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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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HARCH INTERNATIONAL LIMITED, a foreign corporation,

Plaintiff,

- against -

HARCH CAPITAL MANAGEMENT , INC., a Florida Corporation, HARCH CLO I LIMITED, a foreign corporation, and JP Morgan Chase Bank, N.A.

Defendants.

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INDEX NO 601312/2005

MOTION DATE

MOTION SEQ. NO. 005

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 is decided in accordance with the accompanying Decision and Order.

Dated: May 26 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

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HARCH INTERNATIONAL LIMITED, a foreign corporation

Index No. 601312/2005

Plaintiff,

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Decision and Order

HARCH CAPITAL MANAGEMENT , INC., a Florida Corporation, HARCH CLO I LIMITED, a foreign corporation, and JP Morgan Chase Bank, N.A.

Defendants.

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KARLA MOSKOWITZ, J:

Defendant Harch Capital Management ("HCM") moves to dismiss the complaint of plaintiff Harch International Limited ("HIL") pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, CPLR 3211(a)(1) upon documentary evidence and CPLR 3211(a)(7) for failure to state a claim.

This case involves alleged excessive management fees. Plaintiff HIL is a Cayman Islands hedge fund that defendant HCM formed in 1997 to enable investments in corporate loan obligations, non-investment grade debt instruments and privately-placed debt and securities. HCM is an investment management company incorporated in Florida with its principal place of business in Boca Raton, Florida. Defendant Harch CLO I Limited ("Harch CLO") is a Cayman Island's limited liability company that HCM formed to invest in a portfolio of corporate loan obligations and debt instruments and to issue note securities that the portfolio would collaterize. A trustee, Chase Bank of Texas, now defendant JP Morgan Chase Bank N.A. (The "Trustee")

represented the interests of investors in Harch CLO who purchased the note securities (the Noteholders).

Blue Highway Management Limited ("Blue Highway") became HIL's manager for its investments. Blue Highway, in turn, entered into a Subadvisory Agreement, dated May 21, 1997, (the "Subadvisory Agreement"), with HCM by which HCM instead of Blue Highway became the investment advisor for HIL. (Am. Complaint ¶ 9 and Exhibit A). The Subadvisory Agreement gave HCM "full discretion" over the allocation and management of HIL's investments. The Subadvisory Agreement also contains a limitation of liability clause.

The Collateral Management Agreement, dated as of March 15, 2000, (CMA) was an agreement between HCM and Harch CLO. (Am. Complaint Ex. B). It provided for HCM to manage Harch CLO's investments in exchange for fees. Pursuant to the CMA, HCM received an annualized "Base Collateral Management Fee" and could also receive an additional "Incentive Collateral Management Fee." For HCM to obtain the Incentive Collateral Management Fee, Harch CLO's most junior notes, the Class D Subordinated Notes (Class D Notes), needed to achieve an annual rate of return of at least 10% on the original principal amount for a certain period. HCM was then entitled to receive payment of the entire unpaid incentive fee that had accrued over the lifetime of the Notes.

The CMA designated the Trustee as a third-party beneficiary "on behalf of the Noteholders" (CMA § 28). In addition, section 9 of the CMA provides that HCM was to act in the best interests of the Noteholders:

> (a) The Collateral Manager shall perform its obligations hereunder in accordance with the terms of this Agreement and the terms of the Indenture applicable to it and shall use all reasonable endeavors, in the course of carrying

out such obligations, *to act in the best interests of the holders of the Notes.*

(CMA § 9 emphasis added)

In section 7(g), HCM agreed not to take any action that would "adversely affect" the Noteholders. In addition, both HCM and Harch CLO agreed, pursuant to section 22(a) of the CMA, to submit to the jurisdiction of the New York State or federal courts in Manhattan for any action or proceeding arising out of or relating to the Harch CLO Notes, the Indenture, or the CMA. Section 19 of the CMA states that "[t]his Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and permitted assigns as provided herein." Section 13(b) of the CMA precludes the CMA's assignment "without the prior written consent of the Collateral Manager, the Trustee [and a majority of the Class A, B, and C Noteholders]" except under certain circumstances.

There is also an Indenture between the Trustee and Harch CLO dated as of March 15, 2000 (the "Trust Indenture"). In the Trust Indenture, Harch CLO granted to the Trustee the "right, title and interest" in all of Harch CLO's assets and rights "for the benefit and security of the [Noteholders]." (Trust Indenture, page 6). In Section 15.1(f) of the Trust Indenture, Harch CLO promised to obtain: (1) HCM's agreement and consent to the assignment; (2) HCM's acknowledgment that the assignment to the Trustee is "for the benefit of the Secured Parties [i.e. The Noteholders]" and (3) HCM's agreement that "all of the representations, covenants and agreements made by the Collateral Manager in the [CMA] are also for the Trustee on behalf of the Secured Parties" The Trust Indenture contains a nearly identical forum selection provision to that in the CMA.

The Trust Indenture's section 5.8, entitled "Limitation on Suits" sets forth the terms with

which the Noteholders must comply when suing to redress an "Event of Default" under the terms of the Indenture. That section states that "[n]o holder of any Note shall have any right to institute any Proceedings, judicial or otherwise, with respect to this Indenture" without meeting certain conditions. For example, the Noteholders must have provided written notice to the Trustee of a continuing event of default and must have requested the Trustee to institute proceedings without result. Section 5.10 contemplates a Noteholders' lawsuit: "[i]f the Trustee or any Noteholder has instituted any Proceeding to enforce any right or remedy under this Indenture. . . ." Section 5.11, entitled "Rights and Remedies Cumulative" discusses that "[n]o right or remedy herein conferred upon or reserved to the Trustee *or to the Noteholders* is intended to be exclusive." (Emphasis supplied).

Section 20 of the CMA is a merger clause that ties the CMA and the Trust Indenture together: "[t]his Agreement and the Indenture contain the entire agreement and understanding among the parties hereto with respect to the subject matter hereof. . . ." Section 24 of the CMA states that in the event the CMA and the Trust Indenture conflict, the provisions of the Trust Indenture will control.

Thus, by these three agreements: (1) HCM was the investment manager for both plaintiff and Harch CLO; (2) the Trustee held title to Harch CLO's assets and (3) the Trustee was the Noteholder's representative.

Plaintiff's complaint involves a dispute over HCM's reinvestment of distributions paid to Class D Noteholders in Harch CLO, i.e. HIL,[1] and the calculation of HCM's Incentive Fees. The Class D notes were subordinate to A,B, and C classes. HIL invested $30 million in the Class

[1] HIL owns 100% of the Class D Notes.

D notes. HIL claims that in 2001 when credit markets went into a general decline, HCM reinvested over $15.2 million of HIL's distributions into Harch CLO in order to avoid liquidation of Harch CLO. The complaint alleges that in November 2001, HCM explained that it had undertaken the reinvestments "pursuant to and consistent with its fiduciary duties to the Noteholders." (Complaint ¶ 47). HIL claims that it never received additional Class D notes for its reinvestment as the terms of the Trust Indenture required. Nor did HIL receive anything of value in consideration for the reinvestment. The Complaint also alleges that HCM never informed A, B, or C notcholders or the Trustee of the reinvestment, but instead merely reported that there had been a distribution to the Class D Noteholders.

On January 17, 2005, the HIL shareholders removed the existing HIL directors and replaced them with a new Board that demanded liquidation of Harch CLO and redemption of the Notes. Upon liquidation of Harch CLO, the Trustee distributed the liquidated proceeds of Harch CLO to Class A, B and C Noteholders first. The remainder, about $14.3 million, the Trustee distributed to the Class D Noteholders. However, allegedly the Note Valuation report disclosed a principal value of $418 million that would have left $21.3 million for the Class D Noteholders. HIL explains this discrepancy, accusing HCM of taking an excessive management fee of $7.6 million. (See Complaint ¶ 70). HIL claims that HCM manipulated the internal rate of return (IRR) on the Class D Notes by purposefully failing to recognize HIL's reinvestments in order to make it look like HCM was entitled to an incentive fee when in actuality it was not. (Compl ¶ 73-75).

HIL wrote to the Trustee on April 26, 2005 and July 8, 2005 requesting the Trustee to demand return of the $7.6 million from HCM, but the Trustee refused to take any action. HIL

also contends that the Trustee has wrongfully retained over $1.3 million of HIL's funds representing accrued interest. (Complaint ¶¶ 91-96).

By this motion, defendant HCM moves to dismiss. HCM bases its argument, in part, on the ground that there is no personal jurisdiction. It also moves to dismiss for failure to state a claim and because of defenses founded upon documentary evidence. Harch CLO has not moved but joins in those parts of HCM's motion that address the first and second causes of action (for breach of the CMA and breach of the Trust Indenture respectively).[2] Harch CLO has stipulated with counsel for plaintiffs that the resolution of this motion will bind Harch CLO. (See Transcript of oral argument ["Tr."] dated January 18, 2006 at pg 17). Defendant JP Morgan Chase has not moved, but has answered and counterclaimed. (Tr. Pg. 18).

DISCUSSION

I. THIRD PARTY BENEFICIARY

Plaintiff concedes that the only possible basis for jurisdiction is the forum selection clauses in the CMA and the Trust Indenture. HCM, for its part, does not challenge the general validity of the forum selection clauses, but points out that plaintiff cannot enforce these clauses because it is not a party to either agreement. Plaintiff claims it is a third-party beneficiary under both the CMA and the Trust Indenture and therefore can claim the benefit of the forum selection clauses.

In *State of California Pub. Employees' Retirement Sys. v. Sherman & Sterling*, 95 NY2d 427, 434 (2000), our Court of Appeals adopted a standard akin to that in the Restatement Second of Contracts § 302 to establish third party beneficiary status. Accordingly, a party asserting

[2] These are the only causes of action plaintiff asserts against Harch CLO.

rights as a third party beneficiary must show: (1) a valid contract between other parties; (2) that those parties intended to benefit the third-party and (3) that the benefit is "sufficiently immediate rather than incidental" to indicate that the contracting parties assumed a duty to compensate the third-party if that benefit becomes lost. (*See also Edge Management Consulting Inc. v. Blank*, 25 Ad3d 364 [1st Dep't 2006] ["One is an intended beneficiary if one's right to performance is 'appropriate to effectuate the intention of the parties' to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'"]). (citations omitted). In determining whether a party is a third-party beneficiary, courts look at the overall purpose of the transaction. *(Internationale Nederlanden (US) Capital Corporation, v. Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dep't 1999]).

Here, HIL is a third-party beneficiary of the Trust Indenture. First, by virtue of section 15.1(f) of the Trust Indenture, Harch CLO assigned all of its "estate, right, title and interest in, to and under the [CMA] to the Trustee, "for the benefit of the Secured Parties" i.e. the Noteholders. The Trust Indenture also contemplates that HCM would recognize that the assignment to the Trustee was for the benefit of the Noteholders. (*Id.*). Section 5.8 recognizes that the Noteholders have a right to sue. Section 5.11 states "[n]o right or remedy herein conferred upon and reserved to the Trustee *or to the Noteholders* is intended to be exclusive of any other right or remedy." (Emphasis added). This indicates that the parties to the Trust Indenture intended to benefit the Noteholders with their performance and a corresponding duty to compensate the Noteholders should that benefit become lost. Thus, it is clear that the Noteholders are intended third-party beneficiaries under the Trust Indenture.

Because the Noteholders are third-party beneficiaries of the Trust Indenture, they are also third-party beneficiaries of the CMA. The Trust Indenture and the CMA cross-reference each other. The design of both the CMA and the Trust Indenture was to effectuate investment in Harch CLO. The merger clause in the CMA indicates that it and the Trust Indenture represent the entire understanding of the parties.

But, even if the court were to read the Trust Indenture and the CMA separately, it is clear that plaintiffs are third-party beneficiaries under the CMA alone. HCM formed both HIL and Harch CLO and HIL made investments in Harch CLO that HCM would manage. Thus, the very purpose of the CMA was to effectuate plaintiff's investments. In section 9(a),under the heading "Benefit of the Agreement," HCM agreed that it would "act in the best interests of the holders of the Notes." In section 9(b) of the CMA, HCM "agrees and consents to the provisions contained in section 15.1 (f) of the Indenture," the provision that the assignment was for the benefit of the Noteholders. In section 7(g) of the CMA, HCM agreed that it would not take any action that would "adversely affect the interests of the holders of any Class of Notes. . ." Section 28 names the Trustee a third-party beneficiary only "on behalf of the Noteholders." Section 13(a) requires Noteholder consent to assignment of the CMA. These various provisions indicate that the parties intended the CMA to benefit the Noteholders directly and to give the Noteholders the benefit of the promised performance, i.e. the proper administration of the Noteholder's investment.

Given the language of the CMA and the Trust Indenture coupled with the raison d'etre of these two agreements to give the Noteholders the benefit of effectuating and managing their investments, the court holds that HIL meets the requirements of a third-party beneficiary under New York law. *(See International Nederlanden (U.S.) Capital Corp. v. Bankers Trust Co.*, 261

AD2d 117 [1st Dep't 1999] [noteholders were third-party beneficiaries of balloting agent's agreement with issuer of notes]; *Cf. Condren, Walker & Co., v. Wolf*, 19 AD2d 151, 152 [1st Dept 2005][motion to dismiss could not resolve whether broker was intended third-party beneficiary of note purchase agreement]).

Defendants cases are distinguishable. For example, in *Banco Espirito Santo de Investimento, v. Citibank, N.A.*, 2003 WL 2301888 (SDNY Dec. 22, 2003), an investor in an investment fund's notes sued the promoter of the notes following their decline in value. The court in that case held that the investor was not a third-party beneficiary because the agreements by their terms benefitted only the parties and their successors and any obligations to investors were general. However, the only reference to the rights of the Noteholders appeared in the limitation of liability clauses. Here, the Trust Indenture and the CMA repeatedly mention the Noteholders and more than once state that the agreements are for the benefit of the Noteholders. The agreements at issue expressly contemplate a Noteholder lawsuit. *Banco Espirito* did not involve that language. *SNS Bank N.V., v. Citibank, NA*, 7 AD3d 352, involved the same failed investment fund and presumably the same agreements as in *Banco Espirito*, and therefore distinguishable on the same grounds, namely that the references to the Noteholders in those agreements were much more limited than the agreements at issue in this case.

HCM also argues that specifying the Trustee as a third-party beneficiary in the CMA eliminates the Noteholders as a beneficiary. This does not follow. As discussed, the Trust Indenture mentions the Noteholders repeatedly and the CMA and the Trust Indenture were meant to be read together. Further, the Trustee stands in the shoes of the Noteholders. The Agreements therefore are for the benefit of the Noteholders and the Noteholders can assert their rights as

third-party beneficiaries, particularly where, as here, the Trustee has failed to take action.

In a similar argument, defendant contends that the Trustee's ability to recover under the CMA negates any potential third-party beneficiary status that plaintiff might have. (See Def. Mem. at 14). However, this is no longer the standard. *(Cf. PT Bank Mizuho Indonesia v. PT Indah Kiat Pulp and Paper Corp.* 808 NYS2d 72 [1st Dep't 2006][although court found no third-party beneficiary status because the agreement preluded non-party enforcement, the court noted that negating third-party beneficiary status where a plaintiff is unable to show that only it could recover is "an outdated, more narrow standard."]).

Finally, HCM argues that the CMA's "succession" and "non-assignment" clauses preclude the court from holding that plaintiff is a third party beneficiary because these clauses do not include the Noteholders. Section 19, the succession clause, states that "[t]his agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and permitted assigns as provided herein." However, this section does not preclude a Noteholder lawsuit. In addition, "as provided herein" coupled with the repeated references to benefitting the Noteholders cannot indicate an intention to exclude the Noteholders, Section 13(b) precludes assignment without the consent of several parties, including the Trustee and several classes of noteholders, but does not include the Class D Noteholders. Defendant points again to *Banco Espirito* in which the court held that similar clauses meant that the agreement's only intention was to benefit the parties. However, again, the agreement in *Banco Spirito* did not contain the repeated references about benefitting the Noteholders that the agreements in this case contain.

Thus, the situation here satisfies the three requirements the New York Court of Appeals

articulated in *State of California Pub. Employees' Retirement Sys. v. Sherman & Sterling*, 95 NY2d 427, 434 (2000). There are valid contracts between the defendants. Given the nature of those agreements and the references to benefitting the Noteholders, the parties to those agreements intended the Noteholders to receive the benefit of those agreements. That benefit was not incidental. The very purpose of the contracts was to benefit the Noteholders. Finally, as the provisions in the Trust Indenture contemplating Noteholder lawsuits reflect, the parties to the agreements assumed a duty to compensate the Noteholders should the Noteholders lose their benefit (i.e. the fair and proper management of their investments).

II. Closely Related

Because the court has found plaintiff to be a third-party beneficiary under the CMA and the Trust Indenture, it need not reach the issue of whether plaintiff is so closely related to this contractual dispute that it is foreseeable that the forum selection clause might bind it. *(But see Lipcon v. Underwriter's at Lloyd's, London*, 148 F3d 1285, 1299 [11th Cir. 1998]; *Hugel v. Corporation of Lloyd's*, 999 F2d 206, 209 [7th Cir. 1993]).

III. The Trust Indenture's No-Action Clause

HCM next argues that HIL cannot sue HCM under the Trust Indenture because it has not complied with the Trust Indenture's "no action" clause. This clause, section 5.8 of the Trust Indenture, is entitled "Limitation on Suits." While expressly recognizing the Noteholders' right to sue (and therefore cutting against HCM's arguments that the Noteholders are not third-party beneficiaries with rights under the agreements), this section also limits the Noteholders from bringing suit "with respect to this Indenture", without meeting certain preconditions. These conditions include: (1) providing written notice to the Trustee of an event of default and

requesting that the Trustee institute proceedings, (2) offering to provide the Trustee with reasonable indemnity against the costs, expenses and liabilities it might incur in conjunction with that proceeding and (3)the Trustee failing to accede to the Noteholders' request

However, this section contemplates suits concerning payment on the notes themselves. HIL's claims address HCM's manipulation of the IRR to receive an inflated management fee. As HIL's claims do not challenge action taken on the notes, such as the priority of payment among the Noteholders, section 5.8 does not trigger.

But, even if HIL did have to comply with section 5.8's requirement to notify the Trustee, it has already done so. In two letters to the Trustee dated April 26, 2005 and July 8, 2005 (see Amended Complaint Exhibits E and F), HIL both demands that the Trustee take action against HCM concerning the incentive fee and indicates a willingness to arrange reasonable indemnification for the Trustee were the Trustee to take action.. (Id., Ex. F). It is undisputed that the Trustee did not take action after receiving these letters.

HCM contends that plaintiff filed this suit before writing to the Trustee and implies that therefore the letters do not count. However, HCM does not dispute that, despite plaintiff's request, the Trustee has refused to take action. What HCM's argument suggests then is for plaintiff to withdraw this lawsuit only to refile it the next day. The court sees little to gain from that approach, except perhaps an extra filing fee for the State of New York.

IV. Fiduciary Duty

The court declines to dismiss either of HIL's claims for breach of fiduciary duty because plaintiff has properly pled a fiduciary relationship and breach of a fiduciary duty.

A. Fourth Cause of Action: Breach of Fiduciary Duty as Collateral Manager for Harch CLO.

As the Court of Appeals has recently articulated:

> A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation.'. . . Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions.

EBC I, Inc.v. Goldman, Sachs & Co., 5 NY3d 11, 19 [2005].

As discussed, under the CMA HCM is the collateral manager for Harch CLO. Defendants contend that HCM did not owe a fiduciary duty to HIL in this capacity. However, given: (1) the various hats that HCM wore, including that of investment advisor to HIL under the Subadvisory Agreement; (2) the interrelationship of all the agreements in this case and (3) that, despite being HIL's investment advisor and manager, HCM reinvested all of HIL's interest in Harch CLO, a failing entity, allegedly in order to keep Harch CLO afloat and keep HCM's management fees flowing, the court is not in a position to dismiss any portion of plaintiff's claims for breach of fiduciary duty.

Defendants point to the *Banco Espirito* and *SNS Bank* cases for the proposition that a collateral manager does not owe a fiduciary duty to investors. However, neither case involved a situation like the one here where the collateral manager was the investment advisor and manager to the plaintiff and had investment discretion with respect to all of the plaintiff's investments. (Complaint ¶¶ 9-10) Thus *Banco Espirito* and *SNS Bank* are inapplicable to plaintiff's breach of fiduciary claim.

B. The Breach of Fiduciary Duty Claims are not Duplicative of Contract Claims

Defendant HCM argues that this court should dismiss plaintiff's claims for breach of

fiduciary duty because they duplicate the contract claims. Despite the existence of a contract, "a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, [the parties] created a relationship of higher trust than would arise from the . . agreement alone." (*EBC I.* 5 NY3d at 20). Here, plaintiff has alleged that HCM, its own investment advisor via the Subadvisory Agreement, reinvested more than $15.2 million of HIL's capital in Harch CLO, not to benefit HIL, but to "preserve Harch CLO and the stream of collateral management fee income received by HCM from Harch CLO." Given the interdependency of the various agreements that touch this lawsuit and the various capacities in which HCM acted, the court is not in a position to rule that HCM did not abuse its relationship with HIL's and breach its fiduciary duties to HIL when it reinvested HIL's capital and took its management fee.

C. The Claims are Sufficiently Particular

HCM next argues that HIL has failed to plead its breach of fiduciary duty claim with sufficient particularity. HCM points to page 23 of HIL's opposition memorandum, where HIL demonstrates how its breach of fiduciary duty claims differ from its breach of contract claims, as proof that the complaint is inadequate. HCM appears to be arguing that because HIL used a hypothetical to explain how its breach of fiduciary duty claims differ from its breach of contract claims, the complaint is inadequate.

Contrary to HCM's assertions, the complaint is entirely adequate to place HCM on notice as to what it did to breach its fiduciary duty, i.e. reinvesting plaintiff's capital to plaintiff's detriment in a way that preserved HCM's own incentive management fees and without issuing additional notes to HIL. (See complaint paragraphs 131 and 137-140). Accordingly, the court

will not dismiss HIL's breach of fiduciary duty claims. Indeed, it is the court's view, that, given how HIL has currently articulated its Complaint, this case at its core concerns HCM's breach of fiduciary duty

V. Limitation of Liability

Nor will the court dismiss any portion of plaintiff's damages at this pleading stage based upon the limitation of liability provisions in the CMA and the Subadvisory Agreement. The Subadvisory Agreement states that HCM will not be liable "for actions taken or omitted in good faith unless gross negligence, fraudulent, willful or reckless misconduct, dishonesty or violation of applicable law is involved." (Subadvisory Agreement § 3). The CMA contains a similar provision. (See CMA §10[a]).

Plaintiff has alleged that HCM engaged in purposeful self-dealing in order to keep afloat a dying entity and preserve income for itself by reinvesting HIL's capital, miscalculating the IRR and then paying itself a management fee of $7.6 million based upon that miscalculation. The actions of which HIL complains are not those run of the mill claims for negligent management that a noteholder might bring against its investment manager. To the contrary, here plaintiff alleges that HCM purposefully did not issue more Class D notes when it reinvested HIL's money into Harch CLO, then HCM miscalculated the IRR and accepted payment of an incentive fee based upon numbers it contrived. The court will not permit defendant at this stage of the litigation to circumvent liability for intentional wrongdoing of this sort through an exculpatory clause in a contract.

VI. Punitive Damages

For similar reasons, the court cannot dismiss plaintiff's claim for punitive damages at this

juncturc. HCM purposefully reinvested $15.2 million of HIL's money in Harch CLO with no consideration to HIL. Because HCM failed to properly account for that reinvestment, HCM was able to contrive a situation where it received a significant windfall at HIL's expense. Plaintiff has alleged that this scheme was intentional. A showing of intentional conduct evincing a disregard of the rights of others, as plaintiff has pled here, is sufficient to support a punitive damages claim. (*See U.S. Trust v. Newbridge Partners, LLC*, 278 AD2d 172 [1st Dep't 2000)

Defendant's argument that plaintiff needs to plead injury to the public does not apply in tort cases for breach of fiduciary duty. (*See Don Buchwald & Assoc., Inc. v. Rich*, 281 AD2d 329, 330 [1st Dep't 2001]).

Accordingly, it is

ORDERED THAT the motion of defendant Harch Capital Management is denied; and it is further

ORDERED THAT the parties are directed to court-annexed mediation and should contact chambers at (646) 386-3220 to arrange the particulars; and it is further;

ORDERED THAT the parties are directed to attend a preliminary conference on June 20, 2006 at 10:00 am in the courtroom, room 248, 60 Centre Street.

Dated: May 24, 2006

ENTER

J.S.C.