Aozora Bank, Ltd. v UBS AG
2015 NY Slip Op 31918(U)
October 13, 2015
Supreme Court, New York County
Docket Number: 652162/2013
Judge: Saliann Scarpulla

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

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AOZORA BANK, LTD.,

Plaintiff,

DECISION/ORDER
Index No. 652162/2013

-against-

UBS AG, UBS LIMITED, UBS SECURITIES LLC, DEUTSCHE INVESTMENT MANAGEMENT AMERICAS INC.,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Aozora Bank, Ltd. ("Aozora"), asserts numerous claims against defendants UBS Securities LLC, UBS Limited, UBS AG (collectively, "UBS") and Deutsche Investment Management Americas, Inc. ("DIMA") (and collectively with UBS, "defendants") in connection with Aozora's $31 million investment in an asset-backed collateralized debt obligation ("CDO") known as the Brooklyn Structured Finance CDO ("Brooklyn") which was arranged and marketed by UBS, and whose collateral manager was DIMA. Defendant UBS moves to dismiss the complaint pursuant to CPLR 3016(b), 3211(a)(1), (5) and (7) (motion seq. no. 001). Defendant DIMA moves to dismiss the complaint pursuant to CPLR 3016(b), 3211(a)(5) and (7) (motion seq. no. 002). Motion sequence numbers 001 and 002 are consolidated for disposition.

Background

As alleged in the amended complaint,[1] Aozora is a bank organized under the laws of Japan. Aozora purchased $31 million of Brooklyn's Notes ("Notes") from UBS in two transactions. On November 6, 2006, Aozora purchased $13 million of Brooklyn's Class A-2 Notes and $3 million of Brooklyn's Class A-3 Notes. On June 5, 2007, Aozora purchased $15 million of Brooklyn's Class A-1J Notes.

UBS is a diversified international commercial institution whose investment banking arm was a major participant in the residential real estate securitization market.

Brooklyn is an asset backed security CDO, meaning that it is a CDO that is collateralized by a pool of asset backed securities, such as residential mortgage backed securities. Brooklyn's asset pool also included tranches of other CDOs, which comprised what is referred to as its "CDO bucket." Brooklyn's total asset pool was $1 billion, while its CDO bucket was $221 million, or 22.1% of the asset pool.

Brooklyn was arranged by UBS AG and affiliates. The Notes were issued through Brooklyn Structured Finance CDO, Ltd., a Cayman Island's special purpose vehicle that UBS created (the "Brooklyn Cayman SPV"). The Brooklyn Cayman SPV was a mere shell entity that acted as a pass-through intermediary between UBS and CDO investors. It had no prior operating experience; lacked offices, employees, or day-to-day management; was prohibited from engaging in any business other than acquiring Brooklyn's assets; and

[1] Unless otherwise indicated, all background facts are taken from the allegations of the amended complaint, and will be accepted as true only for the purposes of this motion to dismiss. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

its limited business functions were contracted back to UBS or outsourced to third-parties. All documents provided to potential CDO investors – including Brooklyn's Transactional, Marketing, and Offering Documents (the "CDO documents") – were created by UBS Securities.

UBS retained DIMA, a subsidiary of Deutsche Bank AG to serve as Brooklyn's Collateral Manager. DIMA was represented to be responsible for selecting Brooklyn's initial collateral portfolio and for managing the portfolio over Brooklyn's life. According to the CDO documents, DIMA had considerable collateral manager experience and would employ sophisticated analytical techniques to identify optimal collateral for Brooklyn. Although DIMA was charged with selecting the collateral, UBS Securities, as the entity responsible for warehousing Brooklyn's asset pool, monitored, and had ultimate authority with respect to the contents of Brooklyn's asset pool.

Allegedly, UBS secretly exerted control over collateral selection and seeded Brooklyn with $68 million of risky, UBS-arranged CDOs that it wanted off its books. Aozora also alleges that defendants' representation that their collateral selection would "avoid adverse selection" was materially false and misleading because Brooklyn's portfolio contained an unusually high concentration of built-to-fail Constellation ("Constellation") CDOs and dealer bespoke CDO collateral. Finally, Aozora alleges that defendants' representations concerning UBS's role as collateral warehouser for Brooklyn were false and misleading. According to Aozora, CDO investors typically believed that the actions of arranging banks under warehousing agreements functioned as a double-check to the collateral manager's initial evaluation of the collateral and reinforced the

selection of top-quality CDO collateral. However, rather than exclude extra-risky assets, UBS allegedly acted to include them, both by consenting to Constellation and dealer bespoke collateral and by pushing into Brooklyn the unsold inventory of UBS's prior mezzanine CDO securitizations.

Beginning in late 2006, UBS's ability to arrange and structure CDOs outpaced UBS's ability to place CDO securities with investors. Unsold tranches of the CDO notes began aggregating on UBS's books. UBS sought to solve this problem by having its newly arranged CDOs purchase its unsold CDO inventory. In Brooklyn's case, its CDO bucket included $68 million of recycled UBS-arranged CDOs, which accounted for 30.7% of its CDO bucket. UBS's share was not only twice as much as that of any other investment bank, it was many multiples higher than UBS's share of the CDO market generally. Allegedly, DIMA, like many other collateral managers, acquiesced to UBS's seeding of Brooklyn's CDO bucket with its unwanted inventory in order to maintain its relationship with UBS and to not be barred from additional CDO management assignments.

Aozora further alleges that defendants included in Brooklyn's portfolio $65.4 million of Constellation CDOs, which both UBS and DIMA knew were designed by Magnetar Capital ("Magnetar"), a U.S.-based hedge fund, to suffer losses and favor the short position, which Magnetar took for itself. Aozora alleges that during 2006, UBS actually worked with Magnetar to create the built-to-fail Constellation CDOs.

Allegedly, the true nature and risk of Constellation CDOs was known, at the time, only by a handful of market insiders, and CDO investors generally were kept in the dark.

Aozora alleges that because the Constellation CDOs' offering and marketing materials made no mention of Magnetar, they misrepresented that third-party collateral managers had selected collateral deemed most likely to perform, and omitted that Magnetar had selected collateral deemed least likely to perform.

Aozora alleges that both UBS and DIMA were well aware of the Constellation CDOs' structure, and that such structure greatly increased the likelihood of principal impairment. Specifically, in late 2005, Deutsche Bank AG's proprietary trading unit, known as the Special Situations Group ("DB SSG") conceptualized the basic elements of the Constellation CDO program and subsequently partnered with Magnetar to implement it. UBS was one of the first banks to agree to create such CDOs. Aozora alleges that approximately $65.4 million of Brooklyn's collateral consisted of Constellation CDO notes.

Aozora alleges that from 2005 through 2007, certain of the largest and most sophisticated CDO-arranging investment banks maintained special CDO spvs that functioned as CDO issuance shelves for multiple series of so-called bespoke ("bespoke") synthetic CDO notes.

Aozora alleges that notwithstanding the rhetoric that such bespoke CDOs were custom-designed for the benefit of their investors, the practical reality was that the arrangers maintained effective control over the CDOs' portfolios, and used this control to adversely select portfolios to ensure the success of the short positions that they took for themselves. Aozora alleges that only a small group of market insiders, including UBS,

knew of this. Aozora alleges that $83.5 million of Brooklyn's CDO bucket was comprised of notes of dealer bespoke CDOs.

Aozora alleges that Defendants' loading of Brooklyn's asset pool with unwanted and risky securities rendered the Brooklyn CDO documents false and misleading. Among other misstatements, Aozora alleges that defendants misrepresented that DIMA would control collateral selection, when UBS actually forced a substantial amount of its unwanted and unsellable CDO inventory into Brooklyn's collateral pool, and DIMA's methodology for selecting optimal collateral and that DIMA would avoid "adverse selection," as evidenced by its inclusion of the recycled UBS CDOs as well as the highly-risky Constellation CDOs and dealer bespokes. In addition, defendants failed to inform investors that UBS Securities would not use its veto power as warehouser over risky assets under any circumstances, even when it was aware that selected assets included many that were doomed to fail, such as the Constellation CDOs.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211(a)(7); *Sheila C. v. Povich*, 11 A.D.3d 120 (1st Dep't 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v. Mount Sinai Hosp. Ctr.*, 19 A.D.3d 319 (1st Dep't 2005) (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *V. Groppa Pools, Inc. v*

Massello, 106 A.D.3d 722, 723 (2d Dep't 2013); *117 East 24th Street Associates v. Karr*, 95 A.D.2d 735 (1st Dep't 1983).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Ellington v EMI Music, Inc.*, 24 N.Y.3d 239 (2014) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)). "To succeed on a [CPLR 3211(a)(1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961, 963 (3d Dep't 2001), leave to appeal denied 97 N.Y.2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

I. Statute of Limitations

Where a plaintiff alleges a claim occurring in a foreign county, CPLR 202 "requires the cause of action to be timely under the limitations periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999). The parties do not dispute that the tort claims here accrued in Japan where Aozora sustained the economic loss.

Defendants have the burden of proving that the statute of limitations bars Aozora from pressing its suit under either Japanese or New York law. *A.F. Rockland Plumbing Supply Corp. v. Hudson Shore Associated Ltd. P'ship*, 96 A.D.3d 885, 886 (2d Dep't 2012) ("In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by

the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired.").

1. Japanese Statute of Limitations

The parties agree that Japan's statute of limitations is three years for tort claims, which encompass claims for fraud, aiding and abetting, and negligent misrepresentation. Therefore, defendants must establish the statute of limitations was triggered at or before the threshold date of June 18, 2010, three years prior to commencement of this action.

The standard for the three-year statute of limitations under Japanese law is plaintiff's actual knowledge of a possible claim against the defendant. In this case, "[t]he parties' experts on Japanese law agree that proving the statute of limitations has run under Japanese law requires defendants to show evidence of Aozora's actual knowledge of (1) its damages, (2) identity of the perpetrators, and (3) facts sufficient for an ordinary person to determine the act causing the damage constituted a tort." *Aozora Bank, Ltd. v. Morgan Stanley & Co. Inc.*, 2014 WL 3899215 (N.Y. Sup. Ct. Aug. 11, 2014), at *1.

The court finds that the first and second elements of actual knowledge have been met. Defendants have sufficiently shown Aozora's (1) knowledge of the loss of 100% of its principal investment following the downgrading and liquidation of Brooklyn on July 7, 2008, and (2) awareness of the identities of the named defendants at the time it purchased the Notes, in November 2006 and June 2007, through the Offering Circular detailing the roles of both UBS and DIMA in the Brooklyn transaction.

The parties disagree over what constitutes actual knowledge of the third element. Defendants' expert asserts that Japanese law permits the use of circumstantial evidence to

demonstrate that a plaintiff had actual knowledge of enough facts to make this judgment and cites a litany of what constitutes red flags, particularly articles in the media, in this respect.

Aozora's expert notes that the media sources presented by Defendants' expert merely address general assertions about Magnetar and an unrelated private lawsuit against UBS. He asserts that the statute of limitations in Japan is not triggered because there is no proof that Aozora was aware of defendants' expert's sources. Aozora's expert insists on a strict requirement of actual knowledge of tortious conduct. He argues it is insufficient to demonstrate whether Aozora should or could have been aware of facts suggesting its losses resulted from the tortious actions of the Defendants. He maintains the Defendants must demonstrate that Aozora actually was aware of these sources.[2]

The Court has the power to determine foreign law where the parties disagree "after any presentation of evidence which furnishes the court sufficient information to decide." *Stitchting Pensioenfonds ABP v. Credit Suisse Group AG*, 38 Misc. 3d 1214(A), 2012 slip op, 52433(U), at *4 (N.Y. Sup. Ct. 2012). *See also Harris S.A. De C.V. v. Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V.*, 279 A.D.2d 263 (1st Dep't 2001). CPLR 4511(b) dictates that a court must take judicial notice of foreign laws when

[2] Aozora's contention that Defendants do not demonstrate that Aozora had actual knowledge prior to June 18, 2010 is based on Defendants' failure to establish that Aozora was aware of media coverage. Furthermore, Aozora's expert argues that Defendants only assert that these articles were published, and that this does not provide sufficient information to show that Aozora had actual knowledge of the facts that would allow it to know the damage, the perpetrator, and that the act causing the damage was tortious.

requested, and that the presiding judge determines all questions of foreign law. *Aozora Bank,* 2014 WL 3899215.

Pursuant to CPLR 4511(b), the Court holds that the expert affidavits and translations of Japanese cases provide sufficient evidence to determine the statute of limitations standard. The Court holds that Japanese law requires evidence of actual knowledge by a plaintiff to trigger the statute of limitations for fraud. The facts submitted by defendants are not sufficient to determine conclusively that Aozora had actual knowledge of its claims by June 18, 2010. *See also Aozora Bank, Ltd. v Credit Agricole Corporate & Inv. Bank*, 2015 N.Y. Misc. LEXIS 2794 (N.Y. Sup. Ct. July 27, 2015) ("defendants have not made a prima facie showing that the Japanese statute of limitations for fraud has run"); *Aozora Bank, Ltd. v. Morgan Stanley & Co. Inc.*, 2014 N.Y. Misc. LEXIS 3614, 2014 WL 3899215, at *4 (Sup. Ct. N.Y. Cnty. Aug. 5, 2014) ("The court holds that Japanese law requires evidence of actual knowledge to trigger the statute of limitations. . . . A record must be fully developed to determine whether Aozora possessed actual knowledge of its claims in June 2010.")

Accordingly, defendants' motion to dismiss its torts claims based on the Japanese statute of limitations is denied.

2. New York Statute of Limitations

Defendants argue that Aozora's fraud claims are barred by the New York statute of limitations. In New York, the limitation period for fraud claims is the longer of "six years from the date the cause of action accrued" or "two years from the time the plaintiff . . . could with reasonable diligence have discovered [the fraud]," CPLR 213(8). "Where it

does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead the question is one for the trier-of-fact." *Saphir Int'l, SA v. UBS PaineWebber Inc.*, 25 A.D.3d 315, 316 (1st Dep't 2006). When the parties' present competing factual contentions regarding when the plaintiffs had notice to bring their claims, New York state courts generally will deny a motion to dismiss. *Saphir Int'l, SA v. UBS PaineWebber Inc.*, 25 A.D.3d 315, 316 (1st Dep't 2006); *Fin. Structures Ltd. v. UBS AG*, 77 A.D.3d 417, 419 (1st Dep't 2010). Furthermore, in cases of fraud with a scienter element "plaintiffs would have a difficult task in obtaining sufficient notice of facts underlying claims." *HSH Nordbank AG v. Goldman Sachs Group, Inc.*, 43 Misc. 3d 1225(A), at 7 (Sup. Ct. N.Y. Co. 2013).

Plaintiff does not dispute that the fraud claims are barred by the six-year period, if applicable. However, plaintiff aruges that the causes of action are timely brought within "two years from the time the plaintiff . . . could with reasonable diligence have discovered [the fraud]."

Defendants argue that Aozora had sufficient notice of its fraud claims more than two years before it commenced the lawsuit on June 18, 2013. Defendants argue that Aozora was on notice by the following events: on February 25, 2008 Brooklyn experienced an event of default; on March 14, 2008 and June 9, 2008, Standard & Poor's and Moody's downgraded the Brooklyn Notes to "junk" status; on July 7, 2008, Brooklyn was liquidated; on April 9, 2010, *ProPublica* published a story detailing the Magnetar Trade that was shortly re-reported by the *Wall Street Journal*; and before June

18, 2010, multiple plaintiffs had sued UBS for fraud over losses in CDOs and an SEC investigation into UBS's CDO business had commenced.

I find this insufficient to put Aozora on notice of the fraud claims. The default, downgrades, and liquidation of Brooklyn took place during an unprecedented financial collapse of the real estate market. Thousands of RMBS were downgraded and many went bankrupt. Knowledge of loss alone is not enough to put Aozora on notice of its potential claims against Defendants. *Saphir Int'l,* 25 A.D.3d at 316 (plaintiff's loss of "almost all of its investments" did not provide "a sufficient basis for imputing a knowledge of the fraud"). "The mere fact that plaintiffs were aware of the general market deterioration . . . does not equate to notice of a potential fraud, nor would it necessarily cause a reasonably diligent plaintiff to suspect fraud so as to give cause for further investigation." *Fin. Structures Ltd.* 77 A.D.3d at 419.[3]

While the evidence may generally show some connection between UBS, DIMA, the Constellation CDOs and the failure of Brooklyn, the Court does not find that by June 18, 2011, Aozora knew, or should have known about UBS's role in collateral selection or DIMA's compromised position as Collateral Manager with respect to Brooklyn as a matter of law. Certainly, it does not "conclusively appear that Aozora had knowledge of

[3] Defendants' reliance on other cases and publications dealing with Magnetar and allegations against UBS for fraud in connection with CDOs, in unavailing. As an initial matter, it would be unreasonable to expect a Japanese institutional investor like Aozora to be aware of an article published in *ProPublica*, an independent non-profit based in New York City that produces investigative journalism. More significantly, none of the cases or publications specifically mention the defendants' role with respect to fraud in Brooklyn.

facts from which the alleged fraud might reasonably be inferred" *Saphir Int'l,* 25 A.D.3d at 316. A reasonable investor must have been able to link the players and the fraud together in order to possess knowledge of the material misrepresentations and omissions regarding collateral selection in the Offering Documents. *See e.g., Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I, No. 08 Civ. 1713*, 2012 WL 601448, at *11 (E.D.N.Y. Feb. 23, 2012) (news stories that did not "refer to the offerings, the Certificates, or tie the originators to securities offered by the defendants" did not put plaintiff on notice); *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 430-32 (2d Cir. 2008) (mere knowledge of investigation into some aspect of defendant's conduct insufficient; instead, information must provide "indications of the probability (and not just possibility)" of the relevant claims and "barely publicized news reports . . . did not reasonably provide Appellants with . . . knowledge or awareness of the fraud alleged"). The Court finds, at best, indications of possibility of the relevant claims and, accordingly, denies defendants' motion to dismiss with respect to fraud based on the two-year prong of the statute of limitations.

Applying the test in CPLR 213(8), defendants' motion to dismiss the fraud causes of action as time barred is denied.[4]

[4] Plaintiff's causes of action for negligent misrepresentation, breach of contract, breach of good faith and fair dealing, and unjust enrichment are addressed below. Aozora withdrew the Fourth Cause of Action for tortious interference with contract against UBS in its opposition to UBS' motion to dismiss.

II. First Cause of Action – Fraud Against All Defendants

In New York, a claim for common law fraud includes "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damage." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Under CPLR 3016(b), allegations of fraud must be stated with particularity. However, CPLR 3016(b) does not require "unassailable proof of fraud," and factual allegations "sufficient to permit a reasonable inference of the alleged conduct" satisfy the pleading requirement. *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). "[A]ll that is needed to overcome a motion to dismiss a fraud claim is a rational inference of actual knowledge." *AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC*, 108 A.D.3d 444, 446 (1st Dep't 2013).

1. Material Misrepresentation

Aozora alleges that defendants made a number of misrepresentations and omitted certain information regarding the fact that collateral in the Brooklyn CDO would be overseen by an independent portfolio manager. According to Brooklyn's Offering Circular, DIMA would use its expertise to independently select and manage optimal collateral for Brooklyn. The Offering Circular also represented that UBS would not influence collateral selection, and would veto any collateral that was overly risky. Aozora alleges that the presence of a high concentration of UBS arranged CDOs, Constellation CDOs, and dealer bespokes in the Brooklyn portfolio raises a reasonable inference that UBS pressured DIMA to select certain collateral for Brooklyn.

First, Aozora alleges that the amount of UBS-arranged CDOs in Brooklyn, which amounted to 30.7%, was larger than the amount originating from any other CDO arranger, and nearly sextupled UBS's broader market share across all CDOs, which was 5.5%. Aozora supports its position that the Brooklyn CDO was an outlier by pointing to the fact that the only other comparable CDO that DIMA managed prior to Brooklyn—the Ambassador Structured Finance CDO—contained only 11% of UBS arranged CDOs. Aozora argues that these allegations create a reasonable inference that UBS influenced Brooklyn's collateral selection and that DIMA did not use its expertise in selecting those assets.

Second, Aozora alleges that UBS misrepresented its role as warehouser. In the Offering Circular, UBS represented that it would provide warehousing services for Brooklyn and reserved the right to veto any "risky" collateral—thereby adding a layer of assurance that overly risky assets would not be included. However, the loading up of Brooklyn with $65.4 million of Constellation CDO tranches, $83.5 million of dealer bespokes, and $68 million of recycled, UBS-arranged CDOs belie this assurance. UBS's own intimate involvement in the Magnetar Trade as an arranger of Constellation CDOs and its ability to identify dealer bespokes put it in a position to understand the risk involved with those assets. Aozora claims that these allegations are sufficient to establish a reasonable inference that UBS did not act to exclude overly risky assets from Brooklyn, but either consented to or actively included these assets in Brooklyn. Likewise, Aozora claims that the inclusion of these overly risky assets provides a reasonable inference that DIMA misrepresented its role as the selector of the collateral.

Defendants contend that Aozora did not adequately plead misrepresentation because it did not plead with particularity how defendants misrepresented the collateral selection for Brooklyn. Defendants contend that Aozora was provided with the complete list of collateral with a detailed description and CUSIP numbers which provided them the ability to retrieve additional information and to "evaluate the underlying collateral from which the [Brooklyn] CDO[] originated." *MBIA Ins. Corp v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 601324/09, 2010 WL 2347014, at *5 (N.Y. Sup. Ct. Apr. 9, 2010), *aff'd* A.D.3d 419 (1st Dep't 2011).

This argument is unavailing. Despite the ability to identify what collateral comprised Brooklyn, Aozora would not have had the ability to uncover the risks associated with the collateral, or that it was selected by UBS and not DIMA. Due diligence and industry standard did not require Aozora to assess the "underlying securities . . . that made up the collateral of a CDO . . . in order to verify the representations of the arranger." *MBIA Ins. Corp. v. Royal Bank of Can.*, 28 Misc. 3d 1225(A), 2010 N.Y. Slip Op. 51490(U), at *33 (Sup. Ct. Westchester Cnty. Aug. 19, 2010). Furthermore, the misrepresentations made by defendants were not in the actual collateral that made up Brooklyn, but rather that UBS would pressure DIMA into selecting specific collateral for Brooklyn. The fact that Brooklyn contained a percentage of UBS CDOs that greatly exceeded (i) UBS's market share, (ii) the CDOs of any other arranger, and (iii) the amount of UBS CDOs that DIMA included in prior ABS CDOs

provides specific details to support a reasonable inference that defendants misrepresented UBS's role in the collateral selection of Brooklyn.[5]

Aozora also sufficiently alleges that UBS also misrepresented its role as warehouser by not excluding overly risky assets from the Brooklyn portfolio. Although UBS contends that the right to exclude was a discretionary right, the failure to disclose that it never intended to exercise that right is actionable. *See CooperVision, Inc. v. Intek Integration Techs., Inc.*, 7 Misc. 3d 592, 603 (Sup. Ct., Monroe Co. 2005); *see also, In re MBIA, Inc. Sec. Litig.*, 700 F.Supp.2d 566, 578 (S.D.N.Y. 2010) ("A statement can be misleading . . . if it amounts to a half-truth by omitting some material fact.") (internal quotations omitted). That UBS included $83.5 million of dealer bespokes, whose risk was understood by UBS, also belies that it intended to veto any risky collateral. Thus, Aozora has sufficiently pled that that UBS misrepresented its role as warehouser for Brooklyn.

Aozora also pleads with specificity that the inclusion of $65.4 million of Constellation CDOs provides a reasonable inference that UBS misrepresented DIMA's role as collateral selector and its own role as warehouser. While defendants challenge

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[5] This case is similar to *CIMB Thai Bank PCL v. Stanley*, 2013 WL 5314330 (N.Y. Sup. Ct. 2013), in which the plaintiff asserted that it was falsely informed by the defendants that certain CDOs would be managed by independent, third party investors. In *Thai Bank*, the court held that the circumstantial evidence presented supported a reasonable inference of the alleged fraud. *Id; see also Pludeman*, 10 N.Y.3d at 492; *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F.Supp.2d 624, 643-44 (S.D.N.Y. 2012) ("Thus, in the absence of any single, particular smoking-gun document, the allegations in the Complaint collectively supply sufficient circumstantial evidence from which the Court could reasonably infer Defendants' recklessness."). Here, Aozora has pled sufficient allegations that, if true, collectively establishes a reasonable inference that UBS, not DIMA selected the collateral that went into Brooklyn, and therefore misrepresented DIMA's role as collateral manager.

Aozora's allegations, the allegations must be accepted as true for purposes of this motion. Aozora relies on more than conclusory allegations regarding defendants' improper collateral selection. Rather, the allegations in the complaint that explain the structure of the Constellation CDOs; UBS's knowledge of that structure; and that UBS was the largest Constellation CDO arranger in the world between September 2006 and February 2007, was one of Magnetar's most-preferred Constellation CDO underwriters suffice at the pleading stage to show that UBS knew exceptionally risky collateral was being selected for Brooklyn.

NUBS's claim that Aozora could have identified the dealer bespokes is unavailing. UBS relies on *Loreley Fin. (Jersey) No. 4 v. UBS Ltd.*, 963 N.Y.S.2d 566 (N.Y. Sup. Ct. 2013) to support the proposition that Aozora needed to allege facts establishing that the securities were going to fail. *Loreley*, 963 N.Y.S.2d at 573. This confuses Aozora's claims. The plaintiffs in *Loreley* alleged that UBS caused the securities to fail, whereas in the instant case, Aozora alleges that UBS misrepresented its role in the collateral selection process. UBS also argues that through due diligence, Aozora could have identified Dealer Bespokes and invested accordingly. Again, this is a determination for the trier of fact, not to be decided as a matter of law. This court finds that the inclusion of the $83.5 million of dealer bespokes is sufficient to support a reasonable inference that UBS misrepresented its role as warehouser for Brooklyn, and likewise, that DIMA misrepresented its role as independent collateral manager.

2. Scienter

Defendants dispute the adequacy of allegations in the complaint with respect to pleading scienter. Scienter is adequately pled if the plaintiff alleges some "rational basis for inferring that the alleged misrepresentations were knowingly made." *Houbigant, Inc . v. Deloitte & Touche LLP*, 303 A.D.2d 92, 93 (1st Dep't 2003). CPLR 3016(b) requires that the allegations "permit a reasonable inference of" fraud. *Eggert v GCD Rec. Studios*, 90 A.D.3d 425 (1st Dep't 2011); *Aris Multi-Strategy Offshore Fund, Ltd. v. Devaney*, 2009 WL 5851192, at *9 (N.Y. Sup. Ct. Dec. 14, 2009, No. 602231/08) (citing *Pludeman v. Northern Leasing Sys. Inc.*, 10 N.Y.3d 486, 492 (N.Y. 2008)). The complaint must make allegations that permit a "reasonable inference that the defendant participated in, or knew about, the fraud." *China Dev. Indus. Bank v. Morgan Stanley*, 2011 N.Y. Misc. LEXIS 1808, at *16-18. Evidence of the circumstances surrounding the alleged fraud may supplement observable facts in order to draw a reasonable inference. *Pludeman*, 10 N.Y.3d at 188. Because scienter is "most likely to be within the sole knowledge of the defendant and least amenable to direct proof, the requirement of CPLR 3016(b) should not be interpreted strictly when analyzing the scienter allegations in a complaint." *Aris Multi-Strategy Offshore Fund, Ltd. v. Devaney*, 2009 WL 5851192, at *9 (N.Y. Sup. Ct. Dec. 14, 2009, No. 602231/08) (internal citation omitted); *Thai Bank*, 2013 WL 5314330 at *1.

Aozora allege that defendants misrepresented their roles with respect to the selection of collateral for Brooklyn. This type of misrepresentation is an "assertion not

necessarily confined to documentary proof." *Thai Bank*, 2013 WL 5314330 at *1 (quoting *Bayerische Landesbank*, 902 F. Supp.2d 471, 474 (S.D.N.Y. 2012));

Defendants argue that the complaint fails to allege scienter because it is improbable that UBS could be seeking to grow its CDO business by selling "built-to-fail" securities to its customers and because UBS itself has made substantial investments in mortgage-related securities. Additionally, DIMA argues that the complaint fails to allege that it knew that the Constellation CDOs were "highly risky" or that UBS was seeking to offload its unsalable CDOs. Furthermore, DIMA argues that its alleged interest to accede to UBS's demands is a mere profit motive and that it had every incentive to see Brooklyn succeed. These arguments mischaracterize the allegations of the complaint.

Aozora sufficiently alleges scienter by claiming that UBS had the opportunity to commit fraud through its creation of Brooklyn, its control over portfolio selection, its warehousing of Brooklyn's assets, its drafting and dissemination of Brooklyn's Offering Documents, and its marketing and sale of Brooklyn. Furthermore, Aozora alleges that UBS had the motive to commit fraud because unsold tranches of mezzanine CDOs were piling up on their books and UBS sought to offload those risks. By putting the CDOs into Brooklyn, UBS was able to avoid at least $68 million in losses. Additionally, the complaint alleges that DIMA had motive to allow UBS to exert control over the portfolio because it would have been frozen out of future UBS assignments had it refused UBS's demands. Furthermore, the complaint alleges that defendants knew they were misrepresenting DIMA's role as collateral manager since the amount of UBS-arranged CDOs in Brooklyn far exceeded the number originating from any other arranger and

nearly sextupled UBS's wider CDO market share. While 30.7% of Brooklyn's CDO bucket was comprised of CDOs arranged by UBS, the only other comparable CDO DIMA managed prior to Brooklyn - the Ambassador Structured Finance CDO - contained only 11% of UBS-arranged CDOs, and only 6% of CDOs arranged by Wachovia, Ambassador's arranger.

The complaint also alleges that both UBS and DIMA were aware that they were selecting sub-optimal collateral when it filled Brooklyn with $65.4 million of Constellation CDOs and $83.5 million of dealer bespokes. As Brooklyn's warehouser, UBS was aware of, and consented to the inclusion of each and every asset in Brooklyn's portfolio, including the high risk Constellation CDOs and dealer bespokes. The Complaint also alleges that UBS and DIMA were both aware that the Constellation CDOs were built-to-fail because both parties were alleged to have been intimately involved in the Magnetar Trade. Similarly, the complaint alleges only a small group of market insiders understood the true nature of the dealer bespokes.

Defendants' argument that it retained the super-senior tranches in Brooklyn and therefore had every reason to make Brooklyn succeed is also unpersuasive. CDO arrangers were often forced to retain the low-yielding super-senior tranches of their CDOs for lack of a willing buyer. Furthermore, because junior tranches can lose all their value without impairing senior tranches, UBS could view the junior tranches as risky while still maintaining a belief that the super-senior tranches were secure. "[F]or a bank to contend that it did not act with scienter . . . [merely] because the bank stood to sustain a . . . loss if the [securities in question] were bad investments, defies the reality of the

situation." *Phoenix* Light v ACE Sec. Corp., 39 Misc. 3d 1218(A), at *6 (Sup. Ct. N.Y. Co. 2013). The operative questions of *how much* and *how* was often linked to what the bank could market to clients before the toxicity of the housing market was revealed.[6] Accordingly, I find that Aozora sufficiently pled scienter.

3. Reliance

In determining whether or not a plaintiff has alleged reasonable reliance, "[a] court may consider the entire context of the transaction, including...the sophistication of the parties, and the context of any agreements between them." *Terra Securities Asa Konkursbo v. Citigroup, Inc.*, 740 F.Supp.2d 441, 448 (S.D.N.Y. 2010) (internal quotation omitted).

"The question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss." *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015). *See also DDJ Mgmt., LLC v. Rhone Grp. LLC*, 15 N.Y.3d 147, 156 (2010) ("If plaintiffs can prove the allegations in

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[6]Defendants rely on *Basis Pac-Rim Opp. Fund (Master) v. TCW Asset Mgmt. Co.*, 654033/12, 2013 WL 4873885, at *5 (N.Y. Sup. Ct. Sept. 10, 2013), which held that the motive to earn fees alone, without more, is insufficient to permit an inference of scienter. Defendants' reliance on *Basis Rim* is unavailing because Aozora has alleged more than the typical profit motive. UBS was allegedly seeking to offload unsold tranches of risky CDOs into Brooklyn. It was in DIMA's long-term interest to cede control to UBS as it might have been frozen out of future projects with UBS if it did not. Similar acts of undisclosed self-dealing have been found sufficient to establish scienter. *See Dandong v. Pinnacle Performance Ltd., No. 10 Civ. 8086*, 2011 WL 5170293, at *12 (S.D.N.Y. Oct. 31, 2011) (Morgan Stanley was shorting synthetic CDOs that it had designed to fail so that it could profit); *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F.Supp.2d 624, 644-645 (Goldman Sachs sought to profit from its nonpublic knowledge regarding the weakness of the subprime mortgage market by shorting CDOs containing residential mortgage-backed securities).

the complaint, whether they were justified in relying on the warranties they received is a question to be resolved by the trier of fact."); *MBIA Ins. Corp. v. Countrywide*, 2013 WL 1845588, at *5 (N.Y. Sup. Ct. Apr 29, 2013) ("Whether MBIA's due diligence review was sufficient and whether MBIA's review made adequate use of the means available to it, at bottom, are disputed issues of fact.").

A defendant prevails on a motion to dismiss if the allegations in the complaint indicate that the plaintiff could have "uncovered any misrepresentations of the risk of the transaction through exercise of reasonable due diligence." *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 189 (1st Dep't 2012). In testing whether or not a plaintiff has met its due diligence requirement, New York law imposes an affirmative duty on sophisticated investors like Aozora to investigate the details of its business transactions. *See Loreley Financing (Jersey) No. 4 Ltd. v. UBS Ltd.*, 42 Misc.3d 858, 866 (Sup. Ct. N.Y. Co. 2013) (holding a plaintiff "could have and should have done the requisite due diligence before investing.").

A case will not be dismissed for lack of justifiable reliance if the exercise of due diligence would not have discovered the fraud as its elements were in the sole possession of the defendants. *See HSH Nordbank*, 95 A.D.3d at 201. The sole possession rule applies when the relevant information is peculiarly available only to specific individuals made privy to it, and cannot be uncovered by ordinary means. *Id.* The existence of peculiar knowledge impacts the ability of a sophisticated investor like Aozora to uncover critical information through the exercise of reasonable due diligence. The rule is that the plaintiff must have the means available of uncovering, by the exercise of ordinary intelligence

during its investigation, "relevant...common knowledge among participants in that market." *Id.* at 193.

Aozora has sufficiently alleged that the information needed to confirm the accuracy or falsity of UBS and DIMA's representations in the Offering Circular was, indeed, peculiarly within Defendants' knowledge. Aozora alleges: "Plaintiff did not know, and could not have known, that . . . Brooklyn was not as represented, and Brooklyn Marketing and Offering Documents created and disseminated by Defendants contained material misrepresentations, misleading statements and omissions . . . as the nature and purpose . . . remained a secret known only to market insiders such as UBS." One of the central allegations of Aozora's complaint is that UBS suborned DIMA to allow UBS to take over Brooklyn's collateral selection, and adversely select much of it to Aozora's ultimate detriment. This allegation "posits a set of circumstances constituting fraud, with respect to the investment here, that could not have been discovered by any degree of due diligence or analysis performed by the most sophisticated of investors." *China Dev. Indus. Bank v. Morgan Stanley & Co., Inc.*, 2011 N.Y. Misc. LEXIS 1808 at *14-15.

Aozora alleges it conducted reasonable due diligence, and only facts peculiarly within Defendants' knowledge would have alerted a sophisticated investor like Aozora that the Brooklyn CDO contained a substantial number of poor-quality assets. Aozora was precluded from accessing such detailed information when it made its two purchases of the Notes. Aozora alleges UBS was in a unique position to obtain this information because it "had superior knowledge of the true quality and value of Brooklyn's collateral

portfolio, the actual risk of default of the portfolio assets, and the methods and motives underlying the selection of such collateral for Brooklyn."

Because knowledge of relevant facts was solely in the hands of the Defendants, there was no duty for Aozora to conduct due diligence beyond the level that it alleges it performed. Aozora had no way of discovering that Defendants "'would select risky assets and short them,'" or that UBS, rather than DIMA, was selecting most of Brooklyn's collateral. *CIMB Thai Bank PCL v. Morgan Stanley* (quoting *Dandong v. Pinnacle Performance Ltd.*, 2011 WL 5170293 at *14). Plaintiff has alleged reasonable due diligence and the non-disclosure of key information by defendants.

Defendants contend that disclaimers contained in the Offering Circular preclude a claim of common law fraud by addressing "the subject matter of the alleged misrepresentation with sufficient specificity." *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 201 (1st Dep't 2012). However, general disclaimers that do not "'track the substance of the alleged misrepresentation' do not negate the reliance element" of fraud. *See Aozora Bank, Ltd. v. Morgan Stanley & Co. Inc*, 2014 WL 3899215 (Sup. Ct. N.Y. Co. Aug. 11, 2014) (quoting *Caiola v. Citibank, N.A., N.Y.*, 295 F.3d 312, 330 (2d Cir. 2002)).

The disclaimers made regarding the Brooklyn CDO only generally address the speculative and risky nature of investing in mortgage-backed CDOs. However, they do not address the selection of the collateral being done by UBS, the arranging bank, rather than DIMA, the purported asset manager, nor that there may have been tensions between the defendants that would ultimately lead to the plaintiff suffering a total loss on its principal investments. Additionally, the disclaimers are ineffective when faced with

plaintiff's allegations that defendants had peculiar knowledge of the facts not discoverable through the use of reasonable due diligence.

Viewing the allegations with every reasonable inference given to the plaintiff, Aozora has effectively pled the element of justifiable reliance with particularity.

4. Loss Causation

The final element of fraud is loss causation. To demonstrate fraud and negligent misrepresentation, the Plaintiff must show that the "misrepresentations directly caused the loss about which plaintiff complains." *Laub v. Faessel*, 297 A.D.2d 28, 31 (1st Dep't 2002). In cases of fraudulent misrepresentation, there is legal cause "if, but only if, the loss might reasonably be expected to result from the reliance." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 295 (1st Dep't 2011). The Court held in *Stichting Pensioenfonds ABP*:

> When a market-wide phenomenon (such as the financial crisis of 2007–2008) may have caused the loss, the plaintiff must plead "facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events ... [i]t is not, however, necessary to allege that the entirety of the loss was caused by the alleged misstatements and none was caused by the more general market decline.

Stichting Pensioenfonds ABP v. Credit Suisse Group AG, 2012 WL 6929336, at *11.

"Where the plaintiff pleads some causation between the defendant's misstatements and the loss, and the defendant claims some other mechanism of causation such as a market downturn, causation is a matter of proof at trial and not to be decided on a . . . motion to dismiss." *HSH Nordbank AG*, 43 Misc.3d 1225(A).

Aozora has sufficiently pled a causal link between its losses and the alleged misrepresentations and omissions. The complaint alleges that (i) defendants filled Brooklyn with $65.4 million of Constellation CDOs and $83.5 million of Dealer Bespokes CDOs; (ii) defendants also offloaded $68 million of UBS-recycled CDOs into Brooklyn; (iii) these CDOs suffered over $216 million in total losses; and (iv) such losses sufficed to cause principal impairment to plaintiff's $31 million investment in the A1J, A-2, and A-3 tranches. Because it is foreseeable that Aozora would suffer a loss as a result of relying on the defendants' misrepresentations with respect to the collateral selection and management of Brooklyn, the plaintiff sufficiently alleged loss causation.

Accordingly, the defendants' motion to dismiss the cause of action for fraud is denied.

III. Second Cause of Action – Aiding and Abetting Fraud Against All Defendants

Aozora also alleges a cause of action for aiding and abetting fraud against both UBS and DIMA. The elements of aiding and abetting fraud are: "[1] the existence of the underlying fraud, [2] actual knowledge, and [3] substantial assistance." *Oster v. Kirschner*, 77 A.D.3d 51, 55 (1st Dep't 2010). As detailed above, the allegations in the complaint are sufficient to plead the existence of a fraud and the defendants' knowledge of the fraud. Furthermore, Aozora alleges that defendants perpetrated the fraud by concealing that UBS, rather than DIMA, was wielding effective control over the collateral section of Brooklyn. As Aozora has sufficiently pled the elements of a cause of action for aiding and abetting fraud, the defendants' motion to dismiss the cause of action is denied.

IV. Third Cause of Action – Breach of Implied Covenant of Good Faith and Fair Dealing Against All Defendants

Aozora alleges breach of the implied covenant of good faith and fair dealing against both defendants. Where a "cause[] of action alleging breach of the implied covenant of good faith and fair dealing . . . [is] based on the same allegations as underlie the breach of contract claims [it] should be dismissed as duplicative." *Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 A.D.3d 548, 549 (1st Dep't 2015). "A claim for a breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim if it arises out of the same facts or alleges the same damages." *CIMB Thai Bank PCL v. Morgan Stanley*, 2013 WL 5314330 (Sup. Ct. N.Y. Co. 2013). Here, Aozora claims that UBS breached an implied covenant of good faith and fair dealing by hindering DIMA's duty to manage the Brooklyn portfolio. Aozora further alleges that DIMA breached an implied covenant of good faith and fair dealing by allowing UBS to exert control over its duty to manage the collateral in the portfolio. These allegations arise out of the same transactions at issue in the claim for breach of the CMA and seek the same compensatory and punitive damages, and thus are dismissed as duplicative of the breach of contract claim.

V. Fifth Cause of Action – Breach of Contract, Harming a Third Party Against DIMA

"A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to

compensate him if the benefit is lost.'" *State of California Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434-5 (2000) (quoting *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 336 (1983)). Furthermore, the intent of the parties to benefit a third party "must be apparent from the face of the contract. . . . Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent."" *LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108-09 (1st Dep't 2001). *See also U.S. Bank Nat'l Ass'n. v. GreenPoint Mortg. Funding, Inc.*, 105 A.D.3d 639, 640 (1st Dep't 2013) (dismissing third-party beneficiary claim because of "the absence of any clear language on the face of the [contracts]").

Aozora alleges that DIMA breached the CMA between Brooklyn and DIMA when it failed to select collateral in accordance with the CMA terms and allowed UBS to usurp its role, but fails to points to any specific contractual language which indicates that Aozora is an intended third-party beneficiary of the contract. Instead of indicating the provision of the CMS which makes Aozora an intended beneficiary, Aozora argues that "DIMA fails to cite any language in the CMA expressly excluding Plaintiff as an intended beneficiary." Plaintiff's argues that the provisions which benefit the noteholders generally is unavailing. *See U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 105 A.D.3d 639, 640 (1st Dep't 2013) ("given the absence of any clear language on the face of the loan sale agreements evincing an intent to benefit third parties, the insurers failed to allege facts sufficient to sustain the claim that the agreements were intended to give them third-party benefits").

Accordingly, the fifth cause of action is dismissed.

VI. Sixth Cause of Action – Negligent Misrepresentation Against DIMA

In order to state a claim for negligent misrepresentation, a plaintiff must make "a showing of a special relationship of trust or confidence between the parties which creates a duty for one party to impart correct information to another." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 296 (1st Dep't 2011); *OP Solutions, Inc. v. Crowell & Moring, LLP*, 72 A.D.3d 622 (1st Dep't 2010); *Hudson Riv. Club v. Consolidated Edison Co. of N.Y.*, 275 A.D.2d 218, 220 (1st Dep't 2000).

Here, Aozora and DIMA are sophisticated parties engaged in an arm's length transaction, and Aozora does not allege a special relationship of trust or confidence between them. Thus, because the allegations in the complaint are insufficient to show that Aozora and DIMA shared a special relationship, the cause of action for negligent misrepresentation must be dismissed.

VII. Seventh Cause of Action – Unjust Enrichment Against All Defendants

The seventh cause of action alleges unjust enrichment against UBS and DIMA. Aozora cannot maintain this cause of action because "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987). Because Aozora's unjust enrichment claims arise out of the same documents as its breach of contract and third-party beneficiary claims, this cause of action is dismissed. *See CIMB Thai Bank PCL v. Morgan Stanley*, 2013 WL 5314330 (Sup. Ct. N.Y. Co. 2013).

VIII. Punitive Damages

In order to sustain a claim for punitive damages, Aozora must allege "egregious conduct that was 'part of a pattern of similar conduct directed at the public generally.'" *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 209 (1st Dep't 2012) (quoting *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 613 (1994)). Punitive damages are allowed where the wrongful conduct exhibits "high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007) (internal quotations omitted). Generally, a commercial dispute arising "over a failed investment between sophisticated private parties does not implicate egregious tortious conduct directed at the general public." *Inter-Atlantic Fund, L.P. v. William G. ALVARO, Global Group Holdings, Inc.*, 2007 WL 2236595 (Sup. Ct. N.Y. Co. 2007). Here, the alleged misconduct does not rise to the level required to maintain a claim for punitive damages, and thus plaintiff's request for punitive damages is denied.

ORDERED that the motion by defendants UBS Securities LLC, UBS Limited, UBS AG to dismiss plaintiff Aozora Bank, Ltd.'s complaint (motion seq. no. 001) is granted only to the extent of dismissing third and seventh causes of action, and dismissing plaintiff's request for punitive damages, and is denied as to the first cause of action for fraud and the second cause of action for aiding and abetting fraud; and it is further

ORDERED that the motion by defendant Deutsche Investment Management Americas, Inc. to dismiss plaintiff Aozora Bank Ltd.'s complaint (motion seq. no. 002) is

granted only to the extent of dismissing third, fifth, sixth, and seventh causes of action, and dismissing plaintiff's request for punitive damages, and is denied as to the first cause of action for fraud and the second cause of action for aiding and abetting fraud; and it is further

ORDERED that the defendants shall answer the complaint within thirty (30) days of the date of entry of this order; and it is further

ORDERED that the parties shall appear before the Court for a preliminary conference 60 Centre Street, Room 208, on December 9, 2015 at 2:15 p.m.

This constitutes the decision and order of the court.

DATE : 10/13/15
~~10/8/2015~~

SCARPULLA, SALIANN, JSC