Loreley Fin. (Jersey) No. 3 Ltd. v Merrill Lynch
2020 NY Slip Op 31307(U)
April 2, 2020
Supreme Court, New York County
Docket Number: Index No. 652732/2011
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **IAS MOTION 48EFM**

Justice

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LORELEY FINANCING (JERSEY) NO. 3 LIMITED,
LORELEY FINANCING (JERSEY) NO. 18 LIMITED,
LORELEY FINANCING (JERSEY) NO. 28 LIMITED,

Plaintiff,

- v -

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MERRILL LYNCH INTERNATIONAL INCORPORATED, MERRILL LYNCH & CO., INCORPORATED, 250 CAPITAL LLC,COUNTRYWIDE ALTERNATIVE ASSET MANAGEMENT INC.,COUNTRYWIDE SECURITIES CORP., ALPHA MEZZ CDO 2007-1, CORP., ALPHA MEZZ CDO 2007-1, LTD, AURIGA CDO, LTD, AURIGA CDO, LLC,BANK OF AMERICA CORP., MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY & CO. INTERNATIONAL LIMITED, MORGAN STANLEY CAPITAL SERVICES INCORPORATED.,

Defendant.

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INDEX NO. 652732/2011

MOTION DATE 10/25/2019, 10/25/2019, 10/25/2019

MOTION SEQ. NO. 006 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 371, 374, 375, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1384, 1385, 1386, 1387, 1388, 1389, 1401

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were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

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were read on this motion to/for MISCELLANEOUS .

Upon the foregoing documents, it is

Motion Sequence Nos. 006, 007, and 008 are consolidated for disposition and are disposed of in accordance with the following decision and order.

Defendant 250 Capital LLC (250 Capital) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint against it (motion seq. no. 006). Defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPFS), Merrill Lynch International Incorporated (MLI) and Merrill Lynch & Co., Inc. (ML&Co) (together, Merrill) also move for summary judgment dismissing the complaint against them (motion seq. no. 007). Plaintiff Loreley Financing (Jersey) No. 28, Limited (Loreley) cross-moves for partial summary judgment dismissing Merrill's and 250 Capital's second and third affirmative defenses of the statute of limitations. Merrill also moves to exclude the opinions of plaintiff's experts Mark Adelson and Jonathan A. Neuberger, PH.D. (motion seq. no. 008).

This case arises from Loreley's purchase, more than 13 years ago, of a collateral debt obligation (CDO) known as Auriga, which was a structured finance vehicle that issued notes to investors, which were collateralized with subprime residential mortgage backed securities (RMBS). During the 2007-2009 financial crisis, those investments completely failed. Auriga similarly defaulted and Loreley lost its entire investment. Loreley asserts that defendants, who created and managed the CDO, created a fraudulent scheme by failing to disclose that an equity investor named Magnetar exerted improper influence over the structure and selected inferior collateral for Auriga's portfolio to advance Magnetar's strategy to hedge against or "short" the CDO, and position itself to reap profits upon Auriga's failure.

Merrill and 250 Capital move for summary judgment urging that it is undisputed that Loreley's loss in 2008, just like its other portfolio losses, was caused not by any fraud committed by defendants but by market-wide factors affecting subprime RMBS broadly, and that, in any event, Loreley did not rely upon any misrepresentations or omissions

before investing in Auriga. They contend that the undisputed facts also show that Magnetar, one of Auriga's equity investors, was net long in its investment position at closing and, thus, did not bet that it would fail. 250 Capital also urges that its role was to purchase and manage Auriga's assets and it did not make the allegedly misleading statements in the offering circular or marketing book, or in any other materials Loreley relied upon.

BACKGROUND

Loreley is one of a group of special purpose entities organized under the laws of the Bailiwick of Jersey and formed to invest in CDOs with portfolios consisting primarily of RMBS (NYSCEF [NYSCEF] 823 at 11, Loreley's 2007 Annual Report and Financial Statements; NYSCEF 824, affirmation of Shane Hollywood [Hollywood aff] ¶ 2). Loreley entered into a contract with nonparty IKB Deutsche Industriebank AG and its affiliate IKB Credit Asset Management GmbH (collectively, IKB), German banking companies, for IKB to act as Loreley's investment advisor to identify potential investments, perform due diligence on its behalf, and meet with investment banks and collateral managers (NYSCEF 824, Hollywood aff, ¶¶ 3, 6-10).

The Merrill Defendants are the investment bank entities which created Auriga, with defendant MLPFS as the initial purchaser of the securities issued by Auriga, and MLI provided interim financing as a warehouse lender, and acted as a counterparty as purchaser of a credit default swap (CDS) (NYSCEF 233, Merrill Answer, ¶¶ 4, 5). Pursuant to a Collateral Management Agreement, 250 Capital, which was a subsidiary of Merrill Lynch & Co., Inc., acted as the collateral manager for Auriga's collateral (*Id.*, ¶ 5).

IKB's Investment Advisement

IKB assessed the potential investments for Loreley to ensure they met certain eligibility criteria (certain rating levels), then evaluated the potential deal's structure by meeting with the arranging banks and collateral managers. It synthesized the information gathered from its due diligence into an investment proposal (Investment Proposal) which Loreley used in deciding to invest (NYSCEF 786, deposition of Michael Robinson [Robinson tr] at 79-80). IKB would send its recommendations to a designated "Investment Committee," which would review the recommendations, and, if approved would further recommend the investment to Loreley (NYSCEF 263, LOR-AUR0000701-706). As a special purpose entity, Loreley made investment decisions solely through its directors who had the authority to approve investments (NYSCEF 260, deposition of Edward Buckland [Buckland tr] 81-82). It considered the Investment Proposal, and, if satisfied, approved the transaction for investment (NYSCEF 824, Hollywood aff, ¶¶ 6-9, 12).

Auriga's Assets

Auriga was a synthesized CDO with a collateral pool that consisted of a portfolio of primarily CDS positions through which it sold protection on subprime RMBS (at least 85% of its collateral pool consisted of subprime RMBS or CDS referencing RMBS), which closed on December 20, 2006 (NYSCEF 241, Offering Circular [OC] at ML-LORFIN000000523 [OC prohibited more than 20% of collateral pool from consisting of Prime RMBS or Prime CDS of RMBS]). On that date, Loreley invested $60 million in Auriga, purchasing $20 million of Auriga's Class A2B notes and $40 million of its Class B notes (NYSCEF 232, amended compl, ¶ 96).

A CDO is a structured financial product that pools together cash flow-generating assets and securitizes them into tranches for sale to investors (*see* NYSCEF 240, expert

report of Stulz, ¶ 12). A CDS contract is like insurance, there is a protection seller (the insurer or long counterparty) and the protection buyer (the insured or short counterparty), the buyer makes payments similar to insurance premiums, and upon certain events (like a default) the seller pays the protection buyer (*see* NYSCEF 242, Hubbard rep., ¶¶ 33-36).

Auriga was the issuer of the CDO, and owned the assets in the portfolio, issuing eleven tranches of notes, and one tranche of preferred securities (NYSCEF 221, OC at 1-4, ML-LORFIN 00000374-377). As the initial purchaser, MLPFS purchased the notes and preferred securities, and then marketed and re-sold them to sophisticated investors (*id.*, OC at ML-LORFIN 00000355). Cash generated by Auriga's assets were distributed to investors monthly, with the more senior tranches being paid first, so they were the least risky, had the highest credit ratings, but the lowest rate of return (*see* NYSCEF 221, OC at ML-LORFIN-000000389, 457; NYSCEF 242, expert report of Glenn Hubbard [Hubbard rep] ¶ 42). The lowest tranches were paid last, were the most risky, had the lowest credit ratings (or no credit ratings for preferred securities), but the highest rate of return (*id.*). As disclosed in the Offering Circular, Auriga was a "triggerless" CDO, which meant it lacked structural mechanisms, or triggers, found in other CDOs, that would divert cash flows from the riskier lower tranches to higher tranches in the event of certain occurrences, like a default or ratings downgrades (*see* NYSCEF 221, OC at ML-LORFIN-000000468-480; *see also* NYSCEF 244, Oct. 27, 2006 email from J.W to O.B. including attachment produced by IKB Deutsche Industriebank A.G.; NYSCEF 246, deposition of Ken Margolis [Margolis tr] at 55-56).

Merrill's CDO securitization group structured and marketed Auriga by selecting the collateral manager, holding assets pending the CDO's closing, and distributing the CDO

notes (NYSCEF 246, Margolis tr at 48-49). At closing, 250 Capital, the selected collateral manager, purchased 25% of the preferred securities of the Class H and Class I notes of Auriga (250 Capital was a 25% equity investor) (NYSCEF 241, OC at ML-LORFIN 000000438).

Magnetar's Involvement in Auriga

Auriga was a "reverse inquiry" CDO, which means it was initiated by an investor, in this case, Magnetar Capital LLC (Magnetar), an investment fund which was looking to purchase 75% of Auriga's equity, totaling $69,713,228 (NYSCEF 247 Magnetr's subpoena responses, NYSCEF 248, certification). Throughout May 2006 through July 2007, Magnetar acted as an equity sponsor for approximately 26 CDOs in the market, which it named after various constellations (NYSCEF 835, June 5, 2006 email from J. Prusko to R. Lasch). Using these various constellation CDOs, across its portfolio, Magnetar was using a 2 to 1 net short investment strategy; its short position was more than double its long equity position. Magnetar's James Prusko (Prusko) testified that Magnetar

> "kept track of the CDOs we invested in and also the CDOs that were ramping up where we agreed to buy the equity and so from that we knew about how much effective equity exposure we had and then, . . . it was just a two to one ratio, so then we knew what target of hedges we should have"

(NYSCEF 814, deposition of Prusko [Prusko tr] at 52; *see also id.* at 58, 72 ["I would say all the CDO equity that we purchased in '06, '07 was part of our strategy to purchase CDO equity," and that strategy "did include 'hedging'"]). Magnetar tried to keep its exposure net neutral as the market conditions were deteriorating in 2007 (*id.* at 54).

As an equity investor, Magnetar communicated certain preferences for the structure of Auriga, including its "triggerless" feature (NYSCEF 250, Sept. 1, 2006 email from K.

Margolis to H. De Silva), to ensure that cash would keep flowing to its equity positions if there was a slow down on returns, and for the inclusion of certain assets in the portfolio (NYSCEF 255, Aug. 22, 2006 email from J. Prusko to L. Sargent). Auriga's triggerless feature was disclosed in the Offering Circular (NYSCEF 241, OC at ML-LORFIN000000468-480). According to Prusko, he would "imply" to investment banks and collateral managers that Magnetar would be interested in purchasing the equity tranche of CDOs, the riskiest and, therefore, the hardest to sell, that had a particular structure (NYSCEF 814, Prusko tr at 173).

Magnetar communicated its preference to Merrill's CDO Group and to 250 Capital that certain assets be included in Auriga's portfolio (*see* NYSCEF 863, Aug. 17, 2006 email from S. Eliran to A. Phelps), and 250 Capital took this into consideration in selecting the collateral (*see* NYSCEF 252, deposition of Robert Pak [Pak tr] at 52 ["(w)e transacted in the market and we took ideas, discussed with market participants market intelligence"]; *see also* NYSCEF 255, Aug. 22, 2006 email from J. Prusko to L. Sargent).

As the collateral manager, 250 Capital selected the assets that went into the portfolio, determining the price, or the spread, at which Auriga would acquire them (*see* NYSCEF 251, deposition of Liam Sargent [Sargent tr] at 171 ["250 Capital selected every CUSIP (asset) that went into the deal"]; NYSCEF 252, Pak tr at 52 ["But for our transaction, we were the ultimate arbiter of what went into a transaction"]; NYSCEF 254, 2013 SEC deposition of Robert Pak [Pak SEC tr] at 47). With respect to working with Magnetar, Liam Sargent, 250 Capital's Managing Director, testified that "Magnetar was probably the biggest investor in the market with tons of market share and market clout. We agreed they would get better execution than a start-up CDO manager, so we used their

clout to get assets cheaper" (NYSCEF 251 at 171). Thus, 250 Capital's Director of CDOs, Robert Pak indicated that he knew Magnetar well because he had sold it CDO equity on prior deals (NYSCEF 874, July 25, 2006 email from J. Peck to R. Lasch).

Merrill personnel were familiar with Magnetar's objectives and, in August 2006, knew that the "Magnetar boys [were] bringing about 10 deals . . . as well as their protection bids on the same deals to hedge their equity" (NYSCEF 876, Aug. 1. 2006 email from C. Sheen to C. Sorrentino; *see also* NYSCEF 803, 4.20.11 SEC deposition of Sharon Eliran at 45-46; *see also* NYSCEF 878, July 26, 2006 email from Z. Smith to K. Margolis and NYSCEF 880, Nov. 13, 2006 email from R. Lasch to C. Sorrentino). In February 2007, Merrill arranged for Magnetar to short or hedge Auriga as well as two other constellation CDOs (NYSCEF 900, Feb. 16, 2007 email from C. Sorrentino to J. Prusko).

Defendants' Representations

In October 2006, Merrill provided IKB with a marketing book that outlined the general characteristics of a proposed CDO. This marketing book was sent to potential investors "solely for discussion purposes," and identified 250 Capital as the collateral manager (NYSCEF 831, Oct. 27, 2006 email from R. Leissler to Uta Kubis and others attaching the Auriga Pitchbook dated October 2006). It provided general information about 250 Capital, including that it managed asset backed securities and structured products, and information about its prior transactions, its key personnel, and its collateral and security analysis in managing a portfolio (*id.* at ML-LORFIN 000836746, 793-799). Robert Pak, 250 Capital's Director of CDOs, testified that 250 Capital contributed to the drafting of that overview, but that creating the document and selling the transaction was the broker

dealer's function (NYSCEF Doc. 808, Pak tr at 179-180). The marketing book did not refer to Auriga and did not refer to Magnetar (NYSCEF 831).

In November, Merrill met with IKB and provided term sheets for the proposed Auriga CDO (NYSCEF 833, Nov. 1, 2006 email from RI Leissler to A.A.). At the ABS East Conference, as part of its due diligence, IKB met with Merrill's CDO Group and with 250 Capital to discuss Auriga, and to get to know 250 Capital as an asset manager (NYSCEF 788, deposition of Klaus Bauknecht [Bauk. Tr] at 109-110; *see also* NYSCEF 923, Nov. 10, 2006 email from S. Eliran to R. Cuscia). At the meeting, 250 Capital represented that it would use its affiliation with Merrill, including its market-leading database, for the investors' benefit (NYSCEF 790, deposition of Uta Kubis [IKB] [Kubis tr] at 79-80).

On November 21, 2006, nearly a month before IKB received the Offering Circular (OC) or even the preliminary offering circular from Merrill, IKB sent a letter to the Investment Committee, enclosing its "Investment Proposal" regarding Auriga, summarizing IKB's reasons for recommending investment, along with a "Record of Recommendation" (NYSCEF 265, LOR-AUR0000021-37). IKB did not conduct any on site due diligence (*id.* at LOR-AUR0000026). In its proposal, IKB indicated that the portfolio consisted of hybrid synthetic mezzanine CDO of ABS, which were "pure triple B rated subprime and midprime RMBS Securities" with 32% rated BBB-, 11.2% of those were BBB- rated subprime bonds, and "the remaining 20.8% Triple minus rated RMBS bonds are midprime pools" (NYSCEF 265 at LOR-AUR0000024-25). IKB indicated that 250 Capital was a first-time manager to IKB, but that it had a positive judgment of 250 Capital as collateral manager (*id.* at LOR-AUR0000026), because of its "cautious and conservative investment philosophy," and it shared IKB's "concerns over the US housing market" (*id.* at LOR-AUR0000022). By letter

dated November 22, 2006, three members of the Investment Committee then recommended that Loreley invest and purchase notes in Auriga (NYSCEF 266).

On November 27, 2006, Loreley's directors, Michael Robinson and Edward Buckland, considered IKB's Investment Proposal and the Investment Committee's letter in order to decide if they should approve the acquisition (NYSCEF 268). While the directors could not recall the meeting or approving the transaction, the meeting notes indicate that they considered four material facts: (1) "the subordination of 21.34% below the Aa2/AA rated Class B Notes;" (2) "the strict eligibility criteria;" (3) "the high quality of the underlying portfolio;" and (4) IKB's positive judgment of 250 Capital (*id.* at LOR-AUR0014866; *see also* NYSCEF 261, Robinson tr at 98).

From mid-November through December 19, 2006, IKB and Merrill negotiated over eligibility criteria and other terms for the OC (NYSCEF 270, Nov. 21, 2006 email from U.K. to R. Leissler, NYSCEF 271, Dec. 19, 2006 email from R. Cuscia to R. Leissler). On November 19, 2006, IKB drafted a letter summarizing "modifications" made to the transaction, including that the capital structure was "slightly altered" but that "there are no changes in the total deal size and subordination levels" for the note classes ranking above Classes H and I (NYSCEF 269 at IKB-Merrill 0422194). With regard to eligibility criteria, IKB noted that the final criteria were "in compliance with IKB CAM guidelines" (*id.* at IKB-Merrill 0422195), and that other changes "do not affect the Note A2B and B Investor essentially, and therefore we recommend agreeing to them" (*id.* at IKB-Merrill 0422197). Loreley does not dispute that Auriga's collateral met the eligibility criteria set forth in the OC. IKB did not send this letter to Loreley.

On December 18, 2006, Merrill provided the OC to IKB (NYSCEF 241). The OC indicated that the performance of the portfolio "depends heavily on the skills of [250 Capital] in analyzing and selecting the Collateral Debt Securities" (*id.* at 70).

Before making its decision to invest, Loreley had not spoken directly with Merrill, nor received any documents authored by Merrill, including the preliminary or final offering documents such as the OC or the Collateral Management Agreement (NYSCEF 261, Robinson tr at 91-92, 156). Loreley did not receive the November 19, 2006 letter from IKB or any additional information regarding Auriga from IKB, including the preliminary or final OC (NYSCEF 261, Robinson tr at 91-92).

Auriga's Performance

After Auriga's closing on December 20, 2006 through early 2007, the nominal value of Loreley's Auriga notes remained at $60 million (*see* NYSCEF 235 at LOR-AUR0008551). Beginning in July 2007, due to a housing market slowdown and widespread credit ratings downgrades for RMBS, including those in Auriga's portfolio, the RMBS market began to decline and these market-wide downgrades caused Auriga to suffer an event of default on January 31, 2008 (NYSCEF 276, Notice of Default dated Feb. 11, 2008). In October 2008, Auriga was liquidated, final proceeds distributed, and Loreley lost its entire investment (NYSCEF 278, Auriga Trustee's Notice of Final Distribution and Surrender of Securities, dated Oct. 8, 2008; NYSCEF 259, Auriga Trustee's "Final Note Valuation Report," dated Oct. 8, 2008).

On October 5, 2011, Loreley commenced this action seeking recovery of its investment (NYSCEF 236, Summons with Notice). After Loreley filed an amended complaint and defendants made a motion to dismiss, the only claim remaining in the

amended complaint is common law fraud (NYSCEF 232 [amended compl]; NYSCEF 231, May 14, 2013, Transcript, NYSCEF 237, J. Oing Decision mot. 2, dated May 14, 2013 and NYSCEF 238, Order, J. Oing mot. 3, dated May 14, 2013, *affd as modified Loreley Fin. [Jersey] No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 464 [1st Dept 2014]).

DISCUSSION

Defendants' motions for summary judgment (motion seq. nos. 006 and 007) are granted, and the amended complaint is dismissed. Defendant Merrill's motion to exclude the opinions of Loreley's experts (motion seq. no. 008), and Loreley's cross-motion for summary judgment dismissing the statute of limitations defense, both are denied as moot.

The movant on a motion for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon such a showing the burden shifts, and the opposing party must then demonstrate the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-movant (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]).

Causation

A claim for fraud requires proof by clear and convincing evidence of "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*,

149 AD3d 146, 149 [1st Dept 2017] [evidence must be clear and convincing]). As to causation, the plaintiff must establish both that defendant's misrepresentation induced plaintiff to enter into the transaction (transaction causation), and "that the misrepresentations directly caused the loss about which the plaintiff[] complains (loss causation)" (*Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 149 AD3d at 149 [internal quotation marks and citation omitted]).

Transaction causation, also referred to as but-for causation, simply requires proof that but for the defendant's claimed misrepresentations or omissions, "the plaintiff would not have entered into the detrimental securities transaction" (*id.* at 149 [internal quotation marks and citation omitted]; *EV Scarsdale Corp. v Engel & Voelkers North East LLC*, 2017 NY Slip Op 32380[U], at *13 [Sup Ct, NY County 2017] [Kornreich, J.]).

Loss causation is similar to the tort concept of proximate cause; it requires proof that the plaintiff's loss was directly caused by the defendant's fraudulent misrepresentation (*Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 149 AD3d at 149 [plaintiff must prove that the "subject of the fraudulent statement or omission was the cause of the actual loss suffered"] [internal quotation marks and citation omitted]). It is an essential and indispensable element of a fraud claim, and plaintiff bears the burden of establishing it (*see id.* at 149; *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 86 [1st Dept 2017], *affd* 31 NY3d 569 [2018] ["Loss causation is the fundamental core of the common-law concept of proximate cause"] [internal quotation marks and citation omitted]; *Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002] ["the misrepresentation directly caused the loss about which plaintiff complains"]; *Loreley Fin. (Jersey) No.3 Ltd. v Wells Fargo Sec., LLC*, 797 F3d 160, 186 [2d Cir 2015]; *Lentell v Merrill Lynch & Co.*, 396

F3d 161, 172-174 [2d Cir 2005], *cert denied* 546 US 935 [2005] [it is "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff"] [citations and internal quotation marks omitted), cert. denied, 513 US 1079 (1995). Factors that may undermine loss causation include the intervention of other independent causes, a lack of foreseeability of the specific injury, and the lack of "factual directness of the causal connection" (*First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763, 769 [2d Cir. 1994] [internal quotation marks and citation omitted]; *see Powers v British Vita, P.L.C.*, 57 F3d 176, 189 [2d Cir 1995] [no loss causation where intervening direct cause of injury—market value of stock fell due to recession]; *Revak v SEC Realty Corp.*, 18 F3d 81, 90-91 [2d Cir 1994] [must be direct result of defendant's wrongful acts and independent of other causes]; *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 289 F Supp 2d 416, 420-421 [SD NY 2003] [harm suffered was caused by direct intervention of market crash of internet bubble]).

Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt Co. is squarely on point. In that case, the First Department analyzed loss causation in the context of a securities fraud claim against a collateral manager for a CDO investment in connection with RMBS:

> "[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors [i.e., the 2008 financial crisis], the prospect that the plaintiff's loss was caused by the fraud decreases, and a plaintiff's claim fails when it has not . . . proven . . . that its loss was caused by the alleged misstatements as opposed to intervening events. Indeed, when an investor suffers an investment loss due to a market crash . . . of such dramatic proportions that [the] losses would have occurred at the same time and to the same extent regardless of the alleged fraud, loss causation is lacking"

(*Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt Co.*, 149 AD3d at 149 [internal citations and quotation marks omitted]). The Court held that where, as in this case, the defendant moves for summary judgment supported by expert evidence that the plaintiff's losses would have been caused by the market crash regardless of the defendant's fraud, the burden shifts to the plaintiff to raise a triable issue of fact about whether its loss can truly be traced to defendant's fraudulent acts independently of such adverse market downturn (*id.* at 148-149). Specifically, the plaintiff "must parse out the cause of its losses from macroeconomic events" (*EV Scarsdale Corp. v Engel & Voelkers North East LLC*, 2017 NY Slip Op 32380[U], at * 17). The plaintiff's assertion of "purchase-time value disparity, standing alone, cannot satisfy the loss causation pleading requirement" (*Emergent Capital Inv. Mgt., LLC v Stonepath Group, Inc.*, 343 F3d 189, 198 [2d Cir 2003] [such allegations amount to nothing more that transaction causation]).

Here, defendants Merrill and 250 Capital present prima facie proof that Loreley's loss was proximately caused by the intervening events of the 2007-2009 financial crisis. Loreley claims that it lost its entire investment because of Magnetar's undisclosed adverse influence over the selection of Auriga's collateral and its structure. It asserts that Magnetar caused 250 Capital to select toxic assets that were more likely to default and cause Loreley to lose the money it invested. Defendants submit the report of their expert, Dr. Glenn Hubbard, who did an economic analysis to determine the cause of Auriga's default and Loreley's eventual loss and opines that the loss was not caused by the selection of toxic collateral. Rather, Dr. Hubbard performed a regression analysis, comparing the performance of Auriga's RMBS collateral (Moody's Baa-rated subprime RMBS tranches that represented 98% of the notional amount of Auriga's fully ramped portfolio) (NYSCEF

242, Hubbard Reprot, dated July 13, 2018 at 30) to the performance of other comparable RMBS collateral (referred to as Benchmark RMBS), and the performance of the Auriga loan pools supporting Auriga's core RMBS to the performance of loan pools supporting the Benchmark RMBS (NYSCEF 242 at 30-41). Dr. Hubbard concludes that: (1) Auriga's RMBS and its underlying loan pools "performed in-line with comparable industry assets;" (2) the "severe decline in housing prices and economic downturn that accelerated in the summer of 2007 is associated with increases in the default and serious delinquency rate of both loan pools supporting the Aurgia Core RMBS and comparable loans pools;" (3) the increased defaults and delinquencies of "subprime mortgages in turn contributed to the RMBS [credit rating] downgrades and market-wide catastrophic losses on CDOs;" and (4) as a result, any "CDOs backed by pools of loans comparable to those supporting Auriga would have suffered losses as a consequence of the general market downturn, which included a severe decline in housing prices" (*id.* at 3-5, 30). Dr. Hubbard's analysis and results support the conclusion that Loreley's loss was caused by the market-wide financial crisis, particularly in the RMBS subprime mortgage market, and not by the materialization of any risk because of defendants' failure to disclose Magnetar's role or the selection of particularly toxic collateral.

The burden thus shifts to Loreley to raise a triable issue of fact about whether its loss can indeed be traced to defendants' fraudulent actions independent of the adverse market conditions (*Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt Co.*, 149 AD3d at 148-149). It is evident from Loreley's brief and from a review of the report of its expert, Dr. Richard Neuberger, that it merely submitted evidence of transaction causation – that is, but for defendants' alleged misrepresentations regarding the collateral selection

process, and alleged omissions regarding Magnetar's role, Loreley never would have invested in Auriga. Even assuming, for purposes of the instant summary judgment motions, that this is true, nevertheless, Loreley's fraud claim still fails for lack of proof that the alleged misrepresentations and omissions were the cause of its loss.

In his report (NYSCEF 283, expert report of Dr. Richard Neuberger [Neuberger rep]), Dr. Neuberger states that Loreley suffered its loss on the day of closing because the price it paid for the Auriga notes exceeded the true value of the bonds due to Magnetar's undisclosed involvement, and then he calculates the amount of such loss as basically the entire investment (*id.*, Neuberger rep, ¶ 16, at 6). This is a damages calculation, not a proof of proximate or loss causation. Dr. Neuberger's determination is made without regard to whether Magnetar's undisclosed role actually caused Loreley's loss in 2008 (*see* NYSCEF 249, rebuttal report of Dr. Neuberger [Neuberger rebuttal], ¶¶ 14-16 at 5-6; NYSCEF 283, Neuberger rep ¶ 208 at 88). He starts with the economic theory that information asymmetries can lead to market breakdowns, and then concludes that Merrill's representations created such asymmetries, making Auriga a "lemon" which was unmarketable to long investors such as Loreley and making its notes lack any fair market value (NYSCEF 283, ¶¶ 219-222). Dr. Neuberger then uses various methods to calculate the amount of Loreley's overpayment, including creating "hypothetical accurate credit ratings of the bonds at issue" (*id.* at ¶ 224). He, however, fails to perform any analysis comparing the quality or performance of Auriga's assets to other similar CDOs in the market. Without any support, Dr. Neuberger asserts in his rebuttal report that the comparable Benchmark RMBS assets Dr. Hubbard used in his analysis were all "plagued by allegations of fraud" (NYSCEF 279, ¶ 7 at 3; *see also* ¶¶ 26-31, 34-50). Indeed, Dr.

Neuberger testified that even if Auriga continued to perform post-closing as Loreley expected and then Loreley sold its Auriga notes for full purchase price a month after closing, the misrepresentations and omissions regarding Magnetar still caused Loreley harm in the amount of its total investment (NYSCEF 282, deposition of Richard Neuberger [Neuberger tr] at 136-137). This further demonstrates that his report is a damages calculation, not an analysis of the causation of Loreley's loss (*see e.g. Dura Pharm., Inc. v Broudo*, 544 US 336, 338 [2005] [loss causation not adequately pleaded based on overpayment on date of purchase]; *Emergent Capital Inv. Mgt., LLC v Stonepath Group, Inc.*, 343 F3d at 198).

Therefore, Loreley fails to proffer at least some evidence of how much, if any, of its losses were caused by defendants as opposed to the 2008-2009 financial crisis, or that the alleged fraud increased the chance of Loreley's losses in the face of such a significant market-wide crisis. Indeed, it fails to even proffer a theory about how much of their losses were caused independently of that market crisis.

Loreley urges that the common law rule is that fraud damages are the difference between the purchase price of the asset and its true value (*Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 500 F3d 171, 183 [2d Cir 2007]), and that a plaintiff may recover in fraud based on overpayment alone. It distinguishes federal securities cases requiring loss causation as not applicable to its common law fraud claim. First, contrary to Loreley's argument, this is a securities fraud case—CDO notes are securities and the principle of loss causation applies to them (*see Basic PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 149 AD3d at 149-150; *Dura Pharm., Inc. v Broudo*, 544 US at 343-344). In securities fraud cases, overpayment is not sufficient to prove loss causation. As

explained by the First Department in *Basic PAC-Rim Opportunity Fund (Master)*, "[l]oss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff" (149 AD3d at 149 [internal quotation marks and citation omitted]; *see Dura Pharm., Inc. v Broudo*, 544 US at 343-344 [allegations of inflated purchase price not sufficient to show loss causation]). The cases upon which Loreley relies, *Bernstein v Kelso & Co.* (231 AD2d 314, 320-321 [1st Dept 1997] [plaintiff alleged it was fraudulently induced to sell its interest in a corporation]; *Merrill Lynch & Co., Inc. v Allegheny Energy, Inc.* (500 F3d at 183); and *Trainum v Rockwell Collins, Inc.* (2017 WL 2377988 at * 16, 2017 US Dist LEXIS 83260 [SD NY 2017]) are factually distinguishable as they all involve the sale of businesses, not the purchase of securities.

Moreover, Loreley's submission of Dr. Neuberger's opinion on "consequential damages," that Merrill's and 250 Capital's fraudulent misrepresentations led Loreley to increase its exposure to subprime assets and to certain subprime risks and increased the likelihood and severity of the market crisis as a whole (NYSCEF 283, ¶¶ 229-242), again fails to address whether the misrepresentations specifically caused Loreley's loss, and is entirely speculative. Loreley needed to present some proof of a link between the defendants' alleged misconduct and the entire housing market downturn, which it did not. Dr. Neuberger's opinion, that Loreley could have invested in other alternative investments that were less likely to suffer subsequent economic losses in the financial crisis, is irrelevant to showing loss causation (*Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 72 [1st Dept 1990] [fraud victim cannot recover the benefit of an alternative agreement overlooked in favor of the fraudulent one]). Again, he admitted that he did not perform any study or quantitative analysis of how defendants' misconduct was the cause of the

financial crisis. Thus, his analyses in his expert and rebuttal reports were analytically insufficient, and, Loreley fails to raise a question of fact that its losses can be "disentangled from the market forces behind the financial crisis" (*EV Scarsdale Corp. v Engel & Voelkers North East LLC*, 2017 NY Slip Op 32380[U], 2017 WL 5513329 at * 19). Accordingly, defendants are granted summary judgment dismissal of the fraud claim.

RELIANCE

Moreover, defendants have demonstrated that Loreley also fails to present proof of a triable issue of fact on the element of justifiable reliance. Reliance is a fundamental element of a fraud claim (*Ambac Assur. Co. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 579 [2018]). A fraud claim cannot be sustained if the defendants' misrepresentations did not form the basis of the plaintiff's reliance (*Securities Inv. Protection Corp. v BDO Seidman*, 95 NY2d 702, 709 [2001]). In determining this element, the court must consider "the entire context of the transaction, including factors such as the complexity and magnitude, the sophistication of the parties, and the content of any agreements between them" (*Century Pacific, Inc. v Hilton Hotels Corp.*, 354 Fed Appx 496, 498 [2d Cir 2009] [internal quotation marks and citation omitted]). It also must consider the "investor's access to information and whether that investor engaged in due diligence before investing" (*Abbey v 3F Therapeutics, Inc.*, 2011 WL 651416, * 7 [SD NY 2011], *affd sub nom Abbey v Skokos*, 509 Fed Appx 92 [2d Cir 2013] [granting summary judgment on lack of reasonable reliance]).

Generally, courts will not hold a defendant liable for injury sustained by a plaintiff who relied upon misrepresentations provided by a third party, unless the third party acted as a conduit to relay the false statement to the plaintiff who then actually relied on the

misrepresentations (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 828-829 [2016], rearg denied, 27 NY3d 817 (2016); *New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1354 [2d Dept 2017]). To establish such indirect, third party reliance, the plaintiff must prove, among other things, that the third-party conduit conveyed the substance of the defendants' misstatements to the plaintiff (*see Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d at 709-710). Reliance will be insufficient when there is an "insurmountable disconnect" between the defendants and the plaintiff as a result of the third party's "role [as an intermediary] in choosing what information ... it deemed worthy of communicating" (*Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d at 710–11; *Municipal Corp. of Bremanger v Citigroup Global Mkts. Inc.*, 555 F Appx 85, 87 [2d Cir 2014]). Where a conduit is silent or where it does not convey what the defendant communicated, then there is no indirect communication on which to base reliance (*see Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d at 710; *Municipal Corp. of Bremanger v Citigroup Global Mkts. Inc.*, 555 F Appx at 87 [summary judgment dismissal based on lack of proof of indirect reliance]). If the conduit or intermediary has a "significant role in choosing what information it wanted to receive and, in addition what it deemed worthy of communicating" to the plaintiff, in such circumstances, the plaintiff's reliance on the conduit's silence cannot be equated with reliance on affirmative misrepresentations or concealment of material fact by the defendant (*Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d at 710).

Here, it is undisputed that Merrill and 250 Capital never made any direct representations to Loreley. Loreley did not view any of the documents—the marketing book, the OC or the preliminary OC, from Merrill, nor did it communicate with Merrill or 250

Capital about those documents (*see* NSCEF Doc. No. 261, Robinson tr at 90-92). Rather, Loreley relied entirely on the advice of IKB its independent contractual investment advisor (*id.* at 91). Loreley cannot claim reliance on defendants' alleged misrepresentations of which it was not even aware, even by implication (*see Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d at 710).

It is undisputed that Loreley received very limited information from IKB on Auriga before deciding to invest. According to the meeting minutes of Loreley's directors' meeting, the only two directors present at the meeting were Mr. Buckland and Mr. Robinson, and they had received only two documents before they decided to invest: IKB's November 17, 2006 letter plus enclosures (Investment Proposal including its appendices) (NYSCEF Doc. 265), and the Investment Committee's November 22, 2006 letter (NYSCEF 266). Neither of these documents was authored or sent by Merrill or 250 Capital. In fact, Mr. Robinson testified that he never spoke to Merrill or 250 Capital about the Auriga CDO (NYSCEF 261, Robinson tr at 156), and Mr. Buckland did not recall anything about the process of acquiring the Auriga CDOs (NYSCEF 260, Buckland tr at 106). Thus, there clearly was no direct reliance.

To the extent that Loreley's claim is based on IKB as a conduit, Loreley fails to present any evidence that it received any indirect communication from defendants through IKB, and that it actually relied upon that indirect communication. Both directors testified that they did not recall the meeting at which Auriga was approved, or why it was approved, or even if they reviewed IKB's Investment Proposal (NYSCEF 260, Buckland tr at 113, 118-121; NYSCEF 261, Robinson tr at 91, 95-97). Mr. Robinson testified that he did not ever review any marketing books, term sheets, or offering circulars, which were not yet in

existence, and that he did not remember having any communications with anyone concerning an investment Loreley was considering for purchase (NYSCEF 261, Robinson tr at 90-92, 95-97).

Loreley contends that its directors relied upon the Investment Proposal, which it was their practice to review, and they considered IKB's analysis of Auriga's portfolio and IKB's collateral manager due diligence (*see* NYSCEF 786, Robinson tr at 113, 124-125; NYSCEF 784, Buckland tr at 116-117 [he did not recall but "insofar as I am not an investment expert and the investment advisor had been appointed to provide advice . . . I think it's a fair assumption that we did rely on that advice to make this investment"]). Loreley, however, fails to trace any statement in the Investment Proposal back to a representation by defendants (*see McColgan v Brewer*, 112 AD3d 1191, 1194 [3d Dept 2013], lv denied, 24 NY3d 911 [2014]).

While Loreley argues that IKB's recommendation and its "positive view of 250 Capital" were representations Loreley relied upon, it fails to point to any specific communication by defendants about 250 Capital that was a misrepresentation. Loreley urges that IKB's Investment Proposal relayed information about 250 Capital's collateral selection process and its access to Merrill's market-leading database (Loreley's Opposition brief at 14). As to the access to the databases, that was not even stated in the Investment Proposal. Rather, the proposal simply stated that 250 Capital "is supported by an integrated suite of risk management, legal, operations fund accounting and administration, technology and client reporting capabilities" (NYSCEF 265 at 5). Uta Kubis, an IKB employee who conducted due diligence on 250 Capital at the ABS East Conference, stated that 250 Capital explained that, as a Merrill affiliate, it had full access to Merrill's

infrastructure and large database (NYSCEF 917, affidavit of Uta Kubis, ¶ 13). Loreley, however, does not produce any evidence that IKB actually shared this information with Loreley, as it does not appear in the Investment Proposal. Further, Loreley fails to present any evidence that 250 Capital did not use the alleged databases. It also fails to make any assertion that Merrill and 250 Capital intended that Loreley rely upon this (*see Loreley Financing (Jersey) No. 3 Ltd. v Wells Fargo Sec., LLC*, 412 F Supp 3d 392, 409-411 [SD NY 2019] [summary judgment dismissal on reliance where no evidence defendants intended any representations made to IKB as investment advisor were to be passed on the plaintiffs Loreley entities]). Loreley's assertion that defendants represented that 250 Capital would use a "cautious and conservative" approach is based purely on IKB's language in its Investment Proposal, and there is no evidence it came from defendants (NYSCEF 265 at 1).

As to the issue of the collateral quality and 250 Capital's collateral selection process, defendants present evidence from Mr. Sargent of 250 Capital that "250 Capital selected every CUSIP that went into the deal," (NYSCEF 251, Sargent tr at 171), and that, as Mr. Pak explained, "we took ideas discussed with market participants, . . [b]ut for our transactions we were the ultimate arbiter of what went into the transaction" (NYSCEF 252, Pak tr at 52). Again, there is no dispute that the collateral selected satisfied Auriga's investment criteria. In opposition, Loreley points to statements in the OC, which Loreley admittedly did not review or rely upon before deciding to invest because it did not yet exist. Loreley also points out that while the Investment Proposal predates the OC or even the preliminary OC, the Investment Proposal was a continuing and conditional recommendation. The problem with this assertion is that IKB did not communicate the

changes and updates to the deal, or even the finalization of the eligibility criteria for the assets to Loreley (*see Municipal Corp. of Bremanger v Citigroup Global Mkts. Inc.*, 2013 WL 1294615, * 14, 2013 US Dist LEXIS 49603 [SD NY 2013] *affd* 555 Fed Appx at 87 [where intermediary omits relevant and substantial portions of defendant's statements in its communication to plaintiff, then no reliance as the statements have been substantially transformed]). In fact, Loreley never received IKB's December 19, 2006 memo regarding Auriga's structure, explaining that Auriga's waterfall technique "markedly deviates from the standard technique" (NYSCEF 269, IKB-Merrill Lynch 0422197). The court further notes that Loreley does not challenge that the assets 250 Capital selected for Auriga met the eligibility criteria set forth in the OC. Loreley fails to present any case, and this court has found none, in which a plaintiff is relieved of the requirement to show that it actually relied upon specific misrepresentations simply because it generally relied upon its independent investment advisor's recommendation. As the federal district court recently stated in a similar case (*Loreley Financing (Jersey) No. 3 Ltd. v Wells Fargo Sec., LLC*, 412 F Supp 3d at 411), while in securities fraud cases, the court

> "may look to a non-party investment adviser's knowledge in determining reliance, where the investment adviser invests on behalf of institutional plaintiffs . . . reliance would be unjustified here since IKB was an independent contractor and not a general agent of [Loreley] Plaintiffs, and did not have the authority to act for or represent [Loreley] Plaintiffs"

(*id.* [internal quotation marks and citation omitted]). In this case, no rational juror could conclude based on Loreley's opposition evidence that its reliance on defendants' alleged misrepresentations were communicated through IKB as a conduit, that defendants intended that the misrepresentations be passed on to Loreley, and that Loreley's reliance

was reasonable. Therefore, Loreley fails to raise a triable issue of fact that it reasonably relied on material misrepresentations communicated through IKB, and summary judgment dismissing the fraud claim is granted on this ground as well.

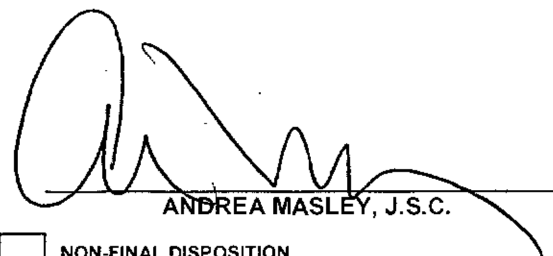
In light of the dismissal of the fraud claim, Loreley's cross motion regarding the statute of limitations defense is denied as moot. Merrill's motion to exclude the opinions of Loreley's experts, Mark Adelson and Dr. Neuberger, also is denied as moot.

Accordingly, it is

ORDERED that the motions of defendants (motion seq. nos. 006 and 007) for summary judgment dismissing the amended complaint are granted and the amended complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion to dismiss the statute of limitations affirmative defense is denied as moot; and it is further

ORDERED that the motion of the Merrill defendants to exclude the opinion of plaintiff's experts (motion seq. no. 008) is denied as moot.



Motion Seq. No. 06
4/21/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE

Motion Seq. No. 07

4/2/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

Motion Seq. No. 08

4/2/2020
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

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