

Oppenheimerfunds, Inc. v TD Bank, N.A.

2014 NY Slip Op 30379(U)

February 5, 2014

Supreme Court, New York County

Docket Number: 653299/2011

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____
Justice

PART 3

Index Number : 653299/2011
OPPENHEIMERFUNDS, INC.
vs
TD BANK, N.A.
Sequence Number : 001
DISMISS ACTION

INDEX NO. 653299/2011
MOTION DATE 10/17/2013
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1

Answering Affidavits — Exhibits No(s) 2

Replying Affidavits No(s) 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2-5-14

[Signature] J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] 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: PART 3

-----X
OPPENHEIMERFUNDS, INC. AND OPPENHEIMER
MULTI-STATE MUNICIPAL TRUST ON BEHALF OF
ITS SERIES OPPENHEIMER PENNSYLVANIA
MUNICIPAL FUND, AND OPPENHEIMER
ROCHESTER NATIONAL MUNICIPALS,

Plaintiffs,

Index No. 653299/2011
Motion Date: 10/17/2013
Motion Seq. No. 001, 002,
003

-against-

TD BANK, N.A., WESTLB AG (NEW YORK BRANCH),
FARM CREDIT BANK OF TEXAS, FIRST UNITED
BANK & TRUST, NGP CAPITAL RESOURCES
COMPANY, AND PLAINFIELD GAMING II INC.,

Defendants.

-----X
BRANSTEN, J.:

This matter comes before the Court on the motions to dismiss filed by Defendants TD Bank, N.A. ("TD"), WestLB AG, New York Branch ("WestLB"), Farm Credit Bank of Texas ("Farm Credit"), NPG Capital Resources Company ("NPG"), and Plainfield Gaming II Inc. ("Plainfield").

In motion sequence no. 001, defendant TD moves to dismiss the complaint with prejudice on the grounds that plaintiffs: (1) lack standing to assert contract claims, (2) fail to include necessary parties, and (3) fail to state a cause of action. In motion sequence no. 002, defendant WestLB moves, pursuant to CPLR 3211, for an order dismissing the complaint on the same grounds as those set forth in TD's motion, as well as the additional ground that plaintiffs' claims are nonjusticiable. WestLB also moves to dismiss the cause

of action for fraud asserted as against it. In motion sequence no. 003, defendant First United moves, pursuant to CPLR 3211, for an order dismissing the complaint with prejudice, and all causes of action asserted as against it, for the same reasons as set forth in the prior motions. These three motions are consolidated for disposition.

By separate affirmations dated March 22, 2013, defendants Plainfield and NPG join in the motions to dismiss. By affirmation dated March 25, 2013, defendant Farm Credit also joins in the motions to dismiss.

For the reasons set forth below, the motions to dismiss are granted, and the complaint is dismissed as against the moving parties.

I. Background

This action arises out of the financing of an ethanol plant built in Clearfield, Pennsylvania by Bionol Clearfield, LLC (“Bionol”). Bionol is now liquidating in the United States Bankruptcy Court for the District of Delaware under Chapter 7 of the Bankruptcy Code. A Senior Intercreditor Agreement, as well as a Senior Credit Agreement entered into in connection with that financing, established various tranches of debt to be repaid by Bionol in a specified order of priority. Plaintiffs are owners of \$65 million of bonds (the “Bonds”), which formed one tranche of debt under the agreements. Plaintiffs contend that they agreed to acquire the Bonds on the condition that, in the event

of a default, the Bonds would share *pari passu* with defendants – the senior lenders – in the collateral security. Plaintiffs further contend that they purchased the Bonds after reviewing a draft of the Senior Intercreditor Agreement. However, the final version of the agreement states that defendants’ claims under the secured credit facility would be senior to plaintiffs’ claims under the Bonds following a default (which subsequently occurred).

Plaintiffs now seek to reform and rescind the Senior Intercreditor Agreement. The complaint asserts only one count against most of the defendants – a “cause of action for equitable relief.” This single count includes assertions of equitable reformation, equitable rescission, unilateral mistake, equitable estoppel, unjust enrichment, and equitable subordination. The complaint also contains a cause of action against defendant WestLB for fraud.

I. Background

A. The Operative Agreements

On February 6, 2008, Bionol, as borrower, entered in the Senior Credit Agreement with various lenders, including defendants TD Banknorth N.A. (TD’s predecessor), WestLB (now known as Portigon AG, New York Branch), Farm Credit, First United, NGP and Plainfield. *See* Affirmation of Noah Stern (“Stern Affirm.”) Ex. A (Senior

Credit Agreement). On the same day, the lenders entered into a Senior Intercreditor Agreement. *Id.* Ex. B (Senior Intercreditor Agreement). Non-party Wells Fargo Bank, N.A. (“Wells Fargo”) was also a lender and a party to each of these agreements.

As part of the financing of the Bionol plant, the Pennsylvania Economic Development Financing Authority (the “PEDFA”) issued a \$65,000,000 secured note to Bionol under a separate loan agreement (the “Tranche TEX Loan Agreement”). To obtain the funds to lend to Bionol, PEDFA issued the Bonds, which were governed by an Indenture of Trust, dated as of January 1, 2008. *Id.* Ex. C (the Indenture). Under the Indenture, Wells Fargo acted as trustee (the “Bond Trustee”). (Compl. ¶¶ 24-25.) Plaintiffs allege that they are the sole owners of the Bonds.

Plaintiffs are neither lenders under, nor signatories to, the Senior Intercreditor Agreement and the Senior Credit Agreement. Plaintiffs allege that Wells Fargo signed the Senior Intercreditor Agreement “on behalf of OppenheimerFunds.” *Id.* ¶ 24. However, the Senior Intercreditor Agreement and the Senior Credit Agreements state that Wells Fargo signed each of those documents on its own behalf, as “Lender,” and not on behalf of plaintiffs or any other party. *See* Senior Intercreditor Agreement and Senior Credit Agreement, at signature pages.

In addition, both the Senior Intercreditor Agreement and the Senior Credit Agreement state that there are no third party beneficiaries to either agreement. The Senior Intercreditor Agreement provides that:

Nothing in this Agreement shall give to . . . any . . . Person (other than the parties hereto and their successor and permitted assigns) any benefit or any legal or equitable right or remedy under this Agreement.

(Senior Intercreditor Agreement, § 5.04.) The Senior Credit Agreement similarly provides that:

nothing in this Agreement or any other Financing Document, express or implied, shall give to any Person, other than the parties hereto and thereto, and each of the successors and permitted assigns under this Agreement or any other Financing Document, any benefit or any legal or equitable right or remedy under this Agreement.

(Senior Credit Agreement, § 10.04.)

In addition, neither agreement states that Wells Fargo – which signed each of these documents as a “Lender” – was acting on behalf of plaintiffs or any other Bond owner.

The Senior Intercreditor Agreement contains a “waterfall” provision that sets forth a designated order of priority and places the Lenders’ priority in the collateral ahead of that of the Bonds. As described in the Senior Intercreditor Agreement, the loans to Bionol were divided into tranches, including (1) “Tranche A Loans,” (2) “Tranche B Loans,” (3) “Tranche C Loans,” (4) a tranche for “Working Capital” loans, and, (5) “Tranche TEX Loans.” (Compl. ¶ 20; Senior Intercreditor Agreement at 1, 3.) “Tranche

TEX Loans” refers to those Bonds for which Wells Fargo (and now its successor U.S. Bank) is the only Lender. *Id.* Ex. A.

As executed, Section 3.04(f)(iv) of the Senior Intercreditor Agreement provides that, in the event of a liquidation:

principal shall be paid in the following order of priority . . . first, to the Tranche A Lenders; second, to the Tranche B Lenders; third, to the Working Capital Lenders; and fourth, the Bond Trustee in respect of the Tranche TEX Loans.

(Senior Intercreditor Agreement, ¶ 3.04(f)(iv).) The agreement provides that the Tranche C Lenders are to be paid after the Tranche TEX Loans. *Id.* §§ 3.04(f)(v) & (vi).

Plaintiffs refer in their complaint to those defendants – TD, WestLB, Farm Credit and First United – who will be paid ahead of the Tranche TEX as the “Senior Lending Group” (Compl. ¶ 9.)

During the nearly three years after the Senior Intercreditor Agreement was executed, neither plaintiffs nor Wells Fargo, the Bond Trustee, complained that the agreement was wrong or failed to reflect a meeting of the minds. As plaintiffs allege in the complaint, when Bionol’s liquidity became tenuous towards the end of 2010, plaintiffs were contacted by counsel for Wells Fargo, who “stated that OppenheimerFunds should be vigilant in monitoring the performance of the Plant, because OppenheimerFunds likely would receive nothing from a liquidation as a result of

its junior status with respect to the repayment of principal in such a situation under Section 3.04(f)(iv) of the Senior Intercreditor Agreement.” *Id.* ¶¶ 31-32.

Plaintiffs allege that they are the sole holders of the Bonds, and that the Indenture provides them with certain rights to enforce Wells Fargo’s rights under the Indenture. *Id.* ¶¶ 35-36. Unlike the Senior Intercreditor Agreement and the Senior Credit Agreement, the Indenture expressly provides that the Bond “Owners” are third-party beneficiaries of the Indenture:

Except as herein otherwise specifically provided, nothing in this Indenture expressed or implied is intended or shall be construed to confer upon any person, firm, corporation or entity other than . . . the Trustee and the Owners of the Bonds any right, remedy or claim under or by reason of this Indenture, this Indenture being intended to be for the sole and exclusive benefit of the . . . Trustee and the Owners of the Bonds.

(Indenture, § 12.02.)

However, while the Indenture provides certain opportunities for the Owners to step into the shoes of the Bond Trustee to enforce specified rights, *see id.*, § 8.05, it also states that any such right is limited by the provisions of the Senior Intercreditor Agreement. *See id.* § 8.12 (“[n]otwithstanding any provisions of this Article VIII (Defaults and Remedies), all defaults and remedies shall be subject to the terms and conditions of the Senior Intercreditor Agreement”). This includes the limitation set forth in the Senior Intercreditor Agreement, which precludes the existence of any third-party beneficiaries.

The Indenture also states that a fiduciary relationship exists between Oppenheimer Funds, as “Owner” of the bonds, and Wells Fargo, as bond Trustee. *See id.* § 12.02. In contrast, no fiduciary relationship is created between the parties to the Senior Credit Agreement or the Senior Intercreditor Agreement. *See, e.g.,* Senior Credit Agreement § 9.03(a)(i) (“Agents” under Senior Credit Agreement (Administrative Agent, Collateral Agent, Syndication Agent and Accounts Agent, all as defined in the Senior Credit Agreement) have no fiduciary duty or other implied duties under Senior Credit Agreement). Moreover, the Senior Intercreditor Agreement provides that no Lender has relied on information provided by any other Lender:

Notwithstanding any other provision of this Agreement to the contrary, it is hereby acknowledged and agreed that no Lender has relied, or shall rely, on any other Lender to review or evaluate the condition of a Borrower, any Affiliate of any thereof, the Project or any Person Each Lender has decided or determined to enter into the Financing Documents to which it is a party on the basis of its own independent judgment, without reliance or information provided by or expected from, or views expressed by, any other Lender.

(Senior Intercreditor Agreement, § 4.01; *see also* Senior Credit Agreement, § 9.08

(similar “no reliance” provision).

B. *The Instant Action*

The gravamen of the complaint is that the executed version of the Senior Intercreditor Agreement did not reflect plaintiffs’ original understanding that there would

be parity of payment priority in the event of a liquidation. (Compl. ¶ 40.) More specifically, plaintiffs allege that WestLB approached them in November 2007 about purchasing the Bonds, and that they agreed to consider the investment on the condition that the Bonds be at equal payment priority with the Senior Lending Group's secured tranches of debt in the event of a liquidation or similar scenario. *Id.* ¶ 15. Plaintiffs further allege that WestLB informed them in early 2007 that the equal payment priority condition "was acceptable." *Id.* ¶ 16.

Plaintiffs allege that they agreed to purchase the Bonds after reviewing a draft of the Senior Intercreditor Agreement, provided by defendants on January 24, 2008. The draft provided that the Bonds would be treated *pari passu* with the debt tranches held by the Senior Lending Group. *Id.* ¶¶ 21-22. Plaintiffs concede that they did not read any drafts or final version of the deal documents in the intervening two weeks between the January 24, 2008 draft Senior Intercreditor Agreement, and the February 6, 2008 final agreement executed at closing, *Id.* ¶ 27, which, contrary to the draft agreement, dictates that following a default, the lenders' claims under the secured credit facility would have a senior interest in the collateral security to the claims under the Bonds. Plaintiffs also concede that they were not present at the in-person pre-closing, or the February 6, 2008 closing of the Bionol financing transaction, *id.* ¶ 23, and they do not allege that their alleged representatives from Wells Fargo were at the closing or pre-closing.

Plaintiff concede that for nearly three years after the documents were executed, they never reviewed the waterfall provision in the Senior Intercreditor Agreement to confirm that it accurately reflected what they allege was the most significant underlying premise of their decision to take part in the Bionol Plant financing. *Id.* ¶¶ 15, 31-32. Rather, plaintiffs allege that they first learned, three years after the February 6, 2008 closing, that the Senior Intercreditor Agreement “did not reflect the [equal payment parity] condition [they] demanded,” *id.* ¶ 32, when Wells Fargo’s counsel, who was aware of the waterfall provisions in the final agreement, called and stated that in the event of a liquidation, plaintiffs “likely would receive nothing ... as a result of [their] junior status with respect to the payment of principal.” *Id.* ¶ 32.

Due to a dispute with Getty Petroleum Marketing over ethanol delivery contracts, Bionol’s ethanol plant began to operate at a loss, and Bionol became unable to make its required loan and Bond payments. As a result, Bionol filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware on July 20, 2011. *Id.* ¶ 30. According to the complaint, if estate assets “are distributed pursuant to the purportedly executed version of the Senior Intercreditor Agreement, OppenheimerFunds will be harmed and the Senior Lending Group will reap the benefit of the payment priority scheme that was improperly created as a result of the wrongful alteration of the Senior Intercreditor Agreement.” *Id.* ¶ 33.

TD removed this action to the Federal District Court for the Southern District of New York, alleging that federal bankruptcy jurisdiction existed over plaintiffs' claims. The case then was transferred to the District of Delaware Bankruptcy Court. In its two-page letter ruling, the Delaware Bankruptcy Court found that plaintiffs' claims arguably implicated the administration of Bionol's bankruptcy estate; however, it remanded the case to this court, in part because it found that plaintiffs' equitable subordination claim arose under state law, rather than the bankruptcy code. *See Stern Affirm. Ex. E.*

Plaintiffs now seek reformation of the Senior Intercreditor Agreement, contending that, as set forth in the January 24, 2008 draft of the Senior Intercreditor Agreement, any final deal was required to have the Bonds share pari passu with the Senior Lending Group in the event of a default, liquidation, or other similar adverse development.

II. Discussion

Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true," *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *see also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976), "factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 220 (1st Dep't

1991) (citation omitted), *lv. denied* 80 N.Y.2d 788 (1992); *see also Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233 (1st Dep't 1994).

Construing the complaint in the generous manner to which it is entitled, this court nevertheless concludes that defendants' motions to dismiss must be granted, and the complaint dismissed.

A. *Defendants' Motion to Dismiss Plaintiffs' Cause of Action for Equitable Relief*

In support of their motions to dismiss, defendants contend that plaintiffs' claim for equitable relief fails for three independent threshold reasons: (1) plaintiffs lack standing to assert their claims against defendants because they are not parties or third-party beneficiaries of the relevant agreements, and do not have any other grounds upon which to assert standing to bring claims against them; (2) plaintiffs have failed to join indispensable parties such as Wells Fargo and U.S. Bank; and (3) plaintiffs' claims are unripe and nonjusticiable, since they fail to plead a cognizable injury.

Plaintiffs assert that they have standing to seek reformation of the Senior Intercreditor Agreement because it was executed by Wells Fargo in its capacity as Bond Trustee, on behalf of plaintiffs. Plaintiffs further contend that Wells Fargo and U.S. Bank are not indispensable parties, since they have no interest in the parity of payment terms under the agreement. Finally, plaintiffs argue that this action is ripe for adjudication

because the market value of the Bonds was adversely affected by their junior priority.

These arguments will be considered in turn.

1. Standing

This Court finds that plaintiffs have failed to establish standing to assert the cause of action for equitable relief, requiring dismissal of plaintiffs' claim.

Under New York law, a party lacks standing to enforce the terms of an agreement unless the party has contractual privity or is a third-party beneficiary of the agreements.

See Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 N.Y.2d 220, 226-227 (1990);

see also CFIP Master Fund, Ltd. v. Citibank, N.A., 738 F. Supp. 2d 450, 478-479

(S.D.N.Y. 2010) (under New York law, only a party or a third-party beneficiary can bring suit to reform or rescind an agreement); *Eaton Vance Mgmt. v. ForstmannLeff Assoc., LLC*, 2006 WL 2331009, at *6 (S.D.N.Y. 2006) (same).

Here, plaintiffs are neither parties nor signatories to either the Senior Intercreditor Agreement or the Senior Credit Agreement. Importantly, the Senior Intercreditor Agreement and the Senior Credit Agreement were executed by Wells Fargo in its capacity as a "Lender." Contrary to plaintiffs' argument, Wells Fargo did not sign either the Senior Intercreditor Agreement or the Senior Credit Agreement in its capacity as "Bond Trustee." The term "Lenders" is defined in the Senior Intercreditor Agreement as the

“Lenders party [to the Senior Credit Agreement] from time to time,” *see* Senior Intercreditor Agreement at 1, and in the Senior Credit Agreement as “the persons identified as ‘Lenders’ and listed on the signature pages of this Agreement.” *See* Senior Credit Agreement Ex. A at 24. Thus, construing the agreements as written, when Wells Fargo executed the Senior Intercreditor Agreement and the Senior Credit Agreement, it did so in its capacity as “Lender” under the credit agreements, and not in its capacity as “trustee” of the Bonds under the Bond Indenture. Thus, contrary to plaintiffs’ arguments, it did not do so on behalf of plaintiffs.

CFIP Master Fund, Ltd. v. Citibank, N.A., 738 F. Supp. 2d 450 (S.D.N.Y. 2010) is directly on point. In that case, the plaintiff, an investment fund, purchased the beneficial interest in the sell-side of a credit default swap issued by a trust. The credit default swap was memorialized in a confirmation executed by the trustee and by Citibank (the credit protection buyer) but not by the plaintiff. The Court held that the plaintiff did not have standing under New York law to pursue either direct or third-party beneficiary claims against Citibank under the credit default swap confirmation because “the Confirmation uses a defined term ‘Parties’ to refer to two parties that do not include [the plaintiff], and expressly limits enforcement of the provisions of that agreement to the two Parties.” *Id.* at 478. The Court saw “no reason to disregard these clear provisions,” *id.*, and

“decline[d] to contort the clear provisions of the Confirmation to permit [the plaintiff] to sue directly or as third-party beneficiary.” *Id.* at 479.

Likewise, here, plaintiffs are not parties to the Senior Intercreditor Agreement or the Senior Credit Agreement, and thus have no standing to assert their claims.

It is also clear that plaintiffs are not third-party beneficiaries of either agreement. Under New York law, where, as here, “a provision in the contract expressly negates enforcement by third parties, that provision is controlling.” *IMS Engrs.-Architects, P.C. v. State of New York*, 51 A.D.3d 1355, 1358 (3d Dep’t 2008); *see also Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786-787 (2006) (holding that plaintiffs lacked standing to bring suit where agreement “explicitly negate[d] any intent to permit its enforcement by third parties such as plaintiffs”); *Matter of Baltia Air Lines v. CIBC Oppenheimer Corp.*, 273 A.D.2d 55, 56 (1st Dep’t 2000).

Section 5.04 of the Senior Intercreditor Agreement unambiguously states that “[n]othing in this Agreement shall give to . . . any . . . Person . . . any benefit or any legal or equitable right or remedy under this Agreement.” Section 10.04 of the Senior Credit Agreement similarly states that it does not give “any benefit or any legal or equitable right or remedy under this Agreement” to anyone other than a party, its successors or assigns.” Thus, because the language in both agreements expressly negates any implication of third-party rights in favor of plaintiffs, they are not third-parties beneficiaries of the

Senior Intercreditor Agreement or the Senior Credit Agreement. *See, e.g., IMS Engrs.-Architects, P.C.*, 51 A.D.3d at 1357-58 (where contracts specified that “nothing therein ‘shall create or give to third parties any claim or right of action’ against the [prime contractor] or defendant,” such language “effectively negate[d] any implication of third-party rights” to plaintiff; *CFIP Master Fund, Ltd.*, 738 F. Supp. 2d at 478 (holding that plaintiff could not sue as third-party beneficiary where contract expressly stated that “[n]o person other than the Parties [to the agreement] shall have any right to enforce any provision of this [t]ransaction.”)).

Plaintiffs contend that they have standing to assert their claims concerning the Senior Intercreditor Agreement through the provisions of the Indenture, an entirely different agreement, which, in certain instances, permits a bondholder to assert claims under the Indenture. *See* Indenture § 8.05. However, Section 8.12 of the Indenture plainly states that “[n]otwithstanding any provisions of this Article VII [Defaults and Remedies, including § 8.05], all defaults and remedies shall be subject to the terms and conditions of the Senior Intercreditor Agreement.” In addition, Section 12.10 of the Indenture provides that:

the exercise of any right or remedy by [Wells Fargo], the trustee hereunder, and each provision of this Indenture are subject to the provisions of the Senior Intercreditor Agreement. In the event of any conflict between the terms of the Senior Intercreditor Agreement and this Indenture, the terms of the Senior Intercreditor Agreement shall govern and control.

Accordingly, because the Indenture is subject to the Senior Intercreditor Agreement, which explicitly precludes third-party beneficiaries, the Indenture does not give plaintiffs standing to pursue their claims under the Senior Intercreditor Agreement.

Plaintiffs also argue that they have standing to reform the Senior Intercreditor Agreement because they are “an intended third-party beneficiary of the Agreement” or in the “functional equivalent” of privity with defendants. *See* Pls.’ Opp. Br. at 16. This argument is based on the theory that (1) Wells Fargo was OppenheimerFunds’ fiduciary in this transaction for all purposes; (2) defendants all knew OppenheimerFunds’ identity and role as bondholder; and, (3) defendants understood that Wells Fargo was signing the Intercreditor Agreement on OppenheimerFunds’ behalf. *See id.* at 11.

The Court rejects this argument. As “Bond Trustee,” Wells Fargo had two roles: (1) “trustee of the Bonds” and (2) “Lender.” Although Wells Fargo had contractually created fiduciary obligations to bondholders in its role as Trustee, it had no such obligations in its role as Lender, and there is no dispute that Wells Fargo signed the Senior Intercreditor Agreement in only one capacity: as “Lender.” Plaintiffs’ argument that the term “Lender” was intended to include Wells Fargo as trustee of the Bonds is not persuasive. Wells Fargo had distinct roles – “Trustee” and “Lender” and there is no contractual basis to support the reading that these roles were interchangeable. Further, construing the term “Lender” to include Well Fargo’s role as “Trustee” would render the

term “Bond Trustee” meaningless. *See Acme Supply Co., Ltd v. City of New York*, 39 A.D.3d 331, 332 (1st Dep’t 2007).

Plaintiffs also argue that OppenheimerFunds has standing because all defendants knew its identity and role at the time of closing. *See Pls.’ Opp. Br.* at 10-12. As the cases cited by plaintiffs make clear, an intended third-party beneficiary must be known to the parties at the time the contract is made. *See Septembertide Pub., B.V. v. Stein and Day, Inc.*, 884 F.2d 675, 679-680 (2d Cir. 1989); *Goodridge v. Harvey Group, Inc.*, 778 F. Supp. 115, 135 (S.D.N.Y. 1991). Moreover, in order for a contract to confer enforceable third-party beneficiary rights, the contract language must clearly evidence “an intent to permit enforcement by the third party.” *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45 (1985); *Oursler v. Women's Interart Ctr., Inc.*, 170 A.D.2d 407, 408 (1st Dep’t 1991).

However, plaintiffs make no specific factual allegations to support their conclusory statements that all defendants were aware of OppenheimerFunds, nor do they point to any provisions of the Senior Intercreditor Agreement that would indicate that OppenheimerFunds was an intended third-party beneficiary of that agreement. Indeed, the complaint contains no allegations that any defendant other than WestLB specifically knew of or interacted with OppenheimerFunds, and, in fact, the incorporated documents do not identify or even include the name of OppenheimerFunds as a signatory or

otherwise. There is thus no support for the argument that defendants knew about OppenheimerFunds' identity and role and the time of the closing, or that Wells Fargo was signing the Senior Intercreditor Agreement on behalf of OppenheimerFunds.

Plaintiffs also argue that OppenheimerFunds is a "permitted assign" under the Senior Intercreditor Agreement. The Senior Intercreditor Agreement states that the only persons with legal or equitable rights under the agreement are "the parties hereto and their successors and permitted assigns. *See* Senior Intercreditor Agreement § 5.04; *see also* Senior Credit Agreement, §§ 10.03, 10.04. Plaintiffs argue that, that since Sections 8.04 and 8.05 of the Indenture granted OppenheimerFunds the right to institute legal proceedings against defendants if the trustee of the Bonds refused to do so, it became a "permitted assign" of Wells Fargo's right to sue under the Senior Intercreditor Agreement. *See* Pls.' Opp. Br. at 17.

This argument fails. By its terms, Section 8.05 does not assign rights, but rather, limits them. *See* Indenture § 8.05 ("Limitations on Owners' Right to Institute Proceedings"). Moreover, a "permitted assign," as used in the Senior Intercreditor Agreement and Senior Credit Agreement, is a person who has gone through the specific procedures for assignments outlined in Section 10.03 of the Senior Credit Agreement, including the "prior written consent" of each Agent and Lender," and execution of a

Lender Assignment Agreement. *See* Senior Credit Agreement § 10.03 & Ex. A at 23.

Plaintiffs have not alleged that any of these procedures was followed.

Accordingly, because plaintiffs are neither parties nor third-party beneficiaries of the Senior Intercreditor Agreement, they lack standing to seek reformation of the Senior Intercreditor Agreement. Thus, the cause of action for equitable relief must be dismissed as against defendants.

2. Indispensible Parties

Although motion is granted on standing grounds, plaintiffs' cause of action nonetheless fails since plaintiffs have failed to join Wells Fargo and U.S. Bank, both indispensable parties.

A court should dismiss a case in the absence of a person who should be joined as a necessary party. *See* CPLR § 1003 ("Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action"); *see also* 3211(a)(10). A necessary party is one whose interests may be adversely affected or prejudiced by a judgment in the action. *See* CPLR § 1001(a). New York courts have long held that in an action seeking rescission, cancellation or avoidance of an agreement, the parties to the agreement are indispensable. *See Gugel v. Hiscox*, 216 N.Y. 145, 153 (1915); *Tudor v. Riposanu*, 93

A.D.2d 718 (1st Dep't 1983); *see also* *Petrie v. Petrie*, 126 A.D.2d 951, 952 (4th Dep't 1987); *Friedman v. Friedman*, 125 A.D.2d 539, 541 (2d Dep't 1986).

Contrary to plaintiffs' arguments, Wells Fargo and U.S. Bank are not mere "nominal participants." Rather, Wells Fargo was intimately involved in the relevant events at issue in this litigation. It was a party to the agreement in dispute here – the Senior Intercreditor Agreement – and was the link between OppenheimerFunds and defendants. U.S. Bank, the successor to Wells Fargo and the current Trustee, is also indispensable. Wells Fargo and U.S. Bank are the parties who knew or should have known what they were signing, have privity of contract with plaintiffs, had duties to plaintiffs, and in fact advised plaintiffs of the terms of the waterfall provisions when Bionol had financial difficulties. Indeed, plaintiffs allege that Wells Fargo, and thus U.S. Bank, represented and protected plaintiffs' interests by signing the Senior Intercreditor Agreement on their behalf. (Compl. ¶ 24.) Therefore, the Senior Intercreditor Agreement cannot be reformed or rescinded without joining Wells Fargo and U.S. Bank as parties. Where, as here, indispensable parties have not been joined, dismissal is appropriate.

3. Justiciability

Defendants also contend that plaintiffs' claims are nonjusticiable under New York law because they are not ripe for adjudication by this court. Although again it is not

necessary to reach this argument, this Court agrees. Plaintiffs do not allege that there are any funds in the Bionol bankruptcy estate available for distribution on account of the Lenders' claims or the Bonds. Accordingly, plaintiffs have not suffered a legally cognizable injury. An action is premature and nonjusticiable, where, as here, it is based upon "the occurrence of a future event that may or may not come to pass." *Combustion Eng'g v. Travelers Indem. Co.*, 75 A.D.2d 777, 778 (1st Dep't 1980), *aff'd* 53 N.Y.2d 875 (1981); *see e.g. Ovitz v. Bloomberg L.P.*, 18 N.Y.3d 753, 758 (2012) (failure to identify cognizable injury fatal to action).

While plaintiffs argue that the market value of the Bonds was adversely affected by their junior priority, plaintiffs concede that they did not even know about the priority of the Bonds until three years after the closing of the Bionol financing arrangements. *See* Compl. ¶ 32. Nor did plaintiffs transact a sale of the Bonds. Hence, any discussion of the market value of the Bonds is irrelevant.

Accordingly, defendants' motion to dismiss the cause of action for equitable relief is granted.

B. Defendant WestLB's Motion to Dismiss the Fraud Cause of Action

Plaintiffs allege that WestLB "fraudulently concealed" from plaintiffs that the draft Senior Intercreditor Agreement was changed so that the Bonds no longer had parity

with the Senior Lending Group, *see* Compl. ¶¶ 56-57, and that WestLB “had a duty to inform OppenheimerFunds that the Senior Intercreditor Agreement would be and was altered prior to or at closing.” *Id.* ¶ 55.

In order to satisfy the elements of a fraud cause of action under New York law, a plaintiff must plead “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). In addition to the traditional elements of a fraud claim, to establish a fraudulent concealment claim, “a plaintiff must also prove that the defendant had a duty to disclose the material information.” *Travelers Indem. Co. of Ill. v. CDL Hotels USA, Inc.*, 322 F. Supp. 2d 482, 498 (S.D.N.Y. 2004); *P.T. Bank Central Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep’t 2003). The duty must be based upon some special relationship between the parties. *See Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Grp.*, 273 A.D.2d 140, 141 (1st Dep’t 2000). “In the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such relationship, there is no duty to disclose.” *900 Unlimited v. MCI Telecom. Corp.*, 215 A.D.2d 227, 227 (1st Dep’t 1995).

Even accepting all of plaintiffs’ allegations as true, this court finds that plaintiffs have not pleaded fraudulent concealment as a matter of law because they have not

demonstrated that WestLB owed them a duty, or that plaintiffs' alleged reliance on WestLB's misrepresentations or omissions was reasonable or justified.

Under New York law, WestLB did not owe any duty to plaintiffs because WestLB and plaintiffs did not have a fiduciary relationship and were not parties entering into a contract with each other. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006). Plaintiffs do not allege any facts giving rise to a duty on the part of WestLB, or allege that WestLB owed them a fiduciary duty. Indeed, it is well settled that parties engaged in an arms' length transaction are not fiduciaries. *See Northeast Gen. Corp. v. Wellington Adver.*, 82 N.Y.2d 158, 162 (1993); *Dembeck v 220 Cent. Park S., LLC*, 33 A.D.3d 491, 492 (1st Dep't 2006).

Moreover, plaintiffs and WestLB were not in contractual privity. It is undisputed that plaintiffs were not parties to the Senior Intercreditor Agreement or the Senior Credit Agreement. Although plaintiffs contend that they have privity with WestLB because Wells Fargo signed the agreement as plaintiffs' agent, the court rejects this argument, as the relationship between a bondholder and its indenture trustee is not one of principal and agent. *See LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1083 (S.D.N.Y. 1996) (rejecting the claim that an indenture trustee is the bondholders' agent, holding that "an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement").

Therefore, WestLB owed no duty to plaintiffs, with whom they had no confidential, fiduciary or contractual relationship. Accordingly, the fraudulent concealment claim cannot be maintained.

Furthermore, under New York law, the “no reliance” clause contained in the Senior Intercreditor Agreement plainly bars plaintiffs’ claims of justifiable reliance. *See Wells Fargo Bank NW, N.A. v. Taca Int’l Airlines, S.A.*, 247 F. Supp. 2d 352, 368 (S.D.N.Y. 2002) (“Under New York law if ‘a party to a contract specifically disclaims reliance upon a representation in a contract, that party cannot . . . [later] assert that it was fraudulently induced into signing the contract by the very representation it has disclaimed.’”); *see also MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d 419, 419 (1st Dep’t 2011).

Pappas v. Tzolis, 20 N.Y.3d 228 (2012), is directly on point. In *Pappas*, the plaintiffs executed a certificate in connection with the sale of their LLC membership interests to the defendant. The plaintiffs represented in the certificate that they had “performed their own due diligence in connection with [the] assignments . . . engaged [their] own legal counsel, and [were] not relying on any representation” by the defendant. *Id.* at 231. The Court held that:

Plaintiffs’ cause of action alleging fraud and misrepresentation must be dismissed. . . . Plaintiffs principally allege that [defendant] represented to them that he was aware of no reasonable prospects of selling the lease for an amount in excess of \$2,500,000. However, in the Certificate, plaintiffs

‘in the plainest language announced and stipulated that [they were] not relying on any representations as to the very matter as to which [they] now claim [they were] defrauded.’

Id. at 233.

Like the disclaimers at issue in *Pappas*, the Senior Intercreditor Agreement and the Senior Credit Agreement expressly provide that no Lender (including Wells Fargo, plaintiffs’ indenture trustee) relied on any other Lender in deciding to enter into the Financing Documents. Thus, plaintiffs cannot establish that they, through Wells Fargo as their trustee, justifiably relied on WestLB as a matter of law. *See, e.g., HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 201 (1st Dep’t 2012) (“Since the plaintiff stipulated in the contract that it was not relying on upon any representations as to the very matter as to which it now claims it was defrauded, such specific disclaimer destroys the allegations in the plaintiff’s complaint that the agreement was executed in reliance upon the defendant’s . . . representations.”).

In opposition to the motion, plaintiffs argue that the “no reliance” clause contained in the Senior Intercreditor Agreement is ineffective because it does not specifically disclaim reliance on representations regarding the priority of the Bonds. However, a disclaimer of reliance need not expressly describe the alleged misrepresentation in order for the disclaimer to be effective. *See Grumman Allied Indus. Inc. v. Rohr Indus. Inc.*, 748 F.2d 729, 735 (2d Cir. 1984) (disclaimer of reliance enforceable where there was no

“identity between the misrepresentation and the particular disclaimer”); *Merrill Lynch Capital Mkt. AG v. Controladora Comercial Mexicana SAB DE C.V.*, 2010 WL 5827550, at *10 (Sup. Ct. N.Y. Cnty. Mar. 16, 2010) (holding that disclaimers precluded reasonable reliance and rejecting argument that disclaimers were “non-specific” and “boilerplate”).

Because plaintiffs cannot demonstrate that WestLB had a duty to disclose material information to them, and because the terms of the Senior Intercreditor Agreement expressly preclude justifiable reliance, their claim for fraudulent concealment against WestLB must be dismissed.

III. Conclusion and Order

Accordingly, it is

ORDERED that the motion of defendant TD Bank, N.A. to dismiss the complaint herein (motion sequence no. 001) is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further;

ORDERED that the motion of defendant WestLB AG, New York Branch to dismiss the complaint herein (motion sequence no. 002) is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said

defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further;

ORDERED that the motion of defendant First United Bank & Trust to dismiss the complaint herein (motion sequence no. 003) is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further;

ORDERED that the complaint is dismissed in its entirety as against defendants Plainfield Gaming II Inc., Farm Credit Bank of Texas and NGP Capital Resources Company, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

February 5
Dated: ~~January~~ __, 2014

ENTER:


J.S.C.