SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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BROADBILL PARTNERS L.P.; DITECH NETWORKS, INC.; ALLIANCE SEMICONDUCTOR CORPORATION; MARK HOLLIDAY; LENADO PARTNERS, SERIES A OF LENDAO CAPITAL PARTNERS, L.P.; LENADO DP, SERIES A OF LENADO DP, L.P.; LLOYD I. MILLER TRUST A-4; MILFAM II L.P.; MILFAM NG LLC; GARY & KAREN SINGER CHILDREN'S TRUST; 2ND GARY AND KAREN SINGER CHILDREN'S TRUST; UNITED STATES DEBT RECOVERY VIII, L.P.; UNITED STATES DEBT RECOVERY X, L.P.; UNITED STATES DEBT RECOVERY XI, L.P.; and WILFRID GLOBAL OPPORTUNITY FUND L.P.,

Plaintiffs,

-against-

AMBAC ASSURANCE CORPORATION, a Wisconsin corporation,

Defendant.

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DECISION AND ORDER

Index No.: 653869/2012
Motion Seq. No.: 005

O. PETER SHERWOOD, J.:

This action arises from a series of put option agreements wherein defendant, Ambac Assurance Corporation (Ambac) is alleged to have wrongfully converted $800 million of securities, backed by valuable commercial paper assets into less valuable shares of Ambac preferred stock. The complaint asserts five causes of action: (1) breach of contract; (2) unjust enrichment; (3) constructive trust; (4) resulting trust; and (5) rescission. Defendant moves, pursuant to CPLR 3211 (a) (1), (3) and (7), to dismiss the complaint and all causes of action. For the reasons stated below, defendant's motion to dismiss is granted.

BACKGROUND

The facts are derived primarily from the complaint and are assumed to be true for the purpose of the motion (*see Monroe v Monroe*, 50 NY2d 481, 484 [1980]). In 2001 and 2002, Ambac completed transactions to raise stand-by capital for its future use. Two Delaware trusts, the Dutch Harbor Finance Master Trust and the Anchorage Finance Master Trust (Master Trusts), together with

eight related sub-trusts (collectively, the Trusts) were created to serve as vehicles for issuing to qualified investors $800 million of asset-backed capital commitment securities that were supported by highly-rated commercial papers (ABC Securities). The Trusts entered into put option agreements with Ambac (Put Option Agreements).

Pursuant to the Put Option Agreements, Ambac was required to pay the Trusts put option premiums, and had the right to require the Trusts to purchase Ambac's preferred stock (Ambac Preferred Stock) in exchange for proceeds from the Trusts' commercial paper assets. When exercised, the put options had the effect of converting holders of ABC Securities into holders of Ambac Preferred Stock, backed only by Ambac's financial strength. To ensure a fair exchange of value if and when the options were exercised, Ambac made certain representations and warranties in the Put Option Agreements about its financial condition. For instance, Ambac promised in the Put Option Agreements that it would not be in default under any material contracts to which it was a party, or be involved in any material current or pending litigation, arbitration and/or administrative proceedings at any time prior to the exercise of the put options. Ambac also promised that if its financial strength rating was ever lowered while the Put Option Agreements were in effect, it would notify the Trusts of such lower ratings.

The complaint alleges that, in 2008, Ambac breached of its obligations under the Put Option Agreements, including default under material contracts, and involvement in significant litigation, arbitration and/or other proceedings. Further, its credit rating was downgraded repeatedly, but Ambac failed to notify the Trusts, the holders of the ABC Securities or their representatives. Despite the breaches, in 2008-2009, Ambac exercised the put options which required the Trusts to liquidate their commercial paper assets, and to exchange the proceeds thereof for worthless Ambac Preferred Stock. Consequently, plaintiffs, who are current holders of the Preferred Stock, commenced the instant action in 2012.

Applicable Legal Standards

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Servs., Inc. v Jupiter Partners*,

309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]. The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 [1994].

However, while factual allegations in a complaint should be accorded a favorable inference, "bare legal conclusions" and "inherently incredible" facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]. Moreover, "[w]hen the moving party [seeks dismissal pursuant to CPLR 3211 (a) (1) and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]. If the allegations in the complaint consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted." *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]. Furthermore, a complaint or a cause of action can be dismissed, pursuant to CPLR 3211 (a) (3), if the plaintiff lacks the legal capacity or standing to sue.

DISCUSSION

Standing

As a threshold matter, defendant Ambac seeks to dismiss the complaint pursuant to CPLR 3211 (a) (3), arguing that plaintiffs lack standing to sue. Ambac argues that plaintiffs must, but have failed to, overcome three separate legal hurdles to establish standing: (1) the complaint's putative claims belong to the Trusts, and such claims cannot be brought directly by plaintiffs; (2) plaintiffs are not third-party beneficiaries of the Put Option Agreements; and (3) even if the ABC Securities holders had standing to assert claims, these claims were not transferred to plaintiffs, who are subsequent holders of Ambac Preferred Stock.

1. Plaintiffs Direct Claims Against Ambac

The parties to the Put Option Agreements are the Trusts and Ambac. Section 15.1 of the Agreements states that the Agreements are governed by New York law. Ambac argues that, based on the express language of the Trusts and applicable law, the Trusts own the claims and plaintiffs lack standing to pursue them against Ambac directly. In essence, Ambac argues that, because the

complaint fails to allege facts establishing any injury to plaintiffs independent of injury to the Trusts, the claims must be dismissed for lack of standing (*see Diana Allen Life Ins. Trust v BP P.L.C.*, 2008 WL 878190, 2008 US Dist LEXIS 25883 [SD NY Mar. 31, 2008, No. 06 Civ 14209], *affd* 333 Fed Appx 636 [2d Cir 2009] (dismissing, for lack of standing, direct claims of plaintiff unit holders against the defendants related to a Delaware business trust because any recovery thereon would flow directly to the trust and only indirectly to the unit holders); *Debussy LLC v Deutsche Bank AG*, 2006 WL 800956, 2006 US Dist LEXIS 16432 [SD NY Mar. 24, 2006, No. 05 Civ 5550], *affd* 242 Fed Appx 735 [2d Cir 2007] (rejecting direct claims against the defendants who had allegedly mismanaged a Delaware business trust by dissolving it prematurely because the alleged injury resulting therefrom caused the trust to lose value, and this injury flowed to the plaintiffs only indirectly); *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 [Del 2004] (holding that a claim is direct when an injury suffered is claimant's alone, independent of any alleged injury to the corporation, but is derivative when the claimant cannot prevail without showing an injury to the corporation)).

The *Tooley* test, established in 2004 by the Delaware Supreme Court, has been adopted by the New York courts (*see Yudell v Gilbert*, 99 AD3d 108, 110 [1st Dept 2012] ["[t]he *Tooley* test is consistent with New York law and has the added advantage of providing a clear and simple framework to determine whether a claim is direct or derivative"]; *see also Leopold v United Capital Corp.*, --AD3d--, 2014 NY Slip Op 1243 [1st Dept 2014] [affirming dismissal of plaintiff's claims as derivative based on *Tooley,* because alleged injury affected both plaintiff and corporation, rather than direct injury independent of any alleged injury to corporation]).

Plaintiffs have not addressed these cases. Instead, they contend that they have direct claims and that the allegations in the complaint are "supported by the reality of the contracts at issue." Opposition Brief at 23. Plaintiffs argue that under the "Declarations of Trust," the Trusts were required to be dissolved after the put options were exercised, and there was never an expectation that the Trusts would hold the Ambac Preferred Stock (as the Trusts were mere conduit transferors of the Preferred Stock). For those reasons, the injury suffered by plaintiffs (as Ambac preferred stockholders), was not identical to the injury, if any, suffered by the Trusts. Plaintiffs also rely on, *Higgins v New York Stock Exch. Co.* (10 Misc 3d 257, 2005 NY Slip Op 25365 [Sup Ct, NY County

2005]), (among other cases) for the proposition of law that, if the harm to a plaintiff is distinct from the harm to the corporation, plaintiff has standing to bring a direct claim, as opposed to a derivative claim. Further, plaintiffs contend that they are entitled to assert direct claims because they are the intended third-party beneficiaries of the Put Option Agreements.

Plaintiffs' arguments are not persuasive. First, as Ambac argues, contrary to the allegation that the Trusts were dissolved after exercise of the put options in 2008-2009, certificates of good standing issued by the Delaware Secretary of State's office indicate that the Master Trusts remain in legal existence and in good standing (*see* MTD at 8; Wilson affirmation in support of MTD [Wilson Affm.], exhibits 7-8). Moreover, even if the Trusts were dissolved, under Delaware law, claims belonging to a dissolved corporation, trust or other business entity may be asserted derivatively on behalf of the entity, but not directly, by the former security holders of the dissolved entity (*see e.g. Matthew v Laudamiel*, 2012 WL 605589, 2012 Del Ch LEXIS 38 [Del Ch Feb. 21, 2012, C.A. No 5957-VCN] [holding that even after a certificate of cancellation was filed for a limited liability company, the company's claims could only be asserted derivatively by the former shareholders]).

Plaintiffs' reliance on *Higgins* is misplaced. In that case, plaintiffs who were seatholders in the New York Stock Exchange (NYSE), alleged that several NYSE board members had personal relationships with financial institutions that were involved in a proposed merger with NYSE. The complaint asserted that the NYSE defendants' breach of fiduciary duty caused plaintiffs injury and that they were distinctly harmed, while the NYSE and the merged corporation benefitted. The court held that the complaint adequately alleged distinct injury to the plaintiffs, resulting in harm to plaintiffs' "equity interest, as opposed to the NYSE's assets," and as such, plaintiffs "have standing to assert direct causes of action for breach of fiduciary duty." *Higgins*, 10 Misc 3d at 274. In this case, the complaint alleges that Ambac improperly exercised the put options by "forc[ing] the *Trust[s]* to liquidate [their] valuable commercial asserts and exchange such funds for Ambac Preferred Stock of substantially lesser value," and as a result Ambac "drained approximately $800 million in principal from the *Trusts*." Complaint, ¶¶ 10, 53 (d) (emphasis added). Thus, the injury alleged in the complaint was to the Trusts. The harm alleged to have been suffered by the ABC Securities holders and Ambac preferred stockholders were not distinct from those suffered by the

Trust. The complaint does not allege facts showing injury to plaintiffs independent of the injury to the Trusts. The court in *Higgins* correctly states the applicable law, observing that "New York courts have consistently held that diminution in the value of shares is quintessentially a derivative claim," and that "[w]hile a decrease in share value is undoubtedly harmful to the individual shareholder, this harm is said to derive from the harm suffered principally by the corporation and only collaterally to shareholders, and thus is derivative in nature" (*id.* at 266 (internal citations omitted)). These principles mandate that plaintiffs' claims be rejected because the complaint alleges claims that are "derivative in nature."

Plaintiffs also rely on *Anwar v Fairfield Greenwich Ltd.* (728 F Supp 2d 372 [SD NY 2010]) for the proposition that, as putative third-party beneficiaries to the Put Option Agreements, they have standing to pursue direct claims. Plaintiffs' reliance is misplaced because the facts in *Anwar* are readily distinguishable from those in this case. First, plaintiffs do not allege that Ambac had tortiously induced them to invest in the Trusts, an allegation viewed by the *Anwar* court as the "core" of that case. The *Anwar* plaintiffs invested in hedge funds that lost money in connection with a Bernard Madoff Ponzi scheme (*see id.* at 401). The *Anwar* plaintiffs asserted claims against certain service providers (fund managers) who owed fiduciary obligations to plaintiffs under the investment management agreement and the placement memorandum involved in that case (*id.* at 419). Here, plaintiffs do not allege that Ambac was a service provider of the Trusts or that it owed any fiduciary duty to manage the Trusts' assets. Rather, it was the trustee (the Bank of New York) which acted on behalf of the Trusts and represented the interests of the ABC Securities holders. Ambac was the counterparty to the Trusts. Further, at least one court has held that, even if a plaintiff limited partner was a third-party beneficiary of engagement contracts between an investment partnership and its administrators and auditors, the breach of contract claim against the administrators and auditors, based upon the investment of the partnership's funds in a Ponzi scheme is derivative of the partnership's claim for the purpose of determining standing, because plaintiff failed to establish that the injury to plaintiff was independent of injury to the partnership (*see Stephenson v CITCO Group Ltd.*, 700 F Supp 2d 599, 611 [SD NY 2010], *affd* 482 Fed Appx 618 [2d Cir 2012]). Accordingly, even if plaintiffs were third-party beneficiaries of the Put Option Agreements, they are still required,

but have failed, to show that their injury was independent of the injury to the Trusts. In any event, as discussed below, plaintiffs are not third-party beneficiaries and for this additional reason cannot bring direct claims against Ambac.

2. Third-Party Beneficiary Claim

In New York, to plead third-party beneficiary status, the party must establish that (1) a valid contract existed; (2) which was intended for the third party's benefit; and (3) the benefit was immediate, not incidental (*see Anwar*, 728 F Supp 2d at 418). Moreover, "[t]o create a third party right to enforce a contract, 'the language of the contract' must '*clearly* evidence [] an intent to permit enforcement by the third party." *Consolidated Edison, Inc. v Northeast Utilities*, 426 F3d 524, 527-528 [2d Cir 2005] (*Con Edison*), quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 (1985).

Plaintiffs assert that the Put Option Agreements contain provisions, including sections 7.4 and 9.2 therein, that safeguard and benefit them. Under section 7.4, Ambac promised to give notice to the trustee if its financial strength rating is lowered, and under section 9.2, Ambac promised that it would not be in default under any material contracts to which it was a party, or be involved in any material litigation, arbitration or administrative proceedings at any time prior to the exercise of the put options. Plaintiffs contend that such provisions are "plainly intended to benefit the interests of the holders of the ABC Securities and Preferred Stock, such as Plaintiffs" (Opposition Brief at 20).

However, it is undisputed that the Trusts, not the securities holders or plaintiffs, are parties to the Put Option Agreements. Also, the provisions on which plaintiffs rely are directed to the trustee and the Master Trusts, as to which Ambac owed contractual duties. Those provisions do not "clearly evidence[] an intent to permit enforcement" of the contractual terms by plaintiffs (*see Con Edison*, 426 F3d at 528). Yet, plaintiffs contend that such status is often a question of fact, and that it is permissible to look at the "surrounding circumstances" and the contract itself because the duty owed to the beneficiary "need not be expressly stated in the contract" (Opposition Brief at 20). As support, plaintiffs cite to *Debary v Harrah's Operating Co.* (465 F Supp 2d 250 [SD NY 2006]) and *Anwar* (728 F Supp 2d at 431).

These contentions lack merit. In *Anwar,* the court noted that while it was permissible to look at the "surrounding circumstances" to determine if a plaintiff was an intended third-party beneficiary,

it added that "such circumstances cannot give rise to third-party beneficiary status 'absent some indication in the actual agreement of the parties' intent'" 728 F Supp 2d at 457 (internal citation omitted). The court dismissed the breach of contract claim against the PwC Member Firms, because "the text fails to show an intent to confer third-party beneficiary status on Plaintiffs" *id.* at 458. The court also dismissed the breach of contract claim against two Citco entities based on third-party beneficiary status, because it found that the Custody Agreements "evince no clear intent to benefit the Plaintiffs" (*id* at 428) and "Plaintiffs can point to no such language in the Custody Agreements" (*id.* at 431). Likewise, in *Debary*, while the court agreed with the plaintiffs that third-party beneficiary status was a question of fact, it disagreed with their suggestion that "the only way to resolve the issue of fact is by trial" 465 F Supp 2d at 261. Indeed, the court opined that the intent of the parties "can and should be gleaned from the four corners of the resulting contract," and that "only if the contract is ambiguous on its face would courts consider parol evidence" *id.* (citations omitted). *Accord, Con Edison*, 426 F3d at 528 ("Absent clear contractual language evincing such intent [to permit enforcement of the contract by third parties], New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent")(citation omitted).

Ambac also argues that the inurement and anti-assignment provisions in the Put Option Agreements indicate that there can be no third-party beneficiaries. Section 13.1 of the Agreements states, in part, that "this Agreement shall enure to the benefit of each party hereto ... provided that neither party hereto may transfer its rights and obligations hereunder ... without the prior written consent of the other party." In turn, section 14.2 states that "[n]either the Master Trust, on behalf of the Sub-Trust, nor Ambac Assurance may assign its rights or obligations under this Agreement to any other person ...."

In *Stephenson*, while noting that the court would deny plaintiff's third-party beneficiary status because nothing in the contracts expressed an intent to benefit third parties, it also observed that "[a]n inurement clause, when taken together with a prohibition of assignments ... does suggest that the parties did not intend that third parties benefit from the contract." 700 F Supp 2d at 611 n 12. The court also observed that "[l]anguage specifying that the benefit of a contract is to inure to the contract's signatories arguably is superfluous unless it serves to limit the category of beneficiaries" *id.* (citation omitted). Plaintiffs have cited no contrary authority.

Nonetheless, plaintiffs argue that dismissing their claims at the pleading stage would be proper only if "the contract rules out any intent to benefit the claimant, or where the complaint relies on language in the contract or other circumstances that will not support the inference that the parties intended to confer a benefit on the claimant" Opposition Brief at 20 n 17, quoting *Bayerische Landesbank v Aladdin Capital Mgt.* LLC (692 F3d 42, 52-53 [2d Cir 2012]) (reversing dismissal because "we cannot conclude that [the contract] precludes an intent by the parties to benefit the [third-party beneficiary]"). The plaintiffs in *Bayerische* were noteholders and they asserted claims against the fund manager based on mismanagement and breach of duties under the Portfolio Management Agreement (PMA). Defendant argued that the PMA ruled out any intent to benefit the noteholders because it stated that "[t]his Agreement is made solely for the benefit of the Issuers and the Portfolio Manager ... and no other person shall have any right ... *except as otherwise specifically provided herein*" *id.* at 53 (emphasis in original). The court disagreed and opined that the exception might include duties owed to the noteholders stated in other provisions of the PMA. Thus, the court concluded that the text of the PMA was ambiguous because it "does not, on its face, specifically foreclose [the noteholders'] theory of recovery" *id.* at 54. Here, the inurement and anti-assignment provisions of the Put Option Agreements do not contain any such exception, and there are no duties owed by Ambac to plaintiffs in connection with Ambac's exercise of the put options. There is also no allegation that the provisions are ambiguous. Hence, *Bayerische* is inapplicable. Plaintiffs are not third-party beneficiaries of the Put Option Agreements.

3. Plaintiffs' ABC Securities Holders' Rights Claim

Ambac asserts that because plaintiffs, as current preferred stockholders, failed to allege in the complaint facts to show that they were ABC Securities holders at the time Ambac exercised the put options, they did not suffer damages arising from Ambac's alleged breach of the Put Option Agreements. Ambac seeks dismissal of the claims on the ground that plaintiffs cannot show they suffered damage (*see* MTD at 21).

In response, plaintiffs assert that one of them, Alliance Semiconducter Corporation, owned ABC Securities at the time the put options were exercised (*see* Opposition Brief at 17). Plaintiffs also assert that they can sue Ambac to enforce the Put Option Agreements regardless of when their interests in the securities were acquired. In support of the assertion, plaintiffs rely on New York

Uniform Commercial Code (UCC) § 8-302 (a), which states, in part, that "a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer." Further, they cite to *R.A. Mackie & Co., L.P. v Petrocorp, Inc.* (329 F Supp 2d 477 [SD NY 2004]) (*Mackie*) and *Ellington Credit Fund, Ltd. v Select Portfolio Serv., Inc.* (837 F Supp 2d 162 [SD NY 2011]) (*Ellington*) as support (*see* Opposition Brief at 17-18).

Plaintiffs' reliance on the UCC provision is flawed. In *Con Edison* (318 F Supp 2d 181, 192-193 [SD NY 2004]), the district court stated that "[n]othing in the text of § 8-302 (a), in its history or commentary ... supports [the] proposition that 'rights in the security' include contract rights against third parties or that § 8-302 (a) codifies a rule for the automatic transfer of such rights to subsequent purchasers of the stock." The court explained that "rights in the security," as used in the statute, meant that, "upon the transfer of stock, the transferee receives rights in the security vis-a-vis the issuer and rights vis-a-vis other potential holders, including, for example, good title and bona fide purchaser status" (*see id.* at 192). Thus, to the extent that plaintiffs argue that pursuant to UCC § 8-302 (a), they acquired the contract rights of ABC Securities holders, to sue a third party by virtue of the security transfer or their status as subsequent Preferred Stock holders, the argument has no merit.

Plaintiffs' reliance on *Mackie* is also misplaced. In *Mackie*, holders of warrants sued the company that acquired the warrant issuer. The *Mackie* plaintiffs alleged that the acquiror, as successor to the issuer via merger, breached the warrant contract that contemplated an exchange of the warrants for stock of the company at a certain strike price, resulting in diminished value of plaintiffs' interest (*see Mackie*, 329 F Supp 2d at 480). The defendants argued that the plaintiffs lacked standing to sue because they purchased their interests after the alleged breach of the warrant contract, and that under UCC § 8-302 (a), the right to bring a claim was not transferred with the warrants. In sum, the defendants argued that the right to bring a breach of contract claim was not a right "in the security" and was not automatically transferred to the plaintiffs when they bought the warrants after the date of alleged breach (*see id.* at 507). The court found that the warrant expressly authorized the warrant holders to bring a breach of contract action, and ruled that "[n]either the Warrant Agreement itself nor § 8-302 ... prevents the plaintiffs from bringing claims against [the successor to the Warrants issuer] based on Warrants that were purchased after the date of the breach

..." *id.* at 508. The *Mackie* court ruling is consistent with that reached in *Con Edison,* where the court noted that "[a] holder's rights in the security thus include the rights against the issuer under the contract embodied in the security as supplemented by federal and state law" *id.* at 507, quoting *Con Edison.* Unlike the warrant in *Mackie*, plaintiffs' right, if any, to bring direct claims against Ambac, is not stated in the Put Option Agreements. Hence, *Mackie* is inapplicable to the facts here.

Ellington provides no support for plaintiffs' claim. In that case, the plaintiffs were investors in a securitization trust. They brought claims against the trustee, the loan servicer and its affiliates, alleging that the defendants breached various contract, fiduciary and common-law duties. The trustee argued that the complaint should be dismissed because the alleged misconduct occurred prior to the plaintiffs' purchase of the trust certificates, and plaintiffs could not show that they suffered any injury traceable to the alleged misconduct (*see Ellington*, 837 F Supp 2d at 180). The court disagreed with the trustee because, pursuant to New York General Obligation Law § 13-107, "bond-related causes of action against the obligor, the indenture trustee or depositary, or the guarantor of the obligation" transferred with the sale of the bond and vested in the transferee (*see id.* at 181). Here, Ambac is not the Trusts, trustee or guarantor. It is the counterparty to the Trusts. As to the servicer and its affiliates, however, the court observed that, "even if common law trust principles applied here, Plaintiffs have not cited any authority for the proposition that a transferee of an interest in a trust automatically assumes all of the transferor's claims against parties *other than the trustee*, such as [the servicer and its affiliates]" *id.* at 183 (emphasis in original). The court concluded that "all claims premised on these entities' misconduct prior to Plaintiffs' [] purchase of the relevant ... certificates are dismissed for lack of standing." *id.* Likewise, plaintiffs' claims against Ambac must be dismissed.

Because plaintiffs failed to overcome these hurdles, the complaint is dismissed pursuant to CPLR 3211 (a) (3) for lack of standing to bring direct claims against Ambac.

Dismissal For Failure To State A Cause Of Action

Ambac also moves to dismiss each of the five causes of action based upon CPLR 3211 (a) (1) (documentary evidence) and (a) (7) (failure to state a cause of action). While the case may be disposed of for lack of standing, the complaint must be dismissed for other reasons, as discussed below.

1. Breach of Contract

As noted above, the complaint alleges that Ambac breached section 7.4 (failure to give notice to the trustee regarding financial downgrade of Ambac's) and section 9.2 (breach of the covenant that Ambac would not be in default of material contracts and/or be involved in material litigation, arbitration and other proceedings prior to the exercise of the put options).

If a document unambiguously contradicts the plaintiff's claim, such document constitutes "documentary evidence" that warrants dismissing the claim under CPLR 3211 (a) (1) (*see SportsChannel Assoc. v Sterling Mets, L.P.*, 7 Misc 3d 1007 [A], *3, 2005 NY Slip Op 50494[U][Sup Ct, NY County 2005], *affd* 25 AD3d 314 [1st Dept 2006]). Contrary to the allegation that Ambac failed to give notice, documentary evidence shows that Ambac complied with section 7.4 (*see* Susan Frances Affidavit in Support of MTD, exhibits 1-8 [letters to the Bank of New York regarding rating downgrades]; exhibits 9-14 [Ambac press releases and Form 8-Ks disclosing downgrades]; and exhibits 15-19 [rating agency press releases]).

With respect to section 9.2, Ambac argues that the complaint mischaracterizes the actual contract language in that the prefatory clause of that section states, in relevant part, that the representations and warranties by Ambac were made "as of the date" of the Agreements, which was in December 2001 and May 2002, and that plaintiffs failed to show that the alleged defaults and litigations existed as of those dates. Plaintiffs counter that such argument is flawed because in section 9.2 (f), Ambac also covenants that its representations and warranties "will be correct and complied with in all respect during the term of this Agreement," and that this constitutes a continuing warranty. Plaintiffs contend that Ambac's "continuing representations and warranties regarding its financial strength" were necessary to ensure a fair exchange of value when Ambac ever exercised the put options. Opposition Brief at 4-5.

Even if there was an ambiguity or internal inconsistency in the language used in section 9.2, plaintiffs ignored the plain language used in the offering memoranda for the ABC Securities, which expressly disclosed in the "Risk Factors" section therein that: "shares of Ambac preferred stock put to a [Trust] when Ambac Assurance is in financial distress may be of little or no value;" "Ambac Assurance may be more likely to exercise its rights under a put agreement during times of financial distress;" and investors should "carefully evaluate the risks associated with an investment in Ambac

Assurance" Wilson Affm., exhibits 5 and 6 at 18-19. The offering memoranda also clearly state that "Ambac has the right to sell, at any time, and the respective Sub-Trust is obligated to purchase, the Ambac preferred stock," and that "Ambac may exercise a put option with respect to an entire series of the ABC Securities ... and may exercise the put options ... in its sole discretion." *Id.* at 15. This is consistent with plaintiffs' recognition that the transactions under the Trusts and Put Option Agreements were "designed and initiated" by Ambac "in an effort to raise stand-by capital for potential use by Ambac Assurance in the future." Complaint, ¶ 6.

Accordingly, the statements in the offering memoranda undermine plaintiffs' allegation that "Ambac wrongfully exercised its [put options] to force the exchange of ... the ABC Securities for significantly less valuable Preferred Stock now owned by Plaintiffs" Opposition Brief at 3. Indeed, if ABC Securities holders were bound by the terms of the Put Option Agreements and related documents, including the offering memoranda, plaintiffs, as holders of the converted securities, are likewise bound. Therefore, plaintiffs cannot now complain about Ambac's purportedly wrongful conduct, when the offering memoranda explicitly state that Ambac may be "more likely to exercise its rights under a put agreement during times of financial distress," and that the Preferred Stock put to the Trusts at that time "may be of little or no value." Plaintiffs do not controvert the plain statements contained in the offering memoranda. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" *SportsChannel*, 25 AD3d at 315 (citation omitted). Further, the trustee's purchase of the Ambac Preferred Stock without raising any objections on behalf of the Trusts, especially when the alleged litigations and defaults were publicly disclosed in SEC filings and press releases, serves as an indicia that section 9.2 was complied with. Accordingly, the breach of contract claim should be dismissed.

2. Unjust Enrichment Claim

Plaintiffs' unjust enrichment claim, sounds in quasi contract and must be dismissed because there is a contract that governs the same subject matter. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ("existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter").

3. Constructive Trust Claim

The elements of a constructive trust claim are: a confidential or fiduciary relationship; an express or implied promise; a transfer made in reliance on the promise; and unjust enrichment. *Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980] (citations omitted). Because plaintiffs cannot show unjust enrichment and cannot allege that they have a fiduciary relationship with Ambac, such claim must also be dismissed.

4. Resulting Trust Claim

Although "resulting trusts" are recognized in New York, they are seldom referenced in recent years (*see McKeown [Frederick] v Frederick*, 39 Misc 3d 1241[A], *4 n 4, 2013 NY Slip Op 50967[U] [Sup Ct, Monroe County 2013]). The court in *McKeown* explained that "a resulting trust arises where a transfer of property is made under circumstances which raise an inference that the person making the transfer or causing it to be made did not intend the transferee to have the beneficial interest in the property transferred" *id. citing Bach v Nagle* (294 NY 151, 156 [1945]).

The facts here do not indicate that the entity making the transfer "did not intend the transferee to have the beneficial interest in the property transferred," and plaintiffs have alleged none. In fact, pursuant to the Put Option Agreements, the Trusts purchased the Ambac Preferred Stock when the put options were exercised by Ambac, and the Preferred Stock was then distributed to the ABC Securities holders, all in compliance with and pursuant to the terms of such Agreements. Yet, plaintiffs allege that a resulting trust is formed when the Trusts "failed," because of "Ambac's misconduct, including but not limited to its breaches of the Put Option Agreements and looting of the assets held in trust by the Trusts, [causing] these express trusts to fail" Complaint, ¶ 62. These allegations are nothing more than a different formulation of plaintiffs' breach of contract claim. Moreover, the allegations do not support a resulting trust claim, which arises when a trust was improperly or inadequately created or the trust's res was not transferred as intended. Accordingly, the resulting trust claim must be dismissed.

5. Rescission Claim

The complaint alleges that Ambac breached its obligations under the Put Option Agreements, and that if actual damages resulting from such breach cannot be reasonably calculated or plaintiffs have no adequate remedy at law, plaintiffs are entitled to rescind the Agreements and/or Ambac's

improper exercise thereof (*see* Complaint, ¶¶ 66-68). Ambac argues that the assert the claim for rescission as set forth in the complaint merely seeks a remedy for plaintiffs' breach of contract (*see* MTD at 24). Plaintiffs do not dispute or address Ambac's characterization of the claim as an alternative remedy for the breach of contract claim. Further, plaintiffs concede that if a plaintiff is not a party or a third-party beneficiary to a contract, the plaintiff cannot seek rescission (*see* Opposition Brief at 15 [citation omitted]). Because plaintiffs are neither a party nor a third-party beneficiary of the Put Option Agreements, the rescission claim must be dismissed.

Based upon all of the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint (motion sequence number 005) is granted in all respects; and it is further

ORDERED that the complaint is DISMISSED with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: March 12, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.