CIMB Thai Bank PCL v Stanley
2013 NY Slip Op 32264(U)
September 18, 2013
Supreme Court, New York County
Docket Number: 653777/2012
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN SCHWEITZER, Justice — PART 45

CIMB THAI BANK PCL

-v-

MORGAN STANLEY et al

INDEX NO. 653777/2012
MOTION DATE ______
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the complaint is GRANTED in part and DENIED in part per the attached Decision and Order as follows:

Motion to dismiss first and second causes of action viz HUNTER, ACES, Elan and Elva CDOs DENIED;

Motion to dismiss first and second causes of action viz Arosa CDO is GRANTED

motion to dismiss third, fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action is GRANTED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: September 18, 2013

MELVIN L. SCHWEITZER

1. CHECK ONE: .... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ....MOTION IS: ☑ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

CIMB THAI BANK PCL., F/K/A BANK THAI PCL., Plaintiff, -against- MORGAN STANLEY; MORGAN STANLEY CAPITAL SERVICES INC.; MORGAN STANLEY & CO. INC; and MORGAN STANLEY & CO. INTERNATIONAL PLC Defendants.	:	Index No. 653777/2012 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

In this action, CIMB Thai Bank Pcl. (Thai Bank) asserts various claims against Morgan Stanley and certain of its subsidiaries (collectively, defendants). Thai Bank alleges that defendants violated New York State law by engaging in fraud, negligent misrepresentation, breach of contract, tortious interference and unjust enrichment in relation to certain collateral debt obligations (CDOs) issued by defendants and purchased by Thai Bank. Defendants have moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), (7), and CPLR 3016 (b).

Background

The following facts are taken from the complaint. Thai Bank is a consumer and corporate bank with its head office located in Bangkok, Thailand. Morgan Stanley, a Delaware corporation with principal executive offices located in New York, is a global financial and securities services provider. Morgan Stanley's wholly-owned subsidiaries include Morgan Stanley Capital Services Inc. (MS Capital), Morgan Stanley & Co., Inc. (MS US), and Morgan Stanley & Co. International Limited (MS International). MS Capital and MS US are both incorporated in Delaware and headquartered in New York, at the same address as Morgan

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Stanley. MS Capital's primary business "is entering into credit default and other swap transactions." MS US is the primary broker-dealer entity through which Morgan Stanley operates in the United States. MS International is incorporated under the laws of England and Wales and has its primary place of business in London. It is the primary broker-dealer entity through which Morgan Stanley operates in Europe and other global regions.

At issue in this case are five synthetic CDOs which defendants structured, issued, and sold to Thai Bank between August 2006 and April 2007. A synthetic CDO is a derivative which achieves exposure to a portfolio of corporate debt "synthetically" via credit default swaps, rather than through cash purchase of the actual assets. Arranging banks create a synthetic CDO by establishing a special purpose vehicle (SPV), which contracts with a swap counterparty to assume the credit risks referenced by the credit default swap. The counterparty pays fixed credit protection payments to the CDO SPV, which allows the SPV to pay a higher yield to the CDO investor than what it would otherwise obtain by investing directly in the underlying assets. However, if defaults and losses in the reference portfolio rise above a certain level, called the tranche attachment point, the CDO SPV begins to makes floating payments to the swap counterparty out of the principal. If defaults and losses continue to rise to the tranche detachment point, the entirety of the principal is swapped to the swap counterparty and investors in the CDO suffer 100% principal loss. Through this arrangement, the investors who purchase the CDO notes issued by the SPV essentially take the long position in the portfolio, while the swap counterparty, initially the arranging bank, assumes the opposite short position.

Because the arranging bank takes the initial short position, it has a monetary incentive to engage in adverse selection, choosing reference entities for the CDO which are at higher risk of

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loss or default. The arranging bank can benefit as a principal or investor if it retains the short position or as a market maker by selling the short position to other clients at a profit.

In order to reduce this potential moral hazard, CDOs meant for distribution into the general capital markets are usually managed by an independent, third-party CDO manager, who is charged with selecting the CDO's collateral portfolio. The independent manager earns fees as a function of the value and continued performance of the CDOs they manage, so his interests are expected to be aligned with those of the investors. Because rules governing CDO portfolio substitutions try to minimize the possibility of a manager's rogue trading by restricting the manager's ability to trade, the CDO manager's selection of the initial reference portfolio is highly consequential and significantly impacts the subsequent performance of the CDO. As a result, the marketability of the CDO depends highly on the CDO manager's skill, experience, and independence from the arranging bank.

Arranging banks also sell "bespoke" CDOs, which are custom-created for particular clients. Since such CDOs are tailored to meet the specific needs and investment objectives of an investor, the risk of adverse selection is diminished.

Thai Bank purchased one bespoke CDO and four CDOs with independent CDO managers (collectively, the "MS CDOs"). The bespoke CDO, Arosa, was designed by Morgan Stanley for Thai Bank in early 2006, to meet Thai Bank's stated investment objectives of portfolio diversification, interest income, and principal preservation. On October 31, 2006, Thai Bank purchased $50 million of credit-linked notes issued by the Arosa SPV. For the transaction, MS International was represented as Arosa's dealer, and MS Capital acted as swap counterparty. Morgan Stanley guaranteed MS Capital's payment obligations, and its name was on the Arosa

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Offering Documents. The reference portfolio of the CDO included, at issuance, 110 corporate and sovereign reference entities selected by Morgan Stanley.

In March 2007, Thai Bank purchased $20 million of notes issued by the Hunter SPV and $30 million of notes issued by the ACES SPV. The Hunter and ACES CDOs were identical to one another and were part of a larger series of "off the rack" CDOs arranged by Morgan Stanley. According to the CDO's pitchbook, the Hunter and ACES CDOs included, at issuance, 120 corporate and sovereign reference entities selected by AllianceBernstein, an independent CDO manager. MS US and MS International acted as the CDO distributors, MS Capital was the swap counterparty, and Morgan Stanley acted as the swap guarantor for MS Capital. Morgan Stanley's name was on the Hunter and ACES offering documents.

In April 2007, Thai Bank purchased a further $30 million of notes issued by the Elan SPV and $10 million of notes issued by the Elva SPV. The Elan and Elva CDOs were identical to one another, containing 100 corporate and sovereign reference entities selected by Deutsche Asset Management GMBH as the CDO Portfolio Advisor. As with Hunter and ACES, MS International acted as the CDO distributor, MS Capital as the swap counterparty, and Morgan Stanley as the swap guarantor.

Thai Bank alleges that Morgan Stanley engaged in a fraudulent scheme whereby it and its subsidiaries adversely selected reference assets that it knew were at risk of default. In particular, Thai Bank contends that Morgan Stanley knew that there was trouble in the subprime mortgage market by early 2007. Consequently, it adversely selected a high concentration of financial, insurance, and real estate (FIRE) entities for the reference portfolios of the bespoke Arosa CDO, knowing that these companies had significant exposure to subprime and real estate markets. Morgan Stanley also secretly forced AllianceBernstein and Deutsche Asset Management to

abdicate of their roles as the portfolio managers for the other four CDOs and usurped the position in order to bias the reference portfolios of these CDOs with FIRE entities. Because Morgan Stanley ultimately held the short position on the portfolios, this fraudulent scheme allowed it to benefit when the reference entities began to default during the 2007 subprime mortgage crisis.

Upon purchase by Thai Bank, the MS CDOs were worth $140.0 million in total. However, after subprime mortgage risks materialized in the fall and winter of 2007, the CDOs began to lose money. From this time and into early 2008, Thai Bank explored strategies to mitigate risks and potential losses. Ultimately, Thai Bank liquidated its holdings in the five CDOs in July-August 2008. Its actual losses after liquidating the CDOs were $102.8 million.

Thai Bank filed suit against defendants seeking rescission, compensatory damages (including interest thereon), and punitive damages for fraud and negligent misrepresentation. Thai Bank also brings various breach of contract claims against defendants.

Discussion

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

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On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fountanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (2d Dept 2001), *leave to appeal denied* 97 NY2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Fraud

Thai Bank's first two causes of action allege fraud and aiding and abetting fraud, against all defendants. To state a claim for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Chung v Wang*, 79 AD3d 693, 694-95 (2d Dept 2010). In any claim for fraud, New York law requires that "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). Under this heightened pleading standard, a claim of fraud must be supported by factual allegations that sufficiently detail the allegedly fraudulent conduct and give rise to a reasonable inference of the alleged fraud. *Pludeman v. Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 (2008). Vague and conclusory allegations or speculative inferences lacking factual support do not suffice. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009).

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Misrepresentations and Omissions

Thai Bank contends that defendants made a number of materially false and misleading representations and omissions regarding the fact that the Hunter, ACES, Elan, and Elva CDOs would be overseen by independent portfolio managers. According to the Offering and Selling Documents of these CDOs, the reference portfolios had been selected by expert, third party managers, namely AllianceBernstein and Deutsche Asset Management; furthermore, the CDO managers acted independently in selecting the CDO reference portfolios. The Selling Documents also included representations concerning the expertise and experience that AllianceBernstein and Deutsche Asset Management would bring to bear in selecting the portfolios. However, Thai Bank asserts that the biases present in the portfolios and their structures raise a strong inference that defendants, rather than the third-party managers, chose the reference portfolios underlying the CDOs.

First, Thai Bank claims that the MS CDOs each featured an unusually high concentration of companies from the FIRE sectors, nearly double that of the industry-standard corporate credit reference portfolio known as CDX.NA.IG. Companies drawn from the FIRE sectors initially appeared to have little in common, and therefore the MS CDO portfolios seemed outwardly diversified. However, these companies were actually each subject to a particularly elevated risk of default in the event of a housing bust. Moreover, the MS CDOs were biased towards subsectors within the broad FIRE sectors with high exposure to a housing downturn, such as monoline and mortgage insurers. Of the insurance companies selected for industry standard CDX.NA.IG, 17-20% were monoline or mortgage insurers; however, among the MS CDOs, the percentage of insurers that were monoline or mortgage insurers ranged between 50% to over 90%. Thai Bank also contends that the defendants' structuring of the MS CDOs advantaged

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their short position, as the tranche attachment and detachment points were both very low, making the CDOs effectively all-or-nothing bets.

Secondly, Thai Bank argues that the MS CDOs bear substantial resemblance to six single-tranche synthetic CDOs which were arranged by Morgan Stanley but did not feature an independent CDO manager (the Pinnacle CDOs). The Pinnacle CDOs were biased towards the same reference entities which were over-represented in the MS CDO portfolios, namely FIRE entities and monoline and mortgage insurers.

From these two comparisons, Thai Bank alleges that Morgan Stanley secretly controlled the portfolio selection in the MS CDOs and used such control to ensure adverse portfolio selection of companies which it knew were at risk of default due to high exposure to the subprime mortgage market. Defendants subsequently misrepresented to Thai Bank that the portfolio selection for the Hunter, ACES, Elan, and Elva CDOs were made by independent managers, rather than by themselves; however, the supposedly independent managers "were placed under intense pressure by the CDO-arranging banks, who controlled manager assignments, to acquiesce in the inclusion of adversely-selected collateral," and they "either ceded control over collateral selection to the arranging banks or faced being frozen out from receiving further CDO management assignments."

Defendants contend that Thai Bank did not adequately plead a misrepresentation because it did not provide factual support for its allegations, specifically regarding how defendants assumed the role of portfolio manager or advisor or why AllianceBernstein and Deutsche Asset Management would abdicate the role, given their monetary stake in the performance of the CDO. Defendants rely primarily on *Loreley Financing (Jersey) No. 7, Ltd. v Credit Agricole Corporate and Inv. Bank*, No. 650673/10 (N.Y. Sup. Ct. N.Y. County June 9, 2011). In *Loreley*, this court

dismissed a claim of fraud which alleged only that "the arranger [of a CDO] was charged with dealing with both sides of a trade. It had to assemble an asset pool attractive to a purchaser of the CDO's securities while, at the same time, attractive to a short-holder with respect to the same asset pool." *Id.* at *4. Defendants contend that, as in *Loreley*, Thai Bank seeks to hold defendants liable for a "grand financial scam" but does not detail what such a scam involves or how it operated—for example, how, in particular, defendants were able to cause AllianceBernstein and Deutsche Asset Management to abdicate their positions as portfolio managers. Furthermore, defendants argue that the presence of some shared investment characteristics does not necessarily prove that defendants engaged in a fraudulent scheme, but may instead demonstrate that Thai Bank deliberately chose to invest in portfolios with a bias towards FIRE entities.

Defendants' argument is unpersuasive. This court dismissed the claim in *Loreley* for inadequate pleading because the plaintiff's primary claim was that it was not informed that defendants took a short position or did not understand the implications of its own long position on the portfolio; however, given the nature of the financial instrument and the fact that the plaintiff was a sophisticated investor, the court found its allegations implausible. Here, however, Thai Bank alleges with respect to the Hunter, ACES, Elan, and Elva CDOs specifically that it was falsely informed by defendants that the CDOs would be managed by independent, third-party investors.

The current case is more similar to *Space Coast Credit Union v Barclays Capital, Inc.*, wherein a New York district court upheld claims based on the assertion that Barclays Capital, the defendant and arranging bank of the Markov CDO, misrepresented that State Street Global Advisors, a purportedly independent collateral manager, would select the collateral for the CDO.

The plaintiff claimed that Barclays Capital had in fact "possessed effective control over the selection of Markov's collateral" and "used such control to fill Markov with hundreds of millions of dollars worth of collateral that served its own (short) interest." 2012 WL 946832, *1 (SDNY, Mar. 20, 2012, No. 11 Civ. 2802(LLS)). The court agreed that the pleading standard for fraud was met by the plaintiff:

> The complaint alleges facts giving plausibility to those conclusions, *see id.* ¶ 159 ("by filling Markov with collateral assets that Barclays believed would fail, Barclays sought to ensure that its 'short' bet it had constructed through Markov paid off"); *id.* ¶ 294 ("Barclays granted 'consent' to bad assets, not to good ones; assets meant to drain Plaintiff's and other Markov investors' principal through swap to Barclays rather than conserve it."), and that SSGA chose to cede power to BarCap, since BarCap likely would have used another collateral manager had SSGA refused, *see id.* ¶ 176 ("if collateral managers insisted upon maintaining independence and control over collateral selection, banks 'froze out' such stubborn collateral managers from further CDO collateral management assignments").

Id. Like the plaintiff in *Space Coast*, Thai Bank has alleged sufficient facts giving plausibility to the conclusion that defendants have made an actionable misrepresentation with respect to the Hunter, ACES, Elan, and Elva CDOs: they have alleged that defendants filled the reference portfolios of these CDOs with assets they believed would default due to high exposure to the real estate market and that AllianceBernstein and Deutsche Asset Management decided to cede their position as portfolio managers to defendants because they felt that their position would other have been threatened. *See also Dandong v Pinnacle Performance Ltd.*, 2011 WL 5170293 (SDNY, Oct. 31, 2011, No. 10-Civ-8086 (LBS)) (denying a motion to dismiss because plaintiffs adequately stated a case that "[f]or each and every series of Notes, MS International selected as underlying assets extremely risky synthetic CDOs specifically created by MS Capital for the transaction. This was done despite industry practice that investors' principal be invested in low—risk collateral. MS Capital then bet on those same CDOs.").

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Although Thai Bank is unable to demonstrate through specific documents whether a misrepresentation regarding the portfolio managers of the Hunter, ACES, Elan, and Elva CDOs has been made, it has advanced sufficient circumstantial evidence to support a reasonable evidence of the alleged fraud. *See Pludeman,*10 NY3d at 492; *Dodona I, LLC v Goldman, Sachs & Co.*, 847 F Supp 2d 624, 643-44 (SDNY 2012) ("Thus, in the absence of any single, particular smoking-gun document, the allegations in the Complaint collectively supply sufficient circumstantial evidence from which the Court could reasonably infer Defendants' recklessness."). The first element of fraud has been adequately pleaded with respect to the Hunter, ACES, Elan, and Elva CDOs.

Thai Bank also contends that defendants omitted to disclose in the CDO Selling Documents that defendants had secretly intended, designed, and operated the MS CDOs as vehicles through which they could and did place proprietary bets for themselves or certain of their preferred clients, rigged in their favor, against Thai Bank. In order for a fraudulent omission or concealment to be actionable, a plaintiff must allege a duty to disclose material information. *Albion Alliance Mezzanine Fund, L.P. v State St. Bank and Trust Co.*, 8 Misc 3d 264, 269-70 (Sup Ct 2003). A duty to disclose typically arises out of a confidential or fiduciary relationship exists between the parties (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400 [1st Dep't 2007], *affd*, 12 NY3d 553 [2009]), but even in the absence of a fiduciary relationship, "a duty to disclose may arise when one party's superior knowledge of essential facts renders nondisclosure inherently unfair." Under this "superior knowledge" or "special facts" doctrine, a duty to disclose arises when "(1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." *Banque Arabe et*

Internationale D'Investissement v Maryland Nat. Bank, 57 F3d 146, 155 (2d Cir 1995). Thai Bank claims that defendants possessed unique knowledge regarding the selection of the reference portfolio underlying the CDO, namely that AllianceBernstein and Deutsche Asset Management abdicated their roles as portfolio managers to Morgan Stanley Capital. Such knowledge was unavailable to Thai Bank and therefore rendered the transactions inherently unfair. Thai Bank has pleaded with particularity that defendants had a duty to disclose their concealed role as portfolio manager, and that the lack of such disclosure is actionable.

Thai Bank's allegations of a misrepresentation or omission regarding the Arosa CDO are less persuasive. Thai Bank claims that, in communications regarding the CDO, defendants represented that they were building the bespoke CDO as a service provided to Thai Bank, for Thai Bank's benefit and to meet Thai Bank's investment goals. However, defendants misrepresented and omitted to disclose that they were building Arosa to serve their own interests rather than those of their client. This argument is unconvincing, as both Thai Bank and Morgan Stanley were sophisticated investors. Each party took the opposite side of an investment transaction, one long position and one short position, for its own economic benefit, and each understood the potential risks of its position. As this Court has stated before, that the arranger initially has to take the short position on the asset pool is "transparent. It [is] in the nature of the structure." *Loreley Financing (Jersey) No. 7, Ltd. v Credit Agricole Corporate and Inv. Bank*, No. 650673/10 (N.Y. Sup. Ct. N.Y. County June 9, 2011). Thai Bank also specifically acknowledges in the complaint that "the fact that the arranging bank at least initially possesses a 'short' position with respect to the CDO reference portfolio creates a potential for 'moral hazard' if the arranging bank is also in charge of portfolio selection"; it clearly understood that Morgan Stanley had assumed the position opposite it, and stood to gain if the reference portfolio

underlying the CDO suffered losses. Thai Bank even relies on this premise to argue that defendants' misrepresentation of the role of third-party portfolio managers for the ACES, Hunter, Elan, and Elva CDOs is material to the transaction, since, as Thai Bank admits, such managers "serve[] as a safeguard against the arranging bank's adverse selection." Thai Bank's contention that it understood defendants' short position with respect to the Arosa reference portfolio as "a mere byproduct of constructing Arosa for Plaintiff's benefit, rather than a motivating principle underlying defendants' portfolio selections" is thus unavailing.

Moreover, Thai Bank was the Substitution Agent for the reference portfolio of the Arosa CDO, and therefore was entitled to remove and replace reference entities in the portfolio after making its initial investment in the CDO. Because Thai Bank had ultimate control over the Arosa CDO, the argument that defendants misrepresented and failed to disclose that they were building Arosa to serve their own interests is not compelling. Thai Bank has failed to allege with particularity that the defendants have alleged a misrepresentation or omission with respect to the Arosa CDO. The fraud claim with respect to the Arosa CDO is thus dismissed.

Scienter

The second element of fraud is scienter. In order to satisfy the element of scienter, a complaint must present facts supporting a "reasonable inference that the defendant participated in, or knew about, the fraud." *China Dev. Indus. Bank v Morgan Stanley*, 2011 NY Misc LEXIS 1808, at *16-18. A reasonable inference can be established either through the allegation that the defendants had the motive and opportunity to commit fraud, or through strong circumstantial evidence of conscious misbehavior and recklessness. *Woodward v Raymond James Fin., Inc.*, 732 F Supp 2d 425, 435-36 (SDNY 2010) (citing *ECA & Local 134 IBEW Joint Pension Trust of Chicago*, 553 F.3d at 198). However, "because the element of scienter is most likely to be

within the sole knowledge of the defendant and least amenable to direct proof, the requirement of CPLR 3016(b) should not be interpreted strictly when analyzing the scienter allegations in a complaint." *Aris Multi-Strategy Offshore Fund, Ltd. v Devaney*, 2009 WL 5851192, at *9 (Sup. Ct., N.Y. County, Dec. 14, 2009, No. 602231/08) (internal citation omitted).

Under the motive and opportunity prong, a complaint must allege both that the defendant has the "means and likely prospect of achieving concrete benefits by the means alleged," (*Novak v Kasaks,* 216 F3d 300, 307 [2d Cir. 2000] [internal citation omitted]) and that such benefits "could be realized by one or more of the false statements or wrongful disclosures alleged." *Kalnit v Eichler,* 264 F3d 121, 138 (2d Cir.2001) (internal quotation marks omitted). "To establish the strong inference of scienter through the motive and opportunity prong, the complaint must allege that [the defendant] or its officers benefited in some concrete and personal way from the purported fraud. Motives that are common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive' for purposes of this inquiry." *Woodward*, 732 F Supp 2d at 435 (citations omitted). The potential for self-dealing in cases related to CDO portfolio managers can satisfy the motive and opportunity prong of the scienter inquiry. In *Dodona I, LLC*, 847 F Supp 2d at 644-645, Dodona contended that defendant Goldman Sachs had nonpublic knowledge regarding the weakness of the subprime mortgage market. In order to offset its own subprime risk, it shorted CDOs containing residential mortgage-backed securities, selling these CDOs to Dodona with the knowledge that most of the assets in the portfolio were likely to default. The court notes, "Dodona . . . is alleging more than a typical profit motive; it is alleging, in essence, that defendants engaged in self-dealing by abusing their nonpublic knowledge and position of power to benefit themselves. The Complaint contains factual

allegations indicating that defendants not only knew that the Hudson CDOs were unlikely to be profitable and failed to disclose this to investors, but also that they sought to profit from that insight." *See also Dandong*, 2011 WL at *11.

Under the circumstantial evidence prong, a complaint must allege that the defendant either "(1) benefited in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) that the defendants failed to check information they had a duty to monitor." *Novak*, 216 F3d at 311 (citations omitted). *See also Woodward*, 732 F Supp 2d at 435-436.

Thai Bank claims in its complaint that by mid-2006, key Morgan Stanley economists had predicted an imminent housing bust and losses on companies with substantial real estate exposures. Furthermore, while defendants were advising Thai Bank to take the long positions created in the CDOs, Morgan Stanley's own publications began commenting that "taking short positions on junior CDX tranches . . . could serve as a valuable hedge or short position should credit markets take a turn for the worse." In early 2007, Morgan Stanley publications also noted the value of structured credit short positions or hedges to protect against market losses sparked by a real estate bust. In anticipation of the downturn, Morgan Stanley constructed the CDOs and acted as the Swap Counterparty, gaining a short position with respect to the CDO portfolios. Thai Bank alleges that Morgan Stanley's unique insight into the real estate market and decision to profit from this insight by creating CDOs with high exposure to the subprime real estate market constituted the motive and opportunity to commit fraud.

Defendants contend that Thai Bank has not satisfied the element of scienter because it has not pleaded with particularity that defendants had unique foresight and knowledge about the

problems in the mortgage market. While Morgan Stanley may have had knowledge of the risk that residential mortgage-backed securities would dramatically default, these securities were in fact not included in the reference portfolios for the CDOs in question. Thai Bank's argument that Morgan Stanley knew of a potential downturn in the market also does not establish defendants' scienter with particularity. Defendants rely on *Woori Bank v RBS Securities, Inc.*, 910 F Supp 2d 697, 703-04 (SDNY 2012), where a court recently dismissed charges of misrepresentation for failure to plead with particularity any supposed knowledge of which companies were at greatest risk from the U.S. real-estate crash or any tie between that alleged knowledge and the specific CDOs at issue in that case. Defendants claim that, because Thai Bank failed to tie any knowledge on the part of defendants to their role in the CDOs, the complaint should be dismissed for failure to adequately plead scienter.

The court does not find defendants' argument persuasive. As in *Dodona I*, Thai Bank has alleged that defendants had nonpublic knowledge regarding a weakness in the subprime mortgage market. Even if the Hunter, ACES, Elan, and Elva CDOs do not directly contain residential mortgage-backed securities in their portfolios, defendants had the opportunity to utilize nonpublic knowledge in order to bias the reference portfolios in favor of assets which had a high exposure to the mortgage market, namely assets in the FIRE sectors. Although the assets contained in the CDOs at question are one step removed from direct exposure to the subprime mortgage markets, it is logical that defendants could have predicted a rash of defaults among assets with high exposure to the failing subprime mortgages, such as insurance companies. Thai Bank has further pleaded that defendants' motive was therefore to engage in self-dealing by filling the CDOs with assets favorable to its own short position, as in *Dodona*.

Defendants' reliance on *Woori Bank* is unavailing, as in that case, the court found no additional allegations which would have satisfied the pleading with particularity requirement for scienter. For example, the court found "no allegation that the defendants were simultaneously marketing these CDOs to Woori while at the same time going short on the very assets that comprised them." *Woori Bank*, 910 F Supp 2d at 704. Here, Thai Bank has clearly pleaded that defendants engaged in self-dealing, marketing the CDO's long position while taking the short position themselves. More significantly, Thai Bank has alleged that defendants misrepresented their role as portfolio manager to Thai Bank, an "assertion not necessarily confined to documentary proof." *Bayerische Landesbank, New York Branch v Barclays Capital, Inc.*, 902 F Supp 2d 471, 474 (SDNY 2012). Thai Bank has adequately alleged defendants' motive and opportunity to commit fraud, thus satisfying the element of scienter.

Reliance

The third element of fraud is reasonable reliance on a material misrepresentation. "To determine, on a motion to dismiss, whether a plaintiff has alleged reasonable reliance, a court may 'consider the entire context of the transaction, including . . . the sophistication of the parties, and the context of any agreements between them." *Terra Securities Asa Konkursbo v Citigroup, Inc.*, 740 F Supp 2d 441, 448 (SDNY 2010).

Thai Bank alleges that its reliance on defendants' representations in the CDO Selling Documents concerning the experience and intention of the portfolio managers was reasonable because it was "customary and typical for CDOs to feature CDO managers, and for CDO managers to make portfolio selections." Thai Bank and most other fixed income investors had no knowledge of the fact that arranging banks such as Morgan Stanley were placing bets against portfolios which the arranging banks thought likely to fail, or that the arranging banks found it

necessary to misrepresent the portfolio managers in order to find investors for the long positions on the CDOs.

Defendants merely note that Thai Bank was a sophisticated investor, but make no further arguments regarding Thai Bank's reasonable reliance on misrepresentations regarding the portfolio managers. However, as noted in *Dandong*, "even a sophisticated investor armed with a bevy of accountants, financial advisors, and lawyers could not have known that Morgan Stanley would select inherently risky underlying assets and short them." 2011 WL 5170293 at *14. The court is satisfied that Thai Bank would not have been able to discover the fraud at the time by any degree of due diligence or analysis by the most sophisticated of investors. Thai Bank has pleaded the element of reasonable reliance with particularity.

Damages

The final element of fraud is damages. Thai Bank has demonstrated that it initially invested a total of $90 million into the Hunter, ACES, Elan, and Elva CDOs. In the fall and winter of 2007, after the collapse of the subprime mortgage market, Thai Bank began exploring strategies to mitigate its potential losses. After Thai Bank liquidated its holdings in the CDOs in July and August 2008, its losses in these CDOs came out to $67.865 million, according to its complaint. This element of fraud has been adequately pleaded.

Defendants' motion to dismiss the first cause of action is denied with respect to the Hunter, ACES, Elan, and Elva CDOs, and granted with respect to the Arosa CDO.

Aiding and Abetting Fraud

Thai Bank alleges aiding and abetting fraud against defendants. The elements of aiding and abetting fraud are "(1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *In*

re Agape Litigation, 773 F Supp 2d 298, 307 (EDNY 2011) (citing *Rosner v Bank of China*, 2008 WL 5416380, at *4 (SDNY, Dec. 18, 2008, No. 06-CV-13562).

Thai Bank has adequately pleaded the existence of a fraud and defendants' knowledge of the fraud. Thai Bank further contends that defendants substantially assisted in perpetrating the same fraudulent scheme by concealing that Morgan Stanley had effective control over the portfolio selection in the CDOs and used this control to serve its own short interests by ensuring adverse selection of reference entities with a high probability of defaulting during the mortgage crisis. Defendants' motion to dismiss this cause of action is denied with respect to the Hunter, ACES, Elan, and Elva CDOs.

Negligent Misrepresentation

Thai Bank's third and fourth causes of action allege negligent misrepresentation against Morgan Stanley and aiding and abetting negligent misrepresentation against all other defendants. To allege the elements of negligent misrepresentation, Thai Bank's complaint must plead that the defendant had a duty, as a result of a special relationship, to give correct information; the defendant made a false representation that he or she should have known was incorrect; the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; the plaintiff intended to rely and act upon it; and the plaintiff reasonably relied on it to his or her detriment. *Hydro Investors, Inc. v Trafalgar Power Inc.*, 227 F3d 8, 20 (2d Cir 2000).

The element most in question in this cause of action is whether Morgan Stanley had a duty to give Thai Bank correct information. "A claim for negligent misrepresentation requires a showing of a special relationship of trust and confidence between the parties which creates a duty for one party to impart correct information to another. Generally, a special relationship

does not arise out of an ordinary arm's length business transaction between two parties." *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287 (1st Dept 2011) (internal citations omitted). Thai Bank claims that a special relationship of trust and confidence existed between it and Morgan Stanley because of Morgan Stanley's "unique or special experience with respect to the . . . CDOs." This special relationship was heightened in the context of the Arosa CDO, which Morgan Stanley created especially for Thai Bank. Thai Bank further contends that a special relationship of trust and confidence existed because of the direct and continuous contact between Thai Bank and Morgan Stanley throughout 2006 and 2007, during which time Morgan Stanley sought to induce Thai Bank to invest in the MS CDOs.

According to the transaction documents, Morgan Stanley held two primary roles in relation to the MS CDOs: it was the swap guarantor for MS Capital for the Elan, Elva, Hunter, and ACES CDOs, and it created and sold the bespoke Arosa CDO for Thai Bank. Neither of these roles gives rise to a special relationship of trust and confidence. Under New York law, there is no special relationship between a guarantor and a lender, or between an issuer and a noteholder. *See Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 589; *M&T Bank Corp. v Gemstone CDO VII, Ltd.*, 2009 WL 921381, at *13 (Sup. Ct., Erie County, Apr. 27, 2009, No. 7064/08). A buyer and seller in an arms-length transaction also do not have the sort of special relationship that would give rise to a duty to impart correct information, as the court noted in *Dandong*, where, as in this case, Morgan Stanley created and sold bespoke CDOs to the plaintiff. 2011 WL 5170293, *15. Because Thai Bank has failed to adequately allege facts showing that its relationship with Morgan Stanley is more than an ordinary arm's length business transaction, the third cause of action is dismissed.

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Under New York law, aiding and abetting claims only apply to intentional torts. *See Appavoo v Phillip Morris Inc.*, 1998 WL 440036, *6 (Sup. Ct., N.Y. County, July 24, 1998, No. 122469/97). The fourth cause of action is dismissed.

Breach of Contract Claims

Thai Bank has alleged a number of contract-related claims against all defendants, including breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference, and unjust enrichment. Before reaching these claims, we address first, whether the corporate veil should be pierced such that Morgan Stanley can be held liable for the action of its subsidiaries, and second, whether Thai Bank has adequately pleaded the existence of a contract.

Piercing the Corporate Veil

Although Thai Bank does not allege that it entered into contracts or had quasi-contractual dealings with Morgan Stanley, it contends that the subsidiaries MS US, MS International, and MS Capital are merely alter egos of Morgan Stanley. Thai Bank argues that, under New York law, the court should pierce the corporate veil in order to hold Morgan Stanley liable for the actions of its subsidiaries. Defendants claim that under Delaware law, the court should decline to pierce the corporate veil and should therefore dismiss all contract-related claims against Morgan Stanley.

Under New York's choice of law principles, "[t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders." *Wausau Bus. Ins. Co. v Turner Const. Co.*, 141 F Supp 2d 412, 416-17 (SDNY 2001) (citing *Fletcher v Atex*, 68 F3d 1451, 1456 [2d Cir 1995]). As Morgan Stanley and its US subsidiaries are all incorporated in Delaware, the court applies Delaware law to the breach of corporate veil issue.

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"Persuading a Delaware court to disregard the corporate entity is a difficult task. . . . Piercing the corporate veil under the alter ego theory requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud." *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v Wood*, 752 A2d 1175, 1183-84 (Del Ch 1999) (citations omitted). The acts of one corporation are therefore not regarded as the acts of another merely because one corporation is a subsidiary of the other, or because "the two may be treated as part of a single economic enterprise for some other purpose." *In re Sunstates Corp. Shareholder Litig.*, 788 A2d 530, 534 (Del Ch 2001).

Thai Bank alleges in its complaint that MS Capital and MS International are alter egos of Morgan Stanley for its US and international derivatives and swaps transactions. According to Thai Bank, MS Capital and MS International (1) are wholly owned subsidiaries of Morgan Stanley with a significant overlap of officers, directors and personnel; (2) are located in Morgan Stanley's headquarters with an identical listed telephone number; (3) are beneficiaries of Morgan Stanley's cost free guarantees for their contractual obligations; (4) did not have independent financial reports; (5) did not have annual meetings for and/or provide reports to shareholders; and (6) secured funding for or from other entities that Morgan Stanley controlled.

Thai Bank contends that it has sufficiently pleaded that Morgan Stanley had *de facto* "domination and control" over its subsidiaries, MS Capital and MS International, and through this domination, Morgan Stanley used its subsidiaries to perpetuate a fraud against Thai Bank. *Wallace*, 752 A2d at 1183. If either MS International or MS Capital were independent companies and not dominated by Morgan Stanley, the result would have been arms-length

negotiations over the swaps underlying the CDOs, and the fraud itself would not have been possible.

While Thai Bank may have adequately pled that Morgan Stanley completely dominated its subsidiaries, it fails to satisfy the "fraud and injustice" prong of the corporate veil piercing inquiry. It is not enough that a parent company merely use a subsidiary to perpetuate fraud; the entire subsidiary must exist for the *sole* purpose of being a vehicle for fraud. *Id.* MS Capital and MS International had significant roles with respect to the MS CDOs and other financial instruments: MS Capital acted as the swap counterparty for the MS CDOs, and MS International was listed as an arranger and distributor for the CDOs. These separate roles demonstrate that MS Capital and MS International are "part[s] of a single economic enterprise" run by Morgan Stanley, rather than "mere shams." *In re Sunstates Corp.*, 788 Ad2d at 534. Thai Bank fails to allege that MS International and MS Capital existed solely for the purpose of perpetuating a fraud. The court declines to pierce the corporate veil, and dismisses all contract-related claims against Morgan Stanley.

Existence of a Contract

It is axiomatic that, in order for a breach of contract to occur, a contract must first exist. *Franklin v Carpinello Oil Company*, 84 AD2d 613, 613 (3d Dept 1981). Thai Bank concedes that it never signed a particular contractual document with MS International requiring defendants to provide an independent third-party portfolio manager for the Hunter, ACES, Elan, and Elva CDOs. However, Thai Bank contends that the various transaction documents and agreements underlying each MS CDO together comprised valid and enforceable contracts which defendants subsequently breached by failing to provide an independent portfolio manager. Specifically, Thai Bank names the Hunter and ACES CDO Term Sheets, Indentures, Private Placement

Memoranda, Private Placement Memorandum Supplements, and Portfolio Substitution Agreements as the documents which constitute the alleged contracts for the Hunter and ACES CDOs. Thai Bank names the Elan and Elva Term Sheets, Indentures, Registration Documents, Securities Notes and Applicable Supplements, and Portfolio Advisory Agreements as the documents which constitute the alleged contracts for the Elan and Elva CDOs.

Thai Bank relies on various doctrines of contract interpretation which hold that instruments "executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument." *BWA Corp. v Alltrans Exp. U.S.A., Inc.*, 112 AD2d 850, 852 (1st Dept 1985). *See also* 11 Richard A. Lord, Williston on Contracts § 30:26 (4th ed 1990) ("Apart from the explicit incorporation by reference of one written instrument into another, the principle that all writings which are part of the same transaction are interpreted together also applies when incorporation by reference of another writing may be inferred from the context surrounding the execution of the writings in question."). Because the various CDO documents are all part of the same transaction—the creation and sale of the CDO by Morgan Stanley to Thai Bank—and because the documents reference one another, each set of CDO transaction documents should be read as a single contract.

Defendants argue that Thai Bank has failed to plead that it was a party to any of the alleged contracts, how it accepted any alleged promises therein, or how and when the alleged contracts were formed. With respect to the Hunter and ACES CDOs, defendants argue that the Term Sheets and Private Placement Memoranda are not contracts. Each Term Sheets contains a disclaimer stating that it has been prepared "solely for informational purposes" and is "not an offer to buy or sell or a solicitation of an offer to buy or sell." The Private Placement

Memoranda and Memoranda Supplements describe the terms of an investment and are offering documents, but not contracts in and of themselves. Furthermore, while the CDO Indentures are contracts upon which Thai Bank is designated as the "Calculation Agent," the Indentures do not contain a provision requiring defendants to provide and independent portfolio manager. The only contracts which list AllianceBernstein as the Portfolio Manager, the Portfolio Substitution and Management Agreements (PSMAs), are agreements solely between MS Capital and AllianceBernstein; Thai Bank is not a party to the agreement.

Defendants also argue that, with respect to the Elan and Elva CDOs, the Term Sheets, Registration Documents, and Securities Notes and Supplements are not contracts; the Trust Deeds (like the Hunter and Aces Indentures) do not contain a provision requiring a third-party portfolio manager; and Thai Bank is not a party to the Portfolio Advisory Agreements (PAAs) between MS Capital and Deutsche Asset Management.

The determination of the existence of the existence of contract is generally a matter of fact, dependent on the intent of the parties. 11 Richard A. Lord, Williston on Contracts § 30:26 (4th ed 1990). However, in order to survive a motion to dismiss, a plaintiff must plead "specific allegations as to the agreement between the parties, the terms of that agreement, and what provisions of the agreement were breached as a result of the acts at issue." *Abu Dhabi Commercial Bank v Morgan Stanley & Co. Inc.*, 651 F Supp 2d 155, 183 (SDNY 2009). Here, as in *Abu Dhabi*, Thai Bank fails to plead more than vague and conclusory allegations regarding the existence of a contract pursuant to which defendants agreed to provide an independent, third-party portfolio manager. In its complaint, Thai Bank alleges merely that it entered into "valid and enforceable contracts [with MS International] pursuant to which Plaintiff agreed to purchase, and MS International agreed to sell: (1) a specified quantity of securities, (2) having specified

terms and features, at (3) a specified price." Thai Bank's contention that the documents underlying each CDO transaction "are component parts of a single transaction that each depended upon the other to effectuate their common purpose" does not provide specific details about how this contract was formed, the date of formation, the consideration, or the contract's major terms, all of which must be pleaded to demonstrate the existence of a contract. *Id.* at 184. Thai Bank does not provide any indication that defendants made an offer to Thai Bank other than to sell it credit-linked notes issued by the various CDOs or that defendants intended to undertake any further obligation to Thai Bank guaranteeing an independent portfolio manager for the CDOs. Thai Bank has failed to adequately plead the existence of a contract. Thai Bank's seventh cause of action for breach of contract against all defendants is dismissed.

Breach of Implied Covenant of Good Faith and Fair Dealing

Thai Bank's fifth and sixth causes of action allege breach of implied covenant of good faith and fair dealing, as well as aiding and abetting the breach of implied covenant, against all defendants.

Thai Bank's causes of action fail as duplicative of the breach of contract claims. A claim for a breach of implied covenant of good faith and fair dealing is duplicative of the breach of contract claim if it arises out of the same facts or alleges the same damages. *See Deer Park Enterprises, LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 (2d Dept 2008). Thai Bank claims that MS US and MS International violated an implied covenant of good faith and fair dealing with respect to the MS CDOs by failing to disclose that they were "gathering monies from Plaintiff in order to ferry that sum to fund Morgan Stanley's rigged bets on products that Defendants had designed to fail, and in failing redound to Morgan Stanley's benefit." Thai Bank further alleges that MS Capital violated the implied covenant of good faith and fair dealing by failing to disclose that, as

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swap counterparty, it was entering into defendants' scheme to misrepresent built-to-fail CDOs. These allegations clearly arise out of the same set of transactions—namely, Thai Bank's purchase of the MS CDO notes from defendants—and seek the same compensatory and punitive damages. Thai Bank's fifth and sixth causes of action are dismissed as duplicative of the breach of contract claim.

Tortious Interference

Thai Bank's eighth cause of action alleges tortious interference with contract, harming a third party. Thai Bank contends that the PSMAs between MS Capital and AllianceBernstein for the Hunter and ACES CDOs and the PAAs between MS Capital, MS International, and Deutsche Asset Management for the Elan and Elva CDOs charged AllianceBernstein and Deutsche Asset Management respectively with selection of the CDOs' initial reference portfolios. Defendants were aware of these agreements and intentionally interfered with the CDO management obligations of the portfolio managers by seizing and wielding effective control over reference portfolio selection. Defendants move to dismiss under CPLR 3211 (a) (5) on statute of limitations grounds.

Thai Bank's claim is time-barred under New York's three-year statute of limitations for tortious interference claims, which accrues at the time of injury, not at the time of discovery. *Am. Fed. Grp., Ltd. v Edelman*, 282 AD2d 279, 279 (1st Dept 2001). Thai Bank suffered its alleged injury from the tortious interference of defendants in 2007 and had liquidated its position in the CDOs in 2008, but filed the complaint four years later, in October 2012. Although Thai Bank argues that it should be entitled to equitable tolling, its argument is unavailing. Equitable tolling is only available in extraordinary circumstances, "where, by fraud, misrepresentation, or deception, [the defendant] had induced the plaintiff to refrain from filing a timely action."

Kotlyarsky v New York Post, 195 Misc 2d 150, 152-53 (Sup Ct, King's Cnty 2002). Although Thai Bank has alleged that defendants engaged in fraud by establishing effective control over the reference portfolios of the various CDOs, it has not alleged that defendants sought to hide such fraud through deception or otherwise induced Thai Bank from filing a timely action. Thai Bank could recognize by the time it decided to liquidate its holdings in the various CDOs the alleged similarities between these CDOs, and was not obstructed by defendants from filing suit. Equitable tolling therefore does not apply here, as Thai Bank has not alleged that it was prevented from discovering the fraud in some "extraordinary way." *Shared Communication Services of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 325.

Thai Bank's eighth cause of action is dismissed under CPLR 3211 (a) (5) for being time-barred under New York's statute of limitations.

Breach of Contract, Harming Third-Party Beneficiary

Thai Bank's ninth cause of action alleges breach of contract, harming a third-party beneficiary. Thai Bank contends that MS Capital and MS International entered into contracts with Deutsche Asset Management and AllianceBernstein, agreeing to specified roles, actions, and obligations to benefit MS CDO investors. Defendants subsequently breached the PSMAs and PAAs by entering into credit default swap agreements with respect to reference portfolios whose selections defendants, rather than AllianceBernstein and Deutsche Asset Management, controlled. This breach caused defendants to suffer damages.

"One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental." *Edge Mgmt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 (1st Dept 2006). Under New York law, "a third-party is an intended

beneficiary only if no one other than the third-party can recover if the promisor breaches the contract or the contract language should otherwise clearly evidence an intent to permit enforcement by the third-party." *Abu Dhabi Commercial Bank*, 651 F Supp 2d at 173 (quotations omitted).

In its complaint, Thai Bank makes only conclusory allegations that AllianceBernstein, MS Capital, and Deutsche Asset Management entered into binding contracts in order to create the MS CDOs to benefit CDO investors such as Thai Bank. However, Thai Bank has failed to allege that it was the intended direct beneficiary of these contracts: it contends neither that it alone can recover if the promisor breaches the contract, nor that the contract itself clearly evidences an intent to permit enforcement by the third party.

Thai Bank's ninth cause of action is dismissed for failure to adequately plead that it was an intended beneficiary of the contracts between MS Capital and the portfolio advisors, Deutsche Asset Management and AllianceBernstein.

Unjust Enrichment

Thai Bank's final cause of action is unjust enrichment. However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 516 NE2d 190, 193 (1987). Thai Bank's claim of unjust enrichment arises out of the same subject matter as its breach of contract and third-party beneficiary claims, namely the various documents underlying the MS CDO transactions. Accordingly, this cause of action is dismissed.

ORDERED that defendants' motion to dismiss plaintiff's first and second causes of action with respect to the Hunter, ACES, Elan, and Elva CDOs is denied; and it is further

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ORDERED that defendants' motion to dismiss plaintiff's first and second causes of action with respect to the Arosa CDO is granted; and it is further

ORDERED that plaintiff's motion to dismiss plaintiff's third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth causes of action is granted.

Dated: September 18 2013

ENTER: