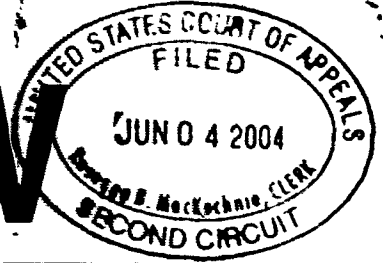


04-0622-cv



IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



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BANCO ESPIRITO SANTO DE INVESTIMENTO, S.A.,

Plaintiff-Appellant,

—against—

CITIBANK, N.A.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (MUKASEY, C.J.)

BRIEF FOR APPELLEE CITIBANK, N.A.

DAVID L. CARDEN
JAYANT W. TAMBE
TODD R. GEREMIA
JONES DAY
222 East 41st Street
New York, New York 10017-6702
(212) 326-3939

*Attorneys for Defendant-Appellee
Citibank, N.A.*

CORPORATE DISCLOSURE STATEMENT

Citicorp is the corporate parent of Citibank, N.A. ("Citibank"). Citigroup, Inc. is the only publicly held corporation that owns 10% or more of the stock of Citibank, N.A.

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PRELIMINARY STATEMENT

This diversity case presents unremarkable issues of New York state law that were properly disposed of by Chief Judge Mukasey in a thorough, forty-four page decision. Appellant Banco Espirito Santo de Investimento (“BESI”), a Portuguese investment bank, challenges virtually all of the District Court’s rulings. BESI cannot avoid, however, that its claims for enforcement of vague oral promises and contrived fiduciary obligations are barred by the very documents that governed the sophisticated investment transactions at issue. The District Court correctly ruled that, in light of these documents and under hornbook principles of New York law, BESI’s complaint did not state a claim against Citibank. Indeed, the New York Appellate Division has recently underscored that Chief Judge Mukasey got it right. In affirming dismissal of a complaint brought against Citibank by another investor in some of the same securities at issue here, the Appellate Division cited Judge Mukasey’s decision with approval and held that the governing documents precluded the investor — a Dutch bank — from stating analogous breach of contract and fiduciary duty claims against Citibank. *See SNS Bank, N.V. v. Citibank, N.A.*, 2004 N.Y. Slip Op. 00445, 2004 WL 1066815 (1st Dep’t May 13, 2004).

STATEMENT OF ISSUES

The District Court dismissed all of BESI's claims. On appeal, BESI concedes only that one—for unjust enrichment—was properly dismissed. The principal issues on this appeal are framed by the District Court's reasons for dismissing the remaining claims. A complete description of the alternative grounds for dismissal are set forth in the "Argument" section of this brief.

1. Under New York law, a party is not bound by an alleged oral contract when it has given forthright signals that it means to be bound only by a written agreement. The Captiva I and III Offering Memoranda, which governed the terms of the Income Notes purchased by BESI, each provided that nobody was authorized to make "any representations other than those contained in this[] Memorandum." (A33, A117) BESI also separately agreed that it had made its decision to invest in Captiva III Income Notes "independently and without relying upon Citibank." (A235) Did the District Court properly rule that, in light of these disclaimers, Citibank was not bound by alleged oral promises that were not memorialized in the Offering Memoranda?

2. Written presentations that, according to BESI, reflect promises Citibank allegedly made to BESI provide that all statements in them "are qualified by reference to the Offering Memoranda." (A236, A257) Did the District Court properly rule that, in light of this express qualification, BESI cannot allege a "clear

and unambiguous” promise, as required to state a claim for promissory estoppel? Did this same qualification and the Offering Memoranda disclaimers make it unreasonable for BESI to rely on the alleged oral promises?

3. New York’s Appellate Division has recently ruled that a holder of Captiva I Income Notes — one of the same securities at issue here — is not an intended third-party beneficiary of an administration agreement between Citibank and Captiva. Under this binding authority, did the District Court properly rule that BESI is not an intended third-party beneficiary of the administration agreements in this case?

4. A Citibank employee made two observations about Captiva in February 2001. BESI claims that Citibank fraudulently induced BESI to invest in Captiva I and Captiva III by not disclosing those observations some three to four years before, in 1997 and 1998, when BESI made its investments. BESI does not, however, allege that Citibank knew these “facts” to be true when BESI decided to invest in the Income Notes. Did the District Court properly dismiss BESI’s fraud claim for failure to allege falsity and fraudulent intent?

5. Did the District Court properly dismiss BESI’s breach of fiduciary duty claim for any of three independent reasons: (i) BESI alleged only a conventional, arms-length relationship with Citibank; (ii) BESI’s claim is based on

the same promises that underlay its breach of contract claim; and (iii) BESI has not properly alleged that Citibank breached any fiduciary duty?

STATEMENT OF THE CASE

BESI purchased \$10 million in Captiva I Income Notes in March 1997 and \$15 million in Captiva III Income Notes in May 1998. (A10-11) Beginning in the third quarter of 1998, the value of the Captiva I and III portfolios declined markedly in the aftermath of unprecedented defaults by corporate debt issuers. Because the Income Notes are subordinated to a higher class of securities issued by the Captiva entities, they bore the brunt of the decline. Disappointed by the return on its investment, BESI filed a seven-count complaint against Citibank on March 6, 2003, alleging losses of \$25 million. (A24) Citibank did not issue Captiva Income Notes, but was involved in marketing them and, later, in providing administrative and financial management services to the Captiva entities.

BESI's claims—for breach of contract, the implied covenant of good faith, and alleged fiduciary duties; promissory estoppel; unjust enrichment; fraud; and breach of an agreement between Citibank and Captiva to which BESI was not a party—were principally based on alleged promises made by Citibank employees during two investor presentations and Citibank's alleged failure to make certain statements at the time BESI invested in the Income Notes. (A5-6)

Citibank moved to dismiss all of BESI's claims under Federal Rule of Civil Procedure 12(b)(6). (A2) Citibank included with its motion several documents that BESI's complaint either referred to or quoted from but did not attach—including the two written presentations on which BESI's claims were predicated, offering memoranda for the securities BESI purchased, a letter agreement related to the purchase of one of the securities, and two "Administration Agreements." In a forty-four page decision, Chief Judge Mukasey ruled that, under New York law, BESI's claims were precluded by these documents and improperly stated. The District Court therefore granted Citibank's motion to dismiss and ordered judgment for Citibank. (SPA45-46) This appeal followed.

STATEMENT OF FACTS

A. Structure of the Captiva Investments

BESI, a Portuguese investment bank, purchased \$25 million of debt securities from two structured finance funds: Captiva Finance Ltd. ("Captiva I") and Captiva Finance III Ltd. ("Captiva III"). Captiva I raised \$300 million to invest in high-yielding corporate debt securities by issuing \$255 million of senior secured "Class A" notes that paid a guaranteed return and \$45 million in unsecured, subordinated "Income Notes" that did not promise any rate of return. (A30, A36) Captiva III was similarly structured, with a total investment of \$500

million, of which \$60 million was Income Notes. (A114, A121) BESI elected to purchase the riskier Income Notes issued by each fund.

The capital raised by Captiva I and III was used to acquire portfolios of high-yielding debt securities and other instruments (the "Portfolio Collateral") as provided in the Offering Memoranda. (A30, A114) Repayment of principal and interest on these portfolios provides a return to Captiva I and III, which in turn pay out all interest and principal collected using a priority-of-distribution formula in the Offering Memoranda. (A312) That formula results in payment to Income Note holders such as BESI only if money remains after paying the Class A Note holders and Captiva's fees and expenses. (A312) The portfolios held by Captiva I and III are pledged entirely for the benefit of the Class A Note holders. (A30, A114) Income Note holders have no ownership or security interest in the portfolios.

Captiva I and III were "closed-end" investment vehicles. Investors had no right to redeem the Income Notes at any time before the stated maturity date: December 15, 2002 for Captiva I, and June 2010 for Captiva III. (A69, A157) These maturity dates could be extended and, in extraordinary circumstances, the Income Notes could be redeemed before the stated date. (A69-70, A157-58)

B. Relevant Provisions of the Transaction Documents

1. Offering Memoranda

The Offering Memoranda are a detailed recitation of the terms and conditions of the Income Notes. (A30-113) These documents make clear that investors “must not” rely upon any information or representation other than those in the Offering Memoranda:

No person has been authorized to give any information or to make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied upon.

(A33) The Offering Memoranda also expressly disclose that “Holders of Income Notes will bear the risk of ... losses” if the Portfolio Collateral is liquidated due to a specified quantum of defaults by obligors on the underlying loans. (A58)

The Offering Memoranda further disclosed that (i) Captiva I and III had limited assets; (ii) the Portfolio Collateral’s liquidity depended on the corporate loan market; and (iii) the Portfolio Collateral’s value could be adversely affected by market conditions. (A57-58, A134-36) The Offering Memoranda detailed that the Income Notes would be at risk during times of economic distress:

Since in such a default scenario payments on the Income Notes will be made only after payment in full of the Class A Notes, *Holders of Income Notes will bear the risk of such losses* and may in such situations receive less than the amounts due under the Income Notes (including on account of principal).

(A58, A136, emphasis added) The Captiva I Offering Memorandum disclosed that a loss of principal was likely at annual default rates as low as 2%. (A80, A102-04) The Captiva III Offering Memorandum made a similar disclosure. (A187)

2. Administration Agreements

The Administration Agreements are “by and between CAPTIVA FINANCE LTD. ... and CITIBANK, N.A.” (A213, A225) Income Notes holders are not parties to the contracts. Under the Administration Agreements, Citibank owed duties to Captiva I and III, not to the Income Note Holders. (A213, A225) And the Agreements provide that Citibank shall be liable for any failure to perform the duties it owes to Captiva (or its shareholders or creditors) only in narrow circumstances including willful misfeasance, bad faith, and reckless disregard of its duties:

[T]he Administrative Agent ... [shall not have] any liability to the Company [Captiva], or to its shareholders or creditors, for any error of judgment ... or for any loss arising out of any investment, or for any other act or omissions in the performance of its ... obligations except for liability to which it would be subject by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of its ... duties and obligations hereunder.

(A220, A231)

3. Captiva III Letter Agreement

The complaint alleged very little about BESI’s purchase of Captiva III Income Notes, omitted any reference to BESI’s written agreement to purchase

Captiva III Income Notes, and did not attach a copy of this written agreement.

(A11) But, in May 1998, BESI executed an agreement to purchase \$15 million of Captiva III Income Notes. (A235) That contract provides that Captiva III Income Notes were allocated to BESI under “the terms set out in the Private Placement Memorandum,” *i.e.*, the Offering Memorandum. (A235) It further provides that BESI “represent[s] to Citibank that [it] independently and *without relying upon Citibank or any other person*, and based on such documents and information as [BESI] deemed appropriate, made [its] own credit analysis and decision to purchase the Notes.” (A235, emphasis added)

C. Alleged Representations

BESI contends that it purchased Captiva Income Notes on the basis of presentations by two Citibank employees—Phillipe Collot and Stephanie Golamco—at two different meetings. The dates of these meetings were alleged to be “early 1997” and “spring 1998.” (A8-11)

BESI alleged that the “promises” made during these presentations were that Citibank would “actively” monitor and supervise the loan portfolios and would keep BESI adequately informed about its investments. (A8-9) The complaint makes no specific allegations concerning how BESI was to get any return on its \$25 million investment under this amorphous “agreement” with Citibank. BESI

contends that Citibank simply agreed to provide for “preservation of capital” and “high returns.” (A9-10)

According to the complaint, Collot’s and Golamco’s alleged oral promises were reflected in two written presentations prepared by Citibank: (i) a November 1995 Presentation that Citibank allegedly provided to BESI at the “early 1997” meeting (the “November 1995 Presentation”); and (ii) a “second investor presentation ... containing figures as of March 1996” (the “March 1996 Presentation”). (A8-10) Although its complaint quoted selectively from these presentations, BESI elected not to attach them as exhibits. There was a reason for this.

Both Presentations, on their very first page, disavow that they are an offer of any kind: “This does not constitute an offering. An offering can be made only through the Offering Memorandum.” (A236, A257) The documents go on to state that they are merely “a product description of [the] Income Notes.” (*Id.*) The Presentations further state that “[t]he CLOs are obligations of Captiva Finance, Ltd.,” not Citibank, and cautions all investors that they “must” read the Offering Memorandum and that all statements in the Presentations are qualified by it:

[Y]ou must obtain and carefully read the Offering Memorandum, which contains additional information needed to evaluate the investment and provides important disclosures regarding risks, fees and expenses. All statements herein are qualified by reference to the Offering Memorandum.

(Id.) Both Presentations expressly provide that investors may not use them as a premise for a damages claim against Citibank: “Citibank ... accepts no liability for any direct or consequential losses arising from” information in this Presentation.

(Id.)

SUMMARY OF THE ARGUMENT

I.A-C. BESI’s contract and promissory estoppel claims were based on promises allegedly made by Citibank during two marketing presentations. Each presentation was accompanied by a writing that directed investors to read the Offering Memorandum and made clear that statements in the presentations were qualified by the Offering Memoranda. The Offering Memoranda, in turn, provided that investors must not rely on representations made outside the Offering Memorandum. In light of these express statements, BESI cannot as a matter of law claim that Citibank’s representations (i) gave rise to an enforceable contract; (ii) were “clear and unambiguous” as required to state a promissory estoppel claim; or (iii) could justifiably be relied upon by BESI. Both claims are also barred by the Statute of Frauds.

I.D. BESI may not enforce the Administration Agreements as an intended third-party beneficiary. The New York Appellate Division, First Department, has recently held that a Captiva Income Note holder may not enforce the Captiva I Administration Agreement as an intended third-party beneficiary. Under this

decision, and general principles of New York law, BESI's third-party beneficiary claim cannot stand.

II. BESI's fraudulent inducement claim was based on two observations about the loan portfolios that, according to BESI, Citibank should have made when BESI invested in the Income Notes. But BESI did not allege that Citibank knew these "facts" to be true at the time BESI invested in the Income Notes. BESI therefore cannot establish either falsity or intent to defraud, two required elements of a fraud claim. In light of express disclaimers in the Presentations, Offering Memoranda, and the Captiva III Letter Agreement, BESI also cannot establish that it justifiably relied on Citibank's alleged oral statements in investing in the Income Notes.

III. BESI's breach of fiduciary duty claim fails for three independent reasons: (i) BESI alleged only a conventional, arms-length business relationship with Citibank; (ii) as re-stated in BESI's brief—but not pleaded in its complaint—the breach of fiduciary duty claim seeks to enforce the same alleged promises that underlay the breach of contract claim; and (iii) BESI alleged only that Citibank acted recklessly, but not that Citibank acted with deceitful intent.

IV. BESI never properly requested leave to amend its complaint. In any event, the District Court did not abuse its discretion in denying BESI leave to amend. BESI's claims all fail as a matter of law due to either express disclaimers

in the transaction documents or other fundamental deficiencies that are not curable by amendment.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint on a motion under Rule 12(b)(6). The standard in both the District Court and in this Court is the same: a motion to dismiss should be granted if the plaintiff's allegations, accepted as true, do not state a claim for relief. *See* Fed. R. Civ. P. 12(b)(6); *see also Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). The District Court's denial of BESI's footnoted request to re-plead is reviewed under an abuse of discretion standard. *See McLaughlin v. Anderson*, 962 F.2d 187, 195 (2d Cir. 1992).

The District Court properly ruled—and BESI does not contest—that all of the documents submitted by the parties in connection with Citibank's motion were “well within the scope of ... review on a dismissal motion as they are incorporated into the complaint either by reference or through BESI's reliance in making the allegations in the complaint.” (SPA3) *See also Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (district court may consider on dismissal motion “any statements or documents incorporated in [complaint] by reference ... and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit”).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED BESI'S CONTRACT CLAIMS

BESI's breach of contract and quasi-contract claims were all based upon three alleged promises purportedly made by Citibank during marketing presentations: that Citibank would (i) "actively monitor and supervise the Captiva investment vehicles with a high degree of skill and vigilance and for the purpose of preserving BESI's capital"; (ii) "keep BESI currently and adequately informed concerning the status of its investments"; and (iii) "provide BESI with other relevant and timely information." (A8-10, A19) The District Court properly ruled that documents allegedly reflecting these promises and other documents governing BESI's investment precluded BESI's contract claims.

A. BESI Failed to State a Breach of Contract Claim

Judge Mukasey dismissed the breach of contract claim because "BESI has failed to allege facts sufficient to show that an enforceable contract existed between BESI and Citibank." (SPA8) This ruling was correct. (SPA10-11)

1. BESI Failed to Allege an Enforceable Contract

The November 1995 and March 1996 Presentations, which allegedly reflected Citibank's promises to BESI, refer investors to the Offering Memorandum as the *only* document pursuant to which the Income Notes could be offered. Specifically, both Presentations unambiguously state that (i) they did not

constitute an offering; (ii) “[a]n offering can be made only through the Offering Memorandum,” a document that prospective investors were expressly told to “obtain and carefully read”; and (iii) all statements in the presentations were “qualified by reference to the Offering Memorandum.” (A236, A257)

The Offering Memoranda for Captiva I and III similarly provide that the *only* representations an investor should rely on in purchasing the Income Notes were set forth in the Offering Memoranda and that an investor “must not” rely on any other representations. (A33, A117) Further still, BESI agreed in the Captiva III Letter Agreement that Citibank would allocate Income Notes to BESI under the terms of the Captiva III Offering Memorandum. (A235) And BESI represented that it did not rely on Citibank in connection with its investment in Captiva III Income Notes: “You [BESI] hereby represent to Citibank that you have independently and without relying upon Citibank or any other person, and based on such documents and information as you have deemed appropriate, made your own credit analysis and decision to purchase the Notes.” (A235)

These statements clearly express Citibank’s intent not to be bound by any representations — including oral representations — not contained in the Offering Memoranda. A fundamental principle of contract law is that parties—especially sophisticated parties—remain free to avoid oral agreements by making the type of clear statements Citibank made here:

[W]hen a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent. Freedom to avoid oral agreements is especially important when ... corporations engage in substantial and complex dealings. ... [I]ndeed, above a certain level of investment and complexity, requiring written contracts may be the norm in the business world, rather than the exception.

R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75 (2d Cir. 1984); *see also*

Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 497

(S.D.N.Y. 1987) (“[P]rime significance attaches to the intentions of the parties and

to their manifestations of intent.”). This principle is neatly summarized in the

RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. a (1981): where, as in this case,

“the addressee of a proposal [BESI] has reason to know that no offer is intended,

there is no offer even though he understands it to be an offer.”

The District Court properly applied this principle and held that the

November 1995 and March 1996 Presentations, Offering Memoranda, and Captiva

III Letter Agreement “constitute objective signs” of Citibank’s “expressed

intentions’ not to be bound by any statements outside the Offering Memoranda.”

(SPA13, quoting *R.G. Group*, 751 F.2d at 74-75) The District Court correctly

reasoned, in adherence with principles of New York law applied by this Court, that

“[i]t is no proper exercise of authority for this court to frustrate that intent,

particularly given ‘the level of investment and complexity’ of the dealings at

issue.” (SPA13, quoting *R.G. Group*, 751 F.2d at 74-75) This Court should therefore affirm the dismissal of BESI’s breach of contract claim.

2. BESI’s Arguments for Reinstating Its Claim Are Meritless

BESI argues that Judge Mukasey committed reversible error in dismissing its breach of contract claim for four reasons: (i) the disclaimers in the transaction documents do not actually show Citibank’s intent to be bound only by a written agreement; (ii) the disclaimers do not refer to Citibank’s obligations to BESI; (iii) the Captiva III Letter Agreement does not refer to “promises about Citibank’s future performance” (BESI Br. 24); and (iv) the disclaimer of reliance on “representations” does not apply to “promises.” (BESI Br. 19-25) Only the latter two grounds are preserved for appeal; BESI did not assert either the first or second above-listed grounds in the District Court.¹ In any event, none of the asserted grounds is a basis for reversal.

(a) Citibank Expressed Its Intent Not To Be Bound by Alleged Oral Promises

BESI argues—in the teeth of the transaction documents—that the Offering Memoranda, which governed BESI’s investment in the Captiva Income Notes, failed to show Citibank’s “intent not to be bound” by any statements outside the

¹ Below, BESI’s sole basis for opposing dismissal of the breach of contract claim was that the disclaimers were directed to “representations,” not “promises.”

Offering Memoranda. (BESI Br. 20-21) BESI is simply wrong. The Offering Memoranda provided, in no uncertain terms, that

No person has been authorized to give any information or to make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied upon.

(A33, A117) Thus, the only statements an investor may rely upon in connection with an investment in Captiva Income Notes are those in the Offering Memoranda.

In this same vein, BESI contends that the disclaimers in the transaction documents fall short because they did not state that “Citibank would be bound only by an ‘executed’ or ‘written’ agreement,” as a traditional “agreement to agree” would. (BESI Br. 21) That circular contention assumes the existence of a written “agreement to agree.” Here, Citibank had *no* agreement with BESI. The marketing Presentations that BESI contends reflect its agreement with Citibank made clear that they were not “agreements” of any kind. Both Presentations clearly provided that all statements were qualified by the Offering Memoranda and that an investment in Captiva Income Notes could be made only through the Offering Memoranda. (A236, A257) Thus, the very documents that BESI points to as support for its alleged “contract” show Citibank’s clear intent not to be bound by any representations other than those in the Offering Memoranda.

(b) The Offering Memoranda Address Citibank’s Role

BESI also argues that the disclaimers in the Offering Memoranda “do not address Citibank’s relationship with BESI,” but only the terms of the Income Notes. (BESI Br. 23) Here again, BESI ignores that Citibank’s alleged “relationship with BESI” was purportedly reflected in the two marketing Presentations, both of which stated that they were not an offer to invest in Income Notes and that such an offer could only be made through the Offering Memoranda. (A236, A257) BESI is also wrong when it says that the Offering Memoranda described only “the terms of the securities being offered [and] not the terms of Citibank’s obligations under any other agreements.” (BESI Br. 23) The Offering Memoranda summarized, among other things, the duties that Citibank would owe to Captiva on a going-forward basis under the Administration Agreements; but the Offering Memoranda said nothing about an alleged “contract” between Citibank and Income Note holders. (A39-40, A127)

(c) BESI Disclaimed Reliance on Citibank’s Promises in the Captiva III Letter Agreement

BESI next contends that the disclaimer in the Captiva III Letter Agreement—whereby BESI represented that it “independently and without relying upon Citibank or any other person, and based on such documents and information as [BESI has] deemed appropriate, made [its] own credit analysis and decision to purchase the Notes” (A235)—does not refer to “BESI’s investment in Captiva I”

or “promises about Citibank’s future performance.” (BESI Br. 24) BESI is correct that the Captiva III Letter Agreement relates only to Captiva III. But, as quoted above, that letter states unequivocally that BESI disclaimed *any* reliance on Citibank in connection with BESI’s purchase of Captiva III Income Notes. The disclaimer is simply not qualified in the manner that BESI suggests, to carve out the possibility that BESI might rely on “promises about Citibank’s future performance” while disclaiming any other sort of reliance on Citibank. The Captiva III letter states, in categorical terms, that BESI invested in Captiva III Income Notes without relying upon Citibank. (A235) BESI nevertheless alleged in its complaint that it invested in Captiva III Income “in reliance on the promises and statements [Collot and Golamco] made during meetings and in other Citibank communications.” (A11) This critical allegation cannot stand in the face of the Captiva III Letter Agreement.

(d) Disclaimers in the Transaction Documents Apply to “Promises”

Finally, BESI argues that broad disclaimers in the Presentations, Offering Memoranda, and Captiva III Letter Agreement do not preclude its claim because they disclaimed reliance on Citibank’s “representations” but not “promises.” The District Court properly rejected this semantic argument. (SPA11-13)

BESI is correct that representations and promises are not “the same thing.” (BESI Br. 23) A representation of fact is plainly not a promise. But that

distinction in no way supports the converse proposition—urged by BESI and rejected by the District Court—that a promise is not a representation. A promise is commonly understood as a representation *of intent*. As the Court of Appeals for the Fifth Circuit has explained in a related context, in holding that a promise is a “representation” for purposes of a federal anti-fraud statute:

[A] promise to perform is not only a prediction, but is generally also a representation of present intent. Promises and representations are simply not mutually exclusive.

United States v. Shah, 44 F.3d 285, 293 (5th Cir. 1995); *see also United States v. Sattar*, 272 F. Supp. 2d 348, 376 (S.D.N.Y. 2003). The authoritative treatise, WILLISTON ON CONTRACTS, similarly states that a “promise” is a representation of intent:

[W]here the party making the representation asserted that he would do or refrain from doing something in the future he made a promise, though it might also be considered a representation of his intent.

4 Richard A. Lord, WILLISTON ON CONTRACTS § 8:4, at 38 (4th ed. 1992).²

Against the above-cited authority, the common-sense notion that a promise is a representation of intent, and its own complaint, BESI offers nothing but what

² Indeed, as the District Court pointed out, BESI itself used “promises” and “representations” interchangeably in its complaint. (SPA12) BESI alleged that the “two written investor presentations ... confirmed [Citibank’s] oral *representations*,” in that the November 1995 Presentation “*promised* ‘ongoing

the District Court aptly characterized as a “semantic argument ... based on nothing but *ipse dixit*.” (SPA12) Indeed, the only New York authority that BESI cites in support of its argument is *Falcon Crest Diamonds, Inc. v. Dixon*, 655 N.Y.S.2d 232, 236 (Sup. Ct. N.Y. Cty. 1996), for the proposition that a representation is “a statement as to past or present fact.” (BESI Br. 22 n.5) As the District Court pointed out, however, this quotation is “incomplete[] and misleading[].” (SPA11) The *Falcon Crest* decision did not distinguish between “promises” and “representations,” as BESI suggests, but simply applied to an insurance contract the statutory definition of “representation” in the New York Insurance Law. 655 N.Y.S.2d at 236-37.

BESI is left, then, without any authority under New York law to support its novel theory that a disclaimer as to all representations does not apply to a representation of intent, *i.e.*, a promise. Still, BESI argues that it should be afforded an opportunity to develop proof in support of this theory. (BESI Br. 23) BESI is wrong. A federal court is simply not the forum to advance novel theories of state law. *See H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1025 (2d Cir. 1989) (“[I]t is not the role of a federal court ruling in diversity to undertake ... an expansion of New York law.”); *see also, e.g., Shields Enters., Inc.*

(continued...)

oversight of the portfolio by the fiduciary arm of Citibank.” (A10, emphasis added)

v. First Chicago Corp., 975 F.2d 1290, 1297 (7th Cir. 1992). BESI could have brought its complaint in New York State court. Having chosen to sue in federal court, it should not now be heard to complain because Chief Judge Mukasey appropriately declined to embrace a novel theory of contractual interpretation that is not supported by New York law, contradicted by other authority, and undercut by BESI's own complaint.

3. The Breach of Contract Claim Is Barred by the Statute of Frauds

BESI's complaint operates on the assumption that the Offering Memoranda and the Captiva III Letter Agreement do not govern its investment in Income Notes. Even on this erroneous assumption, BESI's breach of contract claim was properly dismissed for the alternative reason—not reached by the District Court given how it ruled—that it is barred by the Statute of Frauds.

(a) The Alleged Contract Was for More Than One Year

Under New York law, a contract to perform services that is not embodied in a writing signed by the party to be charged is unenforceable if it cannot be performed within one year. *See* N.Y. Gen. Oblig. Law § 5-701(a)(1); *see also* *Zupan v. Blumberg*, 161 N.Y.S.2d 428 (1957); *Currier v. Prudential Ins. Co. of Am.*, 697 N.Y.S.2d 774, 774 (3d Dep't 1999). Here, the alleged oral "agreements" between Citibank and BESI were clearly for services: the complaint alleges that Citibank agreed to monitor and supervise the Captiva I and III portfolios and

provide BESI with information concerning its investments. (A5) Those services could not be performed within one year, either, because the Income Notes were, by their terms, multi-year, closed-end investments.³ The Statute of Frauds thus bars BESI's contract claim because the oral "contract" alleged by BESI could not be performed within a year and was not memorialized in a writing signed by Citibank.

(b) BESI's Arguments that the Statute of Frauds Does Not Apply Are Meritless

Below, BESI "agreed that Citibank was not expected to complete its supervision of the Captiva I and Captiva III portfolios within a year." (A2, Dkt. # 13, at p. 16) Nevertheless, BESI argued that the Statute of Frauds did not apply because, under the Offering Memoranda, it was theoretically possible for BESI to redeem or sell the Income Notes within a year after purchasing them. The problem with this argument is that, on BESI's theory, the Offering Memoranda *do not* reflect the terms of BESI's alleged contract with Citibank. (A10-11) Indeed, even on appeal, BESI maintains that "[t]hose offering documents detail the terms of the securities being offered ... and they *do not address Citibank's relationship with BESI.*" (BESI Br. 23, emphasis added) It is, on BESI's theory, the November

³ The November 1995 Presentation, which allegedly reflects BESI's purported agreement with Citibank, states that "[t]he Captiva Finance portfolio is a 'closed-end' investment structure, with a four and a half year investment period ending June 1, 2000" and that the "minimum holding period" for Captiva I Income Notes was "4 1/2 – 5 1/2 years." (A237, A246) The Captiva III Income Notes—

1995 presentation that allegedly reflects Citibank's agreement with BESI. And this presentation clearly provides that an investor in the Income Notes was locked in for more than one year. *See Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 299 (S.D.N.Y. 1997) ("The plaintiff cannot have it both ways. He cannot rely on the [written] contract when it works to his advantage, and repudiate it when it works to his disadvantage.") (alterations and internal quotation marks omitted).

BESI also argued that two letters collectively satisfy the Statute of Frauds' requirement for a writing "contain[ing] substantially the whole agreement and all its material terms and conditions." *Currier*, 697 N.Y.S.2d at 775. But neither of the letters, considered alone or together, satisfy the writing requirement. The first, a July 8, 1999 letter, is addressed to *all* "Investors in Captiva Finance Limited"—not only BESI—and does not purport to describe a side agreement between BESI and Citibank or any of its material terms. (A297) The second letter similarly refers to Citibank's commitment to "monitoring the performance of Captiva and Captiva III on behalf of all Income Note investors." (A329) Here, too, there is no mention of any contract between Citibank and BESI and no statement of the material terms—including the consideration paid by BESI to Citibank, the alleged

(continued...)

which BESI purchased in 1998—were similarly structured as a "closed-end" investment vehicle with a stated maturity of June 2010. (A148)

promise to keep BESI adequately informed of the status of its securities, and the alleged promise to preserve BESI's capital—of any such agreement.

B. The District Court Properly Dismissed BESI's Claim For Breach of the Implied Covenant

The District Court dismissed BESI's claim for breach of the implied covenant of good faith and fair dealing because "there can be no breach of the duty of good faith and fair dealing when there is no 'valid and binding contract from which such a duty would arise.'" (SPA14, quoting *American-European Art Assocs., Inc. v. Trend Galleries, Inc.*, 641 N.Y.S.2d 835, 836 (1st Dep't 1996)) BESI does not make any argument for reinstating this claim apart from its arguments for reinstating the breach of contract claim. (BESI Br. 26-27) Because, for the reasons set forth above, the breach of contract claim was properly dismissed, the District Court also properly dismissed BESI's claim for breach of the implied covenant.

C. The District Court Properly Dismissed BESI's Claim For Promissory Estoppel

BESI's promissory estoppel claim is based on the same "promises, representations, [and] statements" that form the basis for its alleged contract with Citibank. (A21) That claim fails because BESI cannot avoid the Statute of Frauds by re-casting a claim for breach of an unenforceable contract as a claim for promissory estoppel. In any event, Chief Judge Mukasey properly ruled that BESI

failed to adequately plead the elements of promissory estoppel.

1. The Statute of Frauds Bars the Promissory Estoppel Claim

Oral representations that are unenforceable as a contract under the Statute of Frauds cannot form the basis for a promissory estoppel claim unless the circumstances make it unconscionable to deny the promise. *See Merex A.G. v. Fairchild Weston Sys., Inc.*, 29 F.3d 821, 826 (2d Cir. 1994); *see also Philo Smith & Co. v. USLIFE Corp.*, 554 F.2d 34, 36 (2d Cir. 1977); *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 471 N.Y.S.2d 299, 302 (1984). BESI claims as promissory estoppel damages the precise damages that it claims for breach of contract. (A21) Such losses cannot, however, be deemed “unconscionable” because they “flow[ed] naturally” from Citibank’s purported failure to perform its alleged unenforceable agreement. *See Merex A.G.*, 29 F.3d at 826 (unconscionable injury is “injury beyond that which flows naturally ... from the non-performance of the unenforceable agreement”); *Philo Smith & Co.*, 554 F.2d at 36 (injury that “is solely a result of the non-performance of a void agreement” is not, as a matter of law, “unconscionable”). The promissory estoppel claim is thus barred by the Statute of Frauds.

2. Citibank’s Alleged Promises Are Not “Clear and Unambiguous”

The District Court also properly dismissed BESI’s promissory estoppel claim because BESI failed to properly plead the elements of this claim. Under

New York law, a claim for promissory estoppel requires: (i) “a clear and unambiguous promise”; (ii) reasonable and foreseeable reliance by the party to whom it is made; and (iii) an injury sustained by the party asserting the estoppel by reason of its reliance. *See R.G. Group*, 751 F.2d at 78 (quoting *Ripple’s of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d 447, 449 (1982)).

BESI did not properly plead a “clear and unambiguous promise.” The two Presentations on which BESI relied as the basis for Citibank’s alleged promises to BESI make it clear that Citibank did not make any binding promises in these presentations. Both Presentations stated that they *did not* constitute an offer to purchase the Income Notes and that an offering could be made only pursuant to the Offering Memorandum. (A236, A257) As the District Court held, by express statements in the Presentations and the Offering Memoranda, “Citibank indicated numerous times that it had no intent to enter into any agreements with BESI outside the written terms of the Offering Memoranda.” (SPA16) No statement qualified in such a resolute manner could be deemed a “clear and unambiguous promise.” *See R.G. Group*, 751 F.2d at 79 (“[T]he entire history of the parties’ negotiations made it plain that any promise or agreement at that time was conditional upon the signing of a written contract. Under those circumstances there never was a ‘clear and unambiguous promise’”); *Advanced Marine Techs., Inc. v. Burnham Sec., Inc.*, 16 F. Supp. 2d 375, 381-82 (S.D.N.Y. 1998)

(“[P]laintiff manifestly cannot make an end run around [defendant’s express] reservation ... by recharacterizing the contract claim as one of promissory estoppel.”).

BESI contends, once again, that the Offering Memoranda and written Presentations did not disclaim reliance on Citibank’s “promises,” but only on “representations” outside the Offering Memoranda. (BESI Br. 28-29) This argument fails for the reasons already stated. But, even accepting BESI’s semantic distinction for the sake of argument, the promises Citibank allegedly made are not “clear and unambiguous.” They are vague and amorphous representations that Citibank would monitor and supervise Captiva I and III with a “high degree of skill and vigilance,” keep BESI “adequately” informed, and provide BESI with “relevant and timely” information. (A19)

3. BESI Cannot Establish Reasonable Reliance

BESI also cannot satisfy the “reasonable reliance” element of its promissory estoppel claim. “In assessing the reasonableness of a plaintiff’s alleged reliance, [the court] consider[s] the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them.” *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 195 (2d Cir. 2003). As the District Court held, BESI’s allegations of reasonable reliance fail on all of these criteria.

The most important “context” of this transaction is the clear statements in the written marketing Presentations and the Offering Memoranda that direct investors not to rely on representations outside the Offering Memoranda. (A33, A117) BESI also represented in the Captiva III Letter Agreement that it had “independently and without relying on Citibank” made its own decision to invest in the Captiva III Income Notes. (A235) *See Emergent Capital*, 343 F.3d at 195 (no reasonable reliance on oral statements made outside the parties’ contract where contract stated seller was not making representations outside written agreement); *Chromalloy Am. Corp. v. Universal Housing Sys. of Am., Inc.*, 495 F. Supp. 544, 552 (S.D.N.Y. 1980) (written disclaimer of reliance rendered reliance unreasonable for purposes of promissory estoppel claim).

In addition, given the sophistication of the parties; the magnitude of BESI’s \$25 million investment; and the extensive and detailed disclosures of the terms of this investment in the Offering Memoranda, it is wholly unreasonable for BESI to claim that it relied on a side agreement with Citibank that was not memorialized in any of the detailed documents that governed BESI’s investment in Income Notes.

BESI contends that Judge Mukasey should not have deemed it “sophisticated” because, according to the complaint, BESI was inexperienced with this particular investment and unfamiliar with the U.S. market. (BESI Br. 29-30) That misses the point. The relevant inquiry is whether BESI—an investment

bank—was sophisticated enough to demand that what it now claims are important oral promises should be memorialized in a signed contract. *See Marine Midland Bank, N.A. v. Green*, 691 N.Y.S.2d 423, 423 (1st Dep’t 1999) (“sophisticated real estate investor ... could not have believed that plaintiff would extend a \$2 million loan ‘on a word and a handshake’”); 4 Caroline N. Brown, CORBIN ON CONTRACTS § 12.8, at 43 n.28 (rev. ed. 1997) (reliance may be unreasonable where “sophisticated party [should be] aware of the legal or customary requirement of a writing”). In any event, BESI’s representation in the Captiva III Letter Agreement—that it conducted its “own credit analysis” and was making its “own ... decision” to invest in Captiva III Income Notes (A235)—belies its lawyers’ argument that BESI lacked the sophistication to understand its investment.

D. The District Court Properly Dismissed BESI’s Third-Party Beneficiary Claim

BESI claimed that the Administration Agreements reflect “an intent that Income Noteholders such as BESI be able to enforce them” and that, as a consequence, it may sue Citibank as an intended third-party beneficiary of these agreements. (SPA21-22, quoting BESI’s brief to the District Court) Judge Mukasey rejected this claim for a host of reasons after careful analysis. (SPA21-29) Since the District Court issued its decision, however, New York’s Appellate Division has made clear that an Income Note holder may not enforce the

Administration Agreement as a third-party beneficiary. For this reason alone, this Court should affirm the dismissal of BESI's third-party beneficiary claim.

1. New York's Appellate Division Has Held That an Income Note Holder May Not Enforce the Administration Agreement

In *SNS Bank, N.V. v. Citibank, N.A.*, 2004 N.Y. Slip Op. 00445, 2004 WL 1066815 (1st Dep't May 13, 2004), a holder of Captiva I Income Notes sued Citibank and claimed, among other things, that it was an intended third-party beneficiary of both the Administration Agreement and another contract not at issue here. The Supreme Court, New York County, dismissed the entire complaint against Citibank and the other defendants (Captiva I and its board) in July 2003. *See SNS Bank, N.V. v. Citibank, N.A.*, No. 601989/02, slip op. (Sup. Ct. N.Y. Cty. July 31, 2003) (attached hereto). BESI was well aware of this decision—the parties wrote letters about it to the District Court—but did not mention the decision in its brief to this Court. After BESI filed its brief, the Appellate Division, First Department, affirmed the dismissal order in *SNS Bank*. The Appellate Division held that the claims for “breach of the administration agreement and the financial management agreement ... were properly dismissed because plaintiff is not an intended third-party beneficiary of either contract (*see, e.g. ...Banco Espirito Santo*, 2003 U.S. Dist. LEXIS 23062, at *29).” *Id.* at *2.

This ruling is indistinguishable and dooms BESI's third-party beneficiary claim as a matter of New York law. *See generally Pentech Int'l, Inc. v. Wall Street Clearing Co.*, 983 F.2d 441, 445 (2d Cir. 1993) (“[W]e are fortunate to have a precedent [from the First Department, involving the same defendant—Wall Street Clearing Co.—and one of the same securities at issue] that is right on point.... As a federal court applying state law, we are generally obliged to follow the state law decisions of state intermediate appellate courts.”). Indeed, as quoted above, the Appellate Division cited with approval Chief Judge Mukasey's analysis in this case. The alleged facts from *SNS Bank* are also identical in all material respects to the facts alleged by BESI here. The only difference between this case and *SNS Bank* is that BESI also alleges that it may enforce the Captiva III Administration Agreement. (*SNS Bank* did not invest in Captiva III Income Notes.) But the Captiva I and III Administration Agreements are identical in all pertinent respects. Indeed, BESI itself does not distinguish between them. (A20)

Curiously, on appeal BESI contends that the District Court “held (without any supporting New York authority) that BESI could not demonstrate that it was an intended beneficiary.” (BESI Br. 31) This is simply not true. Judge Mukasey cited and discussed abundant New York authority in support of his holding. (SPA21-29) It is not necessary to engage BESI's unfounded argument, however, in light of the *SNS Bank* ruling that an Income Note holder is not an intended third-

party beneficiary of the Administration Agreement. For this reason alone, this Court should affirm the District Court's dismissal of BESI's third-party beneficiary claim.

2. Under General Principles of New York Law, BESI May Not Enforce the Administration Agreements

Even considered apart from *SNS Bank*, the District Court's dismissal of BESI's third-party beneficiary claim was correct.

New York has adopted the rule from the RESTATEMENT (SECOND) OF CONTRACTS that a third party may enforce a contract if it is an intended, as opposed to merely incidental, beneficiary of the contract. *See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 495 N.Y.S.2d 1, 4-5 (1985); *see also Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991). In pertinent part, the RESTATEMENT rule is that a party may enforce a contract as a third-party beneficiary only when "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). The District Court properly applied these principles.

(a) The Administration Agreements Do Not Evidence An Intent to Permit BESI to Enforce Them

The Administration Agreements do not “clearly evidence[] an intent to permit enforcement” by an Income Note holder such as BESI. Nowhere do the Agreements state that Income Note holders can enforce the contracts against Citibank. *See generally Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 663 (2d Cir. 1996) (third party will not be considered an intended beneficiary unless the contracting parties’ intent to benefit the third party is revealed “on the face of the agreement”). Instead, the core provisions of the Agreements state that Citibank will perform its duties for Captiva I and III and at their direction. (A213, A225)

BESI contends that the Administration Agreements reveal an intent to benefit Income Note holders because Citibank contracted with Captiva to make “recommendations to the Administrative Committee and the holders of the Income Notes with respect to the termination of the Financial Manager.” (BESI Br. 33) The District Court properly rejected this argument because the complaint does not claim that Citibank breached, or even owed to BESI, this duty. (SPA22) Instead, BESI claims that Citibank breached duties to “periodically review[] the portfolio manager’s performance, monitor[] the portfolios, and provid[e] periodic reports and recommendations to the Administrative Committee with respect to the portfolios.” (A20) These duties are distinct from the narrowly defined duty to

make recommendations to the Income Note holders regarding whether to terminate the Financial Manager; and, as the Administration Agreements make clear, they are to be performed for Captiva and the Administrative Committee, not for the Income Note holders.

Also, both Administration Agreements have a “succession” clause that identifies all beneficiaries of the agreements, without mentioning the Income Note holders, and does not permit assignment to third parties without consent. The succession clause states:

This Agreement shall insure to the benefit of and be binding upon the successors to the parties hereto. No assignment of this Agreement shall be made without the consent of the other party, provided, however, that the Company [Captiva] may assign its interest in this Agreement to the Trustee under the Indenture.

(A221, A231-32) Courts applying New York law, including the District Court here (SPA23), have repeatedly held that such clauses show a clear intent *not* to benefit third parties. *See, e.g., Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157, 163 (S.D.N.Y.1998); *Sazerac Co. v. Falk*, 861 F. Supp. 253, 258 (S.D.N.Y. 1994); *United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 988 F. Supp. 367, 373 (S.D.N.Y. 1997).

BESI’s only response to the succession clause is to misrepresent what it says. According to BESI, this clause does not “state that the Administration Agreements bind and benefit only the signatories.” (BESI Br. 36) As quoted

above, however, the succession clause plainly states that the Administration Agreements “shall inure to the benefit of ... the parties hereto.” (A221, A231-32) BESI is apparently making yet another *ipse dixit* argument that “the parties hereto” does not mean the same thing as the “signatories” to the Administration Agreement. There is of course no basis for this wholly contrived distinction.⁴

(b) Captiva Can Enforce the Administration Agreements

The District Court also properly ruled that BESI failed to demonstrate that it reached third-party beneficiary status because it failed to allege that “no one other than the third party can recover if the promisor breaches the contract.” *Fourth Ocean*, 495 N.Y.S.2d at 5. BESI does not—and cannot—allege that no party other than it may recover if Citibank breaches its contract. The Administration Agreements clearly provide that Captiva I and III may recover for any breaches by Citibank. (A217, A228, Administration Agreement is “enforceable against [Citibank] in accordance with its terms”)

Nevertheless, BESI contends that the District Court should have credited BESI’s “allegations”—which it never even made—that “the Captiva entities ... would never actually sue Citibank to enforce the agreements.” (BESI Br. 38) As

⁴ BESI also argues that exculpatory clauses in the Administration Agreements make Income Note holders intended beneficiaries. (BESI Br. 34-35) As the District Court noted, however, an exculpatory clause can hardly be construed as an intent to *benefit* BESI. (SPA21) Also, in context, the clause is

the District Court pointed out, however, “New York law permits third-party recovery when no other person *can* recover, not simply when no other person *will* recover.” (SPA26) BESI says that there is “no basis” for what it calls “the district court’s strained and technical rule.” (BESI Br. 38) That would be true only if one ignored the New York Court of Appeals decision in *Fourth Ocean Putnam*, cited by Judge Mukasey, that third-party enforcement is permitted when “no one other than the third party *can* recover if the promisor breaches the contract.” 495 N.Y.S.2d at 5 (emphasis added). Here again, the Court should decline BESI’s invitation to modify or expand what BESI derides as a “technical” rule of New York law. As noted above, the appropriate forum for seeking to expand New York State law is a New York State court. In any event, BESI’s argument would almost certainly have been rejected in state court. In *SNS Bank*, the Supreme Court applied the rule from *Fourth Ocean Putnam* and expressly held that the Income Note holder in that case was not an intended third-party beneficiary because “only Captiva had the right to recover for Citibank’s breach of contract.” *SNS Bank, N.V. v. Citibank, N.A.*, No. 601989/02, slip op. at 13 (Sup. Ct. N.Y. Cty. July 31, 2003).

(continued...)

clear that liability to Captiva’s “shareholders or creditors” would be derivative of potential liability to Captiva, as in a shareholders’ derivative action or bankruptcy.

3. **BESI Cannot Overcome the Exculpatory Clauses in the Administration Agreements**

Even if BESI had standing to sue for an alleged breach of the Administration Agreements, the District Court properly ruled that BESI cannot overcome the contractual limitation of liability provisions in those contracts. (SPA27-29) The Agreements state that Citibank shall not have any liability “for any error of judgment ... or for any loss arising out of any investment” except for liability “to which it would be subject by reason of willful misfeasance, bad faith, gross negligence or reckless disregard of” its duties. (A220, A231)

The alleged breaches about which BESI complains pertain at best to a difference of opinion concerning matters of judgment: Citibank’s review of the portfolio manager’s performance; Citibank’s monitoring of the portfolios and reporting on them; and Citibank’s making recommendations to the Administrative Committee with respect to the portfolios. As the exculpatory clauses make clear, merely second-guessing Citibank’s judgments in these matters cannot give rise to liability under the Administration Agreements. *See Lago v. Krollage*, 571 N.Y.S.2d 689, 692 (1991). BESI’s repeated boilerplate allegations that Citibank acted out of “bad faith, with reckless disregard and willful misfeasance of its contractual obligations, and in a grossly negligent manner” (A19-20, A12, A14) are too conclusory to overcome the Administration Agreements’ exculpatory clauses. *See SNS Bank*, 2004 WL 1066815, at *2 (affirming dismissal of Income

Note holder's third-party beneficiary claim for alternative reason that allegations of breach were precluded by this same exculpatory clause); *Colnaghi, U.S.A. Ltd. v. Jewelers Protection Servs., Ltd.*, 595 N.Y.S.2d 381, 382 (1993); *Retty Fin., Inc. v. Morgan Stanley Dean Witter & Co.*, 740 N.Y.S.2d 198, 198 (1st Dep't 2002).

II. THE DISTRICT COURT PROPERLY DISMISSED BESI'S FRAUDULENT INDUCEMENT CLAIM

BESI alleged that in February 2001—long after BESI had purchased Captiva I Income Notes—unidentified Citibank employees stated that the Captiva I portfolio had been “‘distressed’ from almost the beginning.” It also alleged that unidentified Citibank employees gave an opinion, on no specified date, that the portfolio loans for both investment vehicles “‘had been made in a climate of ‘lax underwriting standards.’” (A6) Attempting to scrape up a fraud claim, BESI faults Citibank for having failed to disclose these two purported “‘facts” in 1997 and 1998. (A21) The District Court properly dismissed this claim because BESI did not allege Citibank knew the above-described facts to be true in 1997 and 1998, when BESI decided to invest in Captiva I and III Income Notes. (SPA31) The court also properly rejected BESI's fraud-by-hindsight theory as precluded by the disclaimers in the pertinent transaction documents.⁵

⁵ BESI argues that the District Court erred by dismissing a separate “claim” for negligent misrepresentation that BESI never made. (BESI Br. 51-52) This “claim” was properly dismissed because BESI failed to allege that Citibank owed it any fiduciary duties. *See SNS Bank*, 2004 WL 1066815, at *3 (ordering

A. BESI Failed to Allege Falsity and Fraudulent Intent

To state a fraud claim under New York law, a plaintiff must plead (i) a representation of a material fact; (ii) falsity of that representation; (iii) an intent to defraud; (iv) reasonable reliance on the representation; and (v) damage caused by such reliance. *See May Dep't Stores v. International Leasing Corp.*, 1 F.3d 138, 141 (2d Cir. 1993). Under Rule 9(b), each of these elements, except for intent, must be pleaded with particularity. *See Fed. R. Civ. P. 9(b); Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275 (2d Cir. 1998), *see also Cohen v. Koenig*, 25 F.3d 1168, 1173 (2d Cir. 1994); *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). Intent may be “averred generally,” *id.*, but a fraud claim must nevertheless be supported by allegations giving rise to a “strong inference” of fraudulent intent. *Wexner*, 902 F.2d at 173.

The District Court properly concluded that “BESI has alleged no facts to support a strong inference that Citibank possessed in 1997 and 1998 the knowledge it possessed in 2001 concerning the funds.” (SPA31) BESI nowhere identifies who made these alleged statements or even when the “lax underwriting” statement was made. *See Wexner*, 902 F.2d at 172 (ordering dismissal of fraud claim where

(continued...)

dismissal of misrepresentation claim based on omission; “an omission does not constitute fraud unless there is a fiduciary relationship between the parties”). BESI also cannot establish the requisite element of justifiable reliance. *See Banque*

“[c]onspicuously absent ... are any allegations as to who ... or when and to whom” the allegedly fraudulent statements were made). And, critically, there is no allegation that Citibank knew in 1997 and 1998, when BESI was allegedly “induced” to purchase the Income Notes, that the loan portfolios were either “distressed” or that they were created in a “climate of lax underwriting standards.” BESI has therefore failed to plead that Citibank acted with knowledge in purportedly failing to disclose alleged “facts” that Citibank is not even alleged to have known in 1997 or 1998. And, of course, Citibank cannot be deemed to have acted with fraudulent intent if it never knew these facts at the relevant time. In light of these pleading gaps, the District Court properly dismissed BESI’s fraud claim. *See Ross v. A.H. Robins Co.*, 607 F.2d 545, 558 (2d Cir. 1979) (fraud pleading deficient where plaintiffs “failed to indicate when the defendants allegedly came into possession of this crucial information”); *SKR Res. v. Players Sports, Inc.*, 938 F. Supp. 235, 239 (S.D.N.Y. 1996) (“Without additional supporting facts,” allegation that “[defendant] knew at the time it requested SKR to run ads that it was not going to pay for the ads,” lacked “sufficient detail to support the claim of fraud”).

(continued...)

Arabe et Internationale D’Investissement v. Maryland Nat’l Bank, 57 F.3d 146, 158 (2d Cir. 1995).

BESI does not dispute that it failed to allege that Citibank knew the statements that underlay its fraud claim were true in 1997 and 1998. Instead, it contends that the complaint should be read expansively to support the requisite “strong inference” that Citibank had such knowledge. (BESI Br. 43) The allegations BESl marshals in support of this reading show no such thing. BESl points to allegations that Citibank was “fully responsible for” (A7), “dominated” (A15), and “made all critical business and policy decisions for” (A13) the Captiva entities. At best for BESl, these allegations show only that Citibank should be deemed to have whatever knowledge the Captiva entities had. But there are no allegations that even Captiva was of the opinion, at the time BESl invested in the Income Notes, that the Captiva I portfolio was “‘distressed’ from almost the beginning” or that the loans in the Captiva I or Captiva III portfolio were “made in a climate of ‘lax underwriting standards.’” Indeed, in a document that BESl itself submitted to the District Court, Citibank explained that the “lax underwriting standards” comment referred to the standards that major lending institutions used in 1997 and 1998, not to Citibank’s own credit procedures or the performance of the financial manager for Captiva I and III during that time period. (A342)

B. BESl Cannot Allege Justifiable Reliance

The fraudulent inducement claim fails for the alternative reason, also relied upon by the District Court, that BESl cannot show justifiable reliance. Under New

York law, “where a party specifically disclaims reliance upon a representation in a contract, that party cannot, in a subsequent action for fraud, assert [that] it was fraudulently induced to enter into the contract by the very representation it has disclaimed.” *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 734 (2d Cir. 1984).

BESI represented in the Captiva III Letter Agreement that it “independently and without relying on Citibank, or any other person, and based on such documents and information as [it] deemed appropriate, made [its] own credit analysis and decision to purchase the Notes.” (A235) The Captiva I and III Offering Memoranda similarly provided that an investor “must not” rely on any representations other than those set forth in the Offering Memoranda. (A33, A117) And the very presentations on which BESI professes to have relied in purchasing the Captiva I and III Income Notes directed BESI to “obtain and carefully read the Offering Memorandum” and that “all statements [in the presentations] are qualified by reference to the Offering Memorandum.” (A236, A257)

These disclaimers foreclose BESI from claiming that it relied on Citibank’s alleged promises or misrepresentations in deciding to invest in Captiva I and III. Where, as here, “[p]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded,” this express disclaimer “destroys the allegations in

plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations" *Danann Realty Corp. v. Harris*, 184 N.Y.S.2d 599, 602 (1959).⁶ Chief Judge Mukasey properly applied this rule in holding that "BESI's reliance was unreasonable in light of [Citibank's] several disclaimers." (SPA34)

C. The District Court Did Not Mischaracterize BESI's Fraud Claim

BESI argues that the District Court "mischaracterized BESI's fraud claim as focusing on Citibank's broken promises," and, as a consequence, purportedly erred in ruling that BESI failed to allege reasonable reliance. (BESI Br. 47) Both parts of this argument are wrong.

1. BESI Alleged, But Now Disavows, That Its Fraud Claim Was Based on "Misstatements"

First, Judge Mukasey did not "mischaracterize" BESI's fraud claim. BESI has made it emphatically clear in its appeal brief that it did not base its fraud claim on Citibank's misrepresentations or broken promises. (BESI Br. 47, saying BESI "never made" an argument that "Citibank's broken promises gave rise to BESI's

⁶ *Accord First Fin. Fed. Sav. & Loan Ass'n v. E.F. Hutton Mortgage*, 834 F.2d 685, 687 (8th Cir. 1987) (applying New York law; dismissing fraudulent claim due to disclaimer that "no person has been authorized to give any information or make any representation regarding the mortgage loans, and if given or made, no such information or representation has been relied upon"); *Galvatron Indus. Corp. v. Greenberg*, 466 N.Y.S.2d 35, 35 (N.Y. App. Div. 2d Dep't 1983) (disclaimer of "reliance on any representations . . . made by any other party hereto" precludes a claim for fraudulent inducement).

fraudulent inducement claim”) It then states that “[t]he district court seemingly did not understand that BESI’s fraud claims were chiefly based on omissions, not misrepresentations.” (BESI Br. 48) Apparently, it never occurred to BESI that the reason the District Court “seemingly did not understand” this point is that BESI itself *alleged* its fraud claim was based on “*misstatements* and failures to disclose.” (A21, emphasis added)

Chief Judge Mukasey credited this vague allegation. The court stated that “[t]he complaint is unclear as to what specific misstatements form the basis for BESI’s fraudulent inducement claim.” (SPA31) It then assumed that the misstatements to which BESI might have been referring were the same “promises and statements” that were alleged in the background section to the complaint. The District Court proceeded to explain why, under New York law, the same promises that underlay BESI’s breach of contract claim cannot also form the predicate for a fraud claim. (SPA31-33) While BESI now disavows its own pleading, it was hardly an error for the District Court to credit BESI’s ambiguous allegation and analyze why its fraud claim must be dismissed “to the extent” that it was based on affirmative promises instead of only an alleged failure to disclose. (SPA32)

2. Disclaimers in the Transaction Documents Applied to Statements That BESI Alleged Citibank Should Have Made

Second, the District Court did not assume, as BESI says it did, that BESI’s fraud claim was predicated solely on Citibank’s promises when the court addressed

reliance. The District Court disposed of whether Citibank's alleged promises may serve as the basis for a fraud claim separately and before it reached the reliance issue. (SPA31-35) BESI attempts to forge a link between the District Court's discussion of these two discrete issues to create the impression that the Court failed to address whether disclaimers in the transaction documents apply to Citibank's alleged failure to make certain representations. BESI's theory, apparently, is that the disclaimers apply only to representations outside the Offering Memoranda and not to alleged failures to make representations. But if BESI could not rely on any statements other than those made in the Offering Memoranda, *a fortiori* it could not rely on statements that, on BESI's theory, should have been made as a supplement to the statements in the Offering Memoranda. *See Wells Fargo Bank Northwest, N.A., v. TACA Int'l Airlines, S.A.*, 247 F. Supp. 2d 352, 356, 363-64 (S.D.N.Y. 2002) (dismissing omissions-based fraud claim in the face of disclaimer of reliance on any representation or warranty).

III. THE DISTRICT COURT PROPERLY DISMISSED BESI'S CLAIM FOR BREACH OF FIDUCIARY DUTY

BESI's complaint alleged that Citibank owed BESI a fiduciary duty for the unusual reason that "Citibank dominated and exercised complete control over the Captiva investment vehicles." (A22) BESI alleged, without explaining why this allegation should give rise to a fiduciary duty, that "there was no independent management of Captiva I and III to protect the interests of the Captiva entities and

the Income Note holders.” (A22) Below, BESI improperly attempted to “amend” its breach of fiduciary duty claim by adding in its brief that Citibank’s duty purportedly arose from Citibank’s promises “to exercise ‘special vigilance’ in protecting BESI’s interests by using Citibank’s worldwide resources in order to avoid harm to the value of the Captiva portfolios, and to engage in ‘ongoing oversight of the portfolio by the fiduciary arm of Citibank.’” (SPA35, quoting BESI’s brief to the District Court)

The District Court dismissed BESI’s breach of fiduciary duty claim for three independent reasons: (i) the alleged relationship between Citibank and BESI is an arms-length commercial relationship that does not give rise to fiduciary duties; (ii) the claim was an improper attempt to enforce the same duties that formed the basis for BESI’s alleged contract with Citibank; and (iii) BESI failed to allege that Citibank acted with deceitful intent. (SPA35-40) Each of these was a proper ground for dismissing the breach of fiduciary duty claim.

A. Arms-Length Commercial Transactions Cannot Support a Fiduciary Duty Claim

Conventional business relationships cannot give rise to a fiduciary relationship. *See Oursler v. Women’s Interart Ctr.*, 566 N.Y.S.2d 295, 297 (1st Dep’t 1991). As this Court has put it, “when parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the

existence of a fiduciary relationship will arise absent extraordinary circumstances.”

In re Mid-Island Hosp., Inc., 276 F.3d 123, 130 (2d Cir. 2002).

1. Under *SNS Bank*, BESI Should Be Deemed in an Arms-Length Relationship With Citibank

In *SNS Bank*, the Appellate Division applied this rule in affirming the dismissal of a claim for breach of fiduciary duty asserted by an Income Note holder against Citibank. The court held that “the parties merely had an arm’s length business relationship.” 2004 WL 1066815, at *2. And it invoked the principle of New York law that a “plaintiff’s subjective claims of reliance on defendant’s expertise” do not give rise to a fiduciary duty unless “the requisite high degree of dominance and reliance . . . existed prior to the transaction giving rise to the alleged wrong, and not as a result of it.” *Societe Nationale D’Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int’l Ltd.*, 674 N.Y.S.2d 648, 649 (1st Dep’t 1998).

Like the Income Note holder in *SNS Bank*, BESI’s relationship with Citibank is, at best for BESI, a conventional business relationship. The theory behind BESI’s amorphous claim for breach of fiduciary duty, as BESI pleaded it, is that Citibank stepped into the shoes of Captiva I and III. That, however, is an insufficient basis for a fiduciary relationship. It is well-established under New York law that a holder of debt securities (BESI) is a mere creditor and is not generally owed fiduciary duties by the issuer of those securities (Captiva I and III).

See SNS Bank, 2004 WL 1066815, at *1 (“Under New York law, Captiva would not owe plaintiff [Income Note holder] a fiduciary duty because the relationship between them is one of debtor and note-holding creditor.”); *see also New York Credit Men’s Adjustment Bureau v. Weiss*, 110 N.E.2d 397 (1953); *In re Mid-Island Hosp.*, 276 F.3d at 130.

BESI cannot allege that its relationship with Captiva or Citibank was anything more than a conventional debtor-creditor relationship. The Offering Memoranda made it clear that “the obligations of the parties to the transactions contemplated herein are set forth in and will be governed by certain documents described herein,” and nothing in the Offering Memoranda indicates that Citibank or Captiva accepted any trust or confidence that BESI may have reposed in them. (A32, A116) To the contrary, the Offering Memoranda pointed up the risk of investing in the Income Notes, disclosed that Citibank might enter into self-interested transactions, and disclosed that the Income Note holders ranked dead last in the priority of distributions from the portfolios. (A30, A58-60, A114, A135, A138) In addition, in its Captiva III letter agreement with Citibank, BESI disavowed that it reposed *any* trust or confidence in Citibank by representing that it relied on its own analysis and review in deciding to purchase the Income Notes. (A235) *See Northeast Gen. Corp. v. Wellington Adver., Inc.*, 604 N.Y.S.2d 1, 3 (1993) (“[I]f [the parties] do not create their own relationship of higher trust, courts

should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.”).

2. BESI’s New Theory That It Had “Confidence” In Citibank Does Not Establish a Fiduciary Relationship With Citibank

On appeal, BESI once again abandons the theory in its complaint that Citibank owed fiduciary duties to BESI because Citibank was the alter ego of the Captiva entities. BESI instead now contends that it subjectively “had confidence in Citibank’s honesty and financial management” and “told Citibank ‘that it ... would be relying on Citibank to perform supervisory and management functions’” (BESI Br. 54-55) BESI also relies on Citibank’s use of the word “fiduciary” in selective quotes lifted from the November 1995 presentation and a July 8, 1999 letter to all Income Note holders. Neither of these is a ground for reversing the District Court’s dismissal of the fiduciary duty claim.

(a) BESI Does Not Allege That Citibank Accepted BESI’s Confidence

First, BESI’s allegations that *it* reposed trust and confidence in Citibank are only half the picture. No fiduciary relationship arises unless one party reposes trust or confidence in another *and* the other party accepts that trust or confidence. *See ADT Operations, Inc. v. Chase Manhattan Bank, N.A.*, 173 Misc. 2d 959, 967 (Sup. Ct. N.Y. Cty. 1997) (“unilateral placement of confidence or trust” does not give rise to a fiduciary relationship); *Levitin v. PaineWebber, Inc.*, 159 F.3d 698,

707 (2d Cir. 1998). BESI focuses its argument on allegations establishing that it reposed trust and confidence in Citibank, but the complaint wholly lacks any allegations that Citibank *accepted* this trust or confidence. Nor could BESI have made such allegations, given the subordinated nature of the Income Notes and Citibank’s fully disclosed actual and potential conflicts of interest. *See Northeast Gen. Corp.*, 604 N.Y.S.2d at 3, 4 (commercial agreement did not give rise to fiduciary duties where it “contain[ed] no cognizable fiduciary terms or relationship” and had a “character [that] was not one of trust”).

BESI also did not allege, as it must to state a claim under New York law, that it and Citibank had a *pre-existing* confidential relationship with the “requisite high degree of dominance and reliance.” *SNS Bank*, 2004 WL 1066815, at *2. Instead, BESI merely alleged that some of its affiliates “had previously engaged in transactions with Citibank, and BESI consequently had confidence in Citibank’s honesty and financial management.” (A8) There are no allegations that, due to these previous transactions, Citibank and BESI had a pre-existing relationship characterized by Citibank’s dominance of BESI and BESI’s reliance on Citibank.

(b) Citibank Did Not “Acknowledge” a Fiduciary Duty

Second, Citibank did not “acknowledge” any fiduciary duty to BESI in writing. Faced with the *same* documents that BESI invokes—the November 1995 presentation and Citibank’s July 8, 1999 letter to all Income Note holders—and the

same argument that BESI makes here, the Appellate Division in *SNS Bank* held that “[p]laintiff’s argument that Citibank admitted being a fiduciary is unavailing. The use of the word fiduciary ... cannot alone establish fiduciary duties on the part of the named person or entity.” 2004 WL 1066815, at *3 (internal quotation marks omitted). The Appellate Division also further ruled, in this regard, that an Income Note holder “cannot rely on the November 1995 brochure because it was superseded by the June 1996 offering memorandum.” *Id.*

B. BESI’s Breach of Fiduciary Duty Claim Is Duplicative of Its Breach of Contract Claim

It is well settled under New York law that “[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand.” *William Kaufman Org., Ltd. v. Graham & James L.L.P.*, 703 N.Y.S.2d 439, 442 (1st Dep’t 2000); *see also Perl v. Smith Barney Inc.*, 646 N.Y.S.2d 678, 680 (1st Dep’t 1996). In the District Court, BESI claimed—although its complaint did not plead—that Citibank owed BESI fiduciary duties because Citibank purportedly promised to use “special vigilance” and engage in “ongoing oversight” to protect the value of the Captiva loan portfolios. These are two of the very same promises that underlay its breach of contract claim, however. The District Court therefore properly ruled that, even as re-cast, Citibank’s breach of fiduciary duty claim should be dismissed under the rule that, “where a party is merely seeking to

enforce its bargain, a tort claim will not lie.” *New York Univ. v. Continental Ins. Co.*, 639 N.Y.S.2d 283, 288 (1995).

BESI challenges this ruling. It first suggests that the District Court should have allowed BESI to plead either breach of fiduciary duty or breach of contract. (BESI Br. 56) But this is not a procedural issue of alternative pleading. Rather, under substantive New York law, a claim for breach of fiduciary duty must be “extraneous or distinct from” a claim for breach of contract to be sustainable. *See Steinberg v. DiGeronimo*, 680 N.Y.S.2d 93, 94 (1st Dep’t 1998). When it is not, the breach of fiduciary duty claim is not properly stated, and it must be dismissed even if the breach of contract claim is also not sustainable. *See id.* (ordering dismissal of breach of fiduciary duty claim that was “based on the unenforceable contract”).

BESI next contends that the District Court “failed to consider” that Citibank allegedly breached certain fiduciary duties by “(i) dissembling about the distressed nature of the Captiva I loan portfolio ... ; (ii) engaging in self-dealing at BESI’s expense ...; and (iii) undermining the Captiva entities’ independent management.” (BESI Br. 56-57) These allegations address only whether Citibank *breached* a fiduciary duty, not whether it owed one. Because BESI has failed to properly plead threshold facts showing that Citibank owed any fiduciary duty, it is

unnecessary to reach the distinct issue of whether BESI has adequately alleged that Citibank breached a fiduciary duty.

C. BESI Has Not Alleged That Citibank Breached a Fiduciary Duty

Citibank did not, in any event, breach any fiduciary duties it may have owed to BESI. The District Court properly dismissed BESI's fiduciary duty claim for the independent reason that BESI failed to allege Citibank's deceitful intent, an essential element of a claim for breach of fiduciary duty. BESI contends that New York law does not require deceitful intent. (BESI Br. 58) BESI is wrong. As this Court had made clear, an action for breach of fiduciary duty under New York law "requires a showing of 'deceitful intent' on the part of the fiduciary." *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 599 (2d Cir. 1991) (quoting *Horn v. 440 E. 57th Co.*, 547 N.Y.S.2d 1, 5 (1st Dep't 1989)).

BESI has failed to allege that Citibank acted with an intent to deceive. BESI argues, first, that it adequately alleged "Citibank knowingly and intentionally failed to disclose material facts when it induced BESI to invest in the Captiva entities." (BESI Br. 59) As demonstrated above, however, BESI's allegations were insufficient in this regard. BESI also contends that it alleged Citibank acted intentionally by "misrepresenting the loan portfolios' status." (*Id.*) BESI made no such allegation. Rather, as the complaint makes clear, BESI's theory was that Citibank acted in a grossly negligent and reckless manner—not with deceitful

intent—in allegedly failing to adequately inform BESI of the status of its investments. (A14, alleging that Citibank’s failure to “previously anticipate[] ... losses or warn[] BESI about them” reflects “Citibank’s gross negligence and reckless disregard”) Finally, BESI says it properly alleged Citibank breached fiduciary duties by “engaging in self-dealing[] and undermining the independence of the Captiva entities.” (BESI Br. 59) But this alleged conduct cannot be deemed deceitful in light of disclosures in the Offering Memoranda of (i) nearly all of the facts that BESI alleges “undermin[ed]” the independence of the Captiva entities, and (ii) that Citibank might engage in self-interested transactions.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND

BESI makes a one-paragraph argument that the District Court abused its discretion by denying BESI leave to amend its complaint. (BESI Br. 60) According to BESI, it properly requested leave to re-plead because it buried a terse footnote in the middle of its brief to the District Court that stated only, “BESI requests leave to amend its complaint in the event the Court concludes that any pleading requirements are not met.” (A346 n.10) This is not, first of all, an adequate motion for leave to file an amended complaint. *See McLaughlin v. Anderson*, 962 F.2d 187, 195 (2d Cir. 1992) (plaintiffs “never moved to amend” by asking for leave to re-plead in a footnote). For this reason alone, the District Court

did not abuse its discretion in refusing to grant BESI leave to amend that it never even properly requested. *See id.*

The District Court also did not commit reversible error in ruling that, even assuming BESI had properly requested leave to amend, any amendment would be futile. Chief Judge Mukasey ruled that BESI's claims "cannot be remedied by amendment":

Each of BESI's claims, including its fraud claim, fails on grounds that cannot be remedied by amendment. Most notably, the many disclaimers discussed above are fatal to most of BESI's claims, and the remaining claims fail for related reasons or for reasons not curable by amendment. Indeed, BESI would have to do more than merely add facts to its complaint; it would have to extract certain facts and replace them with contrary allegations. For these reasons, amendment would be futile.

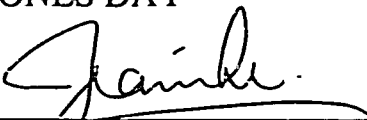
(SPA44-45) This ruling is not an abuse of discretion. For the reasons given above, BESI's claim that Citibank owed contractual or tort duties to BESI outside the scope of the duties set forth in the Offering Memoranda cannot be squared with the disclaimers and other express terms of the Offering Memoranda.

CONCLUSION

The District Court's order should be affirmed.

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New York, New York

Respectfully submitted,
JONES DAY

By: 

David L. Carden
Jayant W. Tambe
Todd R. Geremia
222 East 41st Street
New York, New York 10017
(212) 326-3939

Attorneys for Appellee,
Citibank, N.A.