

**CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC**

2019 NY Slip Op 33921(U)

August 15, 2019

Supreme Court, New York County

Docket Number: 653277/2018

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
CWCAPITAL COBALT VR LTD.,

Plaintiff,

- v -

CWCAPITAL INVESTMENTS LLC, CWCAPITAL ASSET  
MANAGEMENT LLC, CWFS-REDS, LLC,

Defendants.

INDEX NO. 653277/2018

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

-----X  
**MASLEY, J.:**

The following e-filed documents, listed by NYSCEF document number 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 143, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172

were read on this motion to/for DISMISS

Defendants CWCapital Investments LLC (CWCI), CWCapital Asset Management LLC (CWCA), and CWFS-REDS, LLC (Reds) move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint of plaintiff CWCapital Cobalt VR Ltd. (Cobalt) in its entirety (Motion 002).

Background

The factual allegations are taken from Cobalt's complaint, dated June 28, 2018, unless otherwise noted (NYSCEF 1 [complaint]).

This action arises from the transactions and management of a collateral debt obligation (CDO) collateralized by portfolios of commercial mortgage backed securities (CMBS). As previously discussed in this court's July 31, 2018 decision and order (PI Decision) denying Cobalt's prior motion for a preliminary injunction (NYSCEF 96 [PI Decision])—also premised on the allegations in Cobalt's complaint—this action pertains to specific portfolios of CMBS held by Wachovia Commercial Mortgage Securities Commercial Mortgage Trust 2005-C17, Wachovia Commercial Mortgage Securities Commercial Mortgage Trust 2007-C30, and Deutsche Mortgage & Asset Receiving Corporation Trust 2005-LP5 (collectively, CMBS Trusts).

Briefly, the CMBS Trusts at issue contain assets of the CDO originally formed and structured, according to the April 19, 2010 Amended and Restated Indenture (Indenture), by nonparty Cadim Tach Inc. (Cadim), the former corporate parent of defendants CWCI and CWCA, which originally contributed the static CMBS bonds to the CDO to serve as collateral for notes that the CDO would issue to investors (*see* NYSCEF 1, ¶ 20). Under the Indenture, Cobalt is the defined Issuer, nonparty CWCapital Cobalt Vr Corp. is the co-issuer, and nonparty Wells Fargo Bank, NA is the trustee (Trustee) (NYSCEF 1, ¶ 24; NYSCEF 131 [Indenture]). Each of the CMBS Trusts are controlled by pooling and servicing agreements (PSAs) (NYSCEF 1, ¶ 30) which set forth the rights of owners of the assets/certificates of the CMBS Trusts.<sup>1</sup>

Cobalt is a Cayman Islands investment fund with no employees which operates through its directors and service providers, including CWCI (NYSCEF 1). Cobalt engaged CWCI to serve as the CDO's manager pursuant to the November 16, 2007 Collateral Management Agreement (CMA) executed by those parties (NYSCEF 3 [CMA]). CWCI is the exclusive collateral manager and investment-advisory entity responsible for managing the CMBS Trusts on behalf of the CDO and its investors (*see* NYSCEF 3, 96).

Under the terms of the Offering Memorandum (OM), dated November 15, 2007, which is incorporated into the CMA and referenced throughout the Indenture (*see* NYSCEF 2, § 8.01 [a] [9]; NYSCEF 3, § 8), Cobalt appointed CWCI to serve as its exclusive agent for determining whether securities are impaired and should be sold, purchasing and selling investments within the permissible limits of the Indenture, ensuring Cobalt's compliance with the terms of the Indenture, and providing various required notices to the Trustee and others (NYSCEF 3). CWCI is also tasked with exercising or waiving the rights, if any, of holders of any class of notes to appoint or act as the Controlling Class Representative/Directing Holder (CCR) to "terminate and/or appoint the special servicer or direct or consent to actions of the special servicer . . . to the extent permitted

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<sup>1</sup> Notably, the only PSA filed by Cobalt in connection with this action is the C30 Trust PSA, executed in March 2017 prior to Cobalt's execution of the Indenture and CMA, the signatories of which include only nonparties Wachovia Commercial Mortgage Securities, Inc. (Depositor), Wachovia Bank, National Association (Master Servicer), CWCA (Special Servicer), and the Trustee—Cobalt is not a party to that PSA (NYSCEF 4). Likewise, as determined in the PI Decision, Cobalt is not a party to any of the applicable PSAs, which were each executed between 2003 and 2007 (*see* NYSCEF 96).

by the applicable Underlying Instrument ("Control Rights") (NYSCEF 3, ¶ 1 [r]; see NYSCEF 2, § 1.01 [defining the "Underlying Instruments" as "the pooling and servicing agreements, trust agreements, indentures, or other governing documents . . . underlying the Collateral Debt Securities," including the CMBS bonds and CDO equity]).

Cobalt alleges that it is the owner of certain controlling class certificates of the CMBS Trusts, entitling it to the authority to appoint and remove the special servicer for each of the CMBS Trusts, but the Control Rights held by Cobalt as owner of such certificates, pursuant to the applicable PSAs, were "misappropriated" by CWCI (NYSCEF 1, ¶ 5). Cobalt further alleges that CWCI and its affiliates engaged in varied misconduct which deprived Cobalt and the CDO's investors of significant revenue (see generally NYSCEF 1).

On April 20, 2018, Cobalt gave notice, in the form of various letters (Notice Letters), that it appointed Carbolic, LLC (Carbolic) as the new CCR for the CMBS Trusts, effectively removing CWCI as CCR and granting Carbolic the right to engage in transactions as the Special Servicer—the entity appointed to service distressed assets on behalf of the CDO—at more beneficial terms for Cobalt and the investors in the CMBS Trusts than those that had been arranged by CWCI and its affiliate and appointed Special Servicer, CWCA (*id.* ¶¶ 111-115). CWCI and CWCA "refused to recognize Carbolic's appointment or [to] relinquish control" of the CMBS Trusts and ultimately commenced the related CWCI Action on July 6, 2018 (one week after Cobalt commenced this action) (*id.* ¶ 117).

In connection with filing this action, Cobalt moved, in Motion 001, for a preliminary injunction enjoining CWCI and CWCA from serving as CDO Manager and Special Servicer, respectively (NYSCEF 005 *et seq.*). Motion 001 was denied in the PI Decision and the denial was unanimously affirmed on appeal. (*CWCapital Cobalt VR Ltd. v CWCapital Investments LLC*, 168 AD3d 567, 567 [1st Dept 2019]). Subsequently, Cobalt voluntarily dismissed with prejudice its declaratory judgment and permanent injunction claims (counts 6 and 7 in Cobalt's complaint) (NYSCEF 173, 177). Apart from the two dismissed counts, Cobalt alleges the following claims:

- (1) breach of the CMA against CWCI for appointing and retaining CWCA as the Special Servicer and failing to negotiate fair-market value revenue-sharing agreements;
- (2) breach of the CMA against CWCI for failing to prevent CWCA's improper actions—hiring providers to sell CMBS Trusts' defaulted loans and real properties—which generated kickback payments to Reds, an affiliate of CWCI and CWCA;

- (3) breach of the CMA against CWCI for failing to monetize CDO options and permitting sales of the CMBS Trusts' assets to CWCI's affiliates for less than market value;
- (4) breach of the CMA against CWCI for colluding with and permitting CWCA to misappropriate funds from certain CMBS Trusts—specifically, the Stuy Town Trusts—in relation to settlement of a legal matter involving CWCA;
- (5) breach of the CMA against CWCI for failure to obtain Cobalt's consent to assign, as a matter of law under the Investment Advisors Act (IAA), control over CWCI that occurred in the parent entity merger of Fortress and SoftBank;
- (8) breach of fiduciary duty against CWCI for retaining CWCA and failing to prevent CWCA from executing transactions at fair market value with revenue-sharing arrangements, and failing to disclose those corporate opportunities to Cobalt;
- (9) breach of fiduciary duty against CWCI arising from the alleged kickback payments to Reds;
- (10) breach of fiduciary duty against CWCI for failing to monetize CDO options and permitting, in conjunction with CWCA, CWCI affiliates to sell, exercise, or assign those options to Cobalt's detriment, usurping and transferring to CWCA the corporate opportunities of Cobalt without first disclosing the same to Cobalt;
- (11) breach of fiduciary duty against CWCI in connection with CWCA's Stuy Town Trusts settlement;
- (12) aiding and abetting breach of fiduciary duty against CWCA for inducing CWCI's alleged breaches of fiduciary duty;
- (13) conversion against CWCI and CWCA for diverting \$515 million of proceeds from assets of the Stuy Town Trusts in connection with the settlement of a legal involving CWCA;
- (14) conversion against CWCI and CWCA for CWCA's charging unauthorized, excessive fees when it disposed of the CMBS Trusts' defaulted mortgage loans and REO properties assets;
- (15) unjust enrichment against CWCA for the economic benefits it improperly attained through each of the above alleged breaches of contract and fiduciary duty apart from those relating to the claims/allegations of kickbacks to Reds; and

(16) unjust enrichment against CWCA and Reds for wrongfully obtaining economic benefits from improper, extra-contractual fees from the disposition of CMBS Trusts' assets to CWCI's affiliates, including the alleged Reds kickback payments.

Cobalt seeks an award of compensatory and punitive damages, restitution, and creation of a constructive trust (the latter over the assets of CWCA and Reds in connection with the unjust enrichment claims). As the declaratory judgment and injunctive relief claims were voluntarily dismissed with prejudice, the relief sought under those claims is moot.

#### Discussion

Cobalt alleges that, pursuant to the CMA, it retained CWCI to serve as the CDO manager, provide investment advisory services, and manage Cobalt's portfolio of assets, including those in the CMBS Trusts, and that CWCI is compensated by management fees (NYSCEF 1, ¶¶ 2, 25; see NYSCEF 3). Cobalt asserts that CWCI self-interestedly arranged for its affiliates, CWCA (Special Servicer of the CMBS Trusts appointed by CWCI) and Reds (an intermediary entity created by CWCA for the disposition of certain assets of the CMBS Trusts), to derive "lucrative fee[s]" to Cobalt's detriment through transactions involving distressed loans and real properties held by the CMBS Trusts, among other transgressions (e.g. NYSCEF 1, ¶ 3). Cobalt alleges that CWCI orchestrated such self-interested arrangements with its affiliates—and/or failed to act to prevent its affiliates from engaging in improper activities and transactions—in the manners grouped together below:

First, CWCI breached contractual and fiduciary duties by failing to prevent CWCA from arranging improper, below-market-rate agreements for the benefit of defendants. Second, CWCI permitted CWCA to circumvent fee-limit provisions by forming and using Reds to exact kickback payments that should have been designated for the CDO. Third, CWCI and CWCA usurped Cobalt's first value purchase (FVP) options and misappropriated those options for their own self-interested transactions. Fourth, CWCI and CWCA misappropriated Stuy Town Trusts-related settlement funds that should have been returned to the CDO.

Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7).

#### Legal Standard

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88

[1994] [citation omitted]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

#### 1. Cobalt's standing

Although defendants do not identify lack of standing as a basis to dismiss the complaint in their notice of motion, which seeks dismissal under CPLR 3211 (a) (1) and (a) (7) but not under CPLR 3211 (a) (3) (NYSCEF 99), standing is a threshold matter that the court addresses as a preliminary matter.

Defendants argue that Cobalt lacks standing to maintain this action because the right to bring claims against CWCI—which Cobalt obtained in the form of a claim license from the Trustee following a June 2017 event of default (NYSCEF 152 [license])—was automatically revoked under § 15.01 of the Indenture upon a subsequent event of default in May 2018. Specifically, defendants assert that the claim rights returned to the Trustee and that Cobalt did not obtain a new license. Cobalt responds that the license obtained from the Trustee is irrevocable and is not subject to the automatic revocation provision of the Indenture.

The court notes that the license does not state whether the claim rights it grants to Cobalt are either revocable or irrevocable and, while the license was issued by the Trustee in connection with the June 2017 default, it provides that Cobalt is entitled to “exercise the Issuer’s rights under the [CMA] to initiate the Litigation and pursue claims against [CWCI] and certain other parties . . . , without further notice or consent of the Trustee” (*id.* at 1). The terms of the license further do not contemplate whether or how a subsequent default would affect the license or the granted rights.

Defendants’ submissions demonstrate that the Trustee issued a formal notice of default to Cobalt in June 2017 (NYSCEF 111); however, defendants submit, as to the latter May 2018 default, only an informal email from CWCI to the Trustee and Cobalt stating that CWCI “became aware of an Event of Default occurring on May 2, 2018” (NYSCEF 112). There is no formal notice from the Trustee pertaining to the May 2018 default before the court.

The court declines to find that the documents submitted by defendants in support of this motion irrefutably establish that Cobalt lacks standing to initiate this action and declines to dismiss

the complaint for lack of standing, particularly in light of defendants' failure to seek that relief under CPLR 3211 (a) (3) in their notice of motion.

## 2. Statutes of limitations defenses

Defendants contend that the following claims accrued prior to the expiration of the applicable statute of limitations and, therefore, must be dismissed.

### *a. Cobalt's fee-sharing claims (counts 1, 8, 12, 15)*

Defendants contend that counts 1 (breach of contract against CWCI), 8 (breach of fiduciary duty against CWCI), 12 (aiding and abetting breach of fiduciary duty against CWCA), and 15 (unjust enrichment against CWCA) are all barred insofar as those claims allege liability for CWCI's failure to ensure (through its rights and obligations under the CMA) that fee-sharing agreements were negotiated by CWCA and implemented in its transactions as Special Servicer for the CMBS Trusts.

Cobalt alleges that the CWCI-appointed Special Servicer, CWCA, failed to negotiate fair-market revenue-sharing agreements in its disposition of distressed assets and that CWCI was obligated, under the CMA, to prevent or correct those practices and transactions through CWCI's authority to influence CWCA's transactions or altogether replace CWCA as Special Servicer. Cobalt alleges in the complaint that that CWCI was obligated to "maximize the value" of Cobalt's assets under § 1 of the CMA (NYSCEF 1, ¶ 22). Under the CMA, CWCI shall "perform its obligations . . . with reasonable care and in good faith" and manage the CDO's assets in a "manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing" (NYSCEF 3, §1, at 4).

Thus, Cobalt asserts that CWCI was required to ensure that CWCA negotiated revenue-sharing agreements which had become the market standard "in effect" in the aftermath of the 2008 financial crisis, and CWCI's failure to perform its obligations and allow CWCA to serve as Special Servicer without negotiating revenue-sharing agreements constitutes CWCI's breach of the CMA and its fiduciary duty to Cobalt. The court notes that the Special Servicer's obligations as to the transactions alleged are controlled by the PSAs, to which Cobalt is not a party, and no breach of the PSAs is alleged by the purported misconduct.

Briefly, the documents submitted by defendants demonstrate that CWCA was the appointed Special Servicer prior to the execution of the Indenture and CMA in November 2007 (NYSCEF 3, 105), and from 2007 to 2016 Cobalt never objected to the structure of the transactions

negotiated by CWCA despite Cobalt's access to financial reports concerning the Special Servicer's activities and Cobalt's annual affirmation certifying that CWCI was in compliance with its obligations under the applicable agreements—an affirmative obligation Cobalt's directors performed each year under § 7.16 of the Indenture.

Accepting Cobalt's assertion in its complaint that fee-sharing agreements became "so commonplace in the CMBS market that CMBS trusts routinely disclose[d] the presumed existence of these arrangements in offering materials published to prospective investors" since, for example, the "prospectus supplement for the DBUBS 2011-LC3 Mortgage Trust—a CMBS deal created in 2011" (NYSCEF 1, ¶ 54)—such agreements were the market-standard "in effect" as of no later than August 2011. Accordingly, even assuming CWCI has a contractual or fiduciary obligation to ensure the Special Servicer negotiated revenue-sharing agreements, the alleged breach accrued by August 2011 when revenue-sharing agreements were "so commonplace" that they were the "presumed" market-standard structure (*id.*). Thus, the fee-sharing claims first accrued more than six years prior to Cobalt's commencement of this action in July 2018, after expiration of the applicable statute of limitations for breach of contract (six years), breach of fiduciary duty (whether three or six years), aiding and abetting breach of fiduciary duty, and unjust enrichment (*see* CPLR 213 [2], [4]).

Cobalt contends that, even if the claim accrued in 2011 (or earlier), its contract claim is subject to the continuing obligations doctrine exception, under which the statute of limitations "run[s] separately for the damages occasioned each time a breach of the obligation . . . occur[s]" (*Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611 [1979]), as the CMA provides for continuing service obligations; therefore, Cobalt's claims for damages may be asserted up to six years prior to commencement of this case regardless of the date on which the original breach occurred (*see Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 [4th Dept 1980] ["(E)ach breach may begin the running of the statute anew such that accrual occurs continuously."]).

The continuing obligations doctrine is a "narrow common-law exception" to the general accrual rule that was "evolved to ameliorate the [rule's] harshness . . . with respect to some particular continuous wrongs" (*Jensen v General Elec. Co.*, 82 NY2d 77, 85 [1993] [applying the exception in a matter involving a persistent and continuing trespass and nuisance]). In *Henry v Bank of America* (147 AD3d 599), the Appellate Division, First Department noted that the continuing obligations doctrine "may only be predicated on continuing unlawful acts and not on the continuing

effects of earlier unlawful conduct" (*id.* at 601 [internal quotation marks and citations omitted]). "Thus, where a plaintiff asserts a single breach—with damages increasing as the breach continued—the continuing wrong theory does not apply" (*id.* at 601-602, citing *Kahn v Kohlberg, Kravis, Roberts & Co.*, 970 F2d 1030, 1041 [2d Cir 1992], *cert denied* 506 US 986 [1992]). The application of the exception to a contract claim is limited to an agreement that "imposes a continuing duty on the breaching party," as in *Bulova Watch Co.*, where the agreements separately contemplated two "distinct" services and materials: (1) a surety's obligation "appended to a contract for the purchase of goods" which "promised to finish whatever labor and materials are required for future repairs" of the roof for a period of 20 years; and (2) the initial contract for the sale of materials and installation of the roof (46 NY2d at 611). The former limitations period could run until six years after the 20-year guaranteed period ended; the latter accrued on the date the installation contract was executed (*id.*).

Here, accepting the allegations in the complaint as true, and even assuming that CWCI's acts or omissions breached the CMA in failing to secure revenue-sharing arrangements for the CMBS Trusts by permitting CWCA to negotiate non-revenue-sharing arrangements at the expense of the CDO (*see* NYSCEF 1, ¶¶ 55-56),<sup>2</sup> the claim alleges a single breach; specifically, CWCI's failure to ensure that CWCA negotiated revenue-sharing agreements and/or CWCI's failure to replace CWCA with a Special Servicer that would negotiate such agreements for the CDO. Further, the alleged failure of CWCI to take appropriate action with respect to the Special Servicer did not renew the limitations period each time CWCA negotiated a transaction; rather, assuming the fee structure was improper no later than August 2011 (*see id.* ¶ 54 [alleging that revenue-sharing structures were the market standard as of August 2011]), each transaction after the breach first accrued only increased Cobalt's potential damages.

Thus, the continuing obligations exception to the general accrual rule has no application here, especially because New York public policy favors the general rule of accrual for breach of contract claims (the limitations period begins at the time that liability for the wrong has arisen) and New York courts have "repeatedly rejected accrual dates which cannot be ascertained with any

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<sup>2</sup> Cobalt alleges that CWCI should have "insisted on a revenue-sharing arrangement with" CWCA and "negotiated with multiple qualified potential special servicers to appoint the one willing to provide the best revenue-sharing arrangement for the CDO" (NYSCEF 1, ¶¶ 55-56).

degree of certainty[] in favor of a bright line approach" (*Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.*, 32 NY3d 139, 146 [2018] [internal quotation marks and citation omitted]). Additionally, Cobalt had access to reports or other documents demonstrating the CDO's revenue, which includes that resulting from CWCA's transactions and the fees paid to CWCA and could not have been unaware that revenue-sharing agreements were not being negotiated. Notably, Cobalt was required, under the Indenture, to annually review and certify CWCI's compliance with its obligations, and Cobalt's officers consistently certified that CWCI had not defaulted under the CMA through 2016 (*see* NYSCEF 121-122).

Accordingly, the general accrual rule applies here, CWCI's breach occurred no later than August 2011 when revenue-sharing agreements were essentially ubiquitous, and any alleged subsequent misconduct only increased the amount of damages. Thus, the fee-sharing contract claim is barred by the statute of limitations under CPLR 213 (2). This contract claim was also untimely when filed by Cobalt in its (since dismissed) federal court action on December 1, 2017.

Cobalt's fee-sharing breach of fiduciary duty claim against CWCI is also time-barred by the applicable statute of limitations. Cobalt is not entitled to a limitations period accruing upon the greater of six years from the date of the damage or two years after it discovered the breach (*see* CPLR 213 [8]) because its fiduciary fee-sharing claims are not based on allegations of actual fraud. Cobalt's complaint neither includes a claim for fraud nor allegations of actual fraud; rather, Cobalt asserts only that CWCI "prioritized" its affiliates' interests, "allowed" CWCA to enter non-fee-sharing agreements, and that CWCI "failed to disclose" the significant opportunities to Cobalt (*e.g.* NYSCEF 1, ¶ 56).

While "a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information," a fiduciary's "mere failure to disclose facts which one is required to disclose may constitute actual fraud" when "the fiduciary possesses the requisite intent to deceive" (*Kaufman v Cohen*, 307 AD2d 113, 119-20 [1st Dept 2003] [internal quotation marks and citations omitted]). Here, Cobalt does not state any particularized facts establishing that CWCI possessed an intent to deceive. Accordingly, CPLR 213 (8) has no application to the fee-sharing breach of fiduciary claim and both that claim and the aiding and abetting breach of fiduciary claim against CWCA—inasmuch as it arises from the failure to negotiate fee-sharing agreements—are barred by the applicable statute of limitations (*see Access Point Med.*,

*LLC v Mandell*; 106 AD3d 40, 44 [1st Dept 2013]). Here, the three-year limitations period for breach of fiduciary claims seeking only monetary damages applies (see *Block 2829 Realty Corp. v Community Preserv. Corp.*, 148 AD3d 567, 567 [1st Dept 2017]; *Pomerance v McGrath*, 124 AD3d 481, 484 [1st Dept 2015] [applying same period to aiding and abetting claim as underlying predicate claim]). In any event, a six-year limitations period would not preclude dismissal of these claims.

The court further finds that, to the extent that count 15 (unjust enrichment) seeks damages against CWCA for the same fee-sharing allegations, the claim is, likewise, time-barred under the applicable three-year period of limitations as that prong of the claim seeks only monetary relief (see *Loengard v Santa Fe Indus.*, 70 NY2d 262, 266 [1987] [statute of limitations for unjust enrichment is determined by substantive relief sought by claimant]).

Accordingly, the fee-sharing claims against CWCI (counts 1 and 8) are dismissed entirely and the prongs of the aiding and abetting breach of fiduciary duty and unjust enrichment claims against CWCA (counts 12 and 15) are likewise dismissed to the extent those claims arise from Cobalt's fee-sharing agreement allegations.

*b. FVP option claims (counts 3, 10, 12, and 15)*

Defendants contend that the claims alleging improper assignment of FVP options (count 3 for breach of contract and count 10 for breach of fiduciary duty against CWCI, as well as count 12 for aiding and abetting breach of fiduciary duty and count 15 for unjust enrichment against CWCA) must also be dismissed as time-barred. These claims are premised on Cobalt's allegations that CWCI failed to exercise or assign FVP options to Cobalt and its investors, the alleged Controlling Class Certificate Holders for the CMBS Trusts entitled to FVP rights under the PSAs; instead, CWCI and its affiliates arranged for self-interested sales below market-value rates to obtain significant benefits to the detriment of Cobalt and the CDO investors.

Defendants contend that the FVP option claims and alleged breaches accrued in November 2007 upon execution of the CMA and closing of the CDO. Further, defendants assert that the CDO was structured such that controlling class holders could never exercise FVP options for the CDO's assets, the CMBS Bonds, because the original contributors of those CMBS Bonds (Cadim and its affiliates) had irrevocably waived any FVP rights, as was disclosed in the OM (see NYSCEF 105 at 61-62 [stating that "the Control Rights with respect to each of the Underlying CMBS Series, CDO Series ... that constitute a purchase right or a redemption right with respect to each of the assets of such

Underlying Series have been irrevocably waived by the applicable Seller” and “Issuer is prohibited from exercising any Control Rights in a manner which would not be deemed to be an exercise of servicing rights under paragraph 35” of the Statement of Financial Accounting Standards No. 140 regarding Special Purpose Entities]).

Cobalt responds that the continuing obligations doctrine applies to the FVP option claims, and/or each sale supplanting Cobalt’s FVP right was a discreet breach. As to waiver, it argues that the OM is not a valid contract that precludes its right to exercise FVP option rights.

First, the court rejects Cobalt’s argument that its status as an FVP option holder entitled to “FV Price Reports” negates or contradicts Cadim’s irrevocable waiver of the right to exercise FVP options; the FVP option holder under the applicable contracts may waive the right to use those rights without disclaiming its designation as a holder of an FVP option. Next, the OM plainly discloses that the Control Rights for the CMBS Bonds, including FVP options, were irrevocably waived prior to the closing of the CDO, and Cobalt acknowledged and failed to object to or renegotiate those restrictions in November 2007 when it executed the CMA, to which the OM is incorporated and attached as an exhibit (NYSCEF 105 at 61; NYSCEF 3, § 8; see NYSCEF 2, § 8.01 [a] [9]). Thus, even if Cobalt had a right to exercise FVP options in connection with the CMBS Bonds, the breach accrued to its FVP option claims on the date of closing of the CDO/execution of the CMA in November 2007. Accordingly, Cobalt’s FVP option claims are untimely under the six-year applicable statute of limitations under each of Cobalt’s theories as it should have raised those claims within six years of closing in 2007.

Additionally, as discussed above, the narrow continuing obligations doctrine does not apply here and the FVP option rights referenced in the PSAs executed prior to the 2007 CMA do not resuscitate Cobalt’s claims, especially in light of the fact that Cobalt is not a party to the PSAs. Further, Cobalt’s continuing obligation theory is untenable here as these are the terms of the commercial transaction that it negotiated for and any revision to its rights or limitations of rights accrued—and must have been raised—within six years of its execution of the CMA.

Accordingly, counts 3 and 10 are dismissed in their entirety against CWCI, as are counts 12 and 15 against CWCA insofar as the latter claims are based on the alleged misappropriation of FVP option rights.

*c. Reds kickback claims (counts 9, 12, 14, 16)*

Defendants contend that the Reds kickback claims asserting excessive/inflated fees that permitted CWCI's affiliates to collect more than CWCA's contractual 1% fees must be dismissed because Reds was formed and, as alleged, "began arranging for unauthorized payments" in 2013 (NYSCEF 1, ¶ 148). Defendants allege that these claims are each subject to a three-year limitations period (count 9 against CWCI for breach of fiduciary duty; count 12 against CWCA for aiding and abetting breach of fiduciary duty; and count 14 against CWCA for conversion) (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36 [1995] [three-year limitations period for conversion claim runs from date of conversion]). Though Cobalt concedes that the Reds kickback claims accrued in 2013 by asserting in its complaint that "CWCI permitted the sale of over \$9 billion in distressed assets since 2013, generating more than \$100 million in kickbacks for [Reds]," it argues that the Reds kickback claims are timely under the continuing wrong theory and/or because each kickback—some extending through 2017—is separately actionable (NYSCEF 1, ¶¶ 69-71).

As discussed above, the "continuing wrong" theory and the "separately actionable" argument are inapplicable; the Reds kickback claims accrued upon Reds' initial conversion as did any associated claims that CWCI or CWCA breached a fiduciary duty or aided and abetted a breach of fiduciary duty as those claims are purely monetary in nature. Therefore, the Reds kickback claims in counts 9, 12, and 14 are dismissed as time-barred. Likewise, to the extent count 16 raises unjust enrichment against Reds in connection with the fiduciary claims, the cause of action seeks recovery of monetary damages (even though facilitated by the equitable vehicle of a constructive trust); thus, the claim is also time-barred by the applicable three-year statute of limitations.

The Reds kickback claims alleging breach of contract on the part of CWCI (count 2) and unjust enrichment (count 16) are addressed separately below.

*d. Stuy Town settlement claims (counts 4, 11, 12, 13, and 15)*

The court rejects defendants' contention that the Stuy Town settlement claims accrued in 2010 when the underlying foreclosure action ended; the claim relates to CWCA's alleged misappropriation of the CMBS Trusts' funds in 2015 in connection with the settlement, not to the foreclosure judgment itself. The court agrees with Cobalt that, at the very least, there are issues of fact precluding dismissal of these claims at this juncture. It is alleged that \$500 million of funds from the Stuy Town Trusts were misappropriated in December 2015. As the action was filed within three years of this alleged diversion, these claims are timely (Action 2, NYSCEF 1, ¶¶ 93-95).

Accordingly, counts 4 and 11 shall proceed in their entirety and counts 12, 13, and 15 shall proceed to the extent that they pertain to the alleged Stuy Town settlement misconduct.

The court rejects defendants' contention that knowledge of these matters is imputed to Cobalt as it is represented by the same law firm as a nonparty that was involved with the Stuy Town settlement. The court further rejects the contention that these claims constitute an additional loss arising from the earlier-alleged breaches; these claims are, at this juncture, sufficiently distinct from Cobalt's fee-sharing, FVP option, and Reds kickback claims and the breaches alleged here are not continuing wrongs subject to the first accrual dates or limitations periods applicable to those dismissed claims.

### 3. Defendants' remaining defenses and contentions

Defendants' remaining affirmative defenses are discussed below except where analysis is redundant because the applicable claim has already been dismissed above.

#### *a. Settlement and release defenses (counts 1, 3, 8, 10, 12, 15)*

Defendants argue that counts 1, 3, 8, 10, 12, 15 are barred by the terms of a settlement agreement signed by the parties to the CDO on April 19, 2010 (Release) (NYSCEF 119). The Release provided for a release and/or waiver of claims in favor of CWCI and resolved a dispute as to the interpretation of the term "Impaired Security" in § 6 of the Indenture. The parties agreed to release each other from claims and actions relating to or arising out of the CDO, the Indenture, and its interpretation through the date of the Release (*id.*).

As the complaint alleges various breaches and other violations that occurred after the date of the Release, post-Release misconduct not otherwise dismissed above is not encompassed by the terms of the Release; however, Cobalt apparently concedes that pre-Release misconduct is barred by the Release. In any event, the court rejects defendants' contention that all of Cobalt's claims arise from CWCI's allegedly improper acts/omissions which all predate the Release. Nevertheless, to the extent not dismissed on other grounds above, the court limits Cobalt's surviving claims to those that accrued after the 2010 Release.

#### *b. Waiver and estoppel (all counts)*

The court also rejects defendants' contention that, at this juncture, dismissal is required as Cobalt has waived or is estopped from raising all claims on the basis that it did not object to the alleged misconduct from 2007 to 2016.

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988] [citations omitted]). The intent to waive "must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act" (*EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010] [internal quotation marks and citation omitted]). Silence or inaction is alone insufficient to establish an intent to waive a known right (*id.* at 618).

Further, the § 18 (j) of the CMA contains a no-waiver provision stating that "no failure or delay on the part of any party hereto to exercise any right or remedy . . . shall operate as a waiver . . . and no waiver shall be effective unless it is in writing and signed by the party granting such waiver" (*see Rosenzweig v Givens*, 62 AD3d 1, 7 [1st Dept 2009] [similar no-waiver clauses are enforceable]). Accordingly, defendants' waiver/estoppel arguments do not now require dismissal of the remaining claims in the complaint. Specifically, Cobalt's claims pertaining to the Stuy Town settlement, as reflected in counts 4, 11, 12, 13, and 15, are not deemed waived and shall proceed as indicated in this decision.

*c. Non-recourse provision defense (counts 12, 13, 14, 15, and 16)*

The non-recourse provision contained in § 17 of the CMA provides that Cobalt, as Issuer, is precluded from raising claims against CWCI's affiliates for CWCI's obligations under the CMA or transactions contemplated under the CMA (NYSCEF 3, § 17); however, under New York law, such non-recourse provisions bar only contract claims, not claims sounding in tort (*see LaSalle Natl. Bank v Perelman*, 141 F Supp 2d 451, 459-463 [D Del 2001] [applying New York law to a similar non-recourse provision]). Accordingly, Cobalt's claims sounding in tort against CWCA and Reds are not barred by the CMA and, additionally, its claims alleging intentional tortious conduct against CWCA and Reds cannot be waived or exculpated by contract on public policy grounds (*see Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385 [1983]).

The court rejects defendants' contention that these tort claims are barred as duplicative of the contract claims against CWCI as that would, in this instance, violate the broad public policy against such exculpatory clauses.

However, to the extent that Cobalt's unjust enrichment claim against Reds (count 16) seeks to recover money damages (though through the formation of an equitable constructive trust) premised on allegations of CWCI's breach of contract (as opposed to in relation to breach of

fiduciary allegations as discussed above), the unjust enrichment claim is barred by the non-recourse provision. Accordingly, count 16 is dismissed as against Reds.

*d. "Negating Clause" and "No-Action Clause" in the PSA defense (counts 2 and 4)*

Defendants argue that counts 2 and 4, alleging breach of contract against CWCI in connection with the Reds kickback claims and Stuy Town settlement claims are premised on CWCA's alleged breach of the PSAs, not CWCI's breach of the CMA, and that Cobalt lacks standing to enforce the PSAs as it is not a party to those contracts, requiring dismissal of these claims.

The court rejects these arguments. Cobalt alleges that CWCI breached the CMA in failing to exercise its authority to prevent payment of kickbacks to Reds and colluded with CWCA to pay the Stuy Town settlement with CMBS Trusts funds (NYSCEF 1, ¶¶ 150, 171). Thus, defendants' arguments are unavailing as the claims, accepting the allegations as true, adequately plead breaches of the CMA at this juncture.

*e. Defense to assignment consent claim (count 5)*

The court agrees with defendants that, based on the documentary evidence submitted—the National Security Agreement (NSA), executed by Fortress, SoftBank, and the U.S. Treasury and Justice Departments (NYSCEF 126) in connection with the transfer of CWCI's parent company—count 5 for assignment without consent must be dismissed. Cobalt's allegation that CWCI breached § 16 of the CMA because it did not obtain Cobalt's consent to an assignment of the CMA under the Investment Advisers Act (NYSCEF 1, ¶¶ 99-108; 179-180; see 15 USC § 80b-5 [a]) is refuted by the NSA, which states that "SoftBank's involvement in the management and operations of Fortress shall be limited to participation on Fortress' board of directors" and that "SoftBank shall not provide Fortress management with direction or advise as to how Fortress management . . . performs its advisory services with respect to, Fortress Controlled Portfolio Companies" (NYSCEF 196, §§ 2.1-2.3; 2.9; 3.3). The documentary evidence demonstrates that SoftBank's acquisition of Fortress did not effectuate a change of actual management of CWCI. Further, Cobalt's allegation of injury resulting from the purported breach is entirely speculative.

*f. Sufficiency of the tort claims*

The court rejects defendants' contention that count 12, aiding and abetting breach of fiduciary duty against CWCA, must be dismissed as duplicative of the contract claim against CWCI and for failure to allege the requisite elements of knowledge or inducement. Given CWCI's

contractual and fiduciary duties of loyalty to the CDO and Cobalt, as Issuer, the court agrees with Cobalt that the claim should survive this motion as "the same conduct which may constitute the breach of a contractual duty may also constitute the breach of a[n independent] duty arising out of the relationship created by contract" (*37 E. 50<sup>th</sup> St. Corp. v Restaurant Group Mgt. Servs., L.L.C.*, 156 AD3d 569, 570 [1st Dept 2017] [internal quotation marks and citation omitted]). Further, the fiduciary claim against CWCI is not based on CWCI's breach of the CMA but upon CWCI's self-dealing and usurpation of Cobalt's corporate opportunities (*see id.* at 570-571), and CWCI appointed CWCA to effectuate services on behalf of the CDO. In any event, alternative theories of liability are not precluded at this early pleading stage, and actual knowledge on the part of CWCA may be pleaded generally under the circumstances at this early juncture. In any event, the claim is dismissed as time-barred and survives only as to the Stuy Town settlement claims, which plainly involved CWCA and the alleged benefits arising from those matters inured to CWCA and/or CWCI.

As to the unjust enrichment claims (counts 15 and 16) against CWCA and Reds, the court has considered and finds unavailing defendants' contention that these claims are precluded by the PSAs. While CWCA's fees are structured under the PSAs, these the claims are not, as defendants contend, squarely controlled by the PSAs, and Cobalt need not be a party to the PSAs to maintain these claims. For instance, the surviving Stuy Town settlement claims are not premised on CWCA's entitlement to fees under the PSAs but on defendants' obligations to the CDO and its investors. In any event, the unjust enrichment claims survive only to the extent that they relate to the Stuy Town settlement claims and Reds kickback claims, the latter of which are also not wholly encompassed or precluded by the PSAs.

Finally, the court agrees with defendants that the conversion claims (counts 13 and 14) against CWCI and CWCA in connection with the Reds kickback claims and Stuy Town settlement claims should be dismissed as Cobalt cannot establish direct legal title to the funds in question, which are held by the applicable CMBS Trusts or the funds contained in those vehicles that were allegedly diverted to Reds. The Trustee is the holder of legal title to each CMBS Trusts' funds, not the Issuer.

A conversion claim may be maintained by an entity with a "possessory right or interest in the property" (*Abram v Pecile*, 115 AD3d 565, 565 [1st Dept 2014] [citations omitted]). Cobalt does not allege that it has a possessory right or legal title to the subject funds; rather, it alleges that the

funds belonged to Cobalt due to its beneficial interest in the Cobalt-controlled CMBS Trusts (Action 2, NYSCEF 1, ¶¶ 63-66, 252-258). Whether or not duplicative of Cobalt's contract claims, the CDO (not Cobalt) receives distributions from the CMBS Trusts pursuant to the waterfall structure of § 4.01 of the PSAs, and those distributions are not directly passed through to the CMBS certificate holders; thus, Cobalt does not allege—and the documentary evidence refutes that it has—an adequate possessory interest in the CMBS Trusts' funds. Further, it is undisputed that the CMBS Trusts' bonds or certificates are registered in the name of Cede & Co. and Wells Fargo is the Trustee; while Cobalt's title is good and marketable under the Indenture, it was required to transfer such title to the Trustee upon the closing date under the Indenture. Accordingly, counts 13 and 14 are dismissed as refuted by documentary evidence and legally insufficient absent allegations demonstrating an adequate possessory interest in the funds at issue (*see Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

Accordingly, it is

ORDERED that the motion to dismiss (motion sequence no. 002) of defendants CWCapital Investment LLC (CWCI), CWCapital Asset Management LLC (CWCA), and CW-REDS, LLC (Reds) is granted in part; and it is further

ORDERED that the following counts in Plaintiff's complaint are dismissed: Count I (against CWCI), Count III (against CWCI), Count V (against CWCI), Count VIII (against CWCI), Count IX (against CWCI), Count X (against CWCI), Count XII (against CWCA as it relates to the fee-sharing, FVP option, and Reds kickback payment claims), Count XIII (against CWCI and CWCA), Count XIV (against CWCI and CWCA), Count XV (against CW as it relates to the fee-sharing, FVP option, and REDS kickback claims); and Count XVI (against CWCA and Reds); and it is further

ORDERED that pursuant to the parties' stipulation, count VI and count VII are dismissed with prejudice; and it is further

ORDERED that the remaining claims in the complaint shall proceed; and it is further

ORDERED that the complaint is dismissed in its entirety as against Reds, 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 action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the following amended caption:

\_\_\_\_\_  
CWCAPITAL COBALT VR LTD.,  
Plaintiff,

- v -

CWCAPITAL INVESTMENTS LLC, and  
CWCAPITAL ASSET MANAGEMENT LLC,  
  
Defendants.  
\_\_\_\_\_X

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the General Clerks Office (Room 119) who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website - [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that defendants shall answer the complaint within 20 days of entry of this decision and order on NYSCEF by the court; and it is further

ORDERED that counsel for the parties are directed to appear for a preliminary conference in Room 242, 60 Centre Street, New York, New York, on 10/8/19 2019, at 11:00 AM

8/15/2019  
DATE

HON. ANDREA MASLEY  
ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE