Aozora Bank, Ltd. v Goldman Sachs Group, Inc.
2015 NY Slip Op 31939(U)
October 15, 2015
Supreme Court, New York County
Docket Number: 651327/2013
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 3

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AOZORA BANK, LTD.,

Plaintiff,

- against -

Index No.: 651327/2013
Mot. Seq. No.: 001
Motion Date: 11/13/2014

THE GOLDMAN SACHS GROUP, INC, GOLDMAN SACHS & CO., and GOLDMAN SACHS INTERNATIONAL,

Defendants.
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BRANSTEN, J.:

In this action, plaintiff Aozora Bank, LTD. ("Aozora") asserts common-law fraud, conspiracy to commit fraud, breach of the implied covenant of good faith and fair dealing, tortious interference, and unjust enrichment claims against defendants The Goldman Sachs Group, Inc. ("GSG"), Goldman Sachs & Co., and Goldman Sachs International ("GSI") (collectively "Goldman"). Plaintiff also alleges aiding and abetting fraud against GSG and GSI. Goldman now seeks dismissal of the complaint, pursuant to CPLR 201, 3211 and 3016(b). In support of their motion, defendants contend that Aozora's claims are time-barred and that the complaint fails to assert a cause of action. For the following reasons, defendants' motion is granted in part and denied in part.

I. BACKGROUND

This action concerns approximately $103,000,000 of notes to five "High Grade" collateralized debt obligations ("CDOs"),[1] which were purchased by Aozora in 2006 and 2007. The CDOs were comprised of asset-backed securities.

In its complaint, plaintiff alleges that it was fraudulently induced to purchase the notes by defendants' false statements, as well as by omissions and active concealment of material information. Plaintiff also alleges that the CDOs were designed to fail[2] and served as dumping grounds for unwanted assets owned by defendants. Plaintiff further alleges that, in reliance on defendants' misrepresentations, it was damaged when the notes lost all their value.

II. DISCUSSION

Defendants seek to dismiss plaintiff's claims in their entirety on statute of limitations grounds. Defendants also contend that the complaint fails to state a claim. These arguments will be addressed below.

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[1] GSC ABS Funding 2006-3g, Ltd. ("GSC 2006-3g"); Altius I Funding, Ltd. ("Altius I"); Altius II Funding, Ltd. ("Altius II"); Altius III Funding, Ltd. ("Altius III"); and Altius IV Funding, Ltd. ("Altius IV").

[2] Plaintiff does not allege that Altius I/II were designed to fail; Altius II was arranged and underwrote by Credit Suisse, and Altius I was arranged by defendants in 2005, prior to implementation of its alleged "big short" strategy. These notes were purchased from defendants' secondary trading desk, plaintiff was not the initial purchaser.

A. *Statute of Limitations*

"When a nonresident sues on a cause of action accruing outside New York, CPLR 202 [New York's Borrowing Statute] requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999). As explained by the Court of Appeals, "[t]his prevents nonresidents from shopping in New York for a favorable Statute of Limitations." *Id.* "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Benn v. Benn*, 82 A.D.3d 548, 548 (1st Dep't 2011).

1. Tort Claims

The parties agree that because plaintiff resides in Japan, and the cause of action accrued in Japan, the Japanese three-year statute of limitations for tort claims applies. *See Global Fin. Corp.* 93 N.Y.2d at 529. ("When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss.") However, the parties disagree on when the Japanese statute of limitations was triggered.

The parties submitted expert affidavits, accompanied by Japanese case and statutory law, providing the court with a sufficient basis for interpreting Japanese law. Defendants' expert is Kana Manabe, a Japanese attorney who practices in Tokyo.

Plaintiff submits the affidavit of Tsutomu Kuribayashi, also a Japanese attorney who also practices in Tokyo.

The statute of limitations for a tort in Japan is three years, as defined in Article 724 of the Civil Code of Japan: "The right to claim compensation for the damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator; the same rule shall apply when twenty years have elapsed from the time of the tortious act." (Affidavit of Kana Manabe Ex. E.)

Under Japanese law, "the starting point of reckoning the statute of limitations for the right to claim damages in tort, the time at which the victim gained knowledge of the damage should be interpreted to mean not merely gaining knowledge of the fact that damage has occurred due to an injurious act, but also gaining knowledge of the fact that the injurious act constitutes a tortious act . . .." (Kuribayashi Aff. Ex. C., *Mayor of Yamaguchi City*, 89 Saibanshu Minji 279 (Supreme Court. of Japan, Nov. 30, 1967).) "For the purposes of determining the awareness of the tortiousness of the act, it is sufficient that the victim recognizes the basic facts which enable an ordinary person to judge that there would be a fair possibility of the establishment of a tort." (Manabe Aff. Ex. I, Sapporo District Court, July 25, 1979 (Saibanshu Geoppo Vol. 25).)

Defendants' expert states that actual knowledge that a tort has occurred on the part of the plaintiff is not required to trigger the statute of limitations. "Instead, to determine

whether a claimant was aware that an act constituted a tort, Japanese courts examine whether it was on notice of the relevant facts from which an ordinary person could determine that the acts of the perpetrator were tortious or illegal." (Manabe Aff. ¶19.)

In support of this testimony, defendants' expert submits the Japanese Supreme Court decision of April 22, 2011, in which the defendants successfully raised a statute of limitations defense to bar a fraud claim premised on misrepresentations regarding defendants' solvency at the time defendants were soliciting investments. (Manabe Aff. Ex. G, Saibanshu Minji 91-461.) However, the facts of that case are distinguishable from the instant facts. There, the court ruled that the plaintiff was on notice of its fraud claim more than three years before the commencement of the action once defendants failed to make a scheduled payment to the plaintiff and once plaintiff learned of a regulatory order that suspended the defendant's operations and placed the defendant into receivership due to insolvency and improper accounting practices. *See id.* at ¶ 2(5) ("Around that time, the Appellee [plaintiff] discovered that the Appellant [defendant] had received the Disposition and had fallen into bankruptcy.") This is hardly analogous to the situation here, where no specific knowledge is alleged and plaintiff instead purportedly was put on notice by generalized press reports, books, and public hearings about the financial crisis.

The Court holds that defendants have not made a prima facie showing that the Japanese statute of limitations for fraud has run. Defendants have put forth no persuasive Japanese case law in support of the contention that generalized media reports can put a plaintiff on notice that a tort has been committed.

Defendants' motion to dismiss the tort claims on statute of limitations grounds is therefore denied. *See also Aozora Bank, Ltd. v. Morgan Stanley & Co. Inc.*, 2014 N.Y. Slip Op. 32135(U) (Sup. Ct. N.Y. Cnty. Aug. 5, 2014) ("The court holds that Japanese law requires evidence of actual knowledge to trigger the statute of limitations. . . . A record must be fully developed to determine whether Aozora possessed actual knowledge of its claims in June 2010.").

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

The parties agree that Article 552 of the Japanese Civil Code supplies the five-year limitations period for this claim. They also agree that the statute of limitations is applied through Article 166(a) of the Japanese Civil Code, which reads as follows: "The extinctive prescription [statute of limitations] commences to run when it has become possible to exercise the right." (Manabe Aff. Ex. P) "The time that the right becomes exercisable . . . means not just when there are no legal impediments for exercising that right, but also that the extinctive prescription commences to run from the time when the exercise of that right can be realistically expected, due to the nature of that right." (Manabe Aff. Ex. M at 7, *Official Commentary, Supreme Court Judgment, December 11, 2003*), Saikou Saibansho Hanrei Kaisetsu (Minji-hen).)

Defendants' expert argues that the statute of limitations began to run on the date that each CDO was purchased because the alleged breach of duty occurred at that time. Plaintiff's expert contends that the statute commences when damages occur.

In support of their argument, defendants submit an April 24, 1998 Japanese Supreme Court decision, which held that:

> The right to claim damages resulting from a breach of contractual obligations is an extension of the original right of claim for performance and change of content. Given that it is legally the same as the original right of claim for performance, the statute of limitations on the right to claim compensation for the damages arising from a breach of contractual obligations for a cause attributable to the liable party should be understood as beginning to run from the time when the original contract should have been performed.

(Manabe Aff. Ex. J at 3, Hanrei Times 990-135.)

Plaintiff counters that "Article 166(1) of the Civil Code stipulates that the period of statute of limitations is calculated starting from 'the time it has become possible to exercise the right' the purport of that paragraph is that the statute of limitations commences to run from the time not just when there is no legal impediment to the exercise of the right, but in addition, when, given the nature of the right, exercise of the right can actually be anticipated." (Kuribayashi Aff. Ex. N at 2, *The Dai-ichi Mutual Life Insurance Company*, 57 Minshu 11, 2196 (Supreme Court of Japan, Dec. 11, 2003).) In *Dai-ichi Mutual Life Insurance Company*, the plaintiff was the claimant on a life insurance policy of her husband, who had disappeared over three years prior to commencement of the suit – the applicable statute of limitations for making a life insurance claim – and later was found deceased in a ravine from a single-car accident. The insurer refused the plaintiff's claim on the grounds that the contract specified that claims must be made within 180 days of the insured's death. The claimant then initiated an action to collect the death benefit; however, the action was dismissed by the trial court

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on statute of limitations grounds since more than three years had passed since the claimant was "able to exercise" her right to the benefit.

On appeal, this ruling was reversed. The appellate court held that normally, the statute of limitations for a contractual right runs from the time of performance or the time a condition precedent is satisfied. However, in a situation where a right could not be exercised, the statute runs from the time that it may *realistically* be exercised, which in that case, was when the remains of the insured were discovered. "[T]he Supreme Court [of Japan] has found that exceptional circumstances are very limited and do not include cases where the claimant simply fails to bring a claim despite being aware of the basis for that claim and the lack of any impediment to filing." (Manabe Aff. ¶ 41.)

At this juncture, the record is not sufficiently developed to allow the court to determine when plaintiff realistically became aware of defendants alleged breach of the implied covenant of good faith and fair dealing claim. Accordingly, defendants' motion to dismiss the breach of the implied covenant of good faith and fair dealing pursuant to the Japanese five-year statute of limitations for commercial obligations is denied.

B. *Sufficiency of the Claims*

Defendants next contend that plaintiff's complaint must be dismissed for failure to state a claim. On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs, and the plaintiffs must be given the benefit of all

reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

1. Fraud Claims

"To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 135 (1st Dep't 2014). If any of the elements are not adequately stated, the fraud claims must be dismissed.

As a preliminary matter, the Court dismisses the causes of action for fraud as they pertain to Altius I/II notes. Defendants had no role in the issuance of Altius II, and plaintiff has not identified a single misrepresentation by defendants concerning these notes. With regard to Altius I, plaintiff does not allege that this CDO was designed to fail, merely that defendants were motivated to sell the notes because they thought that is was likely that their value would decline. Poor investment decisions by plaintiff may not be recast as claims for fraud.

i. **Particularity**

Defendants first contend that plaintiff's allegations fail to plead the fraud allegations with the particularity required by CPLR 3016(b). "Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). "The language of CPLR 3016(b) merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice." *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 97 (1st Dep't 2003).

Defendants argue that plaintiff's allegations concerning both the "big short" strategy and defendants' control of the collateral selection process are too vague to sustain a cause of action for fraud. Plaintiff's complaint clearly provides notice to defendants that it is alleged that Altius III and GSC 2006-3g "had been secretly transformed into vehicles which Goldman sought to and did increase its 'big short.'" (Compl. ¶ 4.) Plaintiff also alleges that

> Altius IV, when brought to completion in the Spring of 2007, provided Goldman a last opportunity to add to its 'big short,' but also was used as a means to reduce Goldman's remaining RMBS and CDO exposure. As with GSC 2006-3g and Altius III, these realities were not disclosed in Goldman's Altius IV marketing and offering documents, but were instead obscured through misrepresentations and omissions concerning Altius IV's collateral, the rationales and entities purportedly responsible for its selection, and Goldman's roles and interests in Altius IV.

(Compl. ¶ 11.) These allegations are supported by references to the Senate report on the financial crisis, defendants' internal communications, and media coverage.

The claims that defendants, rather than the designated collateral managers, secretly selected toxic collateral also are sufficiently particular. Specifically, plaintiff alleges that defendants selected easily controlled collateral managers so that they could "intervene in collateral selection to further Goldman's own strategic interests – which, unbeknownst to Plaintiff, were adverse to those of GS CDO purchasers." (Compl. ¶ 7.)

In *Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 A.D.3d 463 (1st Dep't 2014), similar allegations were held to be sufficiently particular to sustain a fraud claim. The First Department held that "[t]hese factual allegations provide sufficient details to inform the Merrill defendants and 250 Capital of the alleged fraudulent conduct, namely that the CDO was secretly designed by an undisclosed hedge fund, Magnetar, which was secretly placing massive short bets against the very same deals it was sponsoring." *Id.* at 467.

Accordingly, the Court denies defendants' motion to dismiss on particularity grounds.

ii. Loss Causation

Next, defendants contend that plaintiff fails to plead that defendants' alleged fraud was the cause of its losses. Instead, defendants attribute plaintiff's losses to the financial crisis. This argument was specifically and explicitly rejected in *MBIA Ins. Corp. v.*

Countrywide Home Loans, Inc., 87 A.D.3d 287 (1st Dep't 2011), wherein the court held "[i]t cannot be said, on this pre-answer motion to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and credit crisis[;] it is the job of the factfinder to determine which losses were proximately caused by misrepresentations and which were due to extrinsic forces." *Id.* at 296 (internal citation and punctuation omitted). Defendants' argument likewise fails here.

iii. **Reasonable Reliance**

Defendants also argue that plaintiff has not pleaded justifiable reliance because there were multiple disclosures and disclaimers within the offering documents. This argument is without merit.

"The question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss." *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015). "The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 137 (1st Dep't 2014).

Defendants' disclaimers in this case were not sufficiently specific so to invalidate a claim of reliance. The disclaimers included statements that only the offering documents were to be relied on, that it was Aozora's responsibility as a sophisticated investor to analyze the risks for itself, and that defendants may have conflicts of interest with plaintiff. Such disclaimers do not address the particular fraud alleged here, especially the allegations that defendants knowingly and secretly selected securities which were intended to fail. *See Basis Yield*, 115 A.D.3d at 138 ("These disclaimers and disclosures, in our view, fall well short of tracking the particular misrepresentations and omissions alleged by plaintiff.").

Additionally, the First Department held that disclaimers, such as those at issue in this case, are not specific enough to disclaim reliance on misrepresentations that an independent collateral manager would select assets. "Under the circumstances, it cannot be said that the disclaimers and disclosures in the offering circulars preclude a claim of fraud on the ground of a prior misrepresentation as to the specific matter, namely that the CDO's collateral had been carefully selected by an independent collateral manager, in the interests of the success of the deal and for the benefit of Auriga's long investors. Whether it was reasonable for plaintiff to rely on the representation in the offering circular that 250 Capital would select Auriga's collateral is a factual matter that cannot be determined on a CPLR 3211 motion to dismiss." *Loreley Fin. (Jersey) No. 28 Ltd.*, 117 A.D. 3d at 467-468 (internal citations omitted).

Accordingly, defendants' attacks on plaintiff's justifiable reliance pleading fail, and defendants' motion to dismiss on these grounds is denied.

iv. **Misrepresentation**

Defendants argue that they cannot be held liable for any misrepresentations in the offering circulars, because the offering circulars contain a disclaimer that the issuers – special purpose vehicles with no employees – are responsible for the content of the offering circular. These entities we created by, and controlled by defendants, and the documents they purportedly issued contain defendants' logo. This contention fails.

Next, defendants argue that any representations as to the future performance of the CDOs were nonactionable opinion. However, plaintiff's primary allegations are that defendants secretly selected collateral they knew would fail, not that the collateral did not meet stated qualitative characteristics. This contention therefore also lacks merit.

Defendants further contend that because plaintiff argues that the facts of the alleged fraud were within the "peculiar knowledge" of defendants, plaintiff is required to allege that it sought out information regarding the fraud and was denied. This is not persuasive. Plaintiff alleges that it conducted due diligence on the collateral and that a reasonable prepurchase investigation would not have exposed defendants' alleged concealed motivation to unload toxic assets into the CDOs. Plaintiff need not plead that it inquired as to defendants' concealed motivations as a condition precedent to pleading fraud.

v. **Scienter**

Finally, defendants maintain that the complaint fails to plead scienter, since it merely alleges that defendants feared that the subprime market would become unprofitable. The Court disagrees. Notwithstanding defendants' recasting of the pleading, the allegations of the complaint are not so limited. The complaint alleges that beginning in 2006, Defendants were instructed by senior management to flip their $6 billion net long sub-prime exposure – obtained as a result of their RMBS and CDO creation, and their ABX trading activities – to a $10 billion net short exposure. *See* Compl. ¶¶ 36, 38-48. To accomplish this feat, Defendants had to (i) obtain substantial short positions on sub-prime assets, and (ii) offload their long exposures to such assets onto customers and ramping CDOs. *Id.* at ¶¶ 37, 48-159. The CDOs at issue here allegedly offered the opportunity to do both. Construing the allegations in the light most favorable to plaintiff, the complaint asserts that defendants engaged in undisclosed self-dealing to purge their exposure to subprime mortgages and to profit at the same time by selling this exposure and betting against their former long position. The First Department deemed such allegations sufficient to support a fraud claim in *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 138 (1st Dep't 2014). In light of this First Department precedent, the similar allegations presented herein survive defendants' motion to dismiss on scienter grounds.

2. Unjust Enrichment

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005). "The 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." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Plaintiff's purchases of the notes were governed by a multitude of lengthy written contracts, and thus, the claim for unjust enrichment is dismissed.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

"Implicit in all contracts is a covenant of good faith and fair dealing *in the course of contract performance*." *Dalton v Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (emphasis added). Plaintiff alleges that defendants breached the implied covenant of good faith and fair dealing by actively soliciting plaintiff's purchases, recommending the CDOs to plaintiff, and by completing issuance of the notes by loading GSC 2006-3g and Altius III /IV with toxic assets. (Compl. ¶¶ 306- 309.) Plaintiff also alleges that defendants breached the implied covenant of good faith and fair dealing by soliciting the sale of Altius I/II despite believing they were "very poor" CDOs. (Compl. ¶ 310.) These allegations are dismissed from the complaint, as they are allegations of fraud in the

inducement and concern only pre-contractual acts. These are not breaches of good faith in the course of performance.

The following allegations survive dismissal: defendants "breached the good faith and fair dealing obligations it owed to Plaintiff, as having arranged, marketed and sold GSC 2006-3g, by approving assets for inclusion into GSC 2006-3g's portfolio, even though Goldman, as GSC 2006-3g's warehouse provider, possessed the power to reject the inclusion of such assets, in order to amass short positions through GSC 2006-3g against the same securities upon whose performance GSC 2006-3g and its long investors (including plaintiff) were depending; and (c) causing GSC to cede control over the selection of assets and choosing the assets for GSC 2006-3g's portfolio." (Compl. ¶ 307(b).) These allegations concern defendants' usurpation of the role of collateral manager and failure to reject toxic assets it selected during the course of performance. The identical allegations as they pertain to Altius III also survive. *See* Compl. ¶ 308(b).

Accordingly, the motion to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing is granted in part, and denied in part.

4. Tortious Interference with Contract

Defendants assert that plaintiff's claim for tortious interference fails because Aozora is not a third-party beneficiary to the collateral management agreements ("CMAs") between defendants and the collateral managers.[3] Under the terms of the

[3] The notes to Altius I/II are not included in these allegations.

CMAs and the offering circulars, the collateral manager was tasked with the duty of engaging in market transactions to ensure an income stream to investors.

"A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." *State of Cal. Pub. Emp.' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434-435 (2000) (internal quotation marks and citations omitted).

"[T]he best evidence of whether contracting parties intended their contract to benefit third parties remains the language of the contract itself. Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, as exists in the agreement at bar, that provision is decisive." *Nepco Forged Prods. v. Consolidated Edison Co. of N.Y.*, 99 A.D.2d 508, 508 (1984) (internal quotation marks and citations omitted). Here, the CMAs contain such a clause: "[t]his Agreement is made solely for the benefit of the Issuer, the Collateral Manager and the Trustee, on behalf of the Secured Parties, their successors and assigns, and no other person shall have any right, benefit or interest under or because of this Agreement." (Bradley Affirm. Ex. V § 19(k).)

Nevertheless, the offering circulars confer to noteholders the right to sue the collateral manager if it engages in "acts or omissions of the Collateral Manager constituting criminal conduct, fraud, bad faith, willful misconduct or gross negligence in

the performance, or reckless disregard, of the obligations of the Collateral Manager *under the Collateral Management Agreement*." (Bradley Affirm. Ex. U at 136) (emphasis added). This language indicates an intent to benefit noteholders and to grant noteholders an interest in the CMAs to the extent that they would have the recourse of enforcing their rights if the benefit was not realized.

In light of these conflicting clauses, which the parties have not addressed, the Court cannot determine as a matter of law at this juncture whether Aozora is a beneficiary of the CMAs. Accordingly, the Court declines to dismiss the cause of action for tortious interference.

III. CONCLUSION

Accordingly, it is

ORDERED that defendants' motion to dismiss the fourth cause of action for breach of the implied covenant of good faith and fair dealing is granted in part and denied in part as indicated in this decision; and it is further

ORDERED that defendants' motion to dismiss the sixth cause of action for unjust enrichment is granted in full and these claims are dismissed; and it is further

ORDERED that defendants' motion to dismiss the complaint is otherwise denied; and it is further

ORDERED that defendants shall serve an Answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on December 8, 2015 at 10:00 a.m.

Dated: New York, New York
October 15, 2015

ENTER

Hon. Eileen Bransten, J.S.C.