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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KEYBANK, N.A., a national banking
association,

11 Plaintiff,

12 v.

13 BINGO, Coast Guard Official No.
14 1121913,

15 Defendants.

CASE NO. C09-849RSM

ORDER ON MOTION TO DISMISS
COUNTERCLAIMS

16
17 This matter is before the Court for consideration of plaintiff KeyBank's motion to
18 dismiss defendants' counterclaims. Dkt. # 130. The Court heard oral argument on this matter on
19 March 31, 2011, and has fully considered the parties' memoranda, and the exhibits and
20 arguments presented at the hearing. The motion shall be granted in part, and denied in part, as
21 set forth below.

22 FACTUAL BACKGROUND

23 The facts giving rise to this action, and to defendants' counterclaims, are fairly simple.
24 The defendants in this matter are the vessel *Bingo*, a pleasure craft, *in rem*; together with

1 individual defendants Francis Graham and her children and grandchildren David and Sharon
2 Bingham, Kelly and Scott Bingham, and Christopher and Cherish Bingham (together, “the
3 Bingham’s”); Bingo Investments, LLC, a Washington limited liability company (Bingo
4 Investments”); Bingo Properties, LLC, a Washington limited liability company; and Carnutz,
5 Inc., a Washington corporation. In 2002, David and Sharon Bingham borrowed \$1.5 million
6 from plaintiff KeyBank for the purchase of the vessel *Bingo*, giving KeyBank a security interest
7 in the vessel in a document designated a “ Consumer Security Agreement.” In 2005, Bingo
8 Investments, LLC, borrowed over \$100 million from KeyBank, securing the loans with assets
9 owned by Frances Graham pledged as collateral. Mrs. Graham and her daughter Sharon
10 Bingham each signed a Commercial Pledge Agreement (“Pledge Agreement”); these were
11 restated in 2007. Mrs. Graham and Sharon Bingham also signed “Investment Services
12 Agreements” (“ISA’s”), dated about a week before the date on the first Pledge Agreements.¹

13 The Bingham’s, as owners of Bingo Investments, used the borrowed money to make
14 speculative real estate investments with Centurion Financial Group. These investments failed,
15 the Bingham’s defaulted on the loans, and KeyBank exercised the powers given it in the Pledge
16 Agreements to sell the pledged collateral and pay down the loans. The amount realized from
17 sale of the collateral failed to cover the amount of the loans. The shortfall of \$13 or \$14 million
18 was the original subject of this lawsuit, which was initiated by KeyBank by moving to arrest the
19 vessel *Bingo*.

20 In their amended answer to the amended complaint, defendants asserted counterclaims
21 for breach of fiduciary duty, breach of contract, securities-related liability, release of the vessel
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23 ¹ The ISA’s refer to an “attached schedule of property” but the schedule is not attached,
24 so it is not clear what property these ISA’s covered.

1 *Bingo*, Washington Consumer Protection Act violations, and a declaratory judgment that, among
2 other wrongs, KeyBank’s management of the Bingham assets did not meet minimum standards
3 of care and suitability, and that by failing to properly liquidate the assets KeyBank is liable to
4 defendants for a minimum of \$31 million. Dkt. # 123. Defendants further assert in the
5 counterclaims that allocation of the proceeds of the liquidation was arbitrary, and KeyBank
6 should have applied it to pay off the vessel *Bingo*, and further that KeyBank should be liable to
7 defendants for their investment losses. Defendants seek in their counterclaims direct and
8 consequential damages of \$231,000,000. *Id.*, ¶ 10.30. KeyBank has moved to dismiss all
9 counterclaims for failure to state a claim, pursuant to Fed.R.Civ.Proc. 12(b)(6).

10 DISCUSSION

11 I. Legal Standard

12 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.
13 Such dismissal is proper only where there is either a “lack of a cognizable legal theory” or “the
14 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
15 *Department*, 901 F. 2d 696, 699 (9th Cir. 1988). The issue on a motion to dismiss for failure to
16 state a claim is not whether the claimant will ultimately prevail, but whether the claimant is
17 entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Development Corp.*,
18 108 F. 3d 246, 249 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the Court must
19 accept all material allegations in the complaint as true and construe them in the light most
20 favorable to the non-moving party. *Barron v. Reich*, 13 F. 3d 1370, 1374 (9th Cir. 1994). The
21 Court is not required, however, to accept “conclusory legal allegations cast in the form of factual
22 allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v.*
23 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

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2 Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires “ a short and
3 plain statement of the claim showing that the pleader is entitled to relief. ” 5A Charles A. Wright
4 & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). The notice pleading
5 standard set forth in Rule 8 establishes “a powerful presumption against rejecting pleadings for
6 failure to state a claim.” *Gilligan*, 108 F. 3d at 248 (citations omitted). Therefore, a Court must
7 not dismiss a complaint with prejudice unless “it appears beyond doubt that the plaintiff can
8 prove no set of facts in support of his claim which would entitle him to relief.” *Conley v.*
9 *Gibson*, 355 U.S. 41, 45-48 (1957); *U.S. v. City of Redwood City*, 640 F. 2d 963, 966 (9th Cir.
10 1981).

11 **II. Analysis**

12 **A. Washington Consumer Protection Act Claim**

13 Defendants assert as one of their counterclaims that KeyBank’s actions violated the
14 Washington Consumer Protection Act (“CPA”), RCW 19.86 *et seq.* The Court addresses this
15 counterclaim first as it is so clearly without merit and may be summarily dismissed. It is well-
16 established under Washington law that a CPA violation must include the following elements:
17 (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the
18 public interest; (4) that injures the plaintiff in his or her business or property; and (5) a causal
19 link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training*
20 *Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986). The “unfair or deceptive act or
21 practice” must have the capacity to deceive a substantial portion of the public. *Henery v.*
22 *Robinson*, 67 Wash. App. 277, 289-91 (1992).

1 Defendants can state no facts that would demonstrate that the acts of KeyBank had the
2 capacity to deceive a substantial portion of the public. Under established precedent in this Court,
3 the “tribulations of multimillionaires” cannot serve as the basis for a CPA claim. *Swartz v.*
4 *KPMG, LLC*, 401 F. Supp 2d 1146, 1154 (W.D.Wash. 2004) (Cause No. 03-cv-1252MJP). In
5 dismissing a CPA claim with prejudice in that case, the Court noted that an act affecting multi-
6 millionaires did not have the capacity to deceive a “substantial portion” of the public.

7 The number of consumers who could conceivably find themselves in plaintiff’s
8 circumstances – looking for a tax savings on millions of dollars of capital gains –
9 is extremely small and unable to qualify as “a substantial portion of the public”
under any reasonable definition of that term. As a matter of law, conduct directed
toward a small group cannot support a CPA claim.

10 *Id.* at 291 (citing *Henery v. Robinson*, 67 Wash. App. at 277, and *Micro Enhancement Int’l, Inc.*,
11 *v. Coopers & Lybrand LLP*, 110 Wash.App. 412, 438-439 (2002). Nor could the act affect the
12 public interest:

13 For reasons similar to those stated above, plaintiff cannot establish that his dilemma is
14 one which affects the public interest. The tribulations of multimillionaires are not the
focus of the legislative intent behind the CPA; as a (very small) group, the extremely
wealthy are neither unsophisticated nor easily subject to chicanery.

15 *Id.*, citing *Goodyear Tire & Rubber Co. v. Whiteman Tire Inc.*, 86 Wash.App. 737 (1997).

16 Dismissal of the CPA claim with prejudice was affirmed on appeal. *Swartz v. KPMG LLP*, 476
17 F. 3d 756, 761 (9th Cir. 2007).

18 The same analysis applies here. Defendants cannot demonstrate that KeyBank’s actions
19 had the capacity to deceive “a substantial portion” of the general public, or that they affected the
20 public interest. Their CPA claim shall accordingly be dismissed with prejudice.

21 B. Breach of Fiduciary Duty

22 Defendants assert in this counterclaim that KeyBank “breached its fiduciary duties. . . to
23 Defendants in regard to the custody and management of the Defendants assets, and application
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1 | thereof to claimed debts to KeyBank.” Answer and Counterclaims, Dkt. # 123 ¶ 10.30. They
2 | claim direct damages of “at least \$32,000,000.00, and consequential damages of approximately
3 | \$200,000,000.00 or more.” *Id.* In responding to the motion to dismiss, defendants explain their
4 | theory that KeyBank breached a fiduciary duty by failing to act to protect the value of the
5 | collateral when the markets declined dramatically in 2008, then selling the assets at their
6 | depreciated value for less than the amount due on the loans. This counterclaim is based in part
7 | upon a “75% loan-to-value” clause in the Pledge Agreement. Defendants assert that “Key
8 | breached these duties when it permitted Mrs. Graham’s assets to fall below the 75% ratio
9 | requirement of the loan documents and failed to steward suitable investments of the assets over
10 | which it had discretionary investment control.” Defendants’ Response, Dkt. # 142, p. 20.

11 | In moving to dismiss this counterclaim, KeyBank has pointed to several fatal flaws, the
12 | most notable of which is the fact that the 75% loan-to-value requirement in the Pledge
13 | Agreements was an obligation imposed upon the “Grantor,” namely Mrs. Graham, not on
14 | KeyBank. Moreover, under Washington law, “a lender is not a fiduciary of its borrower; a
15 | special relationship must develop between a lender and a borrower before a fiduciary duty
16 | exists.” *Miller v. U.S. Bank of Washington, N.A.*, 72 Wash. App. 416, 426-27 (1994). To
17 | proceed on their counterclaim, defendants must plead facts that show such a special relationship.

18 | Defendants contend that such a “special relationship” was inherent in KeyBank’s dual
19 | role as lender and as manager of Mrs. Graham’s portfolio, which was pledged as collateral.
20 | However, the relevant documents---the Pledge Agreements and ISA’s, together with the asset
21 | management contract which was produced at the hearing---appear to refute any claim of a
22 | “special relationship” between defendants and KeyBank. Moreover, to the extent that such a
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1 relationship may have been implicit in KeyBank’s dual role, it would only extend to Mrs.
2 Graham and Sharon Bingham, who signed the relevant documents.

3 Defendants’ counterclaim for breach of fiduciary duty relies so heavily on the untenable
4 assertions described above that it must be dismissed for failure to state a claim. Defendants
5 shall, however, be given leave to amend this counterclaim.

6 C. Breach of Contract

7 In their breach of contract counterclaim, defendants contend that KeyBank “breached its
8 contract for discretionary management of funds of the Defendants, and particularly Francis
9 Graham. . . “Amended Answer and Counterclaims, Dkt. # 123, ¶ 10.31. Defendants do not
10 identify in this counterclaim any specific contract or the relevant terms. However, in the factual
11 recitation preceding their counterclaims, their “failed discretionary management” allegation is
12 clearly tied to the 75% loan-to-value provision in the Pledge Agreements:

13 For an outstanding loan balance of \$93,000,000.00, an asset value in the portfolio of
14 \$124,000,000.00 was required. A liquidation of the portfolio at that asset value
15 would have left the Defendants with liquid assets of \$31,000,000.00 rather than the
alleged deficit of approximately \$13,000,000.00, claimed by Key Bank, after its failed
discretionary management of the Defendants [sic] assets.

16 Amended Answer and Counterclaims, Dkt. # 123, ¶ 10.14. As noted above, this 75% provision
17 imposed a duty on the grantor, Mrs. Graham, not on KeyBank. Defendants may not rely upon it
18 as a factual basis for their breach of contract claim. This counterclaim shall accordingly be
19 dismissed, with leave to amend, for the same reasons as the breach of fiduciary duty claim which
20 it mirrors.

21 D. Securities-Related Liability

22 1. Suitability Rule

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1 Defendants assert two types of securities-related counterclaims against KeyBank. In the
2 first, they contend that KeyBank “violated its duties regarding the prudence and suitability of
3 investments of the Defendants [sic] assets.” Amended Answer and Counterclaims, Dkt. # 123,
4 ¶ 10.32. In the other, they allege that “KeyBank was a material participant in the offer, issuance
5 and sale of unregistered securities to the Defendants, in concert with and/or by aiding and
6 abetting Centurion.” *Id.*, ¶ 10.33. Nowhere do defendants cite a statutory or other legal basis
7 for these counterclaims.

8 The factual basis for these counterclaims is set forth as follows:

9 10.15. Key Bank was aware while managing the assets of the Defendants, that the
10 loan proceeds were being used to purchase securities – the funds were invested in
11 unregistered investment contracts created by Thomas R. Hazelrig and Scott Switzer
12 through their Centurion Financial Group, LLC entity or otherwise, hereinafter the
13 “Centurion Investments.” Key Bank’s facilitating Defendants’ investments in the
14 Centurion Investments, through a loan secured by the managed assets, was the
15 equivalent of Key Bank making direct investments of the managed assets into the
16 Centurion Investments.

17 10.16. The Centurion Investments were a part of a scheme to defraud the Defendants
18 through the sale of unregistered securities, non-disclosure of material facts,
19 misrepresentation of material facts, unlawful kickbacks and other improper and/or
20 illegal conduct. In all events, the Centurion Investments were not within a suitable
21 category for the assets managed by Key Bank.

22 10.17. Key Bank promoted and assisted in the offering of the fraudulent and
23 unregistered Centurion Investments to the Defendants and to others, including
24 but not limited to a presentation to the O.D. Fisher Investment Company, at which
Key Bank participated in the distribution of the Centurion offering circular.

...

10.19. As a consequence of the Centurion Investments, Defendants have had over
\$200,000,000.00 in guarantee liabilities asserted against them. As a promoter and
participant in the unlawful sale of securities, Key Bank is liable to Defendants for
some or all of the liabilities, including guarantee liabilities, asserted against them
in connection with the Centurion Investments.

Amended Answer and Counterclaims, Dkt. # 123, ¶¶ 10.15 – 10.17, 10.19.

1 In moving to dismiss the securities-related counterclaims, plaintiff necessarily had to
2 speculate as to the legal basis for the claims, because defendants did not plead one. Plaintiff
3 addressed the claims under both Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.
4 § 78j(b), and the “suitability rule” set forth at RCW 21.20.702. In response, defendants
5 clarified that their unsuitability claim “is primarily premised not on Section 10(b) . . . , of which
6 unsuitability is only ‘analytically’ a subset, but on the common law duty of reasonable care to
7 recommend only suitable investments.” Defendants’ Response, Dkt. # 142, p. 23 (citations
8 omitted). The parameters of this common law duty are, according to defendants, the suitability
9 rule set forth in RCW 21.20.702.

10 This statute requires that:

11 (1) In recommending to a customer the purchase, sale, or exchange of a security, a
12 broker-dealer, salesperson, investment adviser, or investment adviser representative
13 must have reasonable grounds for believing that the recommendation is suitable for
14 the customer upon the basis of the facts, if any, disclosed by the customer as to his
15 or her other security holdings and as to his or her financial situation and needs.

16 (2) Before the execution of a transaction recommended to a noninstitutional customer ...
17 a broker-dealer, salesperson, investment adviser, or investment adviser representative
18 shall make reasonable efforts to obtain information concerning:

19 (a) The customer's financial status;

20 (b) The customer's tax status;

21 (c) The customer's investment objectives; and

22 (d) Such other information used or considered to be reasonable by the broker-
23 dealer, salesperson, investment adviser, or investment adviser representative
24 in making recommendations to the customer.

RCW 21.20.702.

There is no private right of action under RCW 21.20.702. *Ives v. Ramsden*, 142
Wash.App. 369, 390, 174 P.3d 1231 (Wash.App. 2008). Defendants assert that this statute gives

1 rise to a common law duty, but their statement of this duty in opposition to dismissal is for the
2 most part a re-statement of their breach of fiduciary claim:

3 Key failed to comply with this suitability rule when it failed to invest Defendants'
4 asserts or recommend that Defendants' [sic] invest those assets in appropriately
5 conservative investments that would preserve the 75% ratio required by Key's loan
6 documents, drafted by Key, for which the assets served as collateral, and when it
7 facilitated the investment of the loan proceeds in unsuitably risky securities, namely
8 the Centurion Investments.

9 Defendants' Response, Dkt. # 142, p. 24. The first part of this sentence conflates the collateral
10 for the loans with the investments purchased with the proceeds of the loans. The breach of
11 fiduciary duty claim with respect to the collateral has been addressed above.

12 As to the second part of the sentence, regarding the loan proceeds, the Court notes that
13 Washington courts have indeed found that "the suitability rule may set brokers' common law
14 duty of care toward clients." *Ives v. Ramsden*, 142 Wash. App. at 391. However, that duty is
15 imposed solely upon a "broker," described in the statute as "broker-dealer, salesperson,
16 investment adviser, or investment adviser representative." RCW 21.20.702(2). Nowhere in the
17 factual assertions supporting the counterclaims have defendants shown that KeyBank or any
18 named individual representing KeyBank was a "broker" within the meaning of *Ives v. Ramsden*
19 and RCW 21.20.702. Instead, they have asserted that KeyBank was "aware" that the loan
20 proceeds were being used to purchase securities. Amended Answer and Counterclaims, Dkt. #
21 123, ¶ 10.15. Mere "awareness" is insufficient to impose liability under the suitability rule duty
22 of care. Defendants also allege in this paragraph that

23 Key Bank's facilitating Defendants' investments in the Centurion Investments,
24 through a loan secured by the managed assets, was the equivalent of Key Bank
making direct investments of the managed assets into the Centurion Investments.

Id. This "equivalency" assertion is a legal conclusion, not a factual allegation which the Court
must take as true. *Clegg v. Cult Awareness Network*, 18 F.3d at 754-55. Conclusory allegations

1 of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. *In re*
2 *VeriFone Securities Litigation*, 11 F. 3d 865, 868 (9th Cir. 1993). Here, the “equivalent ”
3 inference is unwarranted for several reasons, including its failure to recognize the element of
4 choice that defendants had in making their investments.

5 Defendants’ “suitability” claim cannot be brought directly under the statute, and fails
6 even as a common law duty of care claim. It shall be dismissed, but with leave to amend. Such
7 amendment must demonstrate that KeyBank or its agents qualified as “brokers” under RCW
8 21.20.702.

9 2. Securities Fraud

10 Defendants’ allegations regarding a scheme to defraud through the sale of unregistered
11 securities, set forth in ¶¶ 10.16, 10.17, and 10.19 of the Amended Answer and Counterclaims
12 (quoted above), although not tied to any statute, arguably raise a claim under Rule 10(b) of the
13 Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and/or Rule 10b-5, promulgated under the
14 authority of Section 10(b). Section 10(b) makes it unlawful for any person to “use or employ, in
15 connection with the purchase or sale of any security . . . any manipulative or deceptive device or
16 contrivance in contravention of such rules and regulations as the Commission may prescribe.”
17 15 U.S.C. §78j(b). Rule 10b-5, in turn provides that it is unlawful for any person to “engage in
18 any act, practice or course of business which operates or would operate as a fraud or deceit upon
19 any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10B-5.

20 A private action under § 10(b) and Rule 10b-5 must allege and prove all of the elements
21 of primary liability as to each defendant. The elements of a securities fraud claim are: (1) use of
22 any manipulative or deceptive device or contrivance; (2) scienter, i.e., wrongful state of mind;
23 (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6)

1 loss causation, i.e., a causal connection between the manipulative or deceptive device or
2 contrivance and the loss. See *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42
3 (2005).

4 A Rule 10b-5 claim does not receive the traditional deference a court affords a complaint
5 in resolving a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The
6 complaint of fraud is subject not only to the heightened pleading requirements of Fed.R.Civ.P.
7 9(b), but also the pleading requirements of the Private Securities Litigation Reform Act
8 (“PSLRA”). *In re Daou Systems, Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005). Under Rule 9(b),
9 there is a duty to plead with particularity “the circumstances constituting fraud or mistake,”
10 whereas general allegations will suffice to establish “[m]alice, intent, knowledge, and other
11 condition of mind of a person . . .” Fed.R.Civ.P. 9(b). Under the PSLRA, however, a plaintiff
12 must “state with particularity facts giving rise to a **strong inference** that the defendant acted with
13 the required state of mind. 15 U.S.C. § 78u-4(b)(2) (emphasis added).

14 Defendants’ counterclaims wholly fail to meet this heightened pleading standard.
15 Defendants have not asserted the statutory basis for their fraud claim, nor alleged facts which
16 would support a finding of the requisite elements of fraud, particularly scienter. Defendants’
17 bare allegation in ¶ 10.15 that KeyBank “was aware” that defendants were using loan proceeds to
18 purchase unregistered securities is wholly insufficient. Defendants have not alleged or
19 identified any material misrepresentation with respect to the Centurion investments made by
20 KeyBank, or asserted they in fact relied upon any such misrepresentation. For these and other
21 omissions, to the extent that defendants’ counterclaims plead a cause of action under Section
22 10(b) and Rule 10b-5, it must be dismissed, but with leave to amend.

23 3. Unregistered Securities
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1 Defendants' counterclaims make several references to "unregistered" securities, as
2 though that constitutes a *per se* violation of law, without reference to any state or federal law
3 giving rise to a claim thereon. In their memorandum in opposition to dismissal, they point to
4 "the Securities Act of 1933," with no statutory citation, and one state statute, RCW 21.20.430(3).
5 At the motion hearing, they also argued that "notice pleading" is sufficient to resist dismissal for
6 failure to state a claim. However, as noted, the counterclaims themselves fail to invoke any
7 specific statute, state or federal, as a basis for the claims. When a pleading fails to identify any
8 legal basis whatsoever for a cause of action, leaving the opposing party and the Court to guess at
9 which common law or statutory section is invoked, it cannot be deemed "notice pleading."

10 KeyBank has identified the relevant section of the Securities Act of 1933 as Section 12,
11 codified at 15 U.S.C. §77e. This section creates a private right of action for the sale of
12 unregistered securities, but only against those who solicit, offer or sell the security. KeyBank
13 thus contends that even if the Court accepts as true defendants' allegation that it "aided and
14 abetted" the sale of the Centurion securities, there is no associated secondary liability. *Pinter v.*
15 *Dahl*, 486 U.S. 622 (1988). Defendants contend in their opposition they have overcome this rule
16 by alleging that KeyBank was "affiliated with, associated with, or acted as agents of " Centurion
17 in connection with the investment offering, thereby becoming a "seller" within the meaning of
18 the Securities Act of 1933. Response, Dkt. # 142, p. 27, citing *Craighead v. E.F. Hutton & Co.,*
19 *Inc.*, 899 F. 2d 485, 493 (9th Cir. 1990). In making this argument, defendants have quoted the
20 language of the case rather than the language of their counterclaims. Nowhere in the
21 counterclaims do they allege that KeyBank was "affiliated with" or "associated with" or "acted
22 as agents of " Centurion. Instead they allege that KeyBank acted by "aiding and abetting,"
23 which as demonstrated above is not an avenue to liability under the federal statute. Amended
24

1 Answer and Counterclaims, ¶ 10.33. They also allege that KeyBank “promoted and assisted” in
2 the offering, but have not argued that this would convert KeyBank into a “seller” under the law.
3 *Id.*, ¶ 10.17. Further, their allegations in this area are vague and unspecific as to who did this
4 act, where it occurred, and the date or even the year in which it occurred. Because of these
5 deficiencies, the allegations in the counterclaims are wholly insufficient to state a claim under
6 the Securities Act of 1933.

7 Similarly, with respect to the state securities law to which defendants point in their
8 opposition to dismissal, they have failed to make the requisite showing as to KeyBank’s status in
9 the Centurion transactions. RCW 21.20.430 imposes liability with respect to violation of certain
10 enumerated statutes only upon “a person who offers or sells a security;” a “person who directly
11 or indirectly controls a seller;” a “partner, officer, director or person who occupies a similar
12 status or performs a similar function of such seller;” an “employee of such a seller ...who
13 materially aids in the transaction;” or a “broker-dealer, salesperson, or person exempt under the
14 provisions of RCW 221.20.040 who materially aids in the transaction.” RCW 21.20.430(1), (3).
15 As shown above in consideration of the claim under federal securities law, defendants’ factual
16 allegations of “aiding and abetting” or of “promoting or assisting” in the Centurion transaction
17 are vague, conclusory, and fail to demonstrate that KeyBank or any agent thereof was a “person
18 who offers a security” or falls within any of the definitions enumerated in RCW 21.20.430(3).
19 As with any claim asserted under federal securities law, defendants’ claim regarding sale of
20 unregistered securities in violation of RCW 21.20.430 must be dismissed for failure to state a
21 claim.

22 E. Release of the Vessel *Bingo*
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1 In their fifth cause of action stated in the counterclaims, defendants ask for release of the
2 vessel *Bingo*. Amended Complaint and Counterclaims, Dkt. # 123, ¶¶ 10.36, 10.37. This
3 counterclaim is based on their contention that KeyBank improperly applied the proceeds from
4 the sale of collateral to pay down loans other than the loan secured by the *Bingo*. They have
5 provided no valid legal or factual basis for this claim. They have pointed to no provision in the
6 loans documents that required them to prioritize proceeds of the sale of collateral in this way.²
7 Nor have they demonstrated any basis for finding that the arrest of the vessel was wrongful.
8 They argue that the security interest in the vessel, as a “documented vessel” is preempted by the
9 Ship Mortgage Act, but this assertion is uncited, unpersuasive, and rebutted by plaintiff’s
10 argument in reply that “federal law does not preempt the UCC [Uniform Commercial Code]
11 wholesale; the UCC still applies to ship mortgages where the federal statute is silent on an
12 issue.” KeyBank’s Reply, Dkt. # 143, p. 10, *citing* RCW 62A.9A-201(c); *In re McLean*
13 *Industries Inc.*, 132 B.R. 271 (S.D.N.Y. 1991). Defendants did not pursue this line of argument
14 at the hearing and it appears they abandoned it.

15 Defendants failed to explain how KeyBank’s allocation of collateral sale proceeds
16 violated federal maritime law or the loan documents. Their allocation arguments based on
17 KeyBank’s fiduciary duties have been subsumed in the general claim of breach of fiduciary
18 duties addressed above. The allocation claim shall accordingly be dismissed with prejudice.

19 F. Claim for Declaratory Judgment

20 Defendants’ final counterclaim is for a declaratory judgment as to each of the
21 counterclaims they have asserted separately. They also ask for a declaratory judgment on a new
22 issue, regarding KeyBank’s use of “bail out” or TARP funds, but have alleged no facts

23
24 ² The vessel itself has not been sold.

1 | whatsoever in support of this request, no basis for their standing to assert such a claim, and no
2 | legal basis for this Court’s jurisdiction over such a claim. Amended Answer and Counterclaims,
3 | Dkt. # 123, ¶ 10.29(o).

4 | To the extent that defendants seek declaratory judgment as to the success of their other
5 | causes of action (some of which have already been found lacking in merit), the claim is
6 | duplicative and shall be dismissed. See, *Swartz v. KPMG, Inc.*, 476 F. 3d at 765-66. As to the
7 | request for a declaratory judgment that KeyBank misused TARP funds, the claim is in part a re-
8 | characterization of their allocation claim, and shall be dismissed on that basis. Leave to amend
9 | will not be granted as it would be futile. *Nickerson v. Wells Fargo Bank*, 2010 WL 3990743
10 | (N.D.Cal.,2010) (finding that amending a complaint to include a TARP claim would be futile).
11 | Numerous courts in this circuit have determined that there is no private right of action under
12 | TARP. *Gardner v. American Home Mortg. Servicing, Inc.*, 691 F.Supp.2d 1192, 1203-04
13 | (E.D.Cal.,2010); citing *Pantoja v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 1177, 1185
14 | (N.D.Cal.2009) (“there is no express private right of action against TARP fund recipients.”); see
15 | also *Robinson v. Wells Fargo Bank, N.A.*, 2010 WL 2534192, *6 (D.Ariz. Jun 18, 2010) (“The
16 | Court finds that TARP does not create, either explicitly or implicitly, a private right of action
17 | against TARP fund recipients.”).

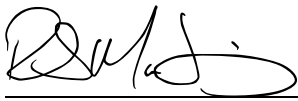
18 | **CONCLUSION**

19 | Plaintiff’s Rule 12(b)(6) motion to dismiss defendants’ counterclaims (Dkt. # 130) is
20 | GRANTED, and all counterclaims asserted in the Amended Answer and Counterclaims (Dkt. #
21 | 123) are DISMISSED. As noted above, such dismissal is with leave to amend the claims of
22 | breach of fiduciary duty, breach of contract, and securities law violations only. The claims for a
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1 declaratory judgment, release of the vessel *Bingo*, and violation of the Washington CPA are
2 dismissed with prejudice.

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Dated this 22nd day of April 2011.


RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE