

<b>TSL (USA) Inc. v Oppenheimer Funds, Inc.</b>
2013 NY Slip Op 30743(U)
April 9, 2013
Sup Ct, NY County
Docket Number: 600976/10
Judge: Charles E. Ramos
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. CHARLES E. RAMOS

PRESENT: \_\_\_\_\_  
Justice

PART 53

Index Number : 600976/2010  
TSL (USA) INC.,  
vs.  
OPPENHEIMERFUNDS, INC.,  
SEQUENCE NUMBER : 013  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

is decided in accordance with  
accompanying memorandum decision and order.

Dated: 4/9/13



\_\_\_\_\_, J.S.C.  
HON. CHARLES E. RAMOS

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
TSL (USA) INC., BRYANT PARK FUNDING LLC,  
and LIBERTY STREET FUNDING LLC,

Plaintiffs,

- against -

OPPENHEIMERFUNDS, INC., HARBOURVIEW  
ASSET MANAGEMENT CORPORATION, and  
AAARDVARK IV FUNDING LIMITED,

Defendants.

-----X

Index No. 600976/10

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

Motion sequences 012 and 013 are herein consolidated for disposition.

In motion sequence 012, the defendants Oppenheimer Funds, Inc. ("Oppenheimer"), Harbourview Asset Management Corporation ("Harbourview"), and AAardvark IV Funding Limited ("AAardvark") move pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs TSL (USA) Inc. ("TSL"), Bryant Park Funding LLC ("Bryant"), and Liberty Street Funding LLC's ("Liberty", collectively, the "Lenders") third amended complaint (the "Complaint"), or in the alternative, for partial summary judgment, dismissing all causes of action, to the extent that the Lenders: (1) rely on the Amortization Events resulting from the Yapi Kredi and Countrywide security purchases, (2) seek to hold the defendants liable for any losses resulting from the Countrywide security purchases, or (3) seek to hold any defendants liable for fraud.

In motion sequence 013, the Lenders move pursuant to CPLR 3212(e) for partial summary judgment on the first cause of action for breach of contract against Oppenheimer.

### **Background**

For a full recitation of the facts, please see this Court's prior decision (NYSCEF Doc. No. 320), entered February 5, 2013 (the "Decision").

Briefly, all parties were participants in an arbitrage system known as AAardvark that used low-interest loans issued by the Lenders to purchase and hold certain securities that would generate enough revenue to pay the interest on the Lenders' loans and retain the excess as profit.

AAardvark executed an administration agreement with Oppenheimer (the "Administration Agreement") designating Oppenheimer as its administrative agent.

Pursuant to the Administration Agreement, Oppenheimer agreed to identify and purchase securities that complied with the investment policy agreed upon by all parties (the "Investment Policy"). The Investment Policy contained restrictions on the individual securities that could be purchased (the "Eligible Security Criteria") and restrictions on the composition of the entire portfolio (the "Portfolio Criteria") (Susman Aff., Ex. A-5, Exhibit C).

In addition, the Administration Agreement identifies the

occurrence of certain events, known as "Amortization Events," that would allow the Lenders to terminate funding to AAardvark immediately (Susman Aff., Ex. A-4, § 1). Under the agreement, Oppenheimer is obligated to promptly notify the Lenders of the occurrence of any Amortization Event.

AAardvark also executed an investment advisory agreement with Harbourview (the "Advisory Agreement") designating Harbourview as its investment advisor. Similar to Oppenheimer, Harbourview also agreed to identify securities that conformed to the Investment Policy for AAardvark's portfolio.

AAardvark executed note purchase agreements with all of the Lenders (the "NPAs"). The Lenders are express third-party beneficiaries of the Administration Agreement and the Advisory Agreement (collectively, the "Transaction Documents") and are entitled to enforce the agreements' provisions as if they were parties thereto (Susman Aff., Ex. A-5, § 13 [u]).

Pursuant to § 3(a)(xvi) of the Administration Agreement, Oppenheimer was responsible for "determining on each Business Day whether an Amortization Event or Suspension Event has occurred or is likely to occur and promptly notifying...each [Lender]...upon the occurrence of any such Amortization Event or Suspension Event" (Susman Aff., Ex. A-4, p. 19).

The relevant portions of the Administration Agreement that define Amortization Event provide that:

"Amortization Event shall mean each and any of the following events, should any occur:

(a) Any representation or warranty made or deemed made by the Company in any of the Transaction Documents to which it is a party or any report delivered by the Company pursuant to any Transaction Document to which it is a party shall be false or incorrect in any material respect when made or at any time thereafter (unless such representation or warranty relates solely to the time it was made) and which continues to be false or incorrect for a period of thirty (30) days after the earlier of (i) written notice thereof to the Company from the Administrative Agent, any VFN Purchaser, any Conduit Administrator or the Controlling Party or (ii) **the date on which [AAardvark] acquires actual knowledge of such false or incorrect statement;** or

(b) The Company fails to perform or observe any term or covenant in any material respect (including, without limitation, failure to comply with the Investment Policy and the failure to meet any financial covenant) but excluding the Amortization Event referred to in clause (g) below under any Transaction Document to which it is a party (which remains unremedied for thirty (30) days after the earlier of (i) receipt of notice thereof under any such Transaction Document and (ii) **the date on which [AAardvark] acquires actual knowledge of such failure);** or...

(n) An Investment Advisor Default shall have occurred" (Susman Aff., Ex. A-4, § 1 **[emphasis added]**).

The relevant portions of the Investment Advisory Agreement defining "Investment Advisor Default" provide that:

"Investment Advisory Default shall mean each and any of the following events should any occur:

(a) Any representation or warranty made or deemed made by the Investment Advisor in any of the Transaction Documents to which it is a party or any report delivered by the Investment Advisor pursuant to any Transaction Document to which it is a party shall be false or incorrect in any material respect when made or at any time thereafter (unless such representation or warranty relates solely to the time it was made) and which continues to be false or incorrect for a period of thirty (30) days after the earlier of (I) written notice thereof to the Investment Advisor from the Administrative Agent, any VFN Purchaser, any Conduit Administrator or the Controlling Party or (ii) **the date on which the Investment Advisor acquires knowledge of such false or incorrect representation or warranty...**" (*id.* [emphasis added]).

#### **The Contentions of the Parties**

The Lenders allege that Oppenheimer breached its duty under the Administration Agreement by failing to notify them of four Amortization Events. Specifically, the Lenders allege that two Amortization Events occurred as a result of AAardvark's purchase of non-conforming securities and the other two Amortization Events occurred as a result of AAardvark incurring greater expenses than the revenue it generated during certain periods of the transaction.

As a result, the Lenders, unaware of the Amortization Events, continued performing under the Administration Agreement by issuing additional loans to AAardvark when, if they were so inclined, they could have terminated funding.

Yapi Kredi Security

The Lenders allege that the first Amortization Event occurred on December 12, 2006, when AAardvark purchased the security identified as Yapi Kredi DPR Finance Company 2006-1 C (the "Yapi Kredi Security").

The Lenders allege that the Yapi Kredi Security did not conform to the Investment Policy because it was not "issued in the public market or issued pursuant to Rule 144A under the Securities Act of 1933, as amended..." (Susman Aff., Ex. A-6, C-4 [13]).

The Lenders argue that Oppenheimer acquired actual knowledge of this fact when it reviewed the Yapi Kredi Security offering memorandum (the "Yapi Kredi OM") which states that the Yapi Kredi Security "[has] not been and will not be registered under the United States Securities Act of 1933, as amended...or the securities or 'blue sky' laws of any states of the United States of America..." (Marks Aff., Ex. 11, p. ii, iii).

Oppenheimer admits to reviewing the Yapi Kredi OM, but nonetheless, concluded "that it was a public offering" (Susman Aff., Ex. A-16, 165:14-166:4; Marks Aff., Ex. 56, 37:2-25). Oppenheimer contends that it was unaware that the Yapi Kredi Security violated the Investment Policy and at all times believed in good faith that it was a conforming security.

Oppenheimer also argues that the purchase of the Yapi Kredi

Security did not trigger an Amortization Event under the Administration Agreement because a breach is not an Amortization Event unless AAardvark acquires "actual knowledge" of the breach and fails to cure within 30 days thereafter (Susman Aff., Ex. A-4, § 1 Amortization Event [a] [b] [n]).

Oppenheimer alleges that they did not receive actual knowledge of the violation until November 2007, when the Lenders informed them that the Yapi Kredi Security did not conform to the Investment Policy. It argues that the Administration Agreement requires that AAardvark obtain actual knowledge of the wrongful conduct, that the purchase was in violation of the Investment Policy, rather than mere knowledge that the securities were purchased.

Furthermore, Oppenheimer argues the purchase of the Yapi Kredi Security cannot form the basis for the Lenders' damages because the last funding request was fulfilled on August 28, 2007.

#### Countrywide Securities

The Lenders allege that the second Amortization Event occurred on April 30, 2007 when AAardvark purchased a security identified as Countrywide Alternative Loan Trusts 2007-12T1 A7 (the "Countrywide ALT Security").

The Lenders allege that this purchase violated the Related Issuer limit contained in the Portfolio Criteria, which provides

that "[t]he aggregate Face Amount of Securities issued by Related Issuers shall not exceed 8% of the 'Maximum MOFA'" (Susman Aff., Ex. A-5, Ex. C-7).<sup>1</sup> The provision essentially mandates a certain level of diversity of the securities within AAardvark's portfolio.

The Lenders allege that the Countrywide Securities were issued by "Related Issuers" because either a majority of the underlying mortgage loans were originated by Countrywide Home Loans, Inc., or they were issued by Affiliates, as defined in the Advisory Agreement (PSMF, ¶¶ 146-8).<sup>2</sup>

The Countrywide ALT Security combined with other Countrywide securities already held by AAardvark (collectively, the "Countrywide Securities") resulted in AAardvark having more than 8% of Maximum MOFA invested in securities that were issued by Related Issuers.

The Administration Agreement provides that the Portfolio Criteria would not apply until the earlier of March 30, 2007 or when the portfolio reached \$780 million or 60% of MOFA.

Oppenheimer argues that the Portfolio Criteria was not operable when the Countrywide Securities were purchased because

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<sup>1</sup> Maximum MOFA is the maximum amount that the Lenders were obligated to lend to AAardvark. MOFA is defined as Maximum Outstanding Facility Amount (Susman Aff., Ex. 2, p. 5).

<sup>2</sup> "PSMF" refers to the Plaintiffs' Response to Defendants' Statement of Material Facts and Plaintiffs Counterstatement of Additional Material Facts.

the parties agreed to delay the application of the Portfolio Criteria. On April 27, 2007, the parties executed an amendment (the "Amendment") to the transaction documents that purportedly extended the application of the Portfolio Criteria because the portfolio had taken longer to construct than the parties anticipated.

However, due to an alleged error in drafting, the Amendment failed to extend the period for which the Portfolio Criteria would not apply and instead, merely amended the definition of "Ramp-Up Date," which does not affect the application of the Portfolio Criteria. Despite the drafting error, Oppenheimer alleges that the parties intended the application of the Portfolio Criteria to be extended the earlier of July 20, 2007 or when the portfolio reached \$780 million.

The Lenders deny that there was an agreement to extend the application of the Portfolio Criteria. The Lenders argue that the Advisory Agreement and the Amendment are unambiguous and the Court should enforce the express language of the agreement.

Waiver-Countrywide

Oppenheimer argues that in any event, the Lenders waived their right to object to the extension because the portfolio reports issued between April 2007 and July 2007 (the "Portfolio Reports") each contain a footnote that states that the "Portfolio Criteria shall apply on the earlier of (I) July 20, 2007, or (ii)

the date on which the [portfolio] exceeds \$780 million" (Susman Aff., Ex. A-24-A-29).

In support of its argument, Oppenheimer submits deposition testimony from the Lenders, wherein they testified that their understanding of the transaction was that the Portfolio Criteria would not apply until July 20, 2007 as opposed to March 30, 2007 (Susman Aff., Ex. A-31, 60:5-18; Ex. A-32, 62:2:10).

The Lenders dispute Oppenheimer's argument that its failure to object to Oppenheimer's misstatements in the Portfolio Report can be construed as a waiver of AAardvark's contractually mandated compliance with the Portfolio Criteria, especially because Oppenheimer, and not the Lenders, were contractually obligated to monitor AAardvark and verify the information contained in the Portfolio Reports. Furthermore, the Lenders deny that they ever intended to extend the application of the Portfolio Criteria.

Excess Spread

The remaining two Amortization Events involve the Excess Spread, which is defined as "on any Settlement Date, an amount equal to (I) any interest income on the Securities received by [AAardvark]...during the period starting on and including the previous Settlement Date to but excluding such current Settlement Date minus (ii) the amount payable by [AAardvark] pursuant to clauses (I) to (vii) of [§] 5.3(b) of the Security Agreement on

such Settlement Date" (Susman Aff., Ex. A-4, p. 7).<sup>3</sup>

The security agreement executed between AAardvark and JP Morgan Chase Bank, N.A., as collateral agent (the "Security Agreement") denotes the order of priority for distributions from AAardvark (the "Waterfall") (Susman Aff., Ex. A-6, p. 8).

The Administration Agreement provides that an Amortization Event would occur if "on any Settlement Date, the weighted average Excess Spread is less than 0" (Susman Aff., Ex. A-4, [1]). To determine the weighted average Excess Spread, Oppenheimer would take the Excess Spread and then divide that number by the amount of expenses payable by AAardvark under § 5.3(b) of the Security Agreement.

The Lenders allege that AAardvark had a negative weighted average Excess Spread on March 30, 2007 (the "March Settlement Date") and on June 29, 2007 (the "June Settlement Date", collectively, the "Settlement Dates") that triggered Amortization Events pursuant to the Administration Agreement.

The March Amortization Event (Excess Spread)

The Lenders allege that on the March Settlement Date, AAardvark had \$4,237,185.08 available for distribution, but owed \$4,248,031.67 in expenses, thus, AAardvark had an Excess Spread of negative \$10,846.59. As a result, Lenders contend that an

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<sup>3</sup>It is undisputed that March 30, 2007 and June 29, 2007 are Settlement Dates, as defined by the Administration Agreement (Susman Aff., Ex. A-4, p. 16).

Amortization Event occurred on the March Settlement Date because the weighted average Excess Spread was negative 0.26% (negative \$10,846.59 divided by \$4,248,031.67).

Oppenheimer argues that the Lenders are improperly including additional expenses into the calculations that were not "owing and payable" on the March Settlement Date. Oppenheimer contends that if those expenses are excluded, the Excess Spread would have been greater than zero. Specifically, there are disputes regarding fees payable to the Bank of New York, Oppenheimer, and Ogier SPV Services Limited, the offshore administrator.

The June Amortization Event (Excess Spread)

The Lenders allege that on the June Settlement Date, AAardvark had \$6,848,231.86 available for distribution, but owed \$6,868,138.11 in expenses, thus, AAardvark had an Excess Spread of negative \$19,906.25. As a result, an Amortization Event occurred on the March Settlement Date because the weighted average Excess Spread was negative 0.29% (negative \$19,906.25 divided by \$6,868,138.11).

On September 20, 2007, Oppenheimer admitted, by letter, that an Amortization Event occurred because AAardvark had a negative weighted average Excess Spread on the June Settlement Date. Thereafter, Oppenheimer stipulated twice that an Amortization Event occurred pursuant to the Administration Agreement.

Now, Oppenheimer is alleging that the average weighted Excess Spread was actually greater than zero on the June

Settlement Date contrary to its admissions in September 2007.

It alleges that it was mistaken when it stated that there was an Amortization Event due to erroneous calculations and that no Amortization Event actually occurred.

It is unclear from the record what precipitated the delay in notifying the Lenders immediately after the June Settlement Date of the negative Excess Spread. Clearly, Oppenheimer still believed in September 2007 that an Amortization Event occurred on the June Settlement Date or it would not have admitted so in its letter. No explanation is provided for the absence of any notification by Oppenheimer of the June 2007 Amortization Event in July 2007 or August 2007.

It is undisputed that, between March 2007 and September 2007, Oppenheimer and Harbourview issued 72 Notices of Borrowing that each represented that there no Amortization Events had occurred (Marks Aff. Vol. III, Exs. 34-36). The Lenders argue that each representation is a separate breach of the Administration Agreement because there was an ongoing Amortization Event as of the March Settlement Date.

Furthermore, the Lenders have alleged that on the Settlement Dates, Oppenheimer modified the priority of the distributions contained in the Waterfall in an effort to conceal the occurrence of the Amortization Events by paying steps (v) and (vi) out of order (PSMF, ¶¶ 249-250, 312-313).

### Materiality

Oppenheimer argues that the shortfalls on the Settlement Dates were immaterial because the provision does not contain the term "materiality," even though it was used in other provisions within the Administration Agreement.

Oppenheimer attributes the shortfall on the June Settlement Date to a "mechanical timing mismatch" (DSMF, ¶ 309).<sup>4</sup> It alleges that because a timing mismatch is not indicative of any performance issues with AAardvark, the Lenders were intending to waive the June Settlement Date Amortization Event. Additionally, Oppenheimer submits communications from the Lenders discussing the possibility of a waiver, but notably, absent from the record is an actual written waiver from any of the Lenders.

### Exculpation Clause

Oppenheimer also argues that notwithstanding its alleged failure to notify Lenders of the Amortization Events, it is exculpated from liability pursuant to § 5 the Administration Agreement (the "Exculpation Clause").

The Exculpation Clause exculpates the Defendants from liability "for losses resulting from investments made by [AAardvark] in Securities except for a loss resulting from the Administrative Agent's gross negligence or willful misconduct" (Susman Aff., Ex. A-4, § 5).

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<sup>4</sup> "DSMF" refers to the Defendant Oppenheimer's Rule 19-a Statement of Material Facts.

Oppenheimer contends that any alleged damages suffered by the Lenders are within the scope of the Exculpation Clause because the Lenders' funds were used by AAardvark solely to purchase securities and AAardvark's sole purpose was to invest in securities.

Thus, Oppenheimer argues that pursuant to §§ 1, 5 of the Administration Agreement, the Lenders have to demonstrate that the Defendants acquired actual knowledge of the Yapi Kredi Security and Countrywide Security breaches and then acted with gross negligence in failing to cure the violations. Similarly, with respect to the Excess Spread Amortization Events, the Lenders have to demonstrate that Oppenheimer's failure to notify them was due to gross negligence or willful misconduct.

The Lenders argue that the Exculpation Clause does not apply here because they were not investing in securities, rather they were merely fulfilling their funding obligations pursuant to the NPAs.

Instead, the Lenders contend that they are seeking to hold Oppenheimer liable for its failure to perform its duties as Administrative Agent, specifically, notifying the Lenders upon the occurrence of an Amortization Event and not for losses arising from the diminution in value of the securities purchased with the loans issued after the Amortization Event.

## Discussion

### The Amortization Events

Clearly many questions of fact have been raised with respect to the claims and defenses set forth above, which preclude summary disposition for any of the parties on those issues.

### Fraud

However, unlike the foregoing, the fraud claim is dismissed with prejudice.

The Lenders allege that between September 21, 2006 and March 30, 2007, the Defendants misrepresented that AAardvark had received enough income to cover its expenses for that time period. Based on this misrepresentation, the Defendants are alleged to have further misrepresented that: (1) the weighted average Excess Spread was greater than zero, (2) AAardvark passed the weighted average Excess Spread test, and (3) no Amortization Event occurred. The Lenders allege that these were misrepresentations of present facts.

The cause of action for fraud fails because the alleged misrepresentations are clearly not extraneous to the Transaction Documents because they are directly related to Oppenheimer and Harbourview's obligations under those agreements (*Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [1st Dept 2010] [determination that a cause of action for fraud premised on duties required under the parties' agreement is duplicative of a

cause of action for breach of contract)).

**Damages**

Notwithstanding issues of fact with respect to the occurrence of Amortization Events, this Court finds that an overriding issue relating to damages must be addressed. Remarkably, it is not disputed by the Lenders that the portfolio is still performing as expected. The Lenders have not asserted that the alleged breaches have caused them any loss. Lenders merely seek a return of their funds for what on the face of the allegations states a breach of contract. The Lenders agree that they are not seeking damages for the loss in value of the AAardvark portfolio, rather they argue that they are seeking as "damages" the return of the balance of the unpaid loans issued to AAardvark after Oppenheimer failed to notify them of the Amortization Event on March 30, 2007, which, they contend, released them from their obligation to continue to issue loans to AAardvark. What is lacking is an allegation that the Lenders sustained damages.

The Defendants contend that absent an allegation of damages, the Lenders have not alleged a cognizable theory that warrants a recovery. They argue that the Lenders are essentially seeking rescission because they seek the return of all the funds they advanced after the occurrence of an alleged Amortization Event. Furthermore, the Defendants assert that because the AAardvark portfolio is still performing as expected, there is no evidence

that the Lenders will be unable to recover the principal balance of the unpaid loans.

Arguably, the Defendants could be ultimately liable for any diminution of the collateral for the Lenders' loans, the AAARDvark portfolio, but the Lenders have not alleged that the portfolio was diminished in any way by the alleged breaches and have not submitted any evidence that they would be unable to recover the unpaid principal balance of the loans when due. Furthermore, the Lenders do not assert that any gains were prevented or any opportunities lost as a result of Oppenheimer's alleged breach. The Lenders may be able to allege a breach of contract, but they can not quantify what contract damages, if any, they have suffered.

This is an action seeking a legal, not an equitable remedy. Based on the instant record, this Court is unable to determine what monetary injury the Lenders have actually suffered (if any) as a result of Oppenheimer's alleged breach of the Administration Agreement. Clearly, if the portfolio does not perform as expected, damages could be recovered. But, the Lenders' present theory of money damages is simply too speculative to sustain their causes of action (*Lloyd v Town of Wheatfield*, 67 NY2d 809 [1986]).

Furthermore, the authority cited by the Lenders to support their theory of damages is clearly distinguishable. Lenders cite *FDIC v Hoyle*, where the plaintiff alleged that it only issued a

mortgage based on the defendants' fraudulent appraisal and was able to recover the unpaid balance of the mortgage after the property was sold at foreclosure (*FDIC v Hoyle*, 2012 US Dist LEXIS 130957, \*6 [ED NY 2012]). However, the *FDIC* court was able to determine that the plaintiff "suffered injury as a natural and probable consequence of the defendants' inflated appraisal" based on the fact that the property was sold at foreclosure for an amount less than the appraised value (*id.* at \*26). Thus, the *FDIC* court had the benefit of a measurable injury, which is not present here.

In the instant action, the Lenders have failed to demonstrate that they have suffered an actual, as opposed to a possible, injury. It would be analogous to the *FDIC* court awarding damages before the property was sold at foreclosure. No authority has been provided that would support such a speculative determination of damages.

Therefore, this Court finds that the action for damages is, at best, premature and the Complaint as drafted is subject to dismissal. Such a dismissal will be without prejudice to a new action by the Lenders in the event they do sustain damages.

#### **Specific Performance**

In addition, *sua sponte*, this Court hereby grants the Lenders leave to replead to assert a cause of action for specific performance or other equitable relief, if they are so advised.

The Lenders may wish to obtain some relief now by seeking to compel the Defendants to cure the alleged defects in AAardvark's portfolio, such as, by requiring them to replace any non-conforming securities with securities conforming to the Investment Policy. If granted, such relief would ease the risk the Lenders complain of.

Accordingly, it is

ORDERED that the defendants motion for summary judgment is granted in part, dismissing the fourth cause of action for fraud in the Complaint with prejudice, and it is further

ORDERED that the remaining claims for breach of contract, are dismissed without prejudice, and it is further


ORDERED that the plaintiffs are granted leave to replead, if so advised, to assert a cause of action for specific performance within thirty (30) days from the date of entry of this decision, and it is further

ORDERED that the plaintiffs' motion for partial summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: April 9, 2013

ENTER:

  
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J.S.C.  
HON. CHARLES E. RAMOS