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

PRESENT: C E Ramos PART 53

Index Number : 601030/2008

**ROBECO-SAGE CAPITAL,**

VS.

**CITIGROUP ALTERNATIVE**

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 DISPOSED OF IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: July 28, 2009

CHARLES E. RAMOS, 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: COMMERCIAL DIVISION

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ROBECO-SAGE CAPITAL, L.P., ROBECO-SAGE CAPITAL INTERNATIONAL, LTD., ROBECO-SAGE CAPITAL INTERNATIONAL II LTD., ROBECO-SAGE TRITON FUND, L.L.C., RIVER ROAD FUND, LTD., ROBECO-SAGE MULTI-STRATEGY FUND, L.L.C., and OLD FIELD FUND, L.L.C.,

Index No. 600121/08

Plaintiffs,

-against-

CITIGROUP ALTERNATIVE INVESTMENTS LLC, CORPORATE SPECIAL OPPORTUNITIES LTD., CSO PARTNERS LTD., CSO LTD., CSO LTD., CSO US LTD., JOHN HAVENS, and JOHN PICKET,

Defendants.

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**Charles Edward Ramos, J.S.C.:**

Motion sequences numbers 002, 003 and 004 are consolidated for disposition.

This action is brought by institutional investors in hedge funds for misrepresentations that allegedly induced plaintiffs not to redeem their shares when they were contemplating it.

In motion sequence 002, defendants Citigroup Alternative Investments LLC (CAI) and CSO Partners Ltd. (CPL) (together, CAI Defendants) moves to dismiss the complaint for failure to state a claim, failure to assert derivative claims, and preemption under the Martin Act.

In motion sequence 003, defendants Corporate Special Opportunities Ltd., CSO Ltd., and CSO US Ltd. (the CSO Funds), and in motion sequence 004, defendant John Pickett (together with the CAI Defendants and the CSO Funds, Defendants), move to dismiss the complaint on the same grounds.

## Background[1]

Plaintiffs[2] are Caymanian and Delaware limited liability partnerships and companies that invest in hedge funds.

The structure of the CSO Funds consists of a master hedge fund, Corporate Special Opportunities Ltd. (the Master Fund), a Caymanian exempted limited liability company, and two Caymanian feeder hedge funds, CSO Ltd., and CSO US Ltd. (together, the CSO Funds).

Defendant CPL is a British LLC and is the CSO Funds' investment advisor, pursuant to an investment management agreement. Defendant John Pickett was CPL's CEO at the time that the events at issue took place. He also served as the Master Fund's portfolio manager, and was a Citigroup employee. Defendant John Havens was appointed the president and chief executive officer of CAI in April 2007. Pickett allegedly reported to Haven at all relevant times.

Defendant CAI is CPL's parent, and is a division of Citigroup's Corporate Special Opportunities investment business unit that was created in 2004 to invest in the Master Fund's two feeder funds, defendants CSO and CSO US, on behalf of its private clients. Citigroup owns approximately fifteen to twenty percent

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[1] The allegations set forth herein are taken from the complaint, and are assumed to be true for the purposes of this motion.

[2] The plaintiffs in the actions are: Robeco-Sage Capital, L.P., Robeco-Sage Capital International, Ltd., Robeco-Sage Capital International II, Ltd., Robeco-Sage Triton Fund, L.L.C., River Road Fund, Ltd., Robeco-Sage Multi-Strategy Fund, L.L.C., and Old Field Fund, L.L.C. (together, Plaintiffs).

of the Master Fund through one of the feeder funds.

CAI, in addition to sponsoring and organizing the CSO Funds, appointed all of its directors, set internal limits on its trading and leverage, and otherwise completely controlled the CSO Funds and its investment strategy (Complaint, ¶¶ 30-39).

On May 17, 2007, CPL, through Pickett, made an oral offer to the managing lead arrangers (MLAs) of a syndicated loan to purchase more than €1.25 billion of the debt of ProSiebenSat 12 Media AG (ProSieben), a German media conglomerate.

On June 27, 2007, the MLAs notified CPL that the Master Fund had been allotted a subscription of €558.6 million. As of June 29, 2007, ProSieben debt was already trading at below par. Purportedly alarmed that ProSieben debt was trading below par and wishing to back out of the transaction, Pickett attempted to dispute the Master Funds' obligation to take the allocation, based upon his view that the MLAs had materially changed the terms of the transaction.

Meanwhile, the Master Fund did not have sufficient liquid assets available to fund the allotment, and would be rendered insolvent unless it could either obtain financing or sell its allotment to a third party. Assuming that financing could be arranged, the ProSieben transaction effectively increased the Master Fund's leverage from approximately four to seven and a half times the net asset value (NAV) of the Master Fund, and more than one hundred percent of its NAV was concentrated in one position, thereby saddling it with an immediate loss because

ProSieben debt was already trading below par.

While looking into a way to back out of the transaction, Pickett and CPL allegedly concealed the transaction from CAI's risk managers, who discovered the trade when the MLAs sent Pickett a letter threatening to sue if the Master Fund failed to fund its share of the ProSieben loan, on August 24, 2007. Nonetheless, CAI did not reveal the trade to CSO Funds' investors, and continued to misrepresent the financial condition of the CSO Funds (Complaint, ¶ 50).

From June to December 2007, Defendants repeatedly provided false and misleading financial indicators to Plaintiffs in face-to-face and telephonic conversations, in addition to providing specially prepared risk reports.

According to the complaint, on July 17, 2007, RIM's CEO, Nathan Peters, and another RIM investment analyst met with Pickett in London. Pickett allegedly represented that the Master Fund's leverage was four times the NAV and that its largest position represented only five percent of the gross assets of the Master Fund (Complaint, ¶ 65).

Ten days later, on July 27, 2007, Nathan Peters spoke to CAI investment relations manager, Ramesh Parameswar, who allegedly stated that the Master Fund was leveraged four times the NAV, and that Pickett "liked his book," and was sitting on twenty percent unencumbered cash (Complaint, ¶ 66).

On July 31, 2007, the CSO Funds issued an exposure report, that did not reflect the ProSieben investment, and understated

its leverage as five point forty-five NAV. Defendants allegedly provided this specially prepared report to Plaintiffs alone, in response to Plaintiffs' specific request for financial indicators.

On August 2, 2007, Parameswar called Peters to provide updated financial information on the CSO Funds, and repeated that they were leveraged at only five times the NAV, that its current cash position was twenty percent, and that they were not close to any margin calls (Complaint, ¶ 67). Peters contacted Parameswar again five days later, and inquired as to the total return swaps utilized to provide the CSO Funds with leverage and the related margin requirements. Parameswar misrepresented that the CSO Funds' unencumbered cash position was fifteen percent of the NAV. In actuality, CAI knew that the CSO Funds' liquidity was non-existent, because the CSO Funds could not fund the ProSieben investment without obtaining outside financing.

On August 27, Peters contacted Parameswar, who again misrepresented the percentage of the Master Funds' unencumbered cash, and that the CSO Funds was actually appreciating in value (Complaint, ¶ 73). Parameswar stated that no redemptions had been received for the November 30 redemption deadline, and promised to provide Plaintiffs with a customized transparency sheet showing specific details of the Master Fund's portfolio investments. The monthly CSO Funds exposure report as of August 31 did not include the ProSieben investment, and represented that leverage was five and a half times the NAV (Complaint, ¶ 74).

On September 7, 2007, Plaintiffs' manager selection committee (Selection Committee) met to discuss whether to remain invested or to redeem their interests in the CSO Funds, as of the November 30, 2007 dealing date. Based upon the allegedly false and misleading financial indicators provided by Defendants, the Selection Committee decided not to submit a notice of redemption by the September 30, 2007 deadline (September 30 Deadline).

On September 12, 2007, Parameswar repeated to Peters that the CSO Funds' leverage remained in the four to five range since October 2006, and that only one notice of redemption had been received. Further, he sent Peters a spreadsheet purporting to show the CSO Funds' exposure as of August 31, that did not include the ProSieben transaction (Complaint, ¶ 77).

Plaintiffs' representatives followed up a week later, and requested a meeting in person and by conference call with Pickett, on September 18, 2007 (Complaint, ¶ 78). In that conversation, Pickett assured that the CSO Funds' portfolio "had no potential blow ups," and that the corporate credit quality is strong across the portfolio." He further misrepresented that the Master Fund's unencumbered cash levels remained unchanged from the August estimate of eighteen percent, and that he and other CPJ inside investors were planning to invest more of their own money in the CSO Funds.

Further, Pickett allegedly assured Plaintiffs that he was negotiating with Citigroup to add an additional $120 million to its proprietary investment in the CSO Funds. Finally, Pickett

misrepresented that the internal rate of return on the Master Fund's current portfolio was twenty-five percent. CAI's Parameswar was on the telephone line by conference, and did not object to or contradict any of Pickett's representations (Complaint, ¶ 78).

On September 28, CAI's managing director, Richard Johnson, informed Peters by e-mail that no additional notice of redemption for the CSO Funds had been received (Complaint, ¶ 80).

The Selection Committee met on the eve of the September 30 Deadline to make a final decision as to whether to redeem their shares. They went over all of the financial indicators, reports and representations that were specifically made by Defendants to Plaintiffs concerning the financial status of the CSO Funds' portfolio over the past few months. Based upon all of these representations, Plaintiffs made the final decision not to redeem their interests by the September 30 Deadline.[3]

On October 5, 2007, the MLAs sent another demand letter to the boards of the CSO Funds and Citigroup, informing them that they would commence an action for breach of contract if the CSO Funds did not honor the ProSieben commitment by October 19, 2007. In early December, the CSO Funds succumbed to the threats and agreed to fund the allocation, in addition to paying £800,000 to

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[3] Shares in the CSO Funds are not publicly traded and may not be transferred without their consent. Consequently, the only way for shareholders to sell their shares is to tender them for redemption to the CSO Funds. Shareholders are required to submit a notice of redemption sixty days in advance of one of the quarterly dealing days.

reimburse the MLAs for their legal fees. On December 12, 2007, Pickett resigned.

Defendants allegedly did not correct the inaccurate representations concerning the financial condition of the CSO Funds and the ProSieben allocation until December 2007. On December 14, 2007, CAI and CPL sent a letter to all of the CSO Funds' investors finally disclosing the ProSieben transaction, and Pickett's resignation. The letter stated that the CSO Funds had taken a reserve of $62.4 million based upon a mark to market valuation of the ProSieben loans, that a settlement was procured with the MLAs to take €512 million in ProSieben debt and to pay £800,000 in legal fees to the MLAs. Finally, the letter stated that ProSieben loans were trading between eighty-six and ninety percent of par. However, according to Plaintiffs, the letter did not state that Pickett had exceeded his trading limits, or that he had previously concealed the trade.

Shortly after learning of the ProSieben transaction, Plaintiffs put in redemption notices. However, on January 14, 2008, redemptions in the CSO Funds were suspended, as the value of the CSO Funds plummeted thirty-one percent in the month of January alone.

In February 2008, CPL announced a restructuring plan for the CSO Funds; a Citigroup affiliate acquired thirty-five percent of the ProSieben loan, and the Master Fund purchased the balance, thereby sustaining a total loss of $173,883,836. In November 2008, Defendants decided to liquidate the CSO Funds.

Subsequently, CPL informed investors that they would receive three cents on the dollar for their investment.

In April 2008, Plaintiffs commenced this action asserting five causes of action for fraud and breach of fiduciary duty against Defendants, professional negligence against all defendants except Pickett, negligent misrepresentation against CAI and CPL, and fraudulent inducement against the CSO Funds, CAI, CPL and Pickett.

**Discussion**

The CAI Defendants move to dismiss the complaint in the first instance on the ground that Plaintiffs lack standing to assert direct claims against the CSO Funds' investment manager and its parent. They contend that, because Plaintiffs seek to recover losses that the CSO Funds suffered as a result of the ProSieben transaction, the claims must be asserted derivatively under applicable Caymanian law.

The CSO Funds additionally move to dismiss on the ground that Plaintiffs lack standing to pursue direct claims under Caymanian law for harm allegedly suffered by the CSO Funds, namely the decline of the value in the CSO Funds' portfolio caused by mismanagement. The CSO Funds argue that under the reflective loss doctrine, an individual action by a shareholder is barred when a wrong has been suffered by both the corporation and the shareholder.[4]

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[4] Pickett largely adopts the other defendants' arguments.

A. Standing

Under the internal affairs doctrine, the law of the state of incorporation generally governs a plaintiff's standing to assert claims involving corporate governance (*CPF Acquis. Co. v CPF Acquis. Co.*, 255 AD2d 200, 200 [1st Dept 1998]; *Seybold v Groenink*, 2007 WL 737502, *5 [SD NY 2007]). Although Plaintiffs dispute that its claims seek resolution of issues of corporate governance, review of the parties' submissions from foreign law experts[5] demonstrates that Caymanian law, and the English law from which it derives, recognize the same distinction between a shareholder's standing to assert direct and derivative claims that exist under New York law (*accord Duck Corp. v Macro Fund Ltd.*, 290 Fed Appx 441, 443 [2d Cir 2008]; *In re Granite Partners, L.P.*, 194 BR 318, 325 [SD NY 1996]).

Under Caymanian law, a corporation alone can sue for harm, and an individual shareholder has no standing to bring an action to redress that harm (Meeson Aff., ¶¶ 15-22; Miles Aff., ¶¶ 4-8). Underpinning this principle is the doctrine of reflective loss, whereby a shareholder is prevented from recovering a loss which is merely reflective of the loss suffered by the corporation, in the sense that the shareholder's loss is measured by the diminution of the value of his shares (*Id.*).

The doctrine of reflective loss is analogous to the derivative loss doctrine, that is adhered to in New York (see

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[5] The court may take judicial notice of the common law of a foreign country where the parties furnish the court with expert opinions and case law (CPLR § 4511 [d]).

*Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied* 67 NY2d 758 [1986]; *Higgins v New York Stock Exchange, Inc.*, 10 Misc 3d 257, 264-271 [Sup Ct, NY County 2005]).

Consequently, because there is no discernible conflict between New York and Caymanian law with respect to an individual shareholder's standing to pursue claims, New York law, the law of the forum state applies (*Internal Bus. Machines Corp. v Liberty Mut. Ins. Co.*, 363 F3d 137, 143-44 [2d Cir 2004]; *Stephens v National Distillers & Chem. Corp.*, 1996 WL 271789, *1,5 [SD NY], *rearg denied* 1996 WL 384920 [SD NY] [it is proper to depart from the internal affairs doctrine and apply New York law where there is no conflict of law at issue]).

Otherwise, a claim is not direct simply because it is pleaded that way. Rather, courts must independently scrutinize the nature of the wrongs alleged in the complaint without regard to the plaintiff's designation (*In re Granite Partners, L.P.*, 194 BR at 325, fn 9).

B. Fraud

With respect to the claim for fraud, Plaintiffs have standing to directly assert it against the Defendants. Plaintiffs allege that, while considering redeeming their subscription in the CSO Funds, Defendants fraudulently induced them to retain their shares in the Feeder Funds by directly communicating misleading information to Plaintiffs in one-on-one meetings and conference calls, that did not include other shareholders of the CSO Funds.

The misrepresentations were allegedly made on a number of occasions, and in response to Plaintiffs' specific inquiries concerning the CSO Funds' leverage as a percentage of the NAV, its unencumbered cash reserve and other financial indicators of the CSO Funds' performance. The alleged misleading statements were not communicated to other shareholders of the CSO Funds, but to Plaintiffs alone.

In addition to oral misrepresentations made by Pickett and by CAI investment relations manager, Ramesh Parameswar, Defendants allegedly provided specially prepared reports to Plaintiffs alone, that falsely represented the CSO Funds' financial indicators.

Plaintiffs sufficiently allege that the loss they seek to redress is not merely derivative of a loss that is recoverable to the CSO Funds stemming from a diminution in the value of its portfolio. If any, the CSO Funds were arguably benefitted by the misrepresentations, insofar as Defendants' tortious behavior induced Plaintiffs not to redeem at the inflated NAV listed on the CSO Funds' monthly performance reports.

Further, redemptions reduce liquidity of the CSO Funds' assets and raise leverage (Complaint, ¶ 72). At the time that Defendants allegedly made the misrepresentations, the Master Fund did not have liquid assets available to fund the ProSieben allotment, unless alternate financing could be arranged. Cognizant that Plaintiffs' redemption would further reduce the CSO Funds' liquidity, inducing Plaintiffs not to redeem injured

Plaintiffs in the first instance, and not the CSO Funds.

Moreover, the CSO Funds would not be due any relief for the alleged loss caused by reliance upon Defendants' misleading communications that induced certain subscribers (Plaintiffs) to retain their subscription beyond the redemption deadline, that is not dependent upon a prior injury suffered by the CSO Funds and would exist even if the ProSieben transaction was proper and authorized (*see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033, 1038 [Sup Ct Del 2004] [in determining whether a claim is direct or derivative in nature, courts should consider who suffered the alleged harm, and who would receive the benefit of any recovery or other remedy]).

Rather, only Plaintiffs, to whom the allegedly misleading statements were directly communicated to, could conceivably receive the benefit of any recovery for the ultimate harm that arose out of the retention of their subscription beyond the redemption deadline, that flowed to Plaintiffs in the first instance, measured as of the November 30 redemption date.

Similarly, in *ABF Capital Mgt. v Askin Capital Mgt.* (957 F Supp 1308, 1328-29 [SD NY 1997]), the court sustained the assertion of a direct claim for fraudulent inducement by plaintiff investors in hedge funds against the funds' managers, arising out of their misleading statements concerning their ability to model and hedge securities, and their concealment of poor fund performance.

As in *ABF Capital Mgt.* (*Id.*), while some of the allegations

underpinning Plaintiffs' fraud claim would obviously be relevant to a derivative claim for corporate mismanagement, Plaintiffs allege suffering harm that is not dependent on a harm to the CSO Funds. Namely, Plaintiffs allege ultimate harm flowing from the misrepresentations that induced them to retain their subscription in the CSO Funds, attributable to Defendants misleading statements concerning the funds' leverage, liquidity and performance, that was directly communicated to Plaintiffs and not to other shareholders of the CSO Funds (*compare Lee v Marsh & McClennan Cos.*, 17 Misc3d 1138[A], *2,6-8 [Sup Ct, Nassau County 2007]).

The misrepresentations and misleading information supplied to Plaintiffs that caused them to retain their investment and not to redeem their shares constitutes a fraud, and not corporate mismanagement (*see Fraternity Fund Ltd. v Beacon Hill Asset Mgt. LLC*, 376 F Supp 2d 385, 407, fn 133 [SD NY 2005]; *Primavera Familllienstifung v Askin*, 130 F Supp 2d 450, 494-95 [SD NY], *amended on reconsid, in part, on other ground* 137 F Supp 2d 438, *reopen denied* 202 FRD 112 [SD NY 2001]; *see also Continental Ins. Co. v Mercadante*, 222 AD 181 [1st Dept 1927]). Consequently, Plaintiffs have standing to pursue a direct claim for fraud against Defendants that caused Plaintiffs to retain their subscriptions where action otherwise would have been taken to redeem.

Defendants additionally attack the claim for fraud as being "doubly derivative," because the ProSieben losses were suffered

directly by the Master Fund, and Plaintiffs themselves are direct shareholders in the feeder funds, CSO Ltd. and CSO US.[6]

However, each defendant could be separately liable for fraud based upon each individual's knowing participation to defraud, even if that participation by itself does not suffice to constitute the fraud (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]; *Kuo Feng Corp. v Ma*, 248 AD2d 168, 168-69 [1st Dept], *app dismissed* 92 NY2d 845, *app denied* 92 NY 809 [1998]).

Plaintiffs allege misrepresentations by CAI, CPL, CPL's CEO, Pickett, and the CSO Funds. On this basis, Plaintiffs may maintain fraud claims against them. The master fund-feeder fund structure of the CSO Funds is not a bar to the assertions of the claim.

Alternatively, Plaintiffs allege that CAI completely controlled CPL and the CSO Funds and its investment strategy. On this basis, Plaintiffs allege that CAI and the Master Fund is liable on an alter ego theory, and that the corporate veil of the feeder funds, that are merely shell companies, should be pierced

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Defendants cite to *Lakonia Mgt. Ltd v Meriwether*, 106 F Supp 2d 540, 553, 558 [SD NY 2000]), arguing that the feeder fund-master fund structure is another basis to dismiss shareholder claims. However, at issue in *Lakonia Mgt. Ltd* was the ability of hedge fund shareholders to directly assert RICO claims against defendant-managers in a fraudulent scheme to gain control of the fund and squeeze out investors for insufficient consideration. Moreover, notwithstanding the conclusion that the RICO claims were derivative in nature, Judge Scheindlin expressly stated that she was not addressing the plaintiff's standing to directly pursue state law claims because the court lacked supplemental jurisdiction over those claims (*Id.* at 553, 558, fn 24, 36).

to hold the Master Fund liable for its tortious conduct.

In some instances, the corporate relationship between a parent and its subsidiary is sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]).[7] Courts pierce the corporate veil to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary (*Id.*).

Notwithstanding common ownership and overlapping directors and personnel as between CAI, CPL and the Mater Fund, Plaintiffs' allegations of domination do not establish that their conduct demonstrates a virtual abandonment of separateness, that CAI utilized CPL to perpetrate or fraud, or other indicia of alter ego, that would justify disregarding their separate corporate forms.

C. Negligent Misrepresentation

Under New York law, a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, is such that in morals and good conscience the one has the right to rely upon the other for information (*Kimmell v*

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[7] The court notes that New York law applies to the issue of piercing the corporate veil, because the parties' briefs largely cite to New York law on this issue. Such "implied consent" to use New York's law is sufficient to establish choice of law *Phillips v Audio Active Ltd.*, 494 F3d 378, 386 [2d Cir 2007]). In the absence of such implied consent, Caymanian law would have applied because it is CPL's and the CSO Funds' state of incorporation (*see Klein v CAVI Acquis., Inc.*, 57 AD3d 376, 377 [1st Dept 2008]).

*Schaefer*, 89 NY2d 257, 263 [1996]). Further, in the commercial context, liability for negligent misrepresentation is imposed only upon those persons who may have special relationships of confidence and trust with their clients, whether the person making the misrepresentation held or appeared to hold unique or special expertise, and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose (*Id.*).

Plaintiffs sufficiently allege a heightened duty of care on the part of CPL and CAI to accurately disclose the CSO Funds' financial condition on the basis of their superior expertise, unique positions and knowledge of the CSO Funds' financial indicators, coupled with their regular and direct communication with Plaintiffs between April (prior to the ProSieben allotment) and September 28, 2007 (subsequent the ProSieben trade), in person and by telephone conference call.

Further, Defendants supplied the misleading information in the course of these direct communications that were not made to other shareholders, and was not the type of information that was generally disclosed to investors because it is allegedly considered proprietary in nature.

Additionally, Defendants allegedly made the misleading statements with the awareness that Plaintiffs were using the information in order to make an informed decision whether to redeem or not to redeem (Complaint, ¶¶ 65-81, 110). For these reasons, Plaintiffs sufficiently allege a direct claim for

negligent misrepresentation based upon the failure to accurately disclose the CSO Funds' financial indicators.

Moreover, the Martin Act is not a bar to Plaintiffs' claim. The Martin Act (General Business Law §§ 352-359), that was enacted to protect the public from fraudulent practices, regulates the purchase and sale of securities in "public offerings ... in or from New York" (GBL § 352-e [a]).

Assuming Plaintiffs' allegations as true for the purposes of this motion - as the court must at this stage - because the solicitation of subscriptions in the CSO Funds was not confined to New York but largely took place in Cayman Islands, their interests do not relate to the solicitation and purchase of securities "within or from New York" (*Fraternity Fund Ltd. v Beacon Hill Asset Mgt.*, 376 F Supp 2d 385, 410 [SD NY 2005]).

D. Breach of Fiduciary Duty and Professional Malpractice

In support of its cause of action for breach of fiduciary duty, Plaintiffs allege that Defendants owed a heightened duty directly to Plaintiffs based upon superior knowledge concerning the ProSieben investment and its effect on CSO Funds' financial indicators, that included the duty to exercise vigilance to ensure that CPL and Pickett invested in accordance with applicable trading limits and practices.

As to both claims, Plaintiffs allege that Defendants breached their duties by failing to truthfully state the financial condition of the CSO Funds, failed to adequately monitor CPL and Pickett and ensure that all trades were executed

in compliance with applicable trading limits, and failed to disclose that Pickett violated internal trading limits (Complaint, ¶¶ 96, 98-99, 102-03).

Further, with respect to the professional malpractice cause of action, Plaintiffs allege that Defendants owed a duty to perform professional services with skill, and to ensure that trades were executed in compliance with trading limits and standards.

It is well-settled that claims that seek redress for corporate mismanagement are derivative in nature (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 57 AD3d 411, 411 [1st Dept 2008]).

According to the complaint, Defendants owed a heightened duty to Plaintiffs "as investors in CSO [Funds]," that "arose from plaintiffs' entrusting assets to defendants for investment," and that CAI had an additional duty to keep Plaintiffs accurately informed as to its monitoring of risk, as set forth in marketing materials (Complaint, ¶¶ 95-99, 107). However, such a duty, if any, was owed to all shareholders of the CSO Funds. Otherwise, Plaintiffs fail to allege a duty owed independent of any duty owed to the CSO Funds' themselves (*Abrams*, 66 NY2d at 953).

Moreover, any loss sustained by Plaintiffs would not stem directly from Defendants' injurious conduct, but would be derivative of the decline in value suffered by the CSO Funds, of which the causative factor was the failure to properly monitor risk and oversee the investment manager's CEO, Pickett, and to

prevent him from undertaking the disastrous ProSieben trade in violation of professional standards and internal trading limits.

Finally, the claim for malpractice is redundant, to the extent that it arises out of the same set of operative facts, based upon the same duty of care, and seeking the same relief as other claims (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8 [1st Dept 2008]).

Accordingly, it is

ORDERED that the motion to dismiss is granted, in part and the second and third claims are severed and dismissed, and the motion is otherwise denied, and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: July 28, 2009

ENTER:

J.S.C.

HON. CHARLES E. RAMOS

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK