

**Glenmede Trust Co., N.A. v Infinity Q Capital Mgt.
LLC**

2023 NY Slip Op 34503(U)

December 21, 2023

Supreme Court, New York County

Docket Number: Index No. 160830/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE

PART

60M

Justice

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INDEX NO. 160830/2022

THE GLENMEDE TRUST COMPANY, N.A.,

MOTION DATE 11/15/2023

Plaintiff,

MOTION SEQ. NO. 009

- v -

INFINITY Q CAPITAL MANAGEMENT LLC, JAMES VELISSARIS, LEONARD POTTER, SCOTT LINDELL, BONDERMAN FAMILY LIMITED PARTNERSHIP, LP, INFINITY Q MANAGEMENT EQUITY LLC, TRUST FOR ADVISED PORTFOLIOS, U.S. BANCORP FUND SERVICES, LLC, EISNERAMPER LLP, QUASAR DISTRIBUTORS, LLC, JOHN C. CRYSTAL, ALBERT J. DIULIO, CHRISTOPHER E. KASHMERICK, HARRY E. RESIS, RUSSELL B. SIMON, STEVEN J. JENSEN,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 148, 153, 158, 178

were read on this motion to/for

DISMISS

Defendant U.S. Bancorp Fund Services, LLC ("US Bancorp") has moved to dismiss the amended complaint of Plaintiff Glenmede Trust Company, N.A. ("Glenmede" or "Plaintiff") pursuant to CPLR 3211(a)(7) and 3013.1 For the following reasons, the court grants in part and denies US Bancorp's motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the collapse of a mutual fund called Infinity Q Diversified Alpha Fund ("Mutual Fund"). Defendant Infinity Q Capital Management LLC ("Infinity Q") managed

1 Under CPLR 3013, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." To the extent failure to comply with CPLR 3013 constitutes an independent basis for dismissal, US Bancorp has presented no arguments in support of dismissal. Therefore, the court disregards this aspect of the motion.

the Mutual Fund. Following an investigation that the SEC began in May 2020, it came to light that the Chief Investment Officer of Infinity Q, Defendant James Velissaris (“Velissaris”), had artificially inflated the value of the Mutual Fund for years (Amended Complaint, NYSCEF Doc. No. 101, ¶¶ 1-2, 11-12). Individual Defendants David Bonderman, Leonard Potter, Scott Lindell and Velissaris created Infinity Q in 2014, allegedly to act as investment advisor for both the Mutual Fund and a separate private hedge fund (*id.*, ¶ 4). Rather than stock the Mutual Fund with traditional stocks and bonds, Infinity Q purchased variance swaps as part of its strategy to “generate absolute returns that did not depend on what direction the market moved, but rather on how much the market moved (i.e., how volatile the market was)” (*id.*, ¶ 5).² However, because these types of securities had no readily available market prices, Infinity Q had to generate its own net asset value (“NAV”) of the assets in the Mutual Fund on a daily basis (*id.*, ¶¶ 6-7). Infinity Q generated this NAV using the third-party valuation service Bloomberg offered, called BVAL (*id.*, ¶ 131). The root of both this action and the criminal action in which Velissaris pled guilty is that, rather than report the NAV accurately, Velissaris artificially inflated the value of the Mutual Fund by hundreds of millions of dollars for several years (*id.*, ¶¶ 9-10). This resulted in an SEC investigation beginning in 2020 and the subsequent collapse of the Mutual Fund (*id.*, ¶¶ 11-13).

Aside from Velissaris, Plaintiff has alleged that other parties are liable under sections 11, 12(a)(2) and 15 of the Securities Act of 1933 for their failure to satisfy their “gatekeeper” functions in the market (*see id.*, ¶ 23). As is relevant for this motion [MS 09], starting in 2014, US Bancorp allegedly served as the administrator of Defendant Trust for Advised Portfolios (“Trust”), the umbrella entity containing the Mutual Fund at issue (*id.*, ¶¶ 18-19, 87). US Bancorp also served as

² According to the amended complaint, variance swaps allow buyers to “bet on the volatility of an underlying asset, security, index, or currency exchange” (Amended Complaint, ¶ 116). For each variance swap, the parties determine a “strike price” (*id.*, ¶ 118). If volatility “exceeds the strike price, the buyer of the swap . . . receives the payment,” but if volatility “is below the strike price, the seller of the swap . . . receives the payment” (*id.*).

the Mutual Fund's fund accountant (*id.*, ¶ 33). US Bancorp employees Christopher Kashmerick ("Kashmerick") and Russell Simon ("Simon") worked as President and Treasurer of the Trust, respectively (*id.*, ¶¶ 36-37, 73, 89).³ The amended complaint alleges that, through its employees who were "charged with running the Trust," US Bancorp provided services to the Mutual Fund, including negotiating contracts, monitoring performance of independent contractors and agents, preparing for "signature by a U.S. Bancorp employee [] all documents required to be filed for compliance by [the Trust] and the Mutual Fund with applicable laws and regulations," and "arranging for the computation of performance data, including NAV per share and yield" (*id.*, ¶ 33).

The amended complaint alleges that US Bancorp employees "ran the day-to-day operations of [the Trust] . . . within the scope of their employment at US Bancorp" (*id.*, ¶¶ 68, 72). Plaintiff alleges that US Bancorp paid these employees and that neither the Trust nor the Mutual Fund paid them separately for their services (*id.*, ¶¶ 72, 89). Specifically, as to Kashmerick and Simon, Plaintiff alleges that they used their US Bancorp email addresses for Trust work and wrote letters on behalf of the Trust using US Bancorp letterhead (*id.*, ¶ 73).

The Board of Trustees established a valuation committee ("Valuation Committee") comprised of US Bancorp employees, allegedly to "provide oversight of Infinity Q's valuations . . . as part of their regular duties as employees of U.S. Bancorp" and also established an audit committee ("Audit Committee") to "review[] [auditor] EisnerAmper's audits" of Infinity Q's valuations (*id.*, ¶ 21). Additionally, the amended complaint alleges that US Bancorp appointed its affiliate Defendant Quasar Distributors, LLC ("Quasar") to act as the underwriter for the Mutual

³ The court notes that the amended complaint appears to allege inconsistently that these individuals were officers of the "Mutual Fund" or the "Trust." However, the 2019 registration statement for the Mutual Fund ("2019 Registration Statement") appears to confirm that these employees worked for the Trust (2019 Registration Statement, NYSCEF Doc. No. 115, pp. 69-70, 117).

Fund (*id.*, ¶ 108). Quasar’s “task” was to “sell the Mutual Fund’s shares to investors” (*id.*). However, notwithstanding the allegations in the amended complaint, the Trust—**not** US Bancorp—executed the agreement with Quasar (Distribution Agreement, NYSCEF Doc. No. 116). The Distribution Agreement stated that the “Trust hereby appoints the Distributor as its agent for the sale and distribution of Shares of the Fund” (*id.*, § 1).

On December 20, 2019, the Trust filed the 2019 Registration Statement with the SEC pursuant to the Securities Act (*id.*, ¶ 142). The 2019 Registration Statement and documents incorporated by reference included past NAV data and information regarding the process for calculating NAV (*id.*, ¶¶ 146-50). In particular, the Prospectus described that, while the securities would be valued “using current market values or official closing prices, if available,” when “reliable market quotations are not readily available or the [Mutual] Fund’s pricing service does not provide a valuation . . . a security or other asset is valued at its fair value as determined under procedures approved by the Board” (*id.*, ¶ 150). Further, the Prospectus “purported to disclose certain risks around valuation . . . such as market turmoil or technological errors” but allegedly did not describe “internal factors” such as “manipulation of valuation models by Infinity Q” (*id.*, ¶ 151). According to Plaintiff, the 2019 Registration Statement contained material misrepresentations on which Plaintiff relied in purchasing Mutual Fund shares (*id.*, ¶¶ 159-65). Kashmerick and Simon both signed the 2019 Registration Statement, allegedly “as part of their regular employment duties for U.S. Bancorp” (*id.*, ¶ 144). Critically, however, the 2019 Registration Statement signature page shows that Kashmerick signed as the President and Principal Executive Officer of “Trust for Advised Portfolios” and Simon signed as Treasurer and Principal Financial Officer (2019 Registration Statement, p. 117).

Subsequently, the Mutual Fund learned of Velissaris's manipulation of the valuation of the securities and sought permission from the SEC to liquidate its holdings (Amended Complaint, ¶¶ 220-21). The Mutual Fund then liquidated its entire portfolio by March 19, 2021, at an alleged loss to Plaintiff and other investors of "almost half a billion dollars" (*id.*, ¶ 224).

Shareholders then filed class action lawsuits related to the collapse of the Mutual Fund, and the parties reached a settlement that the court preliminarily approved on October 17, 2022 (*In re Infinity Q Diversified Alpha Fund Securities Litig.*, Index No. 651295, NYSCEF Doc. No. 181). The court then held a final approval hearing on June 14, 2023. Plaintiff determined to opt out of the class action settlement and filed the complaint in this action on December 19, 2022 (Complaint, NYSCEF Doc. No. 2). Defendants, including US Bancorp, then moved to dismiss. However, on May 3, 2023, after Plaintiff informed Defendants that it intended to amend its complaint as of right, Defendants, including US Bancorp, stipulated to withdraw their pending motions to dismiss (Stipulation Withdrawing Motions to Dismiss, NYSCEF Doc. No. 95). Plaintiff then filed the amended complaint on May 26, 2023. The amended complaint asserts causes of action for violation of sections 11, 12(a)(2), and 15 of the Securities Act of 1933. Defendants moved to dismiss the amended complaint for failure to state a claim pursuant to CPLR 3211(a)(7) and for failure to plead with sufficient particularity pursuant to CPLR 3013, and the court held oral argument on the motions to dismiss on November 15, 2023. For the following reasons, the court grants in part and denies in part US Bancorp's motion.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v*

Martinez, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]).

The court notes that, despite attaching to its motion papers the affirmation of Thomas P. Cimino, Jr. (NYSCEF Doc. No. 110) and a number of exhibits referenced therein (NYSCEF Doc. Nos. 111-22), Defendant has not moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1) on the basis of a “defense [] founded upon documentary evidence” (CPLR 3211(a)(1); Notice of Motion, NYSCEF Doc. No. 108). Rather, the motion is limited to failure to state a cause of action under CPLR 3211(a)(7) and failure to plead with sufficient particularity pursuant to CPLR 3013. Nevertheless, the court may consider documentary evidence where it flatly contradicts the plaintiff’s cause of action (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). When a defendant submits documentary evidence, the standard shifts from “whether the plaintiff stated a cause of action to whether it has one” (*id.* at 135 [internal citations and quotation marks omitted]; *Kaplan v Conway & Conway*, 173 AD3d 452, 453 [1st Dept 2019] [finding that the motion court “properly considered the emails submitted by defendants in dismissing the complaint”]). Therefore, the court will consider the documentary evidence that US Bancorp has submitted.

1. Section 11

Section 11 of the Securities Act of 1933 allows a purchaser of securities to sue where a registration statement “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading” (15 USC § 77[k]). To state a cause of action under section 11, a plaintiff must allege that they “(1) purchased a registered security . . . (2) the defendant participated in the offering in the manner specified by the statute; and (3) the registration statement contained an untrue statement

of a material fact or omitted to state a material fact” (*Mahar v General Electric Company*, 188 AD3d 534, 535 [1st Dept 2020] [internal citation and quotation marks omitted]; *Hoffman v AT & T Inc.*, 67 Misc3d 1212(A), *5 [Sup Ct, NY County 2020]). Section 11 operates as a “strict liability statute” with respect to issuers of securities (*France v Jiayin Group Inc.*, 74 Misc3d 1218(A), **4-5 [Sup Ct, NY County Feb 16, 2022]; *Winter v Stronghold Digital Mining, Inc.*, 2023 WL 5152177, *5 [SDNY Aug 10, 2023]). While a defendant other than an issuer may assert an affirmative defense of due diligence, a plaintiff is not required to plead scienter to allege liability under section 11 (*see Winter*, 2023 WL 5152177, **5-6 [“The Circuit has also made clear that Section 11's due diligence . . . requirement[] regarding a defendant's knowledge [is an] affirmative defense[], not [a] pleading requirement[] that [a] plaintiff[] must overcome on a motion to dismiss.”]).

However, liability under section 11 is limited to discrete categories of defendants, and “courts have construed the list strictly” (*In re Global Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, *8 [SDNY Aug 8, 2005]; *Employees' Retirement System of the Government of the Virgin Islands v J.P. Morgan Chase & Co.*, 804 F Supp 2d 141, 156-57 [SDNY 2011] [dismissing section 11 claim against particular defendants because plaintiff failed to allege facts establishing that the defendants fell into one of section 11's enumerated categories of defendants]). Included within the list are “any person who ‘signed the registration statement’ or ‘was a director of ... the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted’” (*Global Crossing, Ltd.*, 2005 WL 1907005, *8 [citing 15 USC § 77k]).

Here, Plaintiff asserts that US Bancorp is liable under section 11 under a theory of respondeat superior as the signatory of the 2019 Registration Statement because US Bancorp employees, Kashmerick and Simon, signed the 2019 Registration Statement. In response, US Bancorp asserts that, while Kashmerick and Simon are US Bancorp employees, they signed the

2019 Registration Statement in their capacities as officers of the Trust. US Bancorp's position is correct.

The Southern District of New York's holding in *In re Global Crossing, Ltd. Securities Litigation* (2005 WL 1907005 [SDNY Aug 8, 2005]) is directly on point. There, the plaintiffs filed a claim under section 11 of the Securities Act against Microsoft and Softbank based on allegations that employees of Microsoft and Softbank signed AGC's allegedly false SEC filings (*id.* at 2). Contrary to defendants' contention that these individuals were acting in their capacities as AGC directors when they signed the allegedly false filings, plaintiffs argued that the individuals "acted at the behest of Microsoft and Softbank as instruments in AGC's alleged fraud-and therefore that Microsoft and Softbank should be held accountable for violating federal securities law" under a theory of respondeat superior (*id.*). The court rejected plaintiffs' claim, holding that the "mere fact that [the individuals] held high positions with Microsoft and Softbank, and were appointed to the AGC board by those corporations, cannot, standing alone, establish that they acted as agents, or acted under the control, of Microsoft and Softbank" (*id.* at 4). Rather, they could not be "presumed to have been acting at the direction of their outside employers in their capacities as AGC directors" (*id.*). The court went on to hold that "conclusory" allegations of such action would not suffice, but rather "[c]oncrete factual allegations are necessary to establish agency and control" (*id.*).

Here, Kashmerick and Simon indisputably signed the 2019 Registration Statement as officers of the Trust, **not** as US Bancorp employees (2019 Registration Statement, p. 117 [showing that Kashmerick had signed as President and Principal Executive Officer of Trust for Advised Portfolios and that Simon had signed as Treasurer and Principal Financial Officer]). Thus, in accordance with the court's holding in *Global Crossing*, it is not sufficient for respondeat superior liability under section 11 for Plaintiff to assert that these individuals also held positions at US

Bancorp, which appointed them to the Trust. Rather, Plaintiff must provide the court with “concrete factual allegations” establishing agency and control. Plaintiff fails to do this with respect to the 2019 Registration Statement.

Plaintiff generally alleges that US Bancorp was in control of Kashmerick’s and Simon’s actions as officers of the Mutual Fund because neither the Trust nor the Mutual Fund paid them separately. Rather, they simply received their usual salary from US Bancorp without any separate employment agreement with the Trust or Mutual Fund (Amended Complaint, ¶¶ 36-37, and 72). Moreover, Kashmerick and Simon used their US Bancorp email addresses for Trust work and sent letters purportedly on behalf of the Trust on US Bancorp letterhead (*id.*, ¶ 73). Beyond that, Plaintiff merely makes the conclusory allegation that “Kashmerick and Simon were U.S. Bancorp employees who signed the December 2019 Securities Act Filing as part of their regular employment duties for U.S. Bancorp” (*id.*, ¶ 144). These general and conclusory allegations are insufficient to plead respondeat superior liability for the particular act on which the alleged section 11 liability is based, namely, the signing of the 2019 Registration Statement (*see Ho v Duoyuan Global Water, Inc.*, 887 F Supp 2d 547, 580 [SDNY 2012] [rejecting respondeat superior theory of liability under section 11 because of the lack of “any allegation that the GEF Defendants controlled Larrea’s actions as she served as a Director for DGW, or anything else indicating that her actions on the Board of DGW were somehow within the scope of her employment at GEF”]; *O’Sullivan v Trident Microsystems, Inc.*, 1994 WL 124453, *12 [ND Cal 1994] [dismissing section 11 claim based on agency theory where plaintiffs “failed to allege, or provide any factual basis, to support a conclusion that Jagers acted within the scope of his employment to TA when he allegedly made materially false and misleading statements in Trident’s prospectus”]).

Plaintiff fails to distinguish the court's holding in *Global Crossing*. Plaintiff asserts that the case here is different from *Global Crossing* because (1) the amended complaint alleges that Kashmerick and Simon were acting within the scope of their employment at US Bancorp in signing the 2019 Registration Statement and (2) Kashmerick was not an independent trustee with duties only to the Trust, but was an interested trustee by virtue of his relationship with US Bancorp. The court rejects the first argument because the amended complaint contains no factual allegations to support the single conclusory allegation that "Kashmerick and Simon were U.S. Bancorp employees who signed the December 2019 Securities Act Filing as part of their regular employment duties for U.S. Bancorp" (Amended Complaint, ¶ 144). Further, the actual text of the 2019 Registration Statement, that shows that Kashmerick and Simon signed on behalf of Trust for Advised Portfolios (2019 Registration Statement, p. 117), plainly refutes this allegation. Plaintiff's allegations regarding the general use of US Bancorp email addresses and the lack of a separate Trust salary do nothing to advance the theory that Kashmerick and Simon took the specific act of signing the 2019 Registration Statement within the scope of their US Bancorp employment (*see Ho v Duoyuan Global Water, Inc.*, 887 F Supp 2d 547, 580 [SDNY 2012] [rejecting respondeat superior theory for sections 11 and 10(b) claims because of the lack of any allegations "indicating that [the director's] actions on the Board of DGW were somehow within the scope of her employment at GEF"]; *cf. Lewy v. SkyPeople Fruit Juice, Inc.*, 2012 WL 3957916, *16 [SDNY Sept 10, 2012] [finding that complaint adequately alleged section 10(b) violations under respondeat superior theory with "nonconclusory facts plausibly establishing that Liu acted within the scope of her employment when making the allegedly false statements in the U.S. filings"]).

Further, while Plaintiff is correct that the 2019 Registration Statement listed Kashmerick as an interested trustee (2019 Registration Statement, p. 69), Plaintiff provides no argument as to

why any duty Kashmerick might have had to US Bancorp negates Kashmerick's fiduciary duty to the Trust. The *Global Crossing* case is squarely applicable here, and the court consequently dismisses the section 11 claim against US Bancorp.

2. Section 12(a)(2)

The court also dismisses Plaintiff's cause of action under section 12 of the Securities Act of 1933. Section 12(a)(2) provides for liability against any person who "offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading" (15 USC § 77[l]; *In re Facebook, Inc. IPO Securities and Derivative Litig.*, 986 F Supp 2d 487, 505-06 [SDNY 2013]). In order to be a "seller" under section 12(a)(2), a defendant must have either "(1) passed title, or other interest in the security, to the buyer for value, or (2) successfully solicit[ed] the purchase [of a security], motivated at least in part by a desire to serve his own financial interests or those of the securities['] owner" (*Mahar v General Elec. Co.*, 65 Misc3d 1121, 1129 [Sup Ct, NY County Oct 15, 2019] [internal citations and quotation marks omitted], *aff'd* 188 AD3d 534 [1st Dept 2020]; *see also New England Carpenters Guaranteed Annuity and Pension Funds v DeCarlo*, 80 F4th 158, 179-80 [2d Cir 2023] [finding that a statutory seller may include an "underwriter who successfully solicited the transfer of title from issuer to purchaser in exchange for some financial gain"]). Further, merely "urg[ing]" someone else to purchase a security is insufficient to establish statutory seller status, but rather, the plaintiff must establish the defendant's "direct and active participation in the solicitation of the immediate sale" (*Underwood v Coinbase Global, Inc.*, 654 F Supp 3d 224, 238 [SDNY 2023]; *Youngers v Virtus Investment Partners Inc.*, 195 F Supp 3d 499, 522-23 [SDNY 2016]).

Plaintiff attempts to establish that US Bancorp was a statutory seller by relying largely on its general allegations that US Bancorp effectively controlled the Trust through its employees, that US Bancorp employees drafted SEC filings, and that US Bancorp employees staffed the Valuation Committee that oversaw the calculation of the NAV (Opposition, NYSCEF Doc. No. 158, pp. 17-18 [citing Amended Complaint, ¶¶ 19, 33, 68, 71, and 154]). These allegations of control do not move Plaintiff closer to establishing that US Bancorp “solicited the purchase of a security.” To the extent that Plaintiff claims that US Bancorp was a statutory seller merely because its employees drafted and signed the 2019 Registration Statement, the First Department has rejected this theory (*see Labourers' Pension Fund of Cent. & E. Can. v CVS Health Corp.*, 192 AD3d 424 [1st Dept 2021] [holding that plaintiffs’ allegations that defendants were statutory sellers “merely because they reviewed, approved, and signed the registration statement are insufficient”]).

The closest that Plaintiff comes to establishing statutory seller status is its allegation that US Bancorp appointed Quasar to act as the underwriter, tasked with “sell[ing] the Mutual Fund’s shares to investors” (*id.*, ¶ 108). However, documentary evidence that shows that the Trust appointed Quasar flatly contradicts that allegation. The 2019 Registration Statement, that trustees and officers of the **Trust** signed, names Quasar as the distributor (2019 Registration Statement, pp. 43, 117). Contrary to Plaintiff’s allegation in the amended complaint, the Distribution Agreement unequivocally reflects that “[t]he **Trust** hereby appoints the Distributor as its agent for the sale and distribution of Shares of the Fund” (Distribution Agreement, § 1 [emphasis added]). While US Bancorp employees undisputedly worked as officers of the Trust, and while the amended complaint alleges that Quasar was an “affiliate” of US Bancorp (Amended Complaint, ¶ 35), there simply are no factual allegations to support the claim that US Bancorp designated Quasar as its agent for selling shares in the Mutual Fund. This is particularly clear because the Board of Trustees,

“including its disinterested trustees voting separately,” approved the Distribution Agreement (Distribution Agreement, p. 1). If any party could be held liable for appointing Quasar as distributor, it would be the Trust—the entity that allegedly “hired” Quasar as its agent (*see Mahar v General Elec. Co.*, 65 Misc3d 1121, 1130 [Sup Ct, NY County Oct 15, 2019] [denying dismissal of section 12(a)(2) claim, holding that defendant could be liable as a statutory seller for hiring an agent to sell shares on its behalf]). US Bancorp, on the other hand, did not appoint Quasar as its agent, and the court therefore dismisses the section 12(a)(2) cause of action against it.

3. Section 15

The court denies US Bancorp’s motion to dismiss the section 15 claim to the extent it relies on the allegation that US Bancorp was a controlling person with respect to the Trust and the Mutual Fund. Section 15 of the Securities Act of 1933 provides that “[e]very person who, by or through stock ownership, agency, or otherwise . . . controls any person liable under sections [11] or [12] of [the Securities Act], shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable” (15 USC § 77[o]; *Matter of NIO Inc. Securities Litigation*, 211 AD3d 464, 466 [1st Dept 2022] [holding that dismissal of control person liability claims under section 15 was proper because plaintiffs failed to allege a primary violation under sections 11 or 12(a)(2)]). In order to establish control person liability under section 15, a plaintiff must show that the defendant “possessed the power to direct or cause the direction of the management and policies of a person” and that the defendant had “actual control over the transaction in question” (*In re Global Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, *12 [SDNY Aug 8, 2005] [internal citations quotation marks omitted]; *In re Refco, Inc. Sec. Litig.*, 503 F Supp 2d 611, 637 [SDNY 2007] [internal citations and quotation marks omitted]). A plaintiff must prove “actual control, not merely control person status” (*In re Refco*, 503 F Supp 2d at 637

[internal citation and quotation marks omitted]; *Lewy v SkyPeople Fruit Juice, Inc.*, 2012 WL 3957916, *11 [SDNY Sept 10, 2012]). However, determining actual control is a “fact-intensive inquiry” that “generally should not be resolved on a motion to dismiss” (*Wang v Cloopen Group Holding Limited*, 2023 WL 2534599, *19 [SDNY Mar 16, 2023] [internal citation and quotation marks omitted]; *In re CitiGroup Inc. Bond Litigation*, 723 F Supp 2d 568, 595 [SDNY 2010]).

Here, Plaintiff has alleged that US Bancorp “managed the operations, governance, servicing, and administration of the Mutual Fund and [the Trust], and was a control person of the Mutual Fund and [the Trust]” (Amended Complaint, ¶ 296). Throughout the amended complaint, Plaintiff makes a number of factual allegations to support the contention that US Bancorp possessed actual control over the Trust and Mutual Fund, particularly with respect to the 2019 Registration Statement. The amended complaint alleges that US Bancorp “has a team of employees that are charged with running the Trust, including the Mutual Fund” (*id.*, ¶ 33). In particular, the amended complaint alleges that US Bancorp employees Kashmerick and Simon were officers in the Mutual Fund but that neither the Trust nor the Mutual Fund paid them separately for this work; rather, US Bancorp paid them to “perform [these] role[s] as part of [their] regular duties as [] U.S. Bancorp employee[s]” (*id.*, ¶¶ 36-37, 72). Further, the amended complaint alleges that Kashmerick and Simon both signed the 2019 Registration Statement “as part of their regular employment duties for U.S. Bancorp” (*id.*, ¶ 144). While this allegation was not sufficient to plead respondeat superior liability for US Bancorp based on the alleged section 11 violation of **Kashmerick** and **Simon** (*see supra* § 1), it is one allegation, amongst others, that together plead US Bancorp’s actual control over the **Trust** and **Mutual Fund** (*see In re Global Crossing, Ltd. Sec. Litig.*, 471 F Supp 2d 338, 343-53 [SDNY 2006] [while the court dismissed respondeat superior claims, the court denied dismissal of control person liability claims, noting that the release “defense is inapplicable to any

claim in which Microsoft's and Softbank's alleged liability is not entirely derivative of Koll's and Hippeau's, but rather where the companies are alleged to be independently liable for harm caused to plaintiffs”] [emphasis added]).

Rather than rest entirely on a theory of agency liability for the acts of Kashmerick and Simon, Plaintiff supports the control person claim with further allegations reflecting actual control of the Trust and Mutual Fund. Particularly, the amended complaint alleges that US Bancorp employees provided “core services” to the Mutual Fund, including:

- coordinating the negotiation of contracts and fees with, and the monitoring of performance and billing of, the Mutual Fund’s independent contractors and agents;
- assisting in the preparation of the Mutual Fund’s disclosure documents;
- preparation for signature by an officer of [the Trust] all documents required to be filed for compliance by [the Trust] and the Mutual Fund with applicable laws and regulations, including the Mutual Fund’s disclosure documents required to be filed with the SEC;
- arranging for the computation of performance data, including NAV per share and yield; responding to shareholder inquiries;
- arranging for the maintenance of books and records of the Fund, and providing the financial data required to be disclosed in the Mutual Fund’s offering documents, including the quarterly financial statements; and
- providing, at its own expense, office facilities at U.S. Bancorp or one of its affiliates, equipment and personnel necessary to carry out its duties, including the executive officers of [the Trust] and the Chairman of the Board of Trustees.

(Amended Complaint, ¶ 71).

Additionally, the 2019 Registration Statement reflects that US Bancorp and the Trust have the same address (2019 Registration Statement, pp. 1, 43), and the 2019 Registration Statement instructs that it should be sent to Christopher Kashmerick of Trust for Advised Portfolios “c/o U.S. Bank Global Fund Services” (*id.*, p. 1). Further, the 2019 Registration Statement reflects that, in addition to Kashmerick and Simon, there were two other Trust officers who had principal

occupations with US Bancorp, Steven Jensen and Scott Resnick (*id.*, p. 70). These allegations are sufficient to stave off dismissal, given the “fact-intensive” nature of the determination of control-person liability (*see City of Omaha Police and Fire Retirement System v Evoqua Water Technologies Corp.*, 450 F Supp 3d 379, 428-29 [SDNY 2020] [finding that plaintiffs sufficiently pled section 15 claim against one group of defendants based on their level of voting power and a different group of defendants based on allegation that the individual defendants signed or authorized the signing of IPO registration statement]).

US Bancorp’s arguments are unavailing. US Bancorp argues that the trustees had full control over Trust operations, citing the Bylaws. While it is true that the Bylaws state that the “business and affairs of the Trust shall be managed by, or under the direction of, the Trustees” (Trust Bylaws, NYSCEF Doc. No. 119, § 3.1), this does not mean that US Bancorp was not able to exercise actual control regardless through its multiple employees acting as officers of the Trust and trustees and through its alleged control over numerous core functions of the Mutual Fund, including preparing regulatory filings, coordinating the negotiation of contracts, and “arranging for the computation of performance data” (Amended Complaint, ¶¶ 33, 71). Further, while US Bancorp is correct that “[s]ince actual control is required, the mere power to influence, without also the power to direct, is not enough” for control person liability (*In re Alstom SA*, 406 F Supp 2d 433, 487 n. 50 [SDNY 2005]), Plaintiff alleges actual control here. Plaintiff alleges that US Bancorp employees prepared regulatory filings for the Trust and Mutual Fund and that particular employees signed the 2019 Registration Statement (*id.*, ¶¶ 33, 144).

However, the court dismisses this cause of action to the extent Plaintiff alleges that US Bancorp is a control person of Quasar. US Bancorp correctly argued in its reply in further support of its motion to dismiss that Plaintiff had abandoned the claim of control person liability for the

primary violations of Quasar by not responding to US Bancorp's arguments related to Quasar (*see Martin Assoc., Inc. v Illinois National Ins. Co.*, 188 AD3d 572, 573 [1st Dept 2020] [finding that breach of fiduciary duty claim was properly dismissed because the plaintiff "did not oppose dismissal of the breach of fiduciary duty claim in opposition to T&H's motion to dismiss, and thus had abandoned this claim"]; *Annam v City of New York*, 2023 WL 35053, *1 [SDNY Jan 4, 2023] [{"[W]hen a party fails adequately to present arguments in a brief, a court may properly consider those arguments abandoned."}] [internal citation and quotation marks omitted]).

Regardless, Plaintiff has failed to allege control person liability with respect to Quasar. The amended complaint offers few allegations to support the conclusory assertion that "Defendant U.S. Bancorp also was a control person of Quasar" (Amended Complaint, ¶ 296). Among those allegations are that "U.S. Bancorp appointed one of its affiliates, Defendant Quasar, to act as underwriter for the Mutual Fund," that "Quasar's appointment by U.S. Bancorp was meant to provide investors with further assurances that there were independent gatekeepers to ensure the Mutual Fund's compliance with laws and regulations" (*id.*, ¶ 108), and that "Defendant Quasar served as the underwriter for the shares offered pursuant to the December 2019 Securities Act Filing" (*id.*, ¶ 273). None of these allegations suggest that US Bancorp "possessed the power to direct or cause the direction of the management and policies of" Quasar and that US Bancorp had "actual control over the transaction in question," namely, Quasar's sale of shares in the Mutual Fund (*see In re Global Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, *12 [SDNY Aug 8, 2005] [internal citations and quotation marks omitted]).

US Bancorp is correct that Quasar's status as an alleged affiliate of US Bancorp, **without more**, does not render US Bancorp a control person of Quasar (*see Public Employees' Retirement System of Mississippi v Merrill Lynch & Co. Inc.*, 714 F Supp 2d 475, 485 [SDNY 2010] [finding

that “parent/subsidiary relationship is an insufficient basis from which to infer control . . . [because] a parent corporation and its subsidiary are regarded as legally distinct entities” [internal citations and quotation marks omitted]). Further, the Amended Complaint’s allegation that US Bancorp “appointed” Quasar to act as the underwriter (Amended Complaint, ¶ 108) is refuted by the clear text of the Distribution Agreement, that states that “[t]he Trust hereby appoints the Distributor as its agent for the sale and distribution of Shares of the Fund” (Distribution Agreement, § 1). The Distribution Agreement was between the Trust and Quasar, **not** US Bancorp and Quasar. Therefore, the court dismisses this cause of action to the extent it purports to establish control person liability against US Bancorp with respect to Quasar without prejudice.

The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion to dismiss [MS 09] is granted in part, and the first and second causes of action are dismissed against US Bancorp, and the third cause of action [control person liability under section 15 of the Securities Act of 1933] is dismissed without prejudice against US Bancorp only to the extent that the claim asserts liability with respect to US Bancorp’s alleged control of Quasar; and it is further

ORDERED that the remainder of the motion to dismiss is denied, and the third cause of action shall continue against US Bancorp with respect to US Bancorp’s alleged control of the Trust and the Mutual Fund; and it is further

ORDERED that US Bancorp must answer the amended complaint within 20 days of the date of this decision and order; and it is further

ORDERED that there shall be no motion practice without prior conference with the court; and it is further

ORDERED that the parties must appear for a preliminary conference on **February 5, 2024, at 10:00 AM.**

12/21/2023
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: