasons set forth below, the motion to dismiss is denied.

In December 2006, Acorn agreed to loan $40 million to REI as working capital (the REI Loan), but as a condition to funding, Acorn required that REI pledge, as security, collateral with an aggregate appraised value of at least three times the principal loan amount. Amended Complaint (AC), ¶ 3. In December 2007, Acorn also agreed to loan $13.5 million to Vassal to fund its acquisition of REI's stock (the Vassal Loan and the REI Loan, collectively, the Loans). Similarly, Acorn required that Vassal pledge, as security, collateral with an aggregate appraised value that met specified benchmarks based on the principal loan amount. *Id.*, ¶ 4. To satisfy the appraisal requirements, Acorn, REI and Vassal agreed to use two appraisers - Zucker of Precious Stone Co. and Peter Schaffer of A La Vielle Russie Inc. - because of these individuals purported expertise in determining the market value of the pledged collateral, which consisted of collections of art, antiquities and jewels. *Id.*, ¶ 5. The defendants provided Acorn with a number of appraisals, which were required as a condition to the initial and all subsequent loan fundings. In their appraisals, the defendants valued the collateral "well in excess" of the loan agreements' requirements. *Id.*, ¶ 7.

Thereafter, Acorn assigned its rights and interest in the Loans, the pledged collateral and all related documents to the plaintiffs, who are direct and/or indirect assignees of Acorn. The first batch of assignments took place from December 2006 through and including March 2008 (the Prior Assignments). Poler Affirmation, Exh. J. On February 25, 2008, Acorn, in its role as servicer of the Loans, gave notice to REI that it was in default. *Id.*, Exh. L. On

January 5, 2009, Acorn, acting as servicer, gave notice to Vassal that all principal and accrued interest under its loan were due and owing. *Id.*, Exh. M. Because no payments were made by the borrowers, Acorn took possession of the pledged collateral. Acorn then hired two consultants to obtain estimated auction values and historic appraisal values for the collateral, and to assess commercially reasonable means to liquidate same. AC ¶ 48-51. "Much to Acorn's and [the plaintiffs'] surprise", the values of the collateral appraised by these consultants were "considerably lower" than those provided by the defendants. *Id.*

Because no notice of the Prior Assignments was given to the borrowers, as arguably required by the terms of loan agreements, on September 11, 2009, Acorn and the plaintiffs executed another batch of assignments (the 2009 Assignments), pursuant to which Acorn assigned/reassigned to the plaintiffs its rights and interest in the Loans, the pledged collateral, and all claims and causes of action related thereto. Poler Affirmation, Exh. N. In April 2010, certain of the plaintiffs filed a complaint against Vassal and its owner. *Id.*, Exh. O. In May 2010, the plaintiffs filed an involuntary petition against REI and its owner, pursuant to Chapter 7 of the United States Bankruptcy Code. *Id.*, Exh. P. In June 2010, the plaintiffs amended their complaint against the defendants, asserting five causes of action (as noted above) and seeking over $60 million in damages. *Id.*, Exh. A.

In considering a CPLR 3211 (a)(7) motion to dismiss, the determination is whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W.*

232nd Owners Corp. v Jennifer Realty Corp., 98 NY2d 144, 151-152 (2002). The plaintiffs' pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

While factual allegations contained in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Also, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2d Dept 2005).

Defendants argue that both the Prior Assignments and the 2009 Assignments executed by Acorn, as assignor, were ineffective to assign or transfer the causes of action asserted by the plaintiffs in the amended complaint. Defendants' Brief, at 11. Specifically, they argue that the Prior Assignments only assigned to plaintiffs the rights of Acorn "*under the documents evidencing the Loans*," and that the Court of Appeals has held in *State of California Public Employees' Retirement System v Shearman & Sterling* (95 NY2d 427 [2000])(Calpers) that this type of assignment "does not assign causes of action *arising outside of those documents*." Defendants' Brief, at 11-12 (emphasis added).

Defendants' argument is unpersuasive, when viewed in light of the language used in the Prior Assignments, which stated, in relevant part, that "Assignor does hereby transfer, assign ... to the Assignee ... without recourse to the Assignor, the Purchased Note and the loan or loans evidenced thereby, a pro rata interest ... *in the Assignor's rights under the Credit Agreement, Security Agreement, and each document and instrument related to the*

foregoing (collectively, the Credit Documents) ...." Prior Assignment, ¶ 1 (emphasis added). Defendants do not argue that the appraisals, which were required to be submitted to Acorn as a condition to any funding under the Loans, were not related to, or were not an integral part of, the Loan or Credit Documents and the transactions contemplated thereby. Loan Agreement, § 12 (a)(ii), (c)(iv) (conditions to initial and subsequent fundings). In such regard, plaintiffs' causes of action cannot be said to be "arising outside of" the Loans or Credit Documents.

Even if, arguably, the Prior Assignments did not explicitly assign the causes of action to the plaintiffs, the 2009 Assignments cured any defect by specifically assigning "any and all claims, causes of action ... that Assignor ever had or now has against any and all parties related in any manner whatsoever to Assignor's loan to Borrower ...." 2009 Assignment, ¶ 1. The basis for the 2009 Assignment was premised upon the language of the Loan Agreement, which provided, in part, that "Lender may, upon notice to Borrower, assign to any Person all or a portion of Lender's rights and obligations under this Agreement," and that "*[a]ny attempted assignment or participation in violation of this Section 13(f) shall be void and of no force and effect.*" Loan Agreement, § 13 (f)(ii), (v)(emphasis added). Plaintiff's acknowledge that the requisite notice was not given to the borrowers, and as such, the Prior Assignments could be deemed void by the assignor and/or the assignees. Also, in the Prior Assignments, the "Assignor agrees to execute and deliver to the Assignee such additional documents ... as may be necessary ... to effectuate the purposes of this Assignment." Prior Assignment, ¶ 8. The above-quoted language is plain and clear, and the Plaintiffs do not allege otherwise. At any rate, "[w]hether or not a writing is ambiguous is a question of law

to be resolved by the courts," and I find the language unambiguous. *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 (1990).

Notwithstanding the foregoing, the defendants argue that "the 2009 Assignments also failed to transfer the causes of action that Plaintiffs assert here because, at the time of the 2009 Assignments, Acorn had been paid the full value of the Loans .... [and] it had no damages ... [And] without any damages, Acorn had no causes of action to assign to Plaintiffs." Defendants' Brief, at 12 (citing *Calpers*, 95 NY2d at 436). *Calpers* involved an assignee that sued the assignor's counsel (who drafted the assignor's loan documents) for professional negligence, where the assignee "reserved the right of final approval of the loan documents for itself and its counsel, [but] failed to object" to the defectively drafted documents. *Calpers*, 95 NY2d at 434.

In the instant case, the Loan Agreement contained disclosure requirements, which were included in the section entitled "Representations and Warranties." In particular, the Loan Agreement stated, in relevant part, that "none of the written reports ... certificates or other written information ... furnished by or on behalf of Borrower and Guarantor to Lender in connection with the negotiation of the Loan Documents or delivered hereunder ... contains any material misstatement of fact ...." Loan Agreement, § 8(p) (disclosure). In turn, the Loan Agreement stated that "representations and warranties made by any Obligor in any Loan Document and in the certificates or other instruments delivered in connection with ... any Loan Document shall be considered to have been relied upon by Lender and shall survive the execution and delivery of each Loan Document ... so long as the principal or any accrued interest ... under any Loan Document is outstanding and unpaid." *Id.*, § 13(g) (survival).

Also, the Loan Agreement stated that "the Agreement shall be binding upon and inure to the benefit of each party and its successors and assigns ...." *Id.*, § 13(f)(i).

It is undisputed that the subject appraisals were furnished to Acorn by the defendants in connection with the transactions contemplated by the Loans or Credit Documents. Moreover, as explained fully below, these appraisals were representations or statements made by the defendants, for themselves and/or on behalf of the borrowers, as to the market values of the collateral, which were apparently relied upon by Acorn as a condition to funding the Loans, and the representations continued to survive so long as the Loans remained outstanding and unpaid. Thus, even though Acorn was fully paid by the plaintiffs under the assignments, the causes of action (such as fraud) could be assigned to the plaintiffs, because the Loans were undisputedly outstanding and unpaid at the time of the assignments.

Defendants also acknowledge that, pursuant to the terms of the assignments, Acorn was a servicer for the Loans. Defendants' Brief, at 7-8. When the Loans were in default, not only did Acorn's fee revenue, if any, stop, but Acorn also had to hire two consultants to procure estimated auction values and historic appraisal values for the collateral. AC, ¶¶ 48-51; Defendants' Brief, at 8. Thus, the defendants' assertion that "Acorn had no damages when it entered into the 2009 Assignments" (Defendants' Brief, at 14) does not appear to be fully supported by the facts of the case or the Amended Complaint's allegations. Moreover, it is axiomatic that on a motion to dismiss, the court must accept the allegations as true and give them every favorable inference. *Cron v Hargro Fabrics*, Inc., 91 NY2d 362, 366 (1998).

Based on the foregoing, defendants' reliance on *Calpers* is misplaced, because the facts in *Calpers* are distinguishable, and its holding is thus inapplicable. Indeed, seven years after *Calpers* was decided, the Appellate Division, First Department, ruled in *North Fork Bank v Cohen & Krassner* (44 AD3d 375 [1st Dept 2007]) that, the assignee of the lender-assignor's mortgages could maintain a fraud claim against the defendant law firm, which prepared the opinion letter and the corporate resolutions misrepresenting the borrower's authority to enter into the mortgage transaction, even though the assignor was paid full value for the assignment. The appellate court was clearly aware of *Calpers*, as it cited to such case in its ruling, and the defendant-appellant, Cohen & Krassner, also cited to *Calpers* for the proposition that both the assignor's and the assignee's right to sue was extinguished by the non-recourse assignment, as the assignor was fully paid by the assignee. Brief for Defendant-Appellant, Point II, *North Fork Bank,* 2007 WL 5071910 (1st Dept May 16, 2007). Defendants here make the identical argument that was made by the defendant-appellant, but such argument has been rejected by the Appellate Division in *North Fork Bank.*

Also, defendants assert that the rights granted the assignee in *North Fork Bank* were "broader," because "all rights to the transaction" were assigned. Defendants' Reply Brief, at 7, n 6. A review of the defendant-appellant's brief filed in that case seems to reflect otherwise. Indeed, the assignment only stated that "Assignor ... hereby assigns unto the Assignees all of its rights, title and interest in and to those mortgages recited on the attached Schedule of Mortgages." *North Fork Bank,* 2007 WL 5071910 at *9. The language used in such assignment seems narrower than those used in this case, because the assignments here assigned to the plaintiffs all of Acorn's rights and interest not only in the loan and security

agreements, but also in all related documents, including the appraisals, as discussed above. Prior Assignments, ¶ 1. *Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank*, 57 F3d 146, 152 (2d Cir 1995)(when assignment transferred to assignee all of assignor's rights and interest in (a) the participation agreement and (b) participation in the Marceca Loan, subparagraph (b) should be read to transfer something more than assignor's rights and interest in the participation agreement under subparagraph (a); Court held that assignee could bring contract and tort claims held by assignor, even if assignment did not explicitly assign such claims). Notably, *Banque Arabe* was cited as support in *North Fork Bank*. 44 AD3d at 375; *see also Pro Bono Inv., Inc. v Gerry*, 2008 WL 4755760 at *16-17 (SD NY Oct 29, 2008)(transfer or assignment of assets also encompassed transfer or assignment of related claims).

Accordingly, the causes of action stated in the amended complaint are assignable to the plaintiffs, as assignees of Acorn. However, whether one or more of such causes of action should be dismissed due to other legal infirmities, as also urged by the defendants, is analyzed below.

Fraud (First Cause of Action)

To state a cause of action for fraud, the complaint must allege: misrepresentation of a material fact made by defendant, defendant knew of its falsity and intended to defraud plaintiff, plaintiff's justifiable reliance on such misrepresentation, and damages. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); *Richmond Shop Smart, Inc. v Kenbar Dev. Ctr., LLC*, 32 AD3d 423, 424 (2d Dept 2006). Pursuant to CPLR 3016 (b), when a claim is based upon fraud or misrepresentation, the circumstances constituting the

wrong shall be stated in detail. "However, the showing need not be of an evidentiary nature [because] CPLR 3016 (b) requires only that a claim of fraud be pleaded in sufficient detail to give adequate notice ...." *DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 302 (1st Dept 2005).

The amended complaint alleges, among other things, that the defendants submitted multiple appraisals to Acorn that contained material misrepresentation of the market value of the collateral; the defendants knew or should have known of the falsity of the appraisals and intended to use them to deceive Acorn; the defendants knew that Acorn would rely on the appraisals in lending to the borrowers; the defendants met with representatives of Acorn and plaintiffs regarding the nature of Acorn's business, and to discuss the experience and credentials of the defendants; Acorn and plaintiffs reasonably relied on the appraisals to fund and/or participate the Loans; and as a result of the defendants' fraud, the plaintiffs, in their own right and as assignees of Acorn, suffered significant damages. AC, ¶¶ 56-64.

Notwithstanding the allegations of the amended complaint, the defendants argue that (1) the alleged misrepresentations were made to Acorn, not to the plaintiffs, and thus plaintiffs cannot assert a direct cause of action for fraud; (2) the appraisals were statements of opinion, not fact; and (3) the plaintiffs could not reasonably rely on the appraisals. Defendants' Brief, at 7-12. Defendants' arguments are not persuasive. First, because the claims (including fraud) can be brought by the plaintiffs as Acorn's assignees, as discussed above, it is unnecessary to analyze whether they also have the standing to bring the claims directly. "[T]he assignee steps into the shoes of its assignor." *See generally Fallon v Wall Street Clearing Co.*, 182 AD2d 245, 249 (1st Dept 1992).

Secondly, contrary to the defendants' assertion that the appraisals were non-actionable "opinion letters," a review of the documents reflects that they were more akin to representations of fact. For example, in his appraisal dated December 11, 2006, Zucker stated that "the prices indicated are based on my 40 years experience in the American and European marketplace, *as well as dealer and auction values.*" Fleishman Affirmation, Exh. B (emphasis added). Then, in his appraisal dated January 29, 2007, Zucker wrote that "*[y]ou have asked me to re-evaluate and update appraisals* ... that I have done for Acorn ... *Values for [these collateral] have risen in the marketplace over the last year* ...." *Id.*, Exh. C (emphasis added). In another appraisal dated April 17, 2007, Zucker stated that "[o]n the date hereof we examined that item of collateral ... *We represent that the Fair Market Value (defined as sellable within one year) of such item as the amount set forth opposite its description on the Exhibit.*" *Id.*, Exh. D (emphasis added). Based on the quoted language, it is fair to conclude that the appraisals were premised on Zucker's purported analysis of the market conditions, sales histories and fair market values of the relevant collateral, and his statements or representations regarding same. Yet, the complaint alleges that, according to the undertaking conducted by the plaintiffs' consultants that were based on historical sale prices obtained from auction houses (such as Sotheby's and Christie's), the defendants' appraisals "egregiously overinflated" the values of the collateral, and due to the defendants' fraud, the plaintiffs have been damaged in excess of $60 million. AC, ¶¶ 50-53, 63-64. Defendants' other argument, that plaintiffs did not pay for the appraisals, also misses the point. The Loan Agreement expressly stated that Zucker and Schaffer were both "Approved Appraisers" retained to prepare appraisals of the borrowers' collateral, and that the delivery

to Acorn of such appraisals was a condition to funding the Loans. Loan Agreement, Annex A (Schedule of Approved Appraisers). Moreover, the cases relied on by the defendants in support of their argument are distinguishable. For example, in *Augsbury v Adams* (135 AD2d 941 [3d Dept 1987]), the Third Department dismissed the fraud claim, because it found that the buyer-plaintiffs were experienced art collectors who entered into extensive arm's length negotiations with the seller-defendant before consummating the purchase. In contrast, Acorn (and the plaintiffs) stated that they did not have the expertise to evaluate the collateral, and needed to obtain appraisals from well-known professionals (such as the defendants) to conduct due diligence on the Loans. AC, ¶ 5. These statements are undisputed by the defendants.

Defendants also argue that the plaintiffs, as sophisticated parties, cannot plead reasonable reliance because they failed to exercise ordinary diligence in conducting independent appraisals of the collateral before purchasing the Loans from Acorn, and as such, any alleged reliance on the defendants' appraisals was unreasonable as a matter of law. Defendants' Brief, at 19-20. Such argument is unpersuasive. Notably, the Court of Appeals observed in *DDJ Mgt., LLC v Rhone Group, LLC* (15 NY3d 147, 154 [2010]) that, when a plaintiff took "reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud." The Court also noted that, if the plaintiff insisted upon a written representation from the defendant that certain facts were true or not misleading, plaintiff would be "justified in accepting that representation rather than making its own inquiry." *Id.* Acorn insisted upon written appraisals from the defendants which, as discussed above, are akin to representations

of the collateral's market value, and because the plaintiffs are Acorn's assignees, they, like Acorn, can rely on such appraisals. *See Rodin Properties-Shore Mall v Ullman* (264 AD2d 367 [1st Dept 1999])(motion to dismiss fraud claim denied where defendant's appraisal grossly inflated value of the collateral, and defendant knew that the appraisal would be submitted to the lenders to induce them to lend to the borrower). Here, defendants do not deny that they knew that their appraisals were a condition to funding the Loans. Thus, plaintiffs' claim of reasonable reliance is legally sufficient, and the motion to dismiss the fraud claim is denied.

Negligent Misrepresentation (Second Cause of Action)

The plaintiffs also allege a cause of action sounding in negligent misrepresentation. AC, ¶¶ 65-75. In New York, "before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations, there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Parrott v Coopers & Lybrand, LLP*, 95 NY2d 479, 483 (2000) (internal quotation marks and citations omitted). For liability to attach, a plaintiff must show "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Id.* at 484 (citations omitted). Moreover, to establish a negligent misrepresentation claim in a commercial context, it must be shown that the defendant possessed unique or specialized expertise, or be in a special position of trust and

confidence with the plaintiff. *Kimmell v Schaefer*, 89 NY2d 257 (1996); *Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005).

Although there is no direct contractual relationship between Acorn/plaintiffs and the defendants, the Loan Agreement stated that the defendants were "approved appraisers" jointly chosen by Acorn and the borrowers, and the defendants were required to prepare the appraisals and deliver same to Acorn. Based on the foregoing, I conclude that such relationship was "so close as to approach that of privity." Moreover, as discussed above, (1) the defendants were "aware" that the appraisals would be used by Acorn in funding the Loans; (2) Acorn, a "known party" to the defendants, would reasonably rely on the appraisals; and (3) the defendants' conduct evinced their understanding of such reliance. Moreover, the defendants do not deny that they have specialized expertise in appraising the collateral. Thus, the plaintiffs, as assignees of Acorn, have adequately alleged a negligent misrepresentation claim against the defendants.

Negligent Appraisal/Professional Negligence
(Third Cause of Action)

The plaintiffs also assert an alternative claim sounding in negligent appraisal and/or professional negligence. In sum, the plaintiffs allege that the defendants had a duty to apply the skill and care required of a member of the appraisal profession in determining the value of the collateral, but failed to do so. AC, ¶¶ 76-80. While such claim is essentially a malpractice claim based substantially on the same facts and allegations as the negligent misrepresentation claim, the defendants do not argue that such claim is duplicative and should be dismissed; instead, their motion addresses the requisite elements needed to

adequately establish such claim. For the purpose of addressing and deciding the motion, I deny the defendants' request to dismiss such claim, for the reasons stated below.

First, New York law permits a party to plead alternative legal theories to support its claim for recovery. *Ellis v Abbey & Ellis*, 294 AD2d 168, 170 (1st Dept 2002); *Ramos v City of New York*, 285 AD2d 284, 306 (1st Dept 2001); CPLR 3014. Thus, at the current stage of this litigation, pleading the alternative claim is permissible. To state a claim for negligence or malpractice, a plaintiff must allege actual privity or a relationship so close as to approach that of privity, and the three elements set forth in *Parrott, supra*. Defendants' Brief, at 24-25; Plaintiffs' Opposition Brief, at 20-23. For the reasons stated in connection with the negligent misrepresentation claim, the amended complaint also sufficiently alleges the claim of negligent appraisal or professional negligence.

Breach of Contract (Fourth Cause of Action)

The amended complaint alleges that the defendants (upon information and belief) entered into one or more contracts with the borrowers to provide appraisals of their collateral; Acorn-plaintiffs are the intended third-party beneficiary of such contracts; and the defendants breached the contracts by failing to conduct appraisals pursuant to generally accepted appraisal standards. AC, ¶¶ 81-87. While this claim is largely based on the same facts and allegations as the above negligent appraisal or professional negligence claim, plaintiffs may assert an alternative legal theory in support of recovery. *Rodin, supra*, 264 AD2d at 368 ("the fact that the same facts serve as the basis of the tort and contract claims is of no moment. Liability in tort may arise from and be inextricably intertwined with that

conduct which also constitutes a breach of contractual obligations")(internal quotation marks and citation omitted).

Defendants argue that the plaintiffs failed to sufficiently plead the existence of a contract because they only made "the barest allegation" that there were "one or more contracts" between the defendants and the borrowers, and as such, "the question of whether plaintiffs are third-party beneficiaries is moot, if there is no contract." Defendants' Brief, at 25-27. The argument is not persuasive. At this pre-discovery stage of the litigation, the amended complaint adequately alleges a breach of contract claim, because it is the defendants, not the plaintiffs, who should have copies of the subject contracts in their possession. In any event, under the Loan Agreement, the defendants were chosen jointly by the borrowers and Acorn as "approved appraisers," and the defendants do not deny this fact.

The *Rodin* case, *supra*, also supports a breach of a third-party beneficiary contract claim. In *Rodin*, the appellate court ruled that the plaintiff, a consortium of lenders who lent money to the borrower based on an appraisal provided by the defendant, could maintain a breach of contract claim in addition to the tort claims of fraud and negligent misrepresentation, because the complaint adequately alleged that the defendant's appraisal contained material misrepresentation and gross inflation of cash flow, and defendant knew that its appraisal would be submitted to and used by the lenders. *Rodin*, 264 AD2d at 368-69. The amended complaint's allegation substantially mirrors the facts in *Rodin*.

Further, the case relied on by the defendants, *Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173 [2011]), contained facts that are readily distinguishable. In that case, the defendant appraiser provided an appraisal letter for a painting to a non-party Michel

Raymondin, whose role in the transaction or whose relation to the plaintiff was not pleaded, and the letter also did not indicate who requested the appraisal or its purpose. The Court of Appeals rejected the breach of contract claim because the plaintiff - the ultimate buyer of the painting - only offered "conclusory allegations" that it was a third-party beneficiary of the contract, without pleading the terms of the contract, the parties involved, and the conditions under which the appraisal contract was formed. *Id.* at 182. Here, except for the terms of the contracts, which can be obtained via discovery, the amended complaint sufficiently pleads the parties involved, and the conditions under which the appraisals prepared by the defendants were formed. Hence, the defendants' reliance on *Mandarin Trading* is misplaced, as the relevant and operative facts there are distinctly different.

Breach of GBL § 239-c (Fifth Cause of Action)

GBL § 239-c sets forth the civil liabilities of "appraisers of jewelry, works of art, watches and objects made from or containing precious stones or metals." Specifically, the statute states, in relevant part, that "[a]ny person, firm, partnership, corporation ... sustaining damages by reason of a knowingly misleading, deceptive or fraudulent appraisal may bring a civil action for actual damages ... if it is found that such appraiser has willfully violated" the statute's provisions. GBL § 239-c. The amended complaint alleges that the defendants, as appraiser of the collateral which consisted of property that fell within the ambit of the statute, provided appraisal reports that were knowingly misleading, deceptive or fraudulent. AC, ¶¶ 82-87.

The defendants argue that the statute is intended to protect consumers, and only those "who directly receive the allegedly deceptive appraisal" are covered by the statute. Defendants' Brief, at 28-29. They also argue that the statute is akin to GBL § 349(h), which protects consumers from acts of businesses that engage in deceptive trade practices. *Id.*

While it is true that part of § 239-c's legislature history consists of a letter by the New York Consumer Protection Board recommending approval of the bill as a protective measure for consumers, the sponsor (Mr. Jonas) stated that the bill's purpose and effect would be to permit the Attorney General or "an interested party to the transaction" to institute actions against an appraiser "who knowingly makes ... an appraisal containing false, misleading, deceptive or fraudulent representations ...." Bill Jacket L. 1973 ch. 716, Memorandum in Support by Jonas. Nothing in the bill sponsor's memorandum delimits the statute's application to consumers, as urged by the defendants. Indeed, contrary to the defendants' assertion, the statute explicitly states that it is to apply to "any person, firm, partnership, corporation ..." and the language is plain and unambiguous. Hence, this statute cannot be analogized to § 349(h). Also, the argument that the statute only covers an entity who "directly received the appraisal" is refuted by the sponsor's broad statement that the statute also covers "an interested party to the transaction." In any event, because the plaintiffs are Acorn's assignees and can assert claims in such capacity, the amended complaint adequately alleges a claim under GBL § 239-c.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is denied, and the defendants are hereby directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: 3/4/2011

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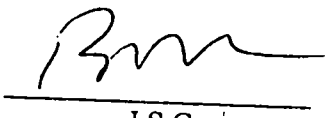

J.S.C.

HON. BERNARD J. FRIED