

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

ODDO ASSET MANAGEMENT,

Plaintiff,

- against -

BARCLAYS BANK PLC, BARCLAYS CAPITAL, INC., SOLENT  
CAPITAL PARTNERS, LLP, SOLENT CAPITAL (JERSEY)  
LIMITED, AND THE MCGRAW-HILL COMPANIES, INC.,

Defendants.

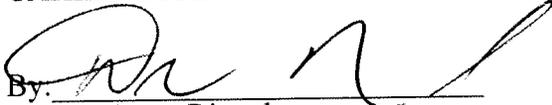
Index No. 109547/08

**ORDER WITH NOTICE OF  
ENTRY**

**PLEASE TAKE NOTICE**, that annexed hereto is a true copy of a Decision and Order of the Supreme Court of the State of New York, entered in the office of the Clerk of that Court on April 26, 2010.

Dated: New York, New York  
April 26, 2010

CAHILL GORDON & REINDEL LLP

By:   
Dean Ringel

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

PRESENT: Hon. **BARBARA R. KAPNICK**  
Justice

PART 39

ODDO ASSET MANAGEMENT

INDEX NO. 109547/08

- v -

BARCLAYS BANK et al.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED: \_\_\_\_\_  
J.S.C.

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

RECEIVED  
APR 23 2010  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 4/21/10

**BARBARA R. KAPNICK**  
c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

NYS SUPREME COURT E-FILED AS DOCUMENT #

4-26-2010

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

-----X  
ODDO ASSET MANAGEMENT,

Plaintiff,

-against-

BARCLAYS BANK PLC, BARCLAYS CAPITAL,  
INC., SOLENT CAPITAL PARTNERS, LLP,  
SOLENT CAPITAL (JERSEY) LIMITED, and  
THE MCGRAW-HILL COMPANIES, INC.,

Defendants.  
-----X

BARBARA R. KAPNICK, J.:

This action arises from the collapse of two structured investment vehicles, Golden Key Ltd. ("Golden Key") and Mainsail II Ltd. ("Mainsail"), that defendants Barclays Bank PLC, which is registered in England, and Barclays Capital, Inc. (collectively, "Barclays"), created and structured in 2005 and 2006.<sup>1</sup>

Golden Key and Mainsail were highly leveraged investment funds (known as "SIV-Lites"), which were funded through the issuance of capital notes (a form of equity), mezzanine capital notes (a form of debt), and by borrowing in the commercial paper market. Golden Key and Mainsail then used the money so raised to invest in

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<sup>1</sup> Golden Key and Mainsail were incorporated in the Cayman Islands.

001

interest rate bearing investments, such as high-quality mortgage-backed securities and other financial instruments.<sup>2</sup>

Between 2005 and 2006, plaintiff Oddo Asset Management ("Oddo"), a French investment firm based in Paris,<sup>3</sup> invested a total of \$50 million in Golden Key and Mainsail. Oddo thus acquired Mezzanine Capital Notes issued by Golden Key and Mainsail.

When Golden Key and Mainsail were initially set up, Barclays arranged for the appointment of "collateral managers" to manage the investment portfolios and their borrowings. Non-party Avendis Financial Services Limited ("Avendis"), which is now in liquidation, was appointed the manager of Golden Key, and defendant Solent Capital (Jersey) Limited ("Solent Jersey"), a limited liability company incorporated under the laws of Jersey, an island in the English Channel, was appointed the manager of Mainsail, each pursuant to a Collateral Management Agreement. Solent Jersey was assisted by co-defendant Solent Capital Partners LLP ("Solent

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<sup>2</sup> The bulk of the funds were borrowed in the short term commercial paper market by issuing promissory notes that would mature typically every 90 days. Thus, the proceeds of the funds' investments were used to pay out the commercial paper first, which was the senior debt, and then the mezzanine capital notes, which were the subordinating debt.

<sup>3</sup> Oddo is a wholly-owned subsidiary of Oddo et Cie, the largest independent finance, investment and advisory company in France.

Capital"), a limited liability partnership operating under the laws of England and Wales, acting as collateral advisor.<sup>4</sup> (Solent Capital and Solent Jersey shall be referred to herein collectively as "Solent" or the "Solent defendants").

Barclays also retained the Financial Services business division of defendant The McGraw-Hill Companies, Inc. ("McGraw-Hill"), Standard & Poor's ("S&P") to issue ratings on the notes for Golden Key and Mainsail, as well as two other troubled SIV-Lites created by Barclays, Sachsen Funding I and Cairn High Grade Funding I.

Plaintiff alleges that Avendis and Solent placed their loyalty to Barclays and their self-interest in maintaining their profitable business relationship with Barclays above their loyalty to the investors in the investment funds.

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<sup>4</sup> The Complaint alleges that Solent Capital's role as the collateral advisor was to provide advisory, portfolio monitoring and information services to Solent Jersey which, as collateral manager, assumed final responsibility for directing investment strategy and for deciding upon and executing transactions. Plaintiff goes on to allege that for all practical purposes, however, Solent Capital and Solent Jersey's functions overlapped with respect to managing and advising Mainsail, and that Solent Capital made all the decisions on behalf of both entities. (Compl., ¶121f.)

Specifically, plaintiff claims that Avendis and Solent conspired with Barclays in the first half of 2007 to transfer certain securities backed by U.S. sub-prime mortgages to the funds, even though Barclays realized that the value of those securities was plummeting while they were being warehoused by Barclays.<sup>5</sup> Plaintiff contends that Barclays was motivated to off-load these securities quickly at the price it cost Barclays to acquire them to avoid recording a loss on Barclays' records. Plaintiff further contends that Avendis and Solent, which caused the investment funds to acquire the impaired securities, were willing participants because they did not wish to jeopardize their relationships with Barclays.

Plaintiff also claims that Golden Key and Mainsail were able to finance the expansion of their investment portfolios by raising additional funding, including more debt, and were thus able to purchase the impaired securities from Barclays, because S&P confirmed the investment funds' ratings.

Plaintiff contends that S&P's confirmations of Golden Key and Mainsail's ratings were false, because S&P knew, *inter alia*, that Barclays was dumping the impaired warehoused securities at inflated

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<sup>5</sup> The transfers at issue took place in April and July of 2007.

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prices on Golden Key and Mainsail, and that the ratings of both Golden Key and Mainsail would be negatively impacted as a result of acquiring these securities. Plaintiff alleges that S&P acted as it did because Barclays was an important repeat customer.

By August 2007, both Golden Key and Mainsail were effectively "frozen" and suspended from further activity after their investment portfolios had plummeted in value, allegedly as a result of the impaired securities purchased from Barclays, and they were no longer able to borrow against their assets.<sup>6</sup> In April 2008, Golden Key and Mainsail were put into receivership.

The Complaint sets forth causes of action: (i) against Barclays and S&P, for aiding and abetting breach of fiduciary duty in connection with Golden Key (first cause of action); (ii) against Barclays, for tortious interference with contract in connection with Golden Key (second cause of action); (iii) against Solent, for breach of fiduciary duty in connection with Mainsail (third cause of action); (iv) against Barclays and S&P, for aiding and abetting breach of fiduciary duty in connection with Mainsail (fourth cause of action); and (v) against Barclays, for tortious interference with contract in connection with Mainsail (fifth cause of action).

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<sup>6</sup> Oddo alleges that Solent also breached a fiduciary duty to it in August 2007 by electing not to draw down on a liquidity facility that Barclays had provided.

The Barclays defendants now move, under motion sequence number 001, for an order: (1) pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing the Complaint in its entirety and with prejudice against Barclays on the grounds that (a) English law governs Oddo's claims against it for aiding and abetting breach of fiduciary duty, and Avendis and Solent did not owe a fiduciary duty to Oddo under English law, and (b) Oddo has not alleged a breach of its Global Mezzanine Notes to support its tortious interference claims; or, in the alternative; and (2) pursuant to CPLR § 327, dismissing this action on the grounds of *forum non conveniens*.

The Solent defendants move, under motion sequence number 002, for an order dismissing the Complaint with prejudice: (1) pursuant to CPLR § 3211(a)(8), for lack of personal jurisdiction; (2) pursuant to CPLR § 327(a), based on the doctrine of *forum non conveniens*; and (3) pursuant to CPLR §§ 3211(a)(1) and (a)(7), for failure to state a cause of action and upon documentary evidence.

Defendant McGraw-Hill moves, under motion sequence number 003, for an order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing the Complaint in its entirety with prejudice on the grounds that: (1) the causes of action directed against S&P's ratings confirmation are barred by the First Amendment; (2) plaintiff's

claims are preempted by the Martin Act; and (3) plaintiff fails to state a cause of action.

*Discussion*

*Personal Jurisdiction - CPLR § 301*

It is well settled that:

[a] foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" in this jurisdiction is warranted (citations omitted). The test for "doing business" is a "simple [and] pragmatic one," which varies in its application depending on the particular facts of each case (citations omitted). The court must be able to say from the facts that the corporation is "present" in the State "not occasionally or casually, but with a fair measure of permanence and continuity" (citations omitted).

*Landoil Resources Corp. v. Alexander & Alexander Servs.*, 77 NY2d 28, 33-34 (1990); see also *Lancaster v. Colonial Motor Frgt. Line, Inc.*, 177 AD2d 152, 156 (1<sup>st</sup> Dep't 1992).

The Solent defendants contend that there is no basis to assert general personal jurisdiction over them under CPLR § 301 because neither one of the Solent entities is "present" in New York. Specifically, defendants contend that: (i) Solent Capital and Solent Jersey are both foreign entities that maintain their sole place of business in London and St. Helier, Jersey, respectively; (ii) neither of the Solent defendants is incorporated or registered to do business in New York; (iii) neither of the Solent defendants

maintains an office, employees, or a bank account in New York; (iv) neither of the Solent defendants pays taxes in New York, owns or leases property, or maintains a telephone listing or mailing address in New York; and (v) none of the hedge funds or other investment vehicles for which the Solent defendants have provided management services, including Mainsail, are incorporated or based in New York.<sup>7</sup>

In opposition, plaintiff argues that Solent conducts business in New York by: (i) managing various investment products on behalf of investors in the State of New York; (ii) soliciting investors

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<sup>7</sup> The Solent defendants submit the Affidavit of Jonathan Marx Laredo, the Chief Executive Officer and founding partner of Solent Capital, executed on October 31, 2008, in which he states that:

[a]side from occasional mailings of informational material to fund managers in New York, Solent Capital personnel have visited New York only sporadically and on a handful of occasions as part of global solicitation efforts. Specifically, with respect to [Solent Capital's] hedge fund business, beginning in March 2007 and to date, Solent Capital employees have made approximately five (5) marketing trips to the United States and those trips have included meetings in New York with potential investors in hedge funds. With respect to the [collateralized debt obligations] business, Solent Capital personnel attended a total of two days of meetings in New York... In addition,... Solent Capital personnel made one trip to New York after the launch of the Mainsail II transaction that was arranged by one of the dealers responsible for placement of Mainsail II's commercial paper.

Mr. Laredo goes on to say that this last trip did not result in any of the commercial paper notes being purchased.

for these products in New York; (iii) causing "information memoranda," "marketing books" and other literature describing Solent to be distributed in the United States, including New York; and (iv) in the course of managing Mainsail, interacting with the New York offices of the Bank of New York, which was the Security Trustee for the investment funds' assets.

However, in *Holness v. Maritime Overseas Corp.*, 251 AD2d 220, 222-23 (1<sup>st</sup> Dep't 1998), the Court held that:

"mere solicitation" of business in New York does not establish the requisite contacts between the state and the foreign defendant... In general, New York has no jurisdiction over a foreign company whose only contacts with New York are advertising and marketing activities plus representatives' occasional visits to New York... The mere periodic sending of corporate officers or employees into the State on corporate business is not enough to predicate a finding that a foreign corporate defendant is present for jurisdictional purposes...

Here, Solent's contacts with New York, which occurred essentially for the purpose of soliciting investors, are not sufficiently systematic or continuous so as to create the "presence" necessary for a finding that those defendants are "doing business" in New York. See *Laufer v. Ostrow*, 55 NY2d 305 (1982). Thus, jurisdiction over Solent cannot be predicated upon CPLR § 301.

*Personal Jurisdiction - CPLR § 302(a)(3)*<sup>8</sup>

CPLR § 302(a)(3) provides as follows:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, ... who in person or through an agent:

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3. commits a tortious act without the state causing injury to person or property within the state... if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;...

Solent contends that there is no basis to assert jurisdiction over them under CPLR § 302(a)(3) because there has been no showing that Oddo, a French company, was "injured" in New York as a result of the Solent defendants' alleged tortious activity in permitting Mainsail to acquire the sub-prime mortgage securities from Barclays at inflated prices or in failing to draw down on the liquidity facility, all of which occurred in London or Jersey.

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<sup>8</sup> Solent also moved to dismiss on the ground of lack of long-arm jurisdiction under CPLR § 302(a)(1), a jurisdictional basis originally asserted by plaintiff in the Complaint. However, plaintiff did not offer any argument on that ground in its brief and confirmed during oral argument that plaintiff would not be pursuing jurisdiction under CPLR § 302(a)(1).

In opposition, plaintiff argues that the "injury" in this case occurred in New York, where the securities comprising Golden Key and Mainsail's investment portfolios were maintained at the Bank of New York and the noteholders' security interest in those assets was damaged by the defendants' malfeasance.

However, in *Uzan v. Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, 51 AD3d 476, 478 (1<sup>st</sup> Dep't 2008), the Court held that "'the situs of the injury for long-arm purposes is where the event giving rise to the injury occurred, not where the resultant damages occurred' (citation omitted)." See also *Polansky v. Gelrod*, 20 AD3d 663, 665 (3d Dep't 2005), in which the Court held that "the situs of ... a nonphysical commercial injury is the place where 'the critical events associated with the dispute took place' and not where the resultant monetary loss occurred (citations omitted)."

Here, plaintiff's allegations indicate that the original events causing plaintiff's "injury" and associated with Solent's alleged breach of fiduciary duty, occurred in England and Jersey, where the Solent defendants made all the decisions to acquire the alleged impaired securities on behalf of Mainsail and where the communications with Barclays took place.

Moreover, "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" *Proforma Partners v. Skadden Arps Slate Meagher & Flom*, 280 AD2d 303 (1<sup>st</sup> Dep't 2001) (quoting *Global Fin. Corp. v. Triarc Corp.*, 93 NY2d 525, 529 (1999)). Here, it is plaintiff who was injured, not the securities themselves, which were held at the Bank of New York. Plaintiff is a French company operating in France, and thus France is the place where it would have sustained any economic impact of the decrease in value of those securities.

In the alternative, plaintiff argues that it should be afforded the opportunity to conduct jurisdictional discovery from Solent under CPLR § 3211(d). However, plaintiff has failed to make a "sufficient start" to show that jurisdiction over the Solent defendants could exist, so as to justify conducting jurisdictional disclosure pursuant to CPLR § 3211(d). See e.g. *Insurance Co. of N. Am. v. EMCOR Group, Inc.*, 9 AD3d 319, 320 (1<sup>st</sup> Dep't 2004).

Accordingly, the third cause of action for breach of fiduciary duty against the Solent defendants must be dismissed.

*Forum Non Conveniens*

The Court of Appeals has held that among the factors to be considered by the Court in determining a motion to dismiss based on *forum non conveniens* are:

the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (citations omitted). The court may also consider that both parties to the action are nonresidents (citation omitted) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (citation omitted). No one factor is controlling (citations omitted). The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case (citations omitted). The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court (citations omitted).

*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 479 (1984), cert. denied, 469 US 1108 (1985).

Barclays argues that this action should be dismissed on the grounds of *forum non conveniens* because the action presents a burden on this Court since there is no substantial nexus with New York and the Court will likely be called on to interpret English, rather than New York, law; another forum is available, *i.e.*, the English courts; and plaintiff's choice of forum is not entitled to deference since plaintiff is not a resident of New York.

The Court, however, agrees with plaintiff that there is a substantial nexus between this case and New York because, as discussed below, New York law will govern much of this litigation and the relevant entities are connected to New York at least as much as to any other forum (i.e., S&P is incorporated and based in New York, Barclays Bank PLC has offices in New York, Barclays Capital, Inc. is headquartered here, and this is also the place where the entities agreed that the securities should be held by the security trustee, the Bank of New York).

In addition, the burden on this Court is minor, as "[t]his action presents the Court with a ... commercial dispute of the type resolved in the Courts of this Department on a frequent basis, ..." *Sambee Corp., Ltd. v. Mohamed Moustafa*, 216 AD2d 196, 198 (1<sup>st</sup> Dep't 1995).

*Aiding and Abetting Breach of Fiduciary Duty Claim*

Barclays contends that English law governs the aiding and abetting breach of fiduciary duty claim and that the Complaint fails to state a cause of action against Barclays because, under English law, neither Avendis nor Solent owed any fiduciary duty to plaintiff.

In addition, defendant McGraw-Hill contends that the Complaint fails to state a cause of action against it because under New York law which applies to it neither Avendis nor Solent owed a fiduciary duty to plaintiff.<sup>9</sup>

In opposition, plaintiff argues that its claims based on breach of fiduciary duty are governed by New York law, not English law, because the choice of law provisions in the agreements which evidence Oddo's purchase of the Mezzanine Notes from Golden Key and Mainsail and set forth the terms of those instruments (the "Global Mezzanine Notes") designate New York law, and the alleged fiduciary relationship of Avendis and Solent with plaintiff arises out of those agreements. Defendants dispute that the choice of law provisions in the Global Mezzanine Notes apply to the fiduciary duty claims because neither Solent nor Avendis were a party to those agreements.<sup>10</sup>

Plaintiff further contends that even if the choice of law provisions do not apply, New York law still governs Oddo's claims

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<sup>9</sup> McGraw-Hill further argues that plaintiff has not adequately alleged S&P's knowing participation in any breach of fiduciary duty, and that S&P's acts were not the proximate cause of Oddo's loss.

<sup>10</sup> Avendis and Solent are alleged to be parties only to the Collateral Management Agreements with Golden Key and Mainsail, pursuant to which they were appointed to act as collateral managers of the funds.

because New York has a more significant "interest" since the security interests allegedly damaged were held by the Bank of New York, Barclays Capital has a place of business in New York, and S&P is incorporated in New York.

It is well settled that "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co. (Stolarz)*, 81 NY2d 219, 223 (1993). In the absence of a conflict, the laws of the forum state where the action is being tried - here, New York - should apply. *Excess Ins. Co. v. Factory Mut. Ins. Co.*, 2 AD3d 150, 151 (1<sup>st</sup> Dep't 2003).

In support of its position, Barclays submits an Affidavit from its foreign law expert, Professor Andrew Burrows QC (Hon), of St. Hugh's, University of Oxford, Oxford, United Kingdom, dated October 29, 2008, who is of the opinion that, based on the application of general principles of English law relating to fiduciary duties, "a collateral manager does not owe fiduciary duties to the purchaser of debt securities from its SIV-Lite commercial counterparty."<sup>11</sup>

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<sup>11</sup> This Court also notes that in support of their motion to dismiss, the Solent defendants submitted an Affidavit from Robert Hildyard QC, an English Barrister, dated October 31, 2008, who is also of the opinion that no fiduciary duty is established under English law where, as here, there was a contractual agreement between sophisticated parties.

Plaintiff has submitted no affidavit from an English law expert to challenge the accuracy of this opinion.

Similarly, defendant McGraw-Hill argues that no fiduciary relationship is created between a noteholder and a collateral or financial manager under New York law. Specifically, McGraw-Hill contends that by purchasing the Mezzanine Capital Notes, which are described at paragraph 31 of the Complaint as "a form of debt that ranks just above the capital notes in terms of priority of distributions from the SIV-Lite" and which "pay a set rate of return," plaintiff became a debt-holder or a creditor of Golden Key and Mainsail.

Relying on the case of *Nam Tai Electronics, Inc. v. UBS PaineWebber Inc.*, 46 AD3d 486, 487 (1<sup>st</sup> Dep't 2007), McGraw-Hill contends that there is "no precedent for the proposition that a fiduciary relationship is created between a creditor [i.e., Oddo] and a third party [i.e., the collateral managers] merely by reason of a contract between the third party and the debtor's creditor [i.e., the SIV-Lites]" (citing *duPont v. Perot*, 59 FRD 404, 409 [SDNY 1973])."

McGraw-Hill further contends that plaintiff's allegations that a fiduciary duty otherwise arose on the part of the collateral managers because "investors reposed confidence in Avendis' [and Solent's] knowledge and expertise, and entrusted Avendis [and Solent] to conduct [themselves] in the best interests of Golden Key [and Mainsail]" (Compl., ¶¶65, 136), are merely conclusory because plaintiff has not alleged any contact between itself and representatives of Avendis or Solent, nor has it asserted a "confidential relationship' whose 'requisite high degree of dominance and reliance' was ... in existence prior to the transaction giving rise to the alleged wrong." *SNS Bank v. Citibank*, 7 AD3d 352, 355-56 (1<sup>st</sup> Dep't 2004).

Moreover, McGraw-Hill points out that the offering documents received by plaintiff, describing the duties of the collateral managers, set out potential conflicts of interest on the part of the collateral managers which would be wholly inconsistent with the existence of a fiduciary duty.

Under New York law, an arm's length business transaction, without more, does not give rise to a fiduciary relationship. See *Schonfeld v. Thompson*, 243 AD2d 343 (1<sup>st</sup> Dep't 1997); see also *Northeast Gen. Corp. v. Wellington Adv.*, 82 NY2d 158, 162 (1993), a case involving a finder's fee, in which the Court held that "if

[the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them."

Plaintiff, instead, relies on the case of *Ito v. Suzuki*, 57 AD3d 205, 208 (1<sup>st</sup> Dep't 2008), which held that "[o]wners of a fractional interest in a common entity are owed a fiduciary duty by its manager." However, *Ito v. Suzuki* is distinguishable from the case at bar because there the plaintiff was a non-English speaking equity investor in the entity and had signed an agreement with the defendants giving them "permanent managing control of [the entity's] affairs." *Id.* at 206.

In *Pension Committee v. Banc of America Securities, LLC*, 446 F.Supp.2d 163 (SDNY 2006), another case cited to by plaintiff, the Court held that a fund administrator owed fiduciary duties to the fund's shareholders.

Plaintiff also relies on the case of *Metropolitan West Asset Management, LLC v. Magnus Funding, Ltd.*, 2004 WL 1444868, at \*10 (SDNY 2004), in which the Court declined to dismiss a negligence claim brought against the investment manager of a special purpose fund by the holder of certain subordinate notes, after making a finding that the fund was a fiduciary of the plaintiff. The Federal

Court reasoned that such fiduciary relationship extended to the investment manager because it was acting as an agent of the fund. However, in reaching that conclusion, the Federal Court relied on the case of *Schneider v. Lazard Freres & Co.*, 159 AD2d 291, 297-98 (1<sup>st</sup> Dep't 1990), which held that an investment advisor hired by a fiduciary is an agent of the fiduciary and is thus liable directly to shareholders for its negligent acts.

Here, however, plaintiff has alleged that Mainsail and Golden Key borrowed funds from Oddo by issuing the Mezzanine Notes, and not that Oddo was a shareholder. See *SNS Bank v. Citibank*, *supra*, 7 AD3d at 354, which held that, "[u]nder New York law, [the investment vehicle] would not owe plaintiff a fiduciary duty because the relationship between them is one of debtor and note-holding creditor, which is purely contractual (citations omitted)." Thus, this Court finds that under New York law which applies because it is not in conflict with the rule argued by Barclays under English law, Solent and Avendis did not owe a fiduciary duty to Oddo.

In the absence of an underlying fiduciary duty owed by the collateral managers to plaintiff, the claims for aiding and abetting breach of fiduciary duty against Barclays and McGraw-Hill must be

dismissed. See *Kaufman v. Cohen*, 307 AD2d 113, 125 (1<sup>st</sup> Dep't 2003).<sup>12</sup>

*Tortious Interference with Contract Claim*

In the second and fifth causes of action for tortious interference with contract in connection with Golden Key and Mainsail, plaintiff alleges that:

[b]y acquiring the warehoused securities, Golden Key [and Mainsail] breached [their] contractual obligations under the mezzanine capital notes to Oddo and other investors. Among other breaches, by acquiring impaired securities, Golden Key [and Mainsail] devalued the investors' security interest in Golden Key's [and Mainsail's] investment portfolio and damaged Golden Key's [and Mainsail's] ability to pay interest on the mezzanine capital notes, thereby causing injury to the investors in the mezzanine capital notes.

(*Compl.*, ¶¶182, 199.)

Barclays contends that the tortious interference claims must be dismissed because the Complaint fails to allege that Mainsail or Golden Key breached the terms of the underlying agreements with plaintiff, *i.e.*, the Global Mezzanine Notes, as required under English law.

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<sup>12</sup> This Court will thus not need to reach McGraw-Hill's alternative arguments that this claim is preempted by the Martin Act or barred by the First Amendment.

In opposition, plaintiff contends that it has stated legally cognizable claims for tortious interference with contract by Barclays under New York law, which also requires a showing that the underlying contract between the plaintiff and a third party was actually breached, see *Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 424 (1996), because Oddo was denied a proportionate security interest in the assets of the SIV-Lites in return for its purchases, as well as periodic payments of interest on the outstanding principal of the mezzanine notes. In addition, plaintiff alleges for the first time that Golden Key and Mainsail breached the covenant of good faith and fair dealing implied in the terms of the Global Mezzanine Notes.

However, Barclays argues that ceasing to pay interest does not constitute a breach of the terms of the Global Mezzanine Notes, which provided that when the confirmation of an "Enforcement Event" occurred, Golden Key and Mainsail were obligated to cease payments to mezzanine note holders like plaintiff until the funds had fulfilled their senior obligations, including the commercial paper holders. In addition, Barclays contends that plaintiff has not pointed to any provision in the Global Mezzanine Notes providing that the alleged deterioration of the plaintiff's security interest

constituted a breach of said Notes.<sup>13</sup>

Barclays further argues that the covenant of good faith and fair dealing is intended to ensure that contracting parties receive the benefit of their bargain but cannot be the basis for incorporating a new duty under the contract. Here, as Barclays contends, Oddo is a sophisticated entity in the position of appreciating the inherent risks associated with debt securities, including the fact that, under certain circumstances, interest payments may cease and the principal may be lost.

Thus, the claims for tortious interference with contract are dismissed as well.

Accordingly, the motions by each of the defendants are granted and this action is dismissed, with prejudice and without costs or disbursements.

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<sup>13</sup> Plaintiff only cites to Section 1(d), *Security Documents*, of the Global Mezzanine Notes, which provides in relevant part that, "[t]he Mezzanine Notes have the benefit of a security interest in the Collateral granted by the Issuer [i.e., Golden Key and Mainsail] in favour of the Security Trustee pursuant to a collateral trust and security agreement ... between the Issuer and the Bank of New York as security trustee..." However, plaintiff had not claimed that such security interest was not granted.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: April 21, 2010



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Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

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Index No. 109547/08

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

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ODDO ASSET MANAGEMENT,

Plaintiff,

- against -

BARCLAYS BANK PLC, BARCLAYS CAPITAL, INC., SOLENT CAPITAL  
PARTNERS, LLP, SOLENT CAPITAL (JERSEY) LIMITED, AND THE  
MCGRAW-HILL COMPANIES, INC.,

Defendants.

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ORDER WITH NOTICE OF ENTRY

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All communications should be referred

to Dean Ringel, Esq.