To be Argued by:
JAYANT W. TAMBE

New York County Clerk's Index No. 601989/02

New York Supreme Court

Appellate Division—First Department

SNS BANK, N.V.,

Plaintiff-Appellant,

– against –

CITIBANK, N.A., CAPTIVA FINANCE, LTD., GLENN B. McCLELLAND, JOHN CARTER, DARREN RILEY, DAVID EGGLISHAW, ELIZABETH KEARNS, DERRIE BOGGESS, GRAHAM LOCKINGTON, JOHN CULLINANE, ANDREW R. COLLINS, JENNIFER DILBERT, DAVID A. DYER, MICHAEL AUSTIN, PAUL COPE AND JOHN AND JANE DOES 1-5,

Defendants-Respondents.

BRIEF FOR DEFENDANTS–RESPONDENTS

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 Defendants-Respondents

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PRELIMINARY STATEMENT

Appellant SNS Bank, N.V. ("SNS Bank") seeks to reverse an order of the Supreme Court, New York County (Helen E. Freedman, J.), dismissing its amended complaint. In a thorough and well-reasoned decision, the Supreme Court held that SNS Bank's complaint failed properly to allege—and the detailed exhibits to the complaint did not support—any of the assorted contractual, fiduciary, and equitable duties that SNS Bank claims respondents breached. The Supreme Court's order was correct and should be affirmed.

This case concerns a sophisticated $15 million investment that SNS Bank—a Netherlands financial institution—made in debt securities ("Income Notes") issued by Captiva Finance, Ltd. ("Captiva"), a Cayman Islands company, in 1996. SNS Bank made its investment pursuant to a contract with Captiva—a Subscription Agreement—which expressly incorporated several other documents that described in detail the nature, extent and scope of the parties' relationship and legal obligations. When SNS Bank's investment suffered a decline in value some years later, SNS Bank attempted to recover all of its investment losses through this lawsuit.

Without regard to the express provisions in the very transaction documents that govern its investment, SNS Bank asserted claims for breach of fiduciary duty and contract, misrepresentation, and unjust enrichment against (i) Captiva; (ii) all

of Captiva's present and former Cayman Islands-based Directors; (iii) Citibank, N.A., which has contracted with Captiva (not SNS Bank) to provide administrative and financial management services to Captiva; and (iv) two of Citibank's former employees, who served on an administrative committee for Citibank but had no relationship with SNS Bank.

Relying on the clear and unambiguous provisions of the transaction documents appended to the complaint and well-settled principles of New York law, the Supreme Court dismissed each of the eight counts of the complaint for multiple reasons, enumerated below.[1] On appeal, SNS Bank indiscriminately challenges each and every one of the Supreme Court's rulings, going so far as to contend that the Supreme Court was "*wrong to rely on . . . 'common sense.'*" (SNS Br. 15) SNS Bank's assault on common sense is, of course, contrary to this Court's jurisprudence. *See Skillgames, LLC v. Brody*, 767 N.Y.S.2d 418, 421 (1st Dep't 2003) (plaintiff is entitled to only "reasonable inferences" on motion to dismiss; court need not credit "bare legal conclusions" or "inherently incredible"

[1] The United States District Court for the Southern District of New York recently applied many of these same principles in dismissing a complaint brought by another Captiva Income Note holder against Citibank. *See Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537(MBM), 2003 U.S. Dist. LEXIS 23062 (S.D.N.Y. Dec. 22, 2003). The Income Note holder there, like SNS Bank, asserted claims for breach of fiduciary duty, breach of contract, and unjust enrichment, among others. Chief Judge Mukasey, like the Supreme Court in this case, ruled that Citibank had no commercial relationship—fiduciary or contractual—with the Income Note holder; the Income Note holder could not state a claim for unjust enrichment based on fees that Captiva paid to Citibank; and the Income Note holder could not sue as a third-party beneficiary under Citibank's contract with Captiva. *See id.* at *23-36, *44, *55.

allegations). The Supreme Court's order was correct—in both substance and procedure—and should be affirmed in all respects.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The principal questions on this appeal, as set forth below, are framed by the Supreme Court's reasons—often multiple—for dismissing each count of the complaint. A complete description of the many alternative reasons for dismissing each count is set forth in the argument section of this brief.

1. Whether respondents owed any fiduciary duties to SNS Bank when, among other things, SNS Bank had no commercial relationship with Citibank or the Administrative Committee and SNS Bank's relationship with Captiva was governed by the terms of a written agreement that did not give rise to a relationship of trust and confidence.

The Supreme Court ruled that respondents owed SNS Bank *no* fiduciary duties and accordingly dismissed Counts I, II, and III of the complaint. (A23-25) The Supreme Court further ruled, in the alternative, that Counts I and II are barred by liability-limiting clauses in the very agreements that SNS Bank invokes as a basis for asserting that Citibank and its former employees were in a fiduciary relationship with SNS Bank. (A24)

2. Whether SNS Bank may sue as a third-party beneficiary of two separate contracts—an Administration Agreement and a Financial Management Agreement—between Citibank and Captiva, when neither contract evidences a clear right of enforcement by SNS Bank and both permit Captiva to recover for any alleged breach.

The Supreme Court ruled that SNS Bank was *not* permitted to sue for breach of contract as a third-party beneficiary under either the Administrative Agreement or the Financial Management Agreement. (A25-26) The Court further ruled that, even if SNS Bank had standing to sue, both contracts barred the asserted right to recovery under express liability-limiting clauses. Accordingly, the Supreme Court dismissed Counts IV and V of the complaint. (A25-26)

3. Whether SNS Bank may recover for Captiva's alleged breach of an "implicit" duty under the Subscription Agreement to "create and maintain a structure" whereby various agents of Captiva and its Administrative Committee all performed their functions independently of each other.

The Supreme Court ruled that the contractual duty asserted by SNS Bank does not exist in the Subscription Agreement. The Court held that because the Subscription Agreement has an express merger clause, no duties may be implied into it. (A26-27) The Supreme Court therefore dismissed Count VI of the complaint. (A27)

4. Whether Citibank, its former employee, Captiva, or Captiva's Directors had a fiduciary duty to disclose to SNS Bank, at the time SNS Bank decided to invest in the Income Notes, that certain events might occur in the future.

The Supreme Court ruled that, because no respondent was a fiduciary to SNS Bank, no respondent owed SNS Bank a fiduciary duty to disclose potential future events. (A27-28) Accordingly, the Supreme Court dismissed Count VII of the complaint, for alleged "misrepresentation." (A28)

5. Whether SNS Bank has stated a claim for unjust enrichment, predicated on Citibank's receipt of certain fees that Captiva was contractually obligated to pay Citibank, when Citibank's fees were not paid by SNS Bank and Citibank's right to such fees was governed by its contracts with Captiva.

The Supreme Court ruled that SNS Bank did not have a possessory interest in Citibank's fees that Captiva was contractually obligated to pay Citibank and, accordingly, dismissed Count VIII of the complaint. (A28)

6. Whether—assuming arguendo that the complaint states any claim against Captiva's Directors—the Supreme Court has personal jurisdiction over the Directors when, as the complaint and unrebutted affidavits by the Directors themselves establish, Captiva's Directors reside abroad, most of them have never even visited New York for Captiva-related business, and the only two that ever have did so in a single visit well after the events of which SNS Bank complains.

The Supreme Court ruled that it did not have personal jurisdiction over Captiva's Directors and exercised its discretion to deny SNS Bank jurisdictional discovery. (A28-29)

STATEMENT OF FACTS

SNS Bank's claims are predicated on duties that it asserts arose out of the documents that governed its investment in Captiva Income Notes. SNS Bank attached those documents to its complaint, but its brief on appeal largely ignores them. We provide here a description of the pertinent provisions of these transaction documents.

A. The Structure Of Captiva

Captiva is a specialized investment fund designed to allow sophisticated non-U.S. investors an opportunity to invest in high-yielding corporate debt securities issued by U.S. and Canadian corporations, partnerships, and other entities. (A199 ¶ 11) In 1996, Captiva raised $300 million in capital by issuing two tranches of debt securities—$255 million of secured Senior Class A Notes and $45 million of unsecured, subordinated, Income Notes. (A199 ¶ 12) Captiva used the funds to acquire a portfolio of debt securities and other instruments (the "Portfolio Collateral") as provided for in the Offering Memorandum and other documents that governed the terms of SNS Bank's investment in the Income Notes. (A199 ¶¶ 11-12)

The repayment of principal and interest on the Portfolio Collateral provides a return to Captiva. (A199 ¶ 11) Captiva, in turn, pays out all interest and principal using a priority-of-distribution formula that results in payment to Income Note holders such as SNS Bank if, and only if, any money remains after satisfying obligations to the Class A Note holders and paying Captiva's fees and expenses. (A199 ¶ 11; A64; A70-72; A74-80; A90; A98-101; A104-08) The Portfolio Collateral is pledged entirely for the benefit of the secured Class A Note holders. (A200 ¶ 13; A70)

B. Key Contractual Provisions

SNS Bank purchased Income Notes pursuant to a Subscription Agreement with Captiva. (A200 ¶ 27) That Agreement incorporated by reference an Offering Memorandum and cross-referenced the other documents that governed the parties' commercial relationships: the Administration Agreement and the Financial Management Agreement. (A203 ¶ 15; A125; A168 ¶ 5(b))

1. The Subscription Agreement

In the Subscription Agreement, SNS Bank agreed to purchase the Income Notes "subject to the terms and conditions set forth . . . in [Captiva's] Offering Memorandum dated June 21, 1996." (A166 ¶ 1) SNS Bank represented and warranted in the Subscription Agreement that it had been furnished with the relevant transaction documents and was not relying on any statement, whether oral or written, that was inconsistent with those documents. (A168 ¶ 5(b)) The Subscription Agreement also contained a merger clause, which provided that it "constitutes the entire agreement among the parties . . . and supersedes all prior agreements, understandings or arrangements, oral or written" with respect to SNS Bank's purchase of Income Notes from Captiva. (A171 ¶ 12)

2. The Offering Memorandum

The Offering Memorandum contained a detailed description of Captiva, the Income Notes, and the risks and "special considerations" of investing in the

Income Notes. (A63, A69-112) At the very outset, the Offering Memorandum also disclosed that "*[t]he obligations of the parties* to the transactions contemplated herein are set forth in and *will be governed by* certain documents described herein." (A65 (emphasis added))

(a) Disclosure Of The Subordinated Nature Of The Income Notes

The Offering Memorandum repeatedly and explicitly disclosed that the Income Notes were subordinated to the Class A Notes and underscored the consequent investment risks borne by holders of the Income Notes. (A69-72, A74-80, A82, A99-108) In particular, the Offering Memorandum cautioned that payments to Income Note holders were subordinated to the payment of Captiva's various expenses and fees, including fees to (i) the Placement Agent, (ii) the Financial Manager, and (iii) the Administrative Agent. (A74-80, A82, A90, A104-08) Indeed, the Income Notes ranked dead last in the priority of distributions in the Offering Memorandum. (A783 (simplified graphical depiction of priority-of-distribution provision))

(b) Disclosure Of Investment Risk And Risk To Principal

The Offering Memorandum disclosed that (i) Captiva had limited assets, (ii) the liquidity of the Portfolio Collateral depended on the liquidity of the corporate loan market; and (iii) the value of the Portfolio Collateral could be adversely affected by market conditions and interest rates. (A63, A90-91, A124)

The Offering Memorandum detailed that during times of economic distress the Income Notes were particularly at risk:

> 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*).

(A91 (emphasis added)) The Offering Memorandum further disclosed that a loss of principal on the Portfolio Collateral could occur at annual default rates as low as 2.0%. (A135-37)[2]

(c) Disclosure Of Potential Conflicts Of Interest

As part of a detailed description of "Special Considerations" in investing in the Income Notes, the Offering Memorandum made extensive disclosures of actual and potential conflicts of interest including that (i) Citibank would serve as the Administrative Agent of Captiva and as the Placement Agent for the Income Notes; (ii) two members of the Administrative Committee—McClelland and Carter—were employees of Citibank and a third member of the Committee—John T. Schmidt—was a member of a New York firm which is "a significant provider of legal services to Citibank, N.A."; (iii) Citibank may experience conflicts of interest

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[2] Notwithstanding these disclosures, SNS Bank's lead argument on appeal is that the Supreme Court's "entire Decision" should be reversed because the Court characterized the Income Notes as "relatively high-risk securities" and "high-yielding bonds, commonly known as junk bonds." (SNS Br. 14-15) The Supreme Court's description was fully consistent with the transaction documents. In any event, that description was not the basis for dismissing any of SNS Bank's claims. (A14-15)

due to Captiva's structure because "[t]he interests of Holders of the Income Notes may not always coincide with the interests of Holders of the Class A Notes"; and (iv) Citibank may experience numerous other potential conflicts of interest due to, among other things, Citibank's current and future commercial relationship with the Financial Manager. (A93, A126)

(d) Disclosure Of The Administration And Financial Management Agreements

The Offering Memorandum cross-referenced the Administration Agreement and the Financial Management Agreement, summarized the material terms of those contracts, and noted that the Administrative Agent and Financial Manager were each to earn annual fees equal to 0.35% of Captiva's total assets. (A125)

(e) Disclosure Of Captiva's Right To Replace The Financial Manager

The Offering Memorandum summarized the relevant termination provision in the Financial Management Agreement and disclosed that Captiva had an absolute right to terminate the Financial Manager at any time. (A125) This summary was qualified in its entirety by the "complete description of the rights and obligations" set forth in the Financial Management Agreement. (A65)

3. The Administration Agreement

Captiva and Citibank are the only parties to the Administration Agreement, which set forth in detail the specific administrative services Citibank agreed to

provide to Captiva. (A143-44 ¶ 1) The Administration Agreement provided that neither Citibank nor any member of the Administrative Committee would be liable to Captiva, its shareholders, or any of Captiva's creditors for "any error of judgment, mistake of law, or for any loss arising out of any investment, or for any other act or omission in the performance of" duties to Captiva. (A150 ¶ 10(a)) The only exceptions are for conduct that constitutes "willful misfeasance, bad faith, gross negligence or reckless disregard of" duties arising under the Administration Agreement. (A150 ¶ 10(a)) The Administration Agreement barred liability for any consequential damages. (A150 ¶ 10(a))

The Administration Agreement provided that Captiva would pay Citibank an annual fee (in the amount of 0.35% on Captiva's total assets) pursuant to the priority-of-distribution formula and not dependent on any performance criteria. (A148-49 ¶ 6) The Administration Agreement gave no right to Captiva, or to any other person, to a rebate or refund of any fees paid to Citibank as Administrative Agent. (A148-49 ¶ 6)

4. The Financial Management Agreement

Captiva entered into three separate Financial Management Agreements between 1996 and 1999. (A155, A173, A186) Like the Administration Agreement, each Financial Management Agreement provided that the Financial Manager would provide services to Captiva. (A155, A173, A186) The Financial

Management Agreements also provided that the Financial Manager could not be held liable to Captiva, the Class A Note holders, the Income Note holders, or to Captiva's shareholders or creditors for "any error of judgment, mistake of law, or for any loss arising out of any investment, or for any other act or omission in the performance of its obligations to [Captiva] 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." (A162, A178, 190) Each Financial Management Agreement also barred liability for any consequential damages. (*Id.*)

C. Replacement Of The Financial Manager

Captiva's first Financial Manager was Chancellor Senior Secured Management, Inc. ("Chancellor"). Chancellor was replaced as Financial Manager on December 31, 1998, when Captiva appointed Stanfield Capital Partners, LLC ("Stanfield") as the Financial Manager after certain key Chancellor employees left Chancellor and joined Stanfield. (A203) The Stanfield Agreement, unlike the Chancellor Agreement, had a ninety-day term. (A177-A)[3] The Stanfield Agreement provided that Captiva could "immediately terminate[]" the Agreement upon a vote by the Income Note holders, but *only if* the Administrative Agent first

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[3] The terms of the Stanfield Agreement were otherwise materially identical to those of the later Citibank Financial Management Agreement and the preceding Agreement with Chancellor. (*Compare* A173 (Stanfield) *with* A186 (Citibank) and A155 (Chancellor))

recommended to the Income Note holders that Stanfield be terminated. (A177-A to A178 ¶ 8) Captiva also always had the right to refuse to renew the Stanfield Agreement upon its expiration, without holding a vote of the Income Note holders. (*Id.*)

On July 8, 1999, Citibank, as Administrative Agent, sent a letter to SNS Bank and the other Income Note Holders concerning "a broad review" Citibank had conducted of "selected loan and high yield portfolio managers' investment processes and their performance for calendar year 1998 and for the first quarter of 1999." (A181) The July 8, 1999 letter recounted the reasons for Citibank's review:

> The timing of this review activity reflects, in part, the widespread disruption in financial markets that occurred in the third quarter of 1998, and the ongoing ramifications of these disruptions on market liquidity, pricing, obligor default trends and rating agency actions which have continued into 1999.

(A181; *see also* A234 (Moody's 2002 Default Report, confirming the market disruptions))

The July 8, 1999 letter set forth in detail the methodology and criteria that Citibank used in conducting the review. (A181) The letter noted that Citibank had sought assistance from "BARRA RogersCasey, a leading investment consulting firm" and other "informal consultation" to perform its review. (A181) It also

disclosed to SNS Bank that Citibank was recommending to Captiva's Board of Directors "changes in the management of this portfolio effective July 31, 1999 (the expiry date of the [Stanfield] portfolio management contract)." (A182) In particular, Citibank would recommend that Captiva's Board appoint as Financial Manager "Strategic Debt Portfolio Management (SDPM) *a unit [of] Citibank, N.A.*, operating under the supervision of Citibank Global Asset Management." (A182 (emphasis added)) Citibank provided a detailed description of the affiliate it was recommending as Financial Manager and the affiliate's recent track record; it also noted that the change in financial manager would result in "[n]o change in fees or other governing provisions" of the Financial Management Agreement. (A182)

On August 1, 1999, Captiva's Board (i) followed Citibank's recommendation, (ii) declined to renew the Stanfield Agreement, and (iii) appointed Citibank as Financial Manager. (A205 ¶ 36; A186) The material terms of the new Financial Management Agreement were unchanged, as was the compensation due. (A186-93)

At no time between July 8, 1999 and August 1, 1999 did SNS Bank voice any protest over Citibank's recommendation that Captiva not renew Stanfield's Financial Management Agreement or Captiva's appointment of Citibank as Financial Manager. Indeed, at no time before it filed this lawsuit did SNS Bank

ever complain about the appointment of Citibank as Financial Manager or contend that it had a right to vote on the replacement of the Financial Manager.

ARGUMENT

I. THE SUPREME COURT PROPERLY DETERMINED THAT SNS BANK'S CORE ALLEGATIONS DO NOT STATE A CLAIM FOR RELIEF

The Supreme Court properly dismissed each of SNS Bank's eight claims against respondents for failure to meet the substantive and jurisdictional requirements of New York law. The particular deficiencies of each claim are addressed in Parts II-VII below. At bottom, however, SNS Bank's complaint is that (i) respondents breached either a fiduciary or contractual duty by failing to allow SNS Bank to vote on whether to renew Stanfield's Financial Management Agreement with Captiva; and (ii) SNS Bank was denied a putative "right" to a Captiva structure in which Captiva's board and all of its agents—including the Administrative Committee, Financial Manager, and Administrative Agent—all perform their duties "independent[ly]" of each other. (A211-21) The Supreme Court correctly ruled that the very documents SNS Bank relies on as support for its claims doom each of these core contentions.

A. SNS Bank Had No Right To Vote On Whether Captiva Should Renew Stanfield's Financial Management Agreement

The Supreme Court properly ruled that SNS Bank had no "right" to vote on whether to renew Stanfield's Financial Management Agreement. (A27) Captiva

could "immediately terminate[]" Stanfield's Financial Management Agreement—even before it was set to expire—by a vote of the Income Note holders, but "only upon the recommendation of the Administrative Agent." (A177-A) The Stanfield Agreement was not "terminated," though. Captiva simply allowed it to expire and did not renew it. Citibank's July 8, 1999 letter to Captiva, appended to the complaint, made this clear. In that letter, Citibank stated that it would recommend to Captiva that a Citibank affiliate take over the role of Financial Manager "on or about July 31, 1999 (*the expiry date* of the current portfolio management contract)." (A182 (emphasis added))

SNS Bank attempts to obfuscate the unambiguous language of the Stanfield Financial Management Agreement by pointing to the Offering Memorandum instead of the controlling language from the Financial Management Agreement itself. (SNS Br. 22-23) The Offering Memorandum stated that

> the Administrative Agent may recommend removal of the Financial Manager. If such a recommendation is made, the Financial Manager will be removed from its position upon the majority vote of the Holders of Income Notes.

(A125) The Offering Memorandum does not, however, establish SNS Bank's asserted right to vote. First, the Offering Memorandum made clear that it merely *summarized* the Financial Management Agreement and other documents and that "all such summaries are qualified *in their entirety* by reference to the actual

documents." (A65 (emphasis added)) Thus, the Stanfield Financial Management Agreement, not the Offering Memorandum, controls whether Captiva could allow the Stanfield Agreement to expire without putting the matter to a vote of the Income Note holders. Second, the Offering Memorandum did not purport to summarize any constraints on Captiva's decision whether to *renew* a Financial Management Agreement upon its expiration. In particular, the Offering Memorandum did not state that Captiva would hold a vote among Income Note holders to decide whether to renew the Stanfield Agreement. The Offering Memorandum in no way supports SNS Bank's alleged right to vote on whether to renew the Stanfield Agreement.[4]

Even if the failure to renew Stanfield's contract is deemed a removal, that would not help SNS Bank because, contrary to its apparent contention, SNS Bank did not enjoy an absolute right to vote on the removal of a financial manager. Under the Stanfield Agreement, Captiva could unilaterally remove the Financial Manager at any time upon 60 days notice, which notice could be waived by the Financial Manager. (A177-A ¶ 8) Stanfield also could be removed by a vote of

4 SNS Bank's only other argument on its asserted right to vote—that the Stanfield Agreement did not actually expire on July 31, 1999, as Citibank stated in its July 8, 1999 letter—has been waived because SNS Bank failed to make this argument to the Supreme Court. *See Rosenberg v. Haddad,* 208 A.D.2d 468, 468 (1st Dep't 1994) (appellant is "precluded from maintaining . . . arguments for the first time on appeal"). This argument would do SNS Bank no good anyway, because—as set forth above—SNS Bank's putative "right" to terminate a financial manager was not triggered here, even assuming the Stanfield Agreement was "terminated" and not simply allowed to lapse.

the Income Note holders but "*only* upon the recommendation of the Administrative Agent." (*Id.* (emphasis added)) A recommendation that would have allowed the Income Note holders to vote on the removal of Stanfield was a recommendation by Citibank "to the Administrative Committee *and* the Holders of the Income Notes." (*Id.*(emphasis added)) Thus, a vote of the Income Note Holders was required only where the Administrative Agent (i) made a removal recommendation, and (ii) the recommendation was made *to the Income Note holders*. The July 8, 1999 letter was neither a removal recommendation nor was it a recommendation *to* the Income Note Holders. (A 181-82) The letter stated that Citibank "[*is*] *recommending to the Board of Directors* changes in the management of this portfolio." (*Id.*) Even if viewed as a removal recommendation, the July 8, 1999 letter was a recommendation only to Captiva's Board and *not* to the Income Note Holders. Accordingly, SNS Bank had no "right" to vote on whether to remove Stanfield as Financial Manager.

Finally, even if the July 8, 1999 letter is deemed to have triggered a right to vote, it would do SNS Bank no good. Under the Stanfield Agreement, a removal recommendation did not disable any of the other means of removing Stanfield, including allowing the contract simply to expire. (A177-A ¶ 8) A removal recommendation was, at most, merely an additional means of terminating Stanfield. Captiva always had the power to decline to renew the contract, or to

terminate it unilaterally. (*Id.*) In no circumstance can the "Termination" provision be read to confer an exclusive right on the Income Note Holders to determine the removal of Stanfield.

B. SNS Bank Was Not Promised That Captiva And Its Agents Would Function "Independently" Of Each Other

SNS Bank's other core contention — that it was denied a putative "right" to have Captiva's board and its agents perform independently of each other — is also unsupported by the transaction documents SNS Bank attached to its complaint.

Nowhere in the Offering Memorandum, Subscription Agreement, or any of Captiva's contracts with its Administrative Agent or Financial Managers are Income Note holders promised what SNS Bank alleges in its complaint: that Captiva would "create and maintain a structure in which a Financial Manager independent of Citibank served subject to the oversight of independent Captiva Directors, an independent Administrative Agent, and an independent Administrative Committee." (A217 ¶ 89; *see also* A220 ¶ 106)

Nor could SNS Bank reasonably imply any such promise. The Offering Memorandum—the terms of which SNS Bank accepted and agreed to be bound by (A168 ¶ 5(b))—made express disclosures that are flatly contrary to the "independent" structure SNS Bank now claims it was promised. The Offering Memorandum disclosed — among other things — that

- Captiva may terminate the Financial Manager;
- Citibank "may maintain . . . banking and investment advisory relationships" with the Financial Manager;
- Citibank would serve as both the Administrative Agent and Placement Agent to Captiva;
- Citibank employees would serve on the Administrative Committee;
- Citibank served as administrative agent for entities whose objectives were similar to Captiva's;
- Citibank may purchase Class A Notes for its own account and, because the interests of the Income Note holders and the Class A Note holders "may not always coincide," Citibank may "experience conflicts of interest";
- Captiva may purchase Portfolio Collateral from Citibank; and
- Citibank may be a lender to, or provide banking services for, obligors of Portfolio Collateral.

(A93, A125; *see also* A64, A72-73, A130) Moreover, nothing in Citibank's Administration Agreement proscribed Citibank from recommending to Captiva that a Citibank affiliate be appointed as the Financial Manager.

In any event, even assuming that SNS Bank had a "right" to an "independent" structure for Captiva, it is estopped from complaining about the denial of that purported right. As the exhibits to the complaint make clear, SNS Bank had advance notice, in July 1999, that Citibank would recommend to Captiva that Stanfield not be renewed as the Financial Manager and that it be replaced with a Citibank affiliate. (A181-82) SNS Bank did not voice an objection to either of

these decisions until almost three years later when it brought this litigation, by which time its investment had markedly deteriorated. SNS Bank's opportunistic assertion of its putative "rights" to vote on Stanfield's replacement and to an "independent" structure for Captiva is thus barred by well-settled principles of estoppel. *See In re Paternity Proceeding of Dion D.*, 250 A.D.2d 429, 430 (1st Dep't 1998) (affirming grant of a motion to dismiss on the ground of equitable estoppel); *Hebert v. Staltac Assocs.*, 231 A.D.2d 675, 676 (2d Dep't 1996) (same); *see also Besicorp Group Inc. v. Enowitz*, 235 A.D.2d 761, 764 (3d Dep't 1997).

II. THE SUPREME COURT PROPERLY DISMISSED THE BREACH OF FIDUCIARY DUTY CLAIMS (COUNTS I, II, AND III)

Each of SNS Bank's individual claims also was properly dismissed by the Supreme Court. The first three counts of the complaint allege that Citibank (Count I), former Citibank employees McClelland and Carter (Count II), and Captiva and its Directors (Count III) each owed and breached fiduciary duties to SNS Bank. (A211-14) The Supreme Court ruled that SNS Bank failed to state a claim for breach of fiduciary duty because no respondent owed a fiduciary duty to SNS Bank. (A23-25) The Supreme Court's ruling was correct and should be affirmed. The complaint improperly attempts to foist a fiduciary duty upon Citibank and its employees on the basis of contracts to which SNS Bank was not even a party. And the Subscription Agreement between Captiva and SNS Bank is a conventional

commercial contract, which cannot give rise to a fiduciary relationship under well-settled law.

A. Citibank Owed No Fiduciary Duty To SNS Bank

The complaint does not allege—nor can it—that there was *any* relationship between Citibank and SNS Bank, let alone a fiduciary one. SNS Bank's allegations that Citibank owed it a fiduciary duty are instead premised on a misreading of the Administration Agreement and Financial Management Agreement—contracts between Captiva and Citibank. (A209 ¶¶ 45-46 (alleging that Citibank owed fiduciary duties based on its role as Administrative Agent and Financial Manager)) SNS Bank is not a party to either of those Agreements; and both Agreements provide that Citibank will perform specified services for *Captiva*, not SNS Bank. (A143-44 ¶ 1; A186-88 ¶ 1) Indeed, the only party with whom SNS Bank had any commercial relationship was Captiva, with whom it had executed the Subscription Agreement. The Supreme Court thus correctly dismissed SNS Bank's breach of fiduciary duty claim against Citibank on the basis that "Citibank had no direct legal or equitable fiduciary obligations to SNS." (A23) *See Northeast Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y.2d 158, 162 (1993) ("[I]f [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."); *see also Calvin Klein Trademark Trust v. Wachner*,

123 F. Supp. 2d 731, 733-34 (S.D.N.Y. 2000) ("Under New York law, parties to a commercial contract do not ordinarily bear a fiduciary relationship to one another unless they specifically so agree.").

On appeal, SNS Bank makes three principal arguments for reinstating its breach of fiduciary duty claim against Citibank: (1) that its complaint alleges a relationship with Citibank that supposedly is "the functional equivalent of privity;" (SNS Br. 19-21); (2) that Citibank has "admitted" it is SNS Bank's fiduciary (*id.* 17-19); and (3) that there are so-called "special circumstances" here that give rise to a fiduciary relationship (*id.* 33-37) None of these arguments has any merit.[5]

1. Citibank Was Not In "Privity" With SNS Bank

Citing paragraph 16 of its complaint, SNS Bank says that its complaint alleges "Citibank, as Administration Agent, had certain contractual duties and responsibilities owed by Citibank directly to SNS." (SNS Br. 20) Paragraph 16 of the complaint, however, recognizes that "[p]ursuant to the Administration Agreement, Citibank agreed to become the Administrative Agent *for Captiva*." (A200) The Administration Agreement, in turn, provides that Citibank would perform its duties "consistent with the objectives and policies of the Company [Captiva]." (A143 ¶ 1) Accordingly, neither the allegation that SNS Bank points

[5] On appeal, SNS Bank does not argue that its breach of fiduciary duty claim against Citibank's former employees McClelland and Carter should be reinstated for any reason other than those it gives for reinstating the breach of fiduciary duty claim against Citibank.

to, nor the Administration Agreement on which it is based, demonstrates that SNS Bank was in privity—or in the "functional equivalent" of privity—with Citibank. *See, e.g., Thermal Imaging, Inc. v. Sandgrain Secs., Inc.*, 158 F. Supp. 2d 335, 342-43 (S.D.N.Y. 2001) (theory that plaintiff was in privity with third party, with whom defendant had a fiduciary relationship, and therefore owed plaintiff a fiduciary duty was "far too attenuated to give rise to a fiduciary duty"). To the contrary, the cited paragraph from the complaint underscores that Citibank was in privity with Captiva, not SNS Bank or any other Income Note holder.[6]

2. Citibank Did Not "Admit" It Is In A Fiduciary Relationship Of Trust And Confidence With SNS Bank

Seizing upon three documents prepared by Citibank that contain the word "fiduciary," SNS Bank argues that Citibank has admitted a "fiduciary relationship between Citibank and SNS." (SNS Br. 18) As the Supreme Court properly ruled, the mere fact that SNS Bank has cherry-picked the word "fiduciary" out of three documents does not create a fiduciary obligation in the total absence of any direct relationship between Citibank and SNS Bank. (A22-23) "[T]he use of the word 'fiduciary,' or other words . . ., cannot alone establish fiduciary duties on the part

[6] SNS Bank also cites to Citibank's July 8, 1999 letter to SNS Bank and other Income Note holders where Citibank referred to "contractual obligations to investment vehicle Boards of Directors and investors." (SNS Br. 20 citing A181) But this letter does not purport to alter the terms of the Administration Agreement itself, which is between Citibank and Captiva, not Citibank and SNS Bank. (A143, A181) In any event, the quoted passage from the July 8, 1999 letter is, at best, only a legally incorrect statement concerning whether Citibank owed contractual duties to SNS Bank; the letter does not state or support that Citibank owed any *fiduciary* duties to SNS Bank.

of the named person or entity." *Campbell v. Computer Task Group, Inc.*, No. 00 Civ. 9543 (RWS), 2001 WL 815575, at *4 (S.D.N.Y. July 19, 2001); *see also In re Lord's Inc.*, 356 F.2d 456, 458 (7th Cir. 1965).

The documents that SNS Bank relies on do not support its argument in any event. The first document, a November 1995 brochure about the Income Notes, does not describe Citibank's relationship with Income Note holders. Rather, it describes Citibank's role as the Administrative Agent vis-à-vis the Financial Manager (at the time, Chancellor) as "[o]ngoing oversight of the portfolio manager by the fiduciary arm of Citibank." (A790) This role of overseeing Chancellor's performance is more completely set forth as one of Citibank's duties to *Captiva* in the Administration Agreement between Captiva and Citibank (A143 ¶ 1(i)), an agreement that quite clearly does not give rise to a fiduciary relationship between Citibank and SNS Bank.

The second document, an attachment to Citibank's July 8, 1999 letter to the Income Note holders gives "background" concerning Citibank's Strategic Debt Portfolio Management team—the affiliate that Citibank recommended as a replacement for Stanfield. (A185) The attachment gives a brief history of the affiliate and, among other things, makes a general statement that this team joined Citibank to "manage investment portfolios for third party investors on a fiduciary basis." (A185) SNS Bank's brief ignores the context of this statement and

pretends that it refers to Citibank's role as Financial Manager for Captiva. (SNS Br. 18 (stating that "Citibank refers to its 'mandate to manage investment portfolios for third party investors on a fiduciary basis'")) But, read in context, the statement is—as the document itself makes clear—merely general "background" about the Strategic Debt Portfolio Management Team's history and not a description of that team's relationship with Captiva's Income Note holders in this particular transaction.

Finally, SNS Bank relies on a February 22, 2001 letter from Citibank. As the Supreme Court noted, however, this letter actually undercuts SNS Bank's position. (A22-23) The letter twice refers to Citibank's "fiduciary" duties to *others* as reasons for *rejecting* SNS Bank's proposals for either capping its losses or "exiting" its investment in Captiva. (A808-09) The clear import of this letter, which SNS Bank wrongly accuses the Supreme Court of "distort[ing]" (SNS Br. 18), is that Citibank is *not* in a fiduciary relationship with SNS Bank.

3. SNS Bank Has Not Alleged, Nor Can It, That There Are "Special Circumstances" That Warrant Imposing Fiduciary Duties On Citibank

(a) The Subscription Agreement Refutes SNS Bank's "Special Circumstances" Theory

SNS Bank's attempt to divine "special circumstances" fares no better than its attempts to assert a fiduciary duty absent any relationship with Citibank. Citing the Subscription Agreement, SNS Bank argues—even though its complaint

nowhere alleges—that it relied on Citibank's representations when purchasing the Income Notes. (SNS Br. 33) In the Subscription Agreement, however, SNS Bank agreed that it had read, understood, and would be bound by the Offering Memorandum. (A168 ¶ 5(b); A172) The Offering Memorandum, in turn, clearly provided that "[n]o 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*." (A66 (emphasis added)) Thus, the documents governing SNS Bank's investment doom its attempt to transform what is at most a commercial relationship into a fiduciary one.

It is well-settled that a "conventional business relationship, without more, *does not* become a fiduciary relationship by mere allegation." *Oursler v. Women's Interart Ctr., Inc.*, 170 A.D.2d 407, 408 (1st Dep't 1991) (emphasis added); *see also Brass v. American Film Techs. Inc.*, 987 F.2d 142, 151 (2d Cir. 1993) ("There is no reason to expand the class of informal fiduciary relationships to include these [sophisticated] parties participating in such an arms-length transaction."). Indeed, a relationship established by a written commercial contract is ordinarily not deemed "fiduciary" in nature unless such duties are specifically set forth in the contract. *See Northeast Gen. Corp.*, 82 N.Y.2d at 163 ("The discussions of the parties prior to the contract should not be used now to enhance the written

agreement" and supplement it with a fiduciary obligation.). Not one word of the Subscription Agreement or Offering Memorandum purports to impose upon Citibank, or any other respondent, a fiduciary duty to the Income Note holders.

(b) SNS Bank's Complaint Does Not Support Its "Special Circumstances" Theory

SNS Bank's "special circumstances" theory also relies on a blatant mischaracterization of the complaint. SNS Bank contends that paragraph 27 of its complaint alleges the following as "special circumstances": (i) "SNS was told it could trust Citibank, and it did," (ii) "SNS relied on Citibank's claimed trust and fidelity," and (iii) "SNS deferred to the claimed expertise and superior knowledge of Citibank." (SNS Br. 34 (citing A203 ¶ 27)) The cited paragraph makes no such allegations; nor, given SNS Bank's express representation to the contrary in the Subscription Agreement, could it.

As quoted in full below, paragraph 27 of the complaint actually alleges only that SNS Bank invested in the Income Notes pursuant to the Offering Memorandum and Subscription Agreement, not out of an alleged relationship of trust and fidelity with Citibank:

> 27. On or about June 18, 1996, SNS, in reliance in part on the Offering Memorandum, executed a Subscription Agreement with Captiva (Exhibit D), and subsequently purchased Income Notes issued by Captiva by paying U.S. $15,000,000 to a Citibank controlled bank account. The Subscription Agreement was faxed to SNS from

> Charles Ross-Stewart of Citibank's Legal Department and provides that it shall be governed by and construed and enforced in accordance with the laws of the State of New York. The transaction closed on July 2, 1996.

(A203 ¶ 27) This allegation hardly describes the sort of "special circumstances" that warrant "transport[ing] [Citibank] to the higher realm of relationship and fashion[ing] the stricter duty" imposed by a fiduciary relationship. *Northeast Gen. Corp.*, 82 N.Y.2d at 162. Instead, it is a straightforward description of a conventional business relationship, not a fiduciary one.

(c) In Any Event, SNS Bank's Unilateral Conduct Cannot Establish A Fiduciary Relationship

Even assuming that SNS Bank had actually alleged the "special circumstances" it now claims it did, that would not, by itself, support a fiduciary duty claim. Rather, for a fiduciary duty to arise "[t]he confidence reposed by one party must be accepted by the other party" (*Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 767 F. Supp. 1220, 1231 (S.D.N.Y. 1999)), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992)), something that SNS Bank does not and cannot allege here. *See also 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).

In none of the transaction documents did Citibank undertake a special relationship of trust and confidence with SNS Bank nor, given that the interests of

the Income Note holders were subordinated to the interest of the Class A Note holders, could Citibank have undertaken to enter into such a relationship. The Court should therefore reject SNS Bank's improper attempt to "amend" its complaint on appeal by asserting "special circumstances." These unpleaded "special circumstances," even if accepted, do not give rise to a fiduciary relationship.

B. There Are Multiple Alternative Grounds For Dismissing SNS Bank's Breach Of Fiduciary Duty Claims Against Citibank And Its Former Employees

A host of alternative grounds—that SNS Bank ignores—independently support the Supreme Court's dismissal of the breach of fiduciary duty claim against Citibank and its former employees. This Court may, of course, affirm the decision below on the basis of those alternate grounds. *See Nieves v. Martinez*, 285 A.D.2d 410, 411 (1st Dep't 2001) (respondent may "advance an alternate ground for affirmance" not reached by Supreme Court); *Ross v. City of New York*, 302 A.D. 2d 232 (1st Dep't 2003) (affirming on alternate ground).

1. SNS Bank Does Not Allege A Pre-Existing Relationship Of Trust And Confidence With Citibank

First, SNS Bank does not allege, as it must, that its supposed relationship of trust and confidence with Citibank—or any of the other respondents—existed before the events alleged to give rise to SNS Bank's claims. Instead, as the complaint and SNS Bank's brief on appeal make clear, SNS Bank's theory is that a

fiduciary relationship arose out of *this* transaction. But a breach of fiduciary duty claim must be predicated on an alleged fiduciary relationship that existed "*prior to* the transaction from which the alleged wrong emanated, not as a result of it." *Elghanian v. Harvey*, 249 A.D.2d 206, 206 (1st Dep't 1998) (emphasis added); *see also Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Bros. Int'l Ltd.*, 251 A.D.2d 137, 138 (1st Dep't 1998) ("[T]he requisite high degree of dominance and reliance must have existed prior to the transaction giving rise to the alleged wrong, not as a result of it."); *Litton Indus., Inc.*, 767 F. Supp. at 1232 ("the confidential relationship must predate the reposal of trust or confidence").

For this reason alone, SNS Bank's breach of fiduciary duty claim against Citibank—and all of the respondents—was properly dismissed.

2. SNS Bank's Breach Of Fiduciary Duty Claim Against Citibank Is Duplicative Of Its Breach Of Contract Claims

Second, SNS Bank's breach of fiduciary duty claim against Citibank is merely duplicative of its breach of contract claims. Under settled law, "[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.*, 269 A.D.2d 171, 173 (1st Dep't 2000); *see also Perl v. Smith Barney Inc.*,

230 A.D.2d 664 (1st Dep't 1996); *Retty Fin., Inc. v. Morgan Stanley Dean Witter & Co.*, 293 A.D.2d 341 (1st Dep't 2002).

As support for its breach of fiduciary duty claim, SNS Bank alleges that Citibank

- recommended itself as Financial Manager (in alleged breach of its duties under the Administration Agreement) (A211 ¶ 59(a), (d));
- did not afford SNS Bank an asserted contractual right to vote on the removal of Stanfield as the Financial Manager (in alleged breach of the Financial Management Agreement) (A211 ¶ 59(b));
- breached its duties as Financial Manager (A211 ¶ 59(e)); and
- breached its duties as Administrative Agent (A212 ¶ 59(f), (g)).

These same allegations form the basis for SNS Bank's claims that Citibank breached the Administration Agreement and Financial Management Agreement. (A215 ¶ 77, A216 ¶ 84)[7] SNS Bank's attempt to bootstrap a meritless breach of contract claim into a claim for breach of fiduciary duty fails under New York law.

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[7] Indeed, only two vague allegations in the breach of fiduciary duty claim do not parrot the allegations of the breach of contract claims: (i) that "Citibank created numerous conflicts of interest," and (ii) that Citibank failed to oversee the actions of its employees on the Administrative Committee. (A211 ¶ 59(c), (h)) But both of these allegations are based on Citibank's purported failure to abide by the terms set forth in the Offering Memorandum, Subscription Agreement, or Administration Agreement. (A211 ¶ 59(c) (referencing conflicts-of-interest disclosure in the Offering Memorandum and Subscription Agreement), (h) (referencing duties under the Administration Agreement))

3. The Liability-Limiting Clauses In The Administration Agreement And Financial Management Agreement Bar SNS Bank's Claims Against Citibank And Its Former Employees

Third, the Supreme Court properly ruled that even if Citibank and its former employees owed a fiduciary duty to SNS Bank, their alleged conduct did not constitute an actionable breach of such duties under the liability-limiting provisions of the Administration Agreement and Financial Management Agreement. (A24)

Both the Administration Agreement and Financial Management Agreement absolve Citibank and members of the Administrative Committee (including respondents McClelland and Carter) of liability for "any error of judgment, mistake of law, or for any loss arising out of any investment, or for any other act or omission in the performance of its, his or her obligations to the Company." (A150; *see also* A190) The only exceptions are for "willful misfeasance, bad faith, gross negligence or reckless disregard of its, his or her duties and obligations hereunder." (A150; *see also* A190)

The complaint has very little to say about why Citibank should be deemed responsible for SNS Bank's investment losses, except to make boilerplate allegations of "willful, wanton, and reckless" conduct. (A212 ¶ 62; A214 ¶¶ 67, 72; A216 ¶ 80; A217 ¶ 87; A218 ¶ 93) SNS Bank accuses the Supreme Court of

ignoring these allegations (SNS Br. 29); but the Supreme Court could not accept those conclusory allegations on a motion to dismiss. *See Retty Fin., Inc.,* 293 A.D.2d at 341 ("The allegations of the complaint fail to set forth actions by defendant evincing a reckless disregard for the rights of plaintiff."); *Sheridan v. Fletcher*, 270 A.D. 29, 32 (3d Dep't 1945); *Tevdorachvili v. The Chase Manhattan Bank*, 103 F. Supp. 2d 632, 644 (E.D.N.Y. 2000) (observing that plaintiff alleged, "by nothing more than a rhetorical flourish that [defendant] was 'reckless,'" and holding that "[i]n the absence of factual allegations showing more, heated language and indignation will not suffice to bootstrap that cause of action into a cause of action for negligence, gross negligence, or recklessness"). The Supreme Court properly ruled that, to the extent the complaint alleges any facts at all, it alleges "mere negligence" (A24), which is not actionable here. *See Colnaghi, USA Ltd. v. Jewelers Protective Serv.*, 81 N.Y.2d 821, 824 (1993) (enforcing clause limiting liability to "gross negligence" and holding that the "allegations do not meet this standard"); *Retty Fin.,* 293 A.D.2d at 341 (clause limiting liability to "gross negligence or willful misconduct" was unambiguous and the "allegations of the complaint fail to set forth actions by defendant" meeting that standard).

SNS Bank's only other argument on this point is that the liability-limiting clauses do not limit common law liability, but only contractual liability. (SNS Br. 31-32) The clauses are not as narrow as SNS Bank asserts. They limit "*any*

liability" for "*any* error of judgment, mistake of law, or for *any* loss arising out of any investment, or for *any other act or omission*." (A150, A190 (emphasis added)) The only exceptions are for (i) "willful misfeasance"; (ii) "bad faith"; (iii) "gross negligence"; or (iv) "reckless disregard of its, his or her duties and obligations hereunder." (A150, A190) Contrary to SNS Bank's reading, the word "hereunder" in the liability-limiting clauses does not modify every exception to liability, but only the exception for "reckless disregard of . . . duties" under the Agreements. Liability for "gross negligence," for example, would arise only under common law, not the Administration or Financial Management Agreements.[8] Indeed, faced with a similarly worded liability-limiting clause in a contract, this Court has affirmed the dismissal of a *negligence* claim that failed to allege conduct meeting a standard of "gross negligence or willful misconduct." *See Retty Fin.*, 293 A.D.2d at 341.

The liability-limiting clauses of the Administration and Financial Management Agreements are thus applicable to and bar SNS Bank's claim for

[8] SNS Bank cites two cases—*Terminal Cent., Inc. v. Henry Modell & Co., Inc.*, 212 A.D.2d 213 (1st Dep't 1995), and *Abernathy-Thomas Eng'g Co. v. Pall Corp.* 103 F. Supp. 2d 582 (E.D.N.Y. 2000)—for the proposition that the liability-limiting clauses should not be construed to bar "claims that exist independent of the Agreements." (SNS Br. 31) Neither case construed an express limitation of liability provision, though. Rather, in each case the court declined to *imply* such a limitation into the contract. Here, by contrast, the limitations on liability are express and broadly stated.

breach of contract *and* breach of fiduciary duty against Citibank and its former employees.

C. Captiva And Its Directors Did Not Owe SNS Bank Any Fiduciary Duties

Count III of SNS Bank's complaint lumps Captiva and its Directors together and claims that they breached an asserted fiduciary duty to SNS by allegedly "participating in or failing to avoid the wrongful acts complained of herein." (A214 ¶ 70) The Supreme Court correctly ruled that Captiva and SNS Bank are in a debtor / creditor relationship, which does not give rise to any fiduciary duties. (A25 (citing *Fallon v. Wall St. Clearing Co.*, 182 A.D.2d 245, 250 (1st Dep't 1992)) *See also Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537(MBM), 2003 U.S. Dist. LEXIS 23062, at *49 (S.D.N.Y. Dec. 22, 2003) (hereinafter "*BESI*") (relationship between Captiva and Income Note holder is "simply a relationship between a creditor and a debtor").

By the Subscription Agreement, which incorporates by reference the Offering Memorandum, Captiva promised that it would pay SNS Bank principal and interest on the Portfolio Collateral pursuant to a priority-of-distribution formula that resulted in payment to the Income Note holders after satisfaction of payment obligations to the Class A Note holders and Captiva's fees and expenses. (A104-08; *see also* A783) In short, Captiva owed SNS Bank money, according to

the priority-of-distribution formula, and SNS Bank was owed money by Captiva. This debtor / creditor relationship does not, under New York law, give rise to any fiduciary duties. *See Fallon*, 182 A.D.2d at 250 ("A debtor-creditor relationship, standing alone, does not create a fiduciary duty of the latter to the former."); *see also New York Credit Men's Adjustment Bureau, Inc. v. Weiss*, 305 N.Y. 1, 7 (1953).

Attempting to escape black-letter law and the terms of the very documents to which it subscribed, SNS Bank makes a convoluted argument that is found nowhere in its complaint -- that it should be regarded, not as a Captiva debt-holder, but rather as an equity holder. (SNS Br. 21-22) SNS Bank's attempt at legal alchemy is without merit. There are also multiple alternative bases for affirming the Supreme Court's dismissal of SNS Bank's breach of fiduciary duty claim against Captiva and its Directors.

1. SNS Bank Was Not An Equity Holder Of Captiva

SNS Bank misrepresents the principal document it cites as support for its contention that it is an equity owner in Captiva. According to SNS Bank, the Income Notes are referred to as "equity," not "debt," in a November 1995 presentation. (SNS Br. 21 (citing A792, A794)) SNS Bank is wrong. The portions of the presentation to which SNS Bank refers do not describe *Captiva's* structure, but the structure of a "typical" company whose loan would be part of

Captiva's assets. (A792) Captiva, on the other hand, is described as having two classes of debt liabilities: senior debt (Class A Notes) and subordinated debt (Income Notes). (A794) Nothing in the November 1995 presentation supports the contention that Income Note holders are anything other than creditors of Captiva.[9]

SNS Bank next contends that it should be considered an equity holder in Captiva because it supposedly had "extensive rights to participate in important governance decisions" of Captiva. (SNS Br. 21-22) Again, the transaction documents belie this contention. The Offering Memorandum provides that "[t]he Directors of the Company are responsible for the management and administration of the Company." (A124) The "rights" to which SNS Bank refers thus do not relate to the "governance" of Captiva and, in any event, are very limited. SNS Bank's right to vote on termination of a financial manager could arise only when the Administrative Agent first made a recommendation directly to the Income Note holders. (A161 ¶ 9) *See* discussion at pp. 16-19, above. And the financial manager could be removed in numerous other ways, without any vote by Income Note holders. (A161) The only other "right" to which SNS Bank refers—to vote on whether to extend the Reinvestment Period—is similarly limited. Again,

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[9] SNS Bank's cases do not support its argument either. For example, *Reves v. Ernst & Young*, 494 U.S. 56 (1990) addressed whether a note is a security for purposes of the federal securities laws and not the question presented here—whether a debt security can be characterized as equity. Not surprisingly, the cases that address that question do not support SNS Bank's position. *See, e.g., Monon R.R. v. Commissioner,* 55 T.C. 345, 360-61 (U.S. Tax Ct. 1970) (rejecting attempt to re-characterize debt as equity).

Income Note holders are afforded this "right" only if Captiva first proposes an extension. (A102) Captiva could also force an Income Note holder who did not consent to an extension to sell its notes. (A82) SNS Bank thus had no real power to decide whether to extend the Reinvestment Period and, in any event, no general power to "govern" Captiva.

2. There Are Multiple Other Bases For Dismissing Count III

SNS Bank also overlooks the multiple other bases for dismissing its breach of fiduciary duty claims against Captiva and its Directors. First, SNS Bank conceded in the Supreme Court that whether Captiva—a Cayman Islands corporation—and its Directors owe a fiduciary duty to SNS Bank is a question of Cayman Islands law. SNS Bank also conceded that, as set forth in the unrebutted affidavit of an expert on Cayman Islands law, neither Captiva nor its Directors would owe a fiduciary duty to SNS Bank under Cayman Islands law. (A287-90 ¶¶ 38-51) For this reason alone, the Supreme Court's dismissal of count III should be affirmed.

Second, even assuming that New York law applies, it is clear that an arm's length commercial transaction cannot support a fiduciary relationship unless the parties' written contract "contains . . . cognizable fiduciary terms or relationship." *Northeast Gen. Corp.*, 82 N.Y.2d at 162. Here, neither the Offering Memorandum nor the Subscription Agreement contain any such terms. To the contrary, the

Offering Memorandum makes it clear that Captiva will subordinate the interests of the Income Note holders to the interests of the Class A Note holders, Captiva, and Captiva's agents. The Subscription Agreement likewise provides that it constitutes the "entire agreement" between SNS Bank and Captiva and expressly provides that SNS Bank purchased the Income Notes pursuant to the Offering Memorandum. Nothing in the transaction documents, therefore, makes either Captiva or any of its Directors a fiduciary of SNS Bank.

Third, because the breach of a fiduciary duty is a "breach of trust," CPLR 3016(b) requires that "the circumstances constituting the wrong shall be stated in detail." *See Perl*, 230 A.D.2d at 664-65; *Wall Street Tr. Corp. v. Ziff Communications Co.*, 225 A.D.2d 322, 322 (1st Dep't 1996). SNS Bank's sole conclusory allegation—that Captiva and its Directors "participat[ed] in or fail[ed] to avoid the wrongful acts complained of herein" (A214 ¶ 70), without specifying any circumstances of what these respondents did—falls well short of that requirement. *See, e.g., Precision Concepts, Inc. v. Bonsati*, 172 A.D.2d 736, 738 (2d Dep't 1991) ("general allegations" unsupported by details do not suffice to state a breach of fiduciary duty claim).

D. SNS Bank's Omnibus Arguments For Making All Respondents A Fiduciary Are Frivolous

In a final, desperate attempt to revive all of its breach of fiduciary duty claims, SNS Bank makes two far-fetched arguments: (i) all respondents are "investment advisors" under a federal statute that SNS Bank itself agreed was inapplicable, the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64; and (ii) SNS Bank acted as respondents' "principal" in connection with SNS Bank's investment in the Captiva Income Notes. Each of these arguments is meritless.

1. The Federal Investment Company Act Does Not Apply

SNS Bank may not look to the federal Investment Company Act of 1940 ("ICA") to create a fiduciary duty where none exists. First, SNS Bank expressly acknowledged in the Subscription Agreement that it would *not* regard Captiva as an Investment Company subject to the ICA. (A167 ¶ 5(a)) Second, under the ICA—just as under New York law—a mere creditor of an investment company lacks standing to sue an investment advisor to the company for breach of fiduciary duty. *See Grossman v. Johnson*, 674 F.2d 115, 121 (1st Cir. 1982) ("The phrase ['security holder' in 15 U.S.C. § 80a-35] was not designed to allow mere creditors to [sue an investment advisor for breach of fiduciary duty under 15 U.S.C. § 80a-35(b)]."). So, even if otherwise applicable, the ICA would not support SNS Bank's claims for breach of fiduciary duty by respondents.

2. SNS Bank Was Not Respondents' "Principal"

SNS Bank's second omnibus argument for reinstating all of its fiduciary duty claims amounts to a misguided attempt to rewrite fundamental principles of the law of agency. According to SNS Bank, the Court should deem SNS Bank the "principal" of all the respondents, who therefore should owe fiduciary duties as SNS Bank's would-be "agents." (SNS Br. 41-43)

The transaction documents attached to the complaint debunk SNS Bank's "agency" theory. Most significantly, the Offering Memorandum itself establishes that SNS Bank cannot be deemed respondents' "principal" because it lacked the essential ability to control the actions of any respondent. *See Save Way Oil Co. v. Mehlman*, 115 A.D.2d 721, 722 (2d Dep't 1985) ("A secured creditor who merely exercises the authority to veto its debtor's transaction in excess of a specified amount does not thereby become a principal."); *Pan Am. World Airways, Inc. v. Shulman Transp. Enters., Inc. (In re Shulman Transp. Enters., Inc.)*, 744 F.2d 293, 295-96 (2d Cir. 1984). SNS Bank had no power to direct its investment in Income Notes, no power to instruct Captiva or any other respondent as to what items to purchase as Portfolio Collateral, and no power to make decisions with respect to the Portfolio Collateral. (A69-70, A102, A124-27) SNS Bank also did *not* have control over when its Notes are to be redeemed. (A102) Instead, Captiva and its Directors, the Financial Manager, the Administrative Agent, and the

Administrative Committee handled all management and policy decisions, including all decisions concerning Captiva's investment in Portfolio Collateral. (A63, A72-74, A124-27) Indeed, SNS Bank even admits that "day to day investment decisions pertaining to management of the Captiva portfolio collateral were vested in and turned over to the Financial Manager subject to the . . . control of the Administrative Agent." (SNS Br. 42)

SNS Bank nevertheless argues that it had "control" over "who would be the Financial Manager" and "the duration of the agency relationship." (SNS Br. 42-43) It did not. As noted above, the Income Note holders had only a very limited right to vote on removal of a financial manager and no right at all to determine who could be appointed as replacement manager. (A177-A to A178 ¶ 8) SNS Bank's other asserted right is non-existent because it had no right to early redemption of the Income Notes. It did have a limited opportunity to vote on an *extension* of the Reinvestment Period, but only if Captiva first proposed an extension. (A102) SNS Bank thus had no real power to "control" the duration of its investment.

Finally, SNS Bank's "agency" theory fails because there was no objective manifestation of an intent to create an agency. Captiva's mere "acceptance of SNS' $15 million"—SNS Bank's only argument on this point—is not sufficient to manufacture an agency relationship. *See Thermal Imaging, Inc.*, 158 F. Supp. 2d

at 345 n.19 (shareholder's deposit of shares with corporation does not render corporation an agent of shareholder).

* * *

The Supreme Court thus properly dismissed all of SNS Bank's breach of fiduciary duty claims (Counts I, II, and III).

III. THE SUPREME COURT PROPERLY DISMISSED THE BREACH OF CONTRACT CLAIMS AGAINST CITIBANK (COUNTS IV AND V)

Counts IV and V of SNS Bank's complaint claim that Citibank breached the Administration Agreement and the Financial Management Agreement. (A49-52 ¶¶ 73-87) The Supreme Court dismissed both claims, ruling that SNS Bank was not a third-party beneficiary with standing to enforce these contracts and, even if it were, the limitation-of-liability clause in each contract precludes SNS Bank from recovering. (A25-26) Both rulings were correct.

A. SNS Bank May Not Sue To Enforce Citibank's Contracts With Captiva

A non-party to a contract may sue to enforce it in only two circumstances: where (i) "no one other than the third party can recover if the promisor breaches," or (ii) "the language of the contract . . . clearly evidences an intent to permit enforcement by the third party." *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 44 (1985); *Bd. of Managers of the Riverview at*

College Pt. Condo. III v. Schorr Bros. Dev. Corp., 182 A.D.2d 664, 665 (2d Dep't 1992) ("incidental beneficiaries" lack standing); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 78 (4th Dep't 1980) (same). SNS Bank cannot satisfy either prong of this test.

First, both the Administration Agreement and the Financial Management Agreement are clear that SNS Bank is *not* the only party who could sue to recover if Citibank breached either Agreement. Instead, *Captiva* would have the right to recover if Citibank breached its obligations under the Agreements. (A143, 147 (Administration Agreement was "by and between CAPTIVA FINANCE LTD. . . . and CITIBANK, N.A." and "enforceable in accordance with its terms"); A186, 188 (same for Financial Management Agreement)) Second, neither Agreement "clearly evidences an intent to permit enforcement" (*Fourth Ocean*, 66 N.Y.2d at 45) by the Income Note holders, in general, or SNS Bank, in particular. To the contrary, both Agreements clearly provide that Citibank's performance flows directly, and exclusively, to Captiva. (A143, A186) And each Agreement provides that it shall "inure to the benefit of" the parties to the Agreements and their successors, while forbidding any assignment to a third party without consent. (A151 ¶ 12; A178 ¶ 11) *See also BESI*, 2003 U.S. Dist. LEXIS 23062, at *28-*29 (this language in the Administration Agreement "undermines the claim that

[Citibank and Captiva] intended to benefit" Captiva's Income Note holders) (citing *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157 (S.D.N.Y. 1998)).

SNS Bank's brief on appeal accurately quotes the *Fourth Ocean* test (SNS Br. 44), but it goes on to argue that its breach of contract claims are viable because the contracts at issue reflect an "intent to benefit" SNS Bank. That is not the test. "Intent to permit *enforcement*" by a third party, not merely an "intent to *benefit*," is the operative legal standard under *Fourth Ocean*. Viewed under the correct legal standard, neither the Administration Agreement nor the Financial Management Agreement "clearly evidence[] an intent to permit enforcement by" SNS Bank. *Fourth Ocean*, 66 N.Y.2d at 45. Accordingly, the Supreme Court properly ruled that SNS Bank lacks standing to bring claims against Citibank for breach of the Administration Agreement and Financial Management Agreement. (A25-26)

B. The Liability-Limiting Clauses Of The Administration Agreement And The Financial Management Agreement Bar SNS Bank's Claims Against Citibank

The Supreme Court also properly ruled that, even if SNS Bank had third-party beneficiary standing to enforce the Administration Agreement and Financial Management Agreement, its claims would be barred by the liability-limiting clauses in each of these contracts. (A26)

SNS Bank accuses the Supreme Court of being "internally inconsistent" for making this ruling. (SNS Br. 47) But there is no inconsistency in invoking the

liability-limiting clauses as an *alternative* reason for dismissing SNS Bank's breach of contract claims against Citibank. The complaint accuses Citibank of, at most, making an error of judgment in both recommending itself as a Financial Manager and then making allegedly "imprudent, improper, and unsuitable" investment decisions in the role of Financial Manager. (A208 ¶ 41; 216 ¶ 84) Under the liability-limiting clauses in the Administration Agreement and Financial Management Agreement, however, Citibank may only be held liable for "willful misfeasance, bad faith, gross negligence or reckless disregard of its, his or her duties." (A150; *see also* A190) A mere "error of judgment" (*e.g.*, making an allegedly "imprudent" investment decision) is not actionable. (A150, A190) *See also BESI*, 2003 U.S. Dist. LEXIS 23062, at *34-*36 (liability-limiting clause in Administration Agreement barred a Captiva Income Note holder's third-party beneficiary claim against Citibank). The Supreme Court therefore correctly ruled that the liability-limiting clauses in the Administration Agreement and Financial Management Agreement provide an alternative ground for dismissing SNS Bank's breach of contract claims against Citibank. (A26)

IV. THE SUPREME COURT PROPERLY DISMISSED THE BREACH OF CONTRACT CLAIM AGAINST CAPTIVA (COUNT VI)

Count VI of the complaint alleges that Captiva breached an alleged "contractual duty to SNS to create and maintain a structure in which a Financial Manager independent of Citibank served subject to the oversight of independent

Captiva Directors, an independent Administration Agent, and an independent Administrative Committee." (A217 ¶ 89) The Supreme Court dismissed this claim, noting that SNS conceded—as it must—that "no express provision of the Subscription Agreement, the Offering Memorandum," which is incorporated by reference in the Subscription Agreement, "or any other contract" imposes this alleged duty. (A26-27) Because the Subscription Agreement contains a valid integration clause, the Supreme Court properly declined to imply such a duty in the Subscription Agreement. (A27) *See Harmonic Textiles Co. v. Stuart Alan Fashions, Ltd.*, 249 A.D.2d 228, 228 (1st Dep't 1998) (declining to consider alleged terms that would vary or add to contract because no such terms were made express and the contract contained an integration clause); *Goldfield v. Mattoon Communications Corp.*, 99 A.D.2d 711, 712 (1st Dep't 1984) (declining to "imply" a provision in light of merger clause in contact); *Manchester Equip. Co. v. Panasonic Indus. Co.*, 141 A.D.2d 616, 618 (2d Dep't 1988) (same).

On appeal, SNS Bank accuses the Supreme Court of failing to recognize that the Subscription Agreement incorporates the Offering Memorandum. (SNS Br. 48) But the Supreme Court expressly, and correctly, noted that the Offering Memorandum does not impose the illusory duty on Captiva to maintain an "independent" structure. (A26-27) The Supreme Court thus properly dismissed SNS Bank's claim against Captiva for breach of the Subscription Agreement.

V. THE SUPREME COURT PROPERLY DISMISSED SNS BANK'S "MISREPRESENTATION" CLAIM (COUNT VII)

In Count VII of the complaint, SNS Bank asserts an omnibus "misrepresentation" claim against Captiva, Citibank, Captiva's Directors, and McClelland, claiming that they all made "material misrepresentations" in the Offering Memorandum. (A218-19 ¶¶ 94-102) Though styled as a "misrepresentation" claim, the claim is, in fact, predicated on purported omissions, not affirmative misrepresentations. (*Id.*) In particular, SNS Bank alleges that respondents failed to disclose in the Offering Memorandum two "facts" that occurred three years after the Offering Memorandum was issued: (i) that Citibank may "perform the functions of Financial Manager . . . without a vote thereon by the Noteholders"; and (ii) that McClelland would "function as Managing Director of the Administrative Agent, a member of the Administrative Committee, and 'VP' of the Financial Manager all at the same time." (A218 ¶ 96-97) The Supreme Court properly dismissed this claim because respondents had no duty to make the alleged representations to SNS Bank. (A27-28)

A. Respondents Had No Duty To Speak

A failure to disclose is only actionable where a defendant has a duty to speak. *See FAB Indus., Inc. v. BNY Fin. Corp.,* 252 A.D.2d 367, 367 (1st Dep't 1998); *accord Morris v. Putnam Berkley, Inc.,* 259 A.D.2d 425 (1st Dep't 1999). Here, SNS Bank alleges that the basis for respondents' "duty" to speak was their

supposed "fiduciary relationship" to SNS Bank. (SNS Br. 53) The Supreme Court dismissed the misrepresentation claim for the straightforward reason that, "[i]nasmuch as defendants were not SNS's fiduciaries, . . . the misrepresentation claim fails." (A28) *See FAB Indus.*, 252 A.D.2d at 367 (dismissal is appropriate where plaintiffs fail to "adduce facts tending to show a special or fiduciary relationship with defendant, a necessary element of the tort of negligent misrepresentation"). SNS Bank complains that the Supreme Court improperly gave "swift treatment" to the negligent misrepresentation claim. (SNS Br. 52) No more analysis was necessary, though, because SNS Bank has failed to properly allege that respondents were in a fiduciary relationship with SNS Bank and a fiduciary relationship is the predicate for SNS Bank's misrepresentation claim.

B. Even Assuming A Duty To Speak, Respondents Had No Obligation To Disclose Future Events

The negligent misrepresentation claim also fails for a host of additional reasons. First, even assuming that respondents were SNS Bank's fiduciary (and they were not), the misrepresentation claim would still fail because it is predicated on a purported "fail[ure]" to disclose speculative future events that did not even occur until three years after the Offering Memorandum was issued. Misrepresentation claims may not be based on a failure to disclose uncertain future events that, only with the benefit of hindsight, are known to have actually occurred. *See Dooner v. Keefe, Bruyette & Woods, Inc.*, 157 F. Supp. 2d 265, 278

(S.D.N.Y. 2001); *see also Friedman v. Mohasco Corp.*, 929 F.2d 77 (2d Cir. 1991); *cf. Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140 (4th Dep't 1976) (representation with respect to "an unreckonable future phenomenon . . . in circumstances that could neither be foreseen with certainty nor controlled with precision" is too "heavily freighted with prophecy, speculation and chance" to support a fraud claim).

SNS Bank pleads no facts, nor could it, to demonstrate that respondents *actually knew*, at the pertinent time when the Offering Memorandum was issued, that three years later Citibank would (i) replace Stanfield as the Financial Manager; and (ii) McClelland would consequently, in his capacity as an employee of Citibank, have roles with the Administrative Committee, the Administrative Agent, and the Financial Manager. Moreover, the transaction documents disclosed in reasonable detail that the Financial Manager could be replaced (A125), Citibank and its employees played several roles in Captiva (A64, 125-27), Citibank might experience conflict of interests (A93), Citibank may have a commercial relationship with the Financial Manager (A93), and McClelland was both a Citibank employee and a member of the Administrative Committee (A126). There is thus no basis for SNS Bank's allegation that respondents had a duty to disclose

in the Offering Memorandum the particularized events that did not actually occur until three years after the Offering Memorandum was issued.[10]

C. The Misrepresentation Claim Is Not Properly Pleaded

A misrepresentation claim—like a breach of trust claim—must be pleaded "in detail." CPLR 3016(b); *see also New York Fruit Auction Corp. v. New York,* 81 A.D.2d, 159, 160 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 1015 (1982) (ordering dismissal of misrepresentation claim for failure to satisfy CPLR 3016(b)'s particularity requirement); *Quail Ridge Assocs. v. Chemical Bank*, 162 A.D.2d 917, 920-21 (3d Dep't 1990). SNS Bank's misrepresentation claim fails to meet this standard. Its *only* allegation of the requisite element that respondents acted with scienter—intent to deceive—is wholly conclusory and unsupported by any facts: that "defendants acted willfully, wantonly and recklessly towards SNS, intending to cause SNS harm." (A219 ¶ 102) Such vague pleadings of scienter have been repeatedly rejected by the courts. *See, e.g., Barclay Arms, Inc. v. Barclay Arms Assocs.*, 14 N.Y.2d 644, 647 (1989) (dismissed for failure to "satisfy the specificity and particularity requirements of CPLR 3013 and 3016(b)"); *Acito*

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[10] SNS represents that *Cristallina, S.A. v. Christie Manson & Woods Int'l, Inc.*, 117 A.D.2d 284 (1st Dep't 1986), stands for the general proposition that a misrepresentation claim may be based on nondisclosure of future events. But that case supports only the far narrower, and inapposite, proposition that a forecast of future events must be grounded on a reasonable assumption of presently known facts.

v. IMCERA Group, Inc., 47 F.3d 47, 54 (2d Cir. 1995) (dismissed for failure to adequately plead scienter).

SNS Bank has also improperly lumped all respondents together, without specifying what each respondent knew and failed to disclose or any other facts to allege—as it must—each respondent's scienter. *See, e.g., Franklin v. Winard,* 199 A.D.2d 220, 220 (1st Dep't 1993) (complaint dismissed "for failure to comply with specificity requirements of CPLR 3016(b)" where it "alleged that 'some or all' of the defendants" wronged plaintiff); *Sirohi v. Lee*, 222 A.D.2d 222, 222 (1st Dep't 1995) (failure to plead "elements of fraud . . . with the particularity mandated by CPLR 3016(b)" with respect to individual defendant justified dismissal); *Cusumano v. Iota Indus., Inc.*, 100 A.D.2d 892, 893 (2d Dep't 1984) (same).

VI. THE SUPREME COURT PROPERLY DISMISSED THE UNJUST ENRICHMENT CLAIM (COUNT VIII)

Count VIII of the complaint asserts a claim for unjust enrichment against all respondents. (A220-21 ¶¶ 103-12) The claim is predicated on SNS Bank's contention that the Offering Memorandum called for "[t]he payment of separate fees to the Administrative Agent and the Financial Manager," which SNS Bank believes was supposed to give it the "benefit of an independent Financial Manager whose activities were overseen and monitored by the Administrative Agent." (A220 ¶ 104) On the basis of this distorted understanding of the Offering

Memorandum—which nowhere calls for the "independent" structure that SNS Bank grafts onto it—SNS Bank alleges that Citibank was unjustly enriched by the fees it was paid acting both as Administrative Agent and Financial Manager." (A220 ¶ 109) As for the remaining respondents, SNS Bank makes only the vague and conclusory allegation that they "drew fees from the Captiva Portfolio Collateral for services . . . that the other defendants failed to provide." (A220 ¶ 109)

The unjust enrichment claim was properly dismissed, both for the reason the Supreme Court gave—that SNS Bank did not have a possessory interest in Citibank's fees (A28)—and the alternative reason that equitable principles of quasi-contract may not be invoked to challenge a party's performance under a written contract. *See also BESI*, 2003 U.S. Dist. LEXIS 23062, at *53-*55 (dismissing a Captiva Income Note holder's unjust enrichment claim against Citibank because "[Citibank's] fees are expressly governed by the Administrative Agreement[] . . . and in any event were not paid by [the Income Note holder] but rather by . . . Captiva").

A. SNS Bank Did Not Pay Respondents' Fees

The Supreme Court correctly dismissed the unjust enrichment claim because respondents' fees were not paid at SNS Bank's expense. (A28) SNS Bank does not dispute, nor could it, that a plaintiff has no right to an equitable recovery of

money or property that never belonged to the plaintiff. (SNS Br. 55 (recounting elements of unjust enrichment claim)) *See Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir. 1983) ("To recover on a theory of unjust enrichment a plaintiff must prove that the defendant was enriched" and "that such enrichment was *at plaintiff's expense*.") (emphasis added); *Reed Int'l Trading Corp. v. Donau Bank AG*, 866 F. Supp. 750, 757 (S.D.N.Y. 1994) (no unjust enrichment claim against bank "for the return of funds in which [plaintiff] had *no possessory interest*" (emphasis added)); *cf. Amanat v. Bank of Leumi Trust Co.*, 243 A.D.2d 257, 258 (1st Dep't 1997) (no recovery under equitable theory for money that never belonged to plaintiff). Instead, SNS Bank contends, in the teeth of the transaction documents, that Citibank's fees "belong[ed] to SNS" because they were paid from the Captiva Portfolio. (SNS Br. 55) But the Captiva Portfolio—which was used to pay Captiva's expenses and Citibank's fees—was *not* SNS Bank's property; it was Captiva's property. Moreover, the entire Captiva Portfolio Collateral was pledged as security for the exclusive benefit of the Class A Note holders, not the Income Note holders. (A63, A113) Citibank's fees and Captiva's expenses were thus not paid with money or property that belonged to SNS Bank, and the Supreme Court properly dismissed the unjust enrichment claim on this ground.

B. The Administration Agreement and The Financial Management Agreement Bar The Unjust Enrichment Claim

The unjust enrichment claim was also subject to dismissal for the alternative reason that Citibank's fees as Administrative Agent and Financial Manager were paid pursuant to the Administration Agreement and Financial Management Agreement. "[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Here, the complaint expressly alleges that SNS Bank's unjust enrichment claim is based on Citibank's fees that it earned for its role as Administrative Agent and Financial Manager. (A220 ¶ 108) Because Citibank earned these fees pursuant to written contracts, SNS Bank's attempt to claim that they were somehow earned "unjustly," by invoking principles of equity instead of the terms of the written contracts themselves, should be rejected.

VII. THE SUPREME COURT PROPERLY RULED THAT IT LACKS JURISDICTION OVER THE CAPTIVA DIRECTORS

The Supreme Court properly determined that—in addition to all of the other reasons for dismissing SNS Bank's claims against the Captiva Directors (counts III, VII, and VIII)—these claims should also be dismissed because the Court did not have personal jurisdiction over the foreign Directors. (A28-29)

A. SNS Bank Does Not Allege Personal Jurisdiction Over The Directors

SNS Bank argues that the Supreme Court had jurisdiction over the Directors under CPLR 302(a)(1), because they supposedly "transacted business within the state." (SNS Br. 56-57) But CPLR 302(a)(1) allows for personal jurisdiction over a person who "transacts any business in the state" if, and only if, the cause of action *arises from* the business transacted in New York. *See* CPLR 302(a) (jurisdiction under CPLR 302(a) must be based on "a cause of action arising from any of the acts enumerated in this section"). It is undisputed that no Director—with the exception of Mr. Dyer and Mr. Egglishaw—ever visited New York to conduct business for Captiva. (A242-59) And, as to Dyer and Egglishaw, their sole visit to New York for Captiva-related business occurred in December 2000, long after the two central events that gave rise to SNS Bank's claims: the alleged omissions from the Offering Memorandum in July 1996 and the replacement of the Financial Manager in August 1999. (A261-62 ¶¶ 15-16; A264-65 ¶¶ 15-16) SNS Bank makes no allegation that its claims against these Directors arise out of any business that they transacted in New York.

SNS Bank also contends that the Directors' contacts with New York satisfy CPLR 302(a)(1) for a grab-bag of reasons that have nothing to do with the Directors themselves: *Captiva* has submitted to jurisdiction in New York, *Captiva's counsel* is based in New York, and *Citibank* is based in New York.

(SNS Br. 57) It is well-settled, however, that corporate officers and directors do not subject themselves to personal jurisdiction in New York merely by serving a corporation that is subject to New York jurisdiction. *See Baran Computer Servs. Ltd. v. First Bank of Maury Cty.*, 143 A.D.2d 63, 63 (2d Dep't 1988) ("[S]tatus as an officer of a corporate defendant which might be subject to jurisdiction in this State does not render him personally subject to such jurisdiction."); *Laufer v. Ostrow*, 55 N.Y.2d 305, 312 (1982) (no personal jurisdiction over president of foreign corporation that was doing business in New York); *see also Charas v. Sand Tech. Sys. Int'l, Inc.*, No. 90 Civ. 5638 (JFK), 1992 WL 296406, at *4 (S.D.N.Y. Oct. 7, 1992) ("Jurisdiction over the representatives of a corporation 'may not be predicated on jurisdiction over the corporation itself.'") (citations omitted). The Supreme Court thus properly determined that it did not have personal jurisdiction over the foreign-based Directors of Captiva.

B. The Supreme Court Did Not Abuse Its Discretion In Disallowing Jurisdictional Discovery

SNS Bank contends that it is entitled to conduct jurisdictional discovery of the Captiva Directors. (SNS Br. 58-59) Although SNS Bank neglects to note the standard of review, to prevail on this point it must demonstrate an abuse of discretion. *See Miracle Sound, Inc. v. New York Property Ins. Underwriting Ass'n*, 169 A.D.2d 468, 469 (1st Dep't 1991). SNS Bank cannot, however, satisfy even a *de novo* standard of review.

SNS Bank's own cases recognize that a court should deny jurisdictional discovery where, as here, a plaintiff has not "made a sufficient start and shown [its] position not to be frivolous." *See Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974) (cited in SNS Br. 58). The Supreme Court determined, in accordance with this rule, that SNS Bank had failed to make *any* showing that jurisdictional discovery "may be productive." (A28-29) That determination was correct. The complaint contains *no* allegations concerning any New York contacts by any of the Captiva Directors. The Directors have submitted unrebutted affidavits establishing their lack of a jurisdictional nexus with New York. (A242-74) And SNS Bank's only argument for asserting jurisdiction over the Directors is based on *Captiva's* contacts with New York, not the Directors' contacts. Under these circumstances, the Supreme Court did not abuse its discretion in denying jurisdictional discovery. *See Mandel v. Busch Enter. Corp.*, 215 A.D.2d 455, 455 (2d Dep't 1995) (plaintiff has initial burden to demonstrate that "a jurisdictional predicate exists"); *see also Sheldon v. Kimberly-Clark Corp.*, 105 A.D.2d 273, 275 (2d Dep't 1984) (denying jurisdictional discovery because complaint contained only "bare conclusory allegations").

CONCLUSION

The Supreme Court's order dismissing the complaint and directing final judgment to be entered for respondents should therefore be affirmed.

Dated: New York, New York
January 7, 2004

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 Defendants-Respondents

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AFFIRMATION OF SERVICE

I, Todd R. Geremia, an attorney admitted to practice in the courts of New York and not a party to this action, hereby affirm under penalty of perjury that, on January 7, 2004, I caused two copies of the foregoing BRIEF FOR DEFENDANTS-RESPONDENTS to be served by hand on counsel for plaintiff-appellant:

Lewis D. Lowenfels, Esq.
Tolins & Lowenfels, P.C.
747 Third Avenue, 19th Floor
New York, New York 10017

Michael J. Sullivan, Esq.
McElroy, Deutsch & Mulvaney, LLP
Wall Street Plaza
88 Pine Street, 24th Floor
New York, New York 10005

Dated: New York, New York
January 7, 2004

____
Todd R. Geremia, Esq.