To Be Argued By:
MARSHALL H. FISHMAN

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ELMROCK OPPORTUNITY MASTER FUND I, L.P.,

Plaintiff-Appellant,

—against—

CITICORP NORTH AMERICA, INC.; ESSL 2, INC.; and CITIGROUP INC.,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF QUESTIONS PRESENTED 1

PRELIMINARY STATEMENT 2

COUNTERSTATEMENT OF FACTS 6

The Original Sale and Leaseback Transaction 6

Appellant's Subordinated Options 6

The Residual Value Appraisal Dispute: The Elmrock Options Were Out of the Money 10

Appellant's Refusal to Challenge the Appraisal Decision 12

The Settlement of the Appraisal Dispute for $60 Million — 130 Percent Above the Appraisal Decision 14

Appellant's Mistaken Reliance on Entergy's Form 10-K 15

Procedural History 17

STANDARD OF REVIEW 18

ARGUMENT 19

I. THE COMMERCIAL DIVISION CORRECTLY DISMISSED THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION 19

A. There Was No Fiduciary Duty: Appellant and Respondents Were Arm's-Length Counterparties to an Option Agreement 19

B. The Fiduciary Duty Cause of Action Is Duplicative of the Breach of Contract Cause of Action 22

C. The Fiduciary Duty Cause of Action Seeks Impermissibly Speculative Damages 23

II. THE COMMERCIAL DIVISION CORRECTLY DISMISSED THE THIRD AND FOURTH CAUSES OF ACTION FOR FRAUD AND FRAUD IN THE INDUCEMENT 24

A. The Commercial Division Correctly Held That There Was No Actionable Misrepresentation 25

B. The Commercial Division Correctly Held That Justifiable Reliance Was Not Adequately Pleaded 27

C. The Commercial Division Correctly Held That Fraudulent Intent Was Not Adequately Pleaded 29

D. The Complaint Failed to Plead Causation 30

E. The Fraud Claims Are Barred by New York's "Out-of-Pocket" Rule 32

III. THE COMMERCIAL DIVISION CORRECTLY DISMISSED APPELLANT'S REQUEST FOR PUNITIVE DAMAGES 33

CONCLUSION 35

TABLE OF AUTHORITIES

PAGE(S)

Cases

ABL Advisor LLC v. Peck,
147 A.D.3d 689, 49 N.Y.S.3d 35 (1st Dep't 2017) 23

Aozora Bank, Ltd. v. J.P. Morgan Sec. LLC,
144 A.D.3d 440, 39 N.Y.S.3d 784 (1st Dep't 2016) 30

Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.,
22 Misc. 3d 1104(A), 880 N.Y.S.2d 222
(Sup. Ct. N.Y. Cty. 2008) 34

Basis Yield Alpha Fund Master v. Morgan Stanley,
136 A.D.3d 136, 23 N.Y.S.3d 50 (1st Dep't 2015) 28, 29

Chen v. Daly,
150 A.D.3d 506 (1st Dep't 2017) 19

CIFG Assur. N. Am., Inc. v. Goldman, Sachs & Co.,
106 A.D.3d 437, 966 N.Y.S.2d 369 (1st Dep't 2013) 29

In re Ciprofloxacin Hydrochloride Antitrust Litig.,
261 F. Supp. 2d 188 (E.D.N.Y. 2003) 24

Conwill v. Arthur Andersen LLP,
12 Misc. 3d 1171(A), 820 N.Y.S.2d 842
(Sup. Ct. N.Y. Cty. 2006) 21

Cosentino v. Sullivan Papain Block McGrath & Cannavo, P.C.,
47 A.D.3d 599, 849 N.Y.S.2d 436 (1st Dep't 2008) 23

In re de Kleinman,
156 B.R. 131 (Bankr. S.D.N.Y. 1993) 24

EBC I, Inc. v. Goldman Sachs & Co.,
5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005) 20

Eurycleia Partners, LP v. Seward & Kissel, LLP,
12 N.Y.3d 553, 883 N.Y.S.2d 147 (2009) 24

PAGE(S)

Facebook, Inc. v. DLA Piper LLP (US),
134 A.D.3d 610, 23 N.Y.S.3d 173 (1st Dep't 2015),
leave to appeal denied, 28 N.Y.3d 903 (2016) 29

Fisher Bros. Sales, Inc. v. United Trading Co. Desarrollo y Comercio, S.A.,
191 A.D.2d 310, 595 N.Y.S.2d 175 (1st Dep't 1993)................ 34

Frydman & Co. v. Credit Suisse First Boston Corp.,
272 A.D.2d 236, 708 N.Y.S.2d 77 (1st Dep't 2000) 20

Gedula 26 LLC v. Lightstone Acquisitions III LLC,
150 A.D.3d 583 (1st Dep't 2017) 33

Harbinger Capital Partners Master Fund I., Ltd. v. Wachovia Capital Mkts.,
27 Misc. 3d 1236(A), 910 N.Y.S.2d 762
(Sup. Ct. N.Y. Cty. 2010).. 29

Houbigant Inc. v. Deloitte & Touche, LLP,
303 A.D.2d 92, 753 N.Y.S.2d 493 (1st Dep't 2003) 27

HSH Nordbank AG v. UBS AG,
95 A.D.3d 185 (1st Dep't 2012).. 27

IKB Int'l S.A. v. Morgan Stanley,
142 A.D.3d 447, 36 N.Y.S.3d 452 (1st Dep't 2016) 28, 29

Jordan Panel Sys., Corp. v. Turner Constr. Co.,
45 A.D.3d 165, 841 N.Y.S.2d 561 (1st Dep't 2007) 5

Kantor v. 75 Worth St., LLC,
95 A.D.3d 718, 945 N.Y.S.2d 245 (1st Dep't 2012) 23

Lama Holding Co. v. Smith Barney Inc.,
88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996) 32, 33

Loreley Fin. (Jersey) No. 4 Ltd. v. UBS Ltd.,
42 Misc. 3d 858, 978 N.Y.S.2d 615 (Sup. Ct. N.Y. Cty. 2013),
aff'd in part, appeal dismissed in part, 123 A.D.3d 413,
998 N.Y.S.2d 172 (1st Dep't 2014)................................. 31

PAGE(S)

Mandelblatt v. Devon Stores,
132 A.D.2d 162, 521 N.Y.S.2d 672 (1st Dep't 1987) 23

MatlinPatterson ATA Holdings LLC v Fed. Express Corp.,
87 A.D.3d 836, 929 N.Y.S.2d 571 (1st Dep't 2011) 18

MBIA Ins. Co. v. GMAC Mortg. LLC,
30 Misc. 3d 856, 914 N.Y.S.2d 604 (Sup. Ct. N.Y. Cty. 2010) 29

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
87 A.D.3d 287, 928 N.Y.S.2d 229 (1st Dep't 2011) 26, 29, 34

MBIA Ins. Corp. v. Morgan Stanley,
42 Misc. 3d 1213(A), 984 N.Y.S.2d 633
(Sup. Ct. Westchester Cty. 2011) 34

Meyercord v. Curry,
38 A.D.3d 315, 832 N.Y.S.2d 29 (1st Dep't 2007).................. 31

MP Cool Invs. Ltd. v. Forkosh,
142 A.D.3d 286, 40 N.Y.S.3d 1 (1st Dep't 2016),
lv. den., 28 N.Y.3d 911 (2016) 21, 24

Naturopathic Labs. Int'l, Inc. v. SSL Ams. Inc.,
18 A.D.3d 404, 795 N.Y.S.2d 580 (1st Dep't 2005) 25

Norcast S.ar.l. v. Castle Harlan, Inc.,
147 A.D.3d 666, 48 N.Y.S.3d 95 (1st Dep't 2017).................. 32

Oddo Asset Mgmt. v. Barclays Bank PLC,
19 N.Y.3d 584, 950 N.Y.S.2d 325 (2012)............................ 19

Pacnet Network Ltd. v. KDDI Corp.,
78 A.D.3d 478, 912 N.Y.S.2d 180 (1st Dep't 2010) 25

Perrotti v. Becker, Glynn, Melamed & Muffly LLP,
82 A.D.3d 495, 918 N.Y.S.2d 423 (1st Dep't 2011) 25

Recovery Consultants, Inc. v. Shih-Hsieh,
141 A.D.2d 272, 534 N.Y.S.2d 374 (1st Dep't 1988)................ 21

Sebastian Hldgs., Inc. v. Deutsche Bank AG,
78 A.D.3d 446, 912 N.Y.S.2d 13 (1st Dep't 2010).................. 28

PAGE(S)

Steinhardt Grp. Inc. v. Citicorp,
272 A.D.2d 255, 708 N.Y.S.2d 91 (1st Dep't 2000) 29

Wiener v. Lazard Freres & Co.,
241 A.D.2d 114, 672 N.Y.S.2d 8 (1st Dep't 1998).................. 20

Wyle v. ITT Corp.,
130 A.D.3d 438, 13 N.Y.S.3d 375 (1st Dep't 2015) 26

Zanett Lombardier, Ltd. v. Maslow,
29 A.D.3d 495, 815 N.Y.S.2d 547 (1st Dep't 2006) 27

Rules

CPLR § 3211 .... 19, 29

CPLR § 3211(a)(1)... 3, 5, 17

CPLR § 3211(a)(7)... 3, 5, 17

CPLR § 5501(c) 18

Other Authorities

Siegel, N.Y. Prac. § 529 (5th ed.) 18

Defendants-Respondents Citicorp North America, Inc., ESSL 2, Inc. and Citigroup Inc. (together, "Citi" or "Respondents") respectfully submit this brief in opposition to Plaintiff-Appellant Elmrock Opportunity Master Fund I, L.P.'s ("Elmrock" or "Appellant") Brief for Plaintiff-Appellant ("App. Br.").

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Commercial Division (Hon. Barry R. Ostrager) correctly dismissed the breach of fiduciary duty cause of action brought by Appellant, a sophisticated hedge fund, against its counterparty to an option agreement when Appellant represented it had evaluated the risks and merits of purchasing the option, the agreement was at arm's length, and did not provide for the assumption of any fiduciary duties.

The Commercial Division correctly dismissed Appellant's second cause of action for breach of fiduciary duty.

2. Whether the Commercial Division correctly dismissed the fraud and fraud in the inducement causes of action where: (i) the alleged misrepresentations were contradicted by the documentary evidence integral to the Complaint, (ii) Appellant specifically represented in the option agreement that it had conducted an independent analysis of the transaction, (iii) Appellant retained its own independent consultants before buying the option, (iv) the fraud claims are duplicative of the breach of contract cause of action, and (v) Appellant seeks

benefit of the bargain damages under the option agreement and not out-of-pocket losses?

The Commercial Division correctly held that the fraud and fraud in the inducement causes of action failed to allege actionable misrepresentations, justifiable reliance or fraudulent intent. The Commercial Division did not reach the additional grounds mandating dismissal based on a failure to allege causation and non-speculative out-of-pocket damages.

3. Whether the Commercial Division correctly dismissed the cause of action for punitive damages where the alleged conduct concerned a commercial contractual dispute between sophisticated counterparties and alleged no misconduct directed at the public generally?

The Commercial Division correctly dismissed the punitive damages cause of action.

PRELIMINARY STATEMENT

Appellant, a sophisticated hedge fund specializing in nuclear power plant investments, and Respondents, entered into an option agreement concerning the residual value of a particular nuclear power plant. Appellant's option was heavily subordinated to another option holder and Appellant lost its premium (approximately $7 million) when its option on the value of the power plant expired out of the money.

Appellant sought to hold Respondents liable for Appellant's speculation not only under the governing option agreement, but also for lost profits through a battery of other claims for breach of fiduciary duty, fraud and punitive damages. The Commercial Division allowed the breach of contract claim to proceed and dismissed each of the Complaint's other causes of action pursuant to CPLR 3211(a)(1) and (7). Appellant appeals from the Commercial Division's dismissal of the breach of fiduciary duty, fraud and punitive damages causes of action.

* * *

Respondents, through a sale and leaseback transaction entered into in 1989, acquired a minority stake in the Waterford Steam Electric Generation Station Unit 3 ("Waterford 3" or the "Plant"). The acquisition contemplated that Respondents would sell back to the Plant's owner, at fair market value, Respondents' residual interest in the Plant at the end of the lease term.

Thereafter, Respondents sold options in the potential proceeds from the Plant's residual value to two sophisticated energy-sector investors: (i) a hedge fund managed by the Fortress Investment Group ("Fortress"), the preferred option holder that stood to recover 100 percent of the first $70.72 million of the Plant's residual value (and 25 percent of any recovery thereafter); and (ii) Appellant, which stood to recover only if the Plant's residual value exceeded $70.72 million.

At the end of the lease term, Respondents and the Plant owner could not agree on the fair market value of the Plant. Pursuant to an appraisal protocol conducted in accordance with the transaction documents, it was determined that the fair market value of Respondents' residual interest in the Plant was $26 million. Because Appellant's option was out of the money, Respondents tendered to Appellant the right to appeal the appraisers' decision by commencing suit with Fortress in state court in Louisiana. Appellant refused and instead purported to "instruct" Respondents to institute suit at Respondents' own expense on Appellant's behalf (and without disclosing Appellant's identity). Through negotiations with the Plant's owner, Respondents and Fortress reached a settlement with the Plant's owner whereby they recovered an additional $34 million (130 percent above the appraisal decision).

Despite increasing the value through negotiations, as the Commercial Division found, Appellant's option remained out of the money. In fact, the value remained more than $10 million below Fortress's priority position.

Appellant's claims to recover its option premium and its lost profits against Respondents are deficient under any theory. For its fraud claim, Appellant argues that the parties' settlement of the residual value issue was $183 million. But the irrefutable documentary record that is integral to the Complaint demonstrates that the settlement with the Plant's owner for the residual value of the Plant was

$60 million. Appellant misreads the Plant owner's Form 10-K in arguing that the residual value was fixed and settled for $183 million. Moreover, as the Commercial Division correctly found, there was no fiduciary duty created by these commercial counterparties, and the Complaint fails to make the requisite allegations to allow a claim for punitive damages and fraud.

Indeed, demonstrating that this case is nothing more than a breach of contract case (as the Commercial Division held), Appellant's brief is interspersed with various contractual provisions of the parties' option agreements (*see, e.g.*, App. Br. at 6-7).[1] Appellant's attempt to transform this action into something more than a "commercial dispute between two entities" (R. 19) should be rejected and the Dismissal Decision affirmed.[2]

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[1] The Commercial Division did not dismiss Appellant's breach of contract cause of action which is based on the underlying option agreement between the parties. (*See* R. 8-20 (the "Dismissal Decision").)

[2] Citations to "R. __" refer to the Record on Appeal, filed with the Court by Appellants on July 10, 2017. The facts set forth herein are based on the Dismissal Decision and the Complaint, and assumed to be true except where contradicted by documentary evidence considered pursuant to CPLR 3211(a)(1) and (7). *See Jordan Panel Sys., Corp. v. Turner Constr. Co.*, 45 A.D.3d 165, 167, 841 N.Y.S.2d 561, 563 (1st Dep't 2007) ("For purposes of this appeal, we assume the truth of the facts alleged in plaintiff's complaint, as amplified by the affidavit plaintiff's president submitted in opposition to defendant's pre-answer motion to dismiss. We also consider the documentary evidence . . . that defendant submitted in support of that motion. Plaintiff does not dispute any of this documentary evidence.").

COUNTERSTATEMENT OF FACTS

The Original Sale and Leaseback Transaction

On September 1, 1989, a predecessor to Entergy Corporation ("Entergy") entered into a sale and leaseback transaction (the "Sale and Leaseback Transaction") with ESSL 2, a Citi subsidiary with respect to the Plant. (Dismissal Decision at R. 10; *see also* R. 512-13 at ¶¶ 10-15.)

To effectuate the Sale and Leaseback Transaction: (i) Entergy first sold an approximate ten percent undivided ownership interest in the Plant to First National Bank of Commerce ("First National") as Owner Trustee for the benefit of ESSL 2, the Owner Participant; (ii) Entergy leased the property back from First National and agreed to make semi-annual rent payments to First National for ESSL 2's benefit; and (iii) Entergy retained the option to repurchase the property at certain intervals or at the termination of the lease agreements by paying the Plant's fair market value at the end of the lease term. (*Id.*)

Appellant's Subordinated Options

Years after the original Sale and Leaseback Transaction, Respondents sold two options in the residual value of the Plant. (Dismissal Decision, R. 10-11; *see also* R. 515, 517-18 at ¶¶ 21, 25-26.) Respondents sold the first of such options in July 2005 to Fortress, a non-party to this litigation (the "Fortress Options"). (*Id.*) Fortress was the preferred option holder entitled to receive all of the first $70.72

million of the Plant's residual value and 25 percent of any residual value in excess of $70.72 million. (*Id.*)

On June 30 2010, Respondents sold additional options in the Plant's residual value to Appellant (the "Elmrock Options") pursuant to the Elmrock Option agreements (the "Elmrock Option Agreements" (R. 62-151)). (Dismissal Decision at R. 11; *see also* R. 517-18 at ¶¶ 25-26.) Pursuant to the Elmrock Option Agreements, the Elmrock Options were subordinated to the Fortress Options. (R. 517-18 at ¶ 26.) As the Commercial Division observed: "[s]imply stated, Elmrock was to receive nothing if the income stream from the re-sale or re-lease of the undivided interest in Waterford 3 did not exceed $70,720,000, but was entitled to receive various percentages thereafter." (Dismissal Decision at R. 11.)

The Elmrock Option Agreements included Appellant's representations to Respondents that Appellant had: (i) "completed its due diligence with respect to the transaction" (R. 73 at § 3(a)(ii)(A)); (ii) "received from Seller complete copies of all Transaction Documents" other than certain scheduled exceptions not applicable here (*id.* at § 3(a)(ii)(B)); and (iii) "received an appraisal by DAI Management Consultants, Inc. ["DAI"], addressed to Buyer, of the Waterford Undivided Interest satisfactory to Buyer" (R. 74 at § 3(a)(iii)).

Appellant's representation concerning its receipt of an appraisal from DAI was part of Appellant's representation that it had performed its own diligence

based on "DAI's best professional judgment in light of the information provided and/or available at the time of preparation" (the "DAI Analysis"). (R. 336.)

The DAI Analysis concluded that:

> The facility's operating license currently expires on December 18, 2024. Entergy Louisiana has announced that it anticipates submission of a license renewal application for Waterford 3 in January 2013. Although Entergy Louisiana has not yet submitted an application for extension of the operating license, DAI expects that it will eventually apply for, and receive, a twenty-year license extension, ending at the end of 2044. As a result, DAI's estimate of the value of Waterford 3 is based on an economic useful life of sixty years. <u>As of May 1, 2010, the remaining economic useful life of the facility is estimated to be slightly greater than thirty-five years, through December 18, 2044</u>.

(R. 323-24 (emphasis added).) An exhibit to the DAI Analysis (Exhibit 8) (R. 333) was a "Future Value Table" which projected valuations for Waterford 3 through December 31, 2044. (R. 333.)[3]

Appellant further affirmatively represented in the Elmrock Option Agreements that the information it received was adequate for it to independently evaluate the risks and merits of the transaction:

> <u>Adequacy of Information</u>. Buyer has received all the information it considers necessary or appropriate for deciding whether to purchase

[3] The Complaint alleges that Appellant relied upon the views expressed in DAI's valuation transmitted <u>by Citi</u> to Appellant in February 2010. (R. 516-17 at ¶ 24.) But, as demonstrated above, Appellant independently retained DAI and received the DAI Analysis directly from DAI. Insofar as the Complaint is based on an earlier version of a report Respondents had commissioned, from the face of the documents, the earlier DAI valuation informed Citi's "<u>understanding</u>" that the "<u>vast majority</u>" of nuclear facilities "are <u>expected</u> to be granted license extensions," and that Entergy "stated its <u>intent</u> to submit a license renewal application." (R. 515 at ¶¶ 22-24 (emphases added).) Citi never made any factual representation. *See* § II.A, *infra.*

> the Option, and further represents that it has had an opportunity to ask questions and receive answers from Seller regarding the terms and conditions of the Transaction Documents and otherwise with respect to the Waterford Undivided Interest. Buyer has independently evaluated the risks and merits of purchasing the Option.

(R. 81 at § 8(f) (emphasis added).) The Elmrock Options were executed by the parties as fully-integrated instruments that reflected the "entire agreement of the parties" and "supersede[d] all prior written and oral agreements and understandings with respect to such subject matter." (R. 90 at § 19.)

Prior to purchasing the Elmrock Options, Appellant received from Citi (*see* R. 515 at ¶ 22) "for discussion purposes only" a "Confidential Outline" prepared by Citi for Appellant to consider in deciding whether to purchase the options (the "Outline"). (*Id.*; *see also* R. 55-61.) The Outline stated that Appellant was "not relying on Citi for advice as to the status of any party to the Transaction nor in relation to investment issues and that it will make an independent analysis and make decisions regarding the Transaction based on advice from its own professional advisors." (R. 60.)

The Outline further stated that:

- "The Confidential Outline has been prepared to assist interested parties in making their own evaluation of the Transaction and does not purport to be all-inclusive or to contain all of the information that a prospective participant may consider material or desirable in making its decision to become a lender." (*Id.* (emphasis added).)
- "Each Recipient of the information and data contained herein should take such steps as it deems necessary to assure that it has

the information it considers material or desirable in making its decision to participate and should perform its own independent investigation and analysis of the Transaction and the creditworthiness of the parties." (*Id.* (emphasis added).)

- "The Recipient represents that it is sophisticated and experienced in lease-related transactions. The information and data contained herein are not a substitute for the Recipient's independent evaluation and analysis and should not be considered as a recommendation by Citi or any of its affiliates that any Recipient enter into the Transaction." (*Id.* (emphasis added).)
- "The Confidential Outline may include certain forward looking statements and projections. Any such statements and projections reflect various estimates and assumptions concerning anticipated results. No representations or warranties are made as to the accuracy of any such statements or projections." (R. 60-61.)

The Residual Value Appraisal Dispute:
The Elmrock Options Were Out of the Money

The "Ground Leases" — the original Sale and Leaseback Transaction agreements that established ESSL 2's right to occupy the Plant — terminated on the earlier of December 18, 2024 and any earlier date upon which the license to operate the Waterford 3 facility expired. (R. 512-13 at ¶¶ 12-14; R. 155-56 at § 2.01(a)(ii).) Upon termination of the Ground Leases, the undivided interests in the Plant were subject to reversion to Entergy on December 18, 2024 unless First National had retained an ownership interest in the facility site that was sufficient to override the reversion. (R. 512-13 at ¶¶ 12-14; R. 156 at § 2.01(d).)

The "Facility Leases" — the original Sale and Leaseback Transaction agreements pursuant to which ESSL 2 leased back its interest to Entergy and was

entitled to the revenue stream for the Waterford 3 rent payments — expired on July 1, 2017 (the end of the basic term of the leases) unless Entergy exercised rights to renew or repurchase ESSL 2's undivided interests in Waterford 3 at fair market value. (R. 513-14 at ¶¶ 16-19.) To that end, on or before January 1, 2015, Entergy and ESSL 2 were required to agree on the fair market value of the residual interests in Waterford 3 and submit any disagreement to three appraisers pursuant to an appraisal procedure. (*Id.* at ¶ 18; R. 185-87 at § 12(a), 13(a)-(e).)

On or about July 23, 2014, Entergy declared that it would repurchase or re-lease ESSL 2's interests at the end of the lease term. (R. 521 at ¶ 39.) Entergy provided a valuation of the fair market sale or rental value as required by the Facility Leases. The Entergy valuation was predicated upon an assumed reversion of the undivided interests — and extinguishment of revenue streams — in December 2024. (*Id.* at ¶ 40.) Citi opposed that position, arguing that the value of the revenue stream for Waterford 3 extended through December 2044 (the useful life of the facility anticipated at that time given an expected license extension to be obtained from the Nuclear Regulatory Commission). (R. 523-24 at ¶¶ 52-53.)

On July 24, 2015, after months of contested appraisal proceedings, two of the three appraisers determined that the valuation period ended in December 2024. (Dismissal Decision at R. 13.) Accordingly, after applying an averaging protocol, the residual value of ESSL 2's interest in Waterford 3 was fixed by the pre-agreed

procedure at approximately $26 million (the "Appraisal Decision"). (R. 524 at ¶¶ 54-56; R. 414-20.)[4]

The Appraisal Decision's determination that the valuation period ended in December 2024, left Appellant's option out of the money. The Commercial Division summarized, "[i]n short, Elmrock is 'out of the money' if the valuation period through 2024 controls or Elmrock is 'in the money' if the valuation period through 2044 controls." (Dismissal Decision at R. 13.)

Pursuant to the appraisal procedure, any party challenging the assumptions underlying that valuation — including the determinative issue of whether the valuation period terminated in 2024 or 2044 — was entitled to seek judicial review by challenging the determination through litigation in Louisiana state court pursuant to Louisiana law. (R. 523 at ¶ 49; R. 349.)

Appellant's Refusal to Challenge the Appraisal Decision

Both Fortress and Appellant sought to challenge the Appraisal Decision through judicial review. (R. 522, 524 at ¶¶ 46, 57.) By letter dated August 6, 2015, Appellant's counsel purported to direct Respondents to "commence

[4] The appraisals produced a series of valuations for the fair market sales value of the residual interest in Waterford 3 and required the elimination of valuations that substantially deviated from the median and an averaging of the remaining values. (R. 414-20.) The averaged appraisal valuation based on the 2024 period was $26.47 million. (*Id.*)

litigation . . . in accordance with Section 10(d) of the Supplemental Appraisal Protocols" and seek an extension from Entergy to do so. (R. 424.)

In response to Appellant's August 6, 2015 demand, Respondents advised Appellant that if it wanted to challenge the Appraisal Decision it should engage with the other option holder (Fortress) and together appeal the Appraisal Decision because, as was the case with Fortress, Appellant was the real party in interest. (R. 427-28; R. 524 at ¶ 58.) Appellant refused. In fact, Appellant refused to even allow Respondents to identify it as an interested party to either Fortress or Entergy. (R. 672-74.)

As the Commercial Division found: "Citi provided a series of letters from August to November 2015" that "indicate that Elmrock refused to pursue such litigation and further refused to allow Citi to reveal Elmrock's identity and role in the transaction to Fortress, the preferred equity holder in the 2010 deal." (Dismissal Decision at R. 14 (citing R. 427-32).) The Commercial Division focused specifically on communications from Citi to Appellant's counsel stating, among other things, that "Citi is prepared [to] assign Elmrock . . . and Fortress the right to control any anticipated litigation seeking judicial review pursuant to the appraisal protocol between ESSL 2 . . . and Entergy. (*Id.* (quoting R. 427).)

The Settlement of the Appraisal Dispute for $60 Million — 130 Percent Above the Appraisal Decision

The litigation that Fortress and Citi prepared to commence (and that Appellant refused to join) resulted in a negotiated resolution under which Entergy agreed to an increased residual value of Waterford 3 in the amount of $60 million. (R. 525 at ¶¶ 60-63.) That settlement valuation was 130 percent greater than the amount determined by the Appraisal Decision. (R. 517-18, 524 at ¶¶ 26, 54; R. 438.)[5]

Achieving such a negotiated resolution was contemplated by the Elmrock Options which contained an applicable limitation of liability providing that Respondents "shall not be deemed to be in breach" of their obligations by "taking any actions" "in connection with" Entergy's "right to purchase the Waterford Undivided Interest or to re-lease the Waterford Undivided Interest," or "the rights of [Entergy] under the Facility Lease or under any agreement entered into in connection therewith," including the original Sale and Leaseback Transaction documentation and/or the Fortress Options. (R. 86 at § 10(h).)

[5] Contrary to the Complaint's allegations that Citi refused to provide the residual value settlement (*see* R. 525-26 at ¶¶ 61, 64), Citi advised Appellant of the terms of the settlement and offered to provide a copy upon confirmation it would be kept confidential. (R. 442-43.) Appellant refused. (R. 682-83.)

Appellant's Mistaken Reliance on Entergy's Form 10-K

The Complaint relied upon a mistaken reading of Entergy's Form 10-K in alleging that the Plant's residual value was $183 million (a $60 million purchase of the residual value of the Plant plus an additional $123.273 million in future lease payments). (*See* R. 525, 527 at ¶¶ 63, 73.) The future lease payments owed under the Sale and Leaseback Transaction agreements are not part of the Plant's residual value and were specifically excluded in the Elmrock Options. (R. 68.)[6]

The irrefutable documents that are integral to the Complaint included schedules of the basic rent payments (not included as Option Property under the Elmrock Options) due under the original 1989 Sale and Leaseback Transaction. (R. 123.) Those schedules also were incorporated into the 2010 Elmrock Options (the "Basic Rent Schedules") and excluded as Option Property with respect to which the Elmrock Options would be valued. (R. 68, 123.) The Basic Rent Schedules, for the 2016 and 2017 period at issue, total $123.273 million.

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[6] In reaching the $60 million settlement, Fortress obtained $10 million less than the $70.72 million it would have been entitled to before the Elmrock Options would have been in the money. (R. 11, 14.) Fortress also would have been entitled to an additional 25 percent participation in any recovery above the $70.72 million threshold. (*Id.*)

Waterford Undivided Interest 1 (US Dollars)	$ 200,000,000.0			**Basic Rent**	
Date	**% of Facility Cost**	**Advance**	**Arrears**	**Advance**	**Arrears**
2 Jan-2016	2.548443740%	100.000000000%	0.000000000%	5,096,887.5	-
2 Jul-2016	2.165982130%	0.000000000%	100.000000000%	-	4,331,964.3
2 Jan-2017	17.693320320%	100.000000000%	0.000000000%	35,386,640.6	-
2 Jul-2017	12.806262700%	0.000000000%	100.000000000%	-	25,612,525.4

Waterford Undivided Interest 2 (US Dollars)	$ 100,000,000.0			**Basic Rent**	
Date	**% of Facility Cost**	**Advance**	**Arrears**	**Advance**	**Arrears**
2 Jan-2016	2.541087460%	100.000000000%	0.000000000%	2,541,087.5	-
2 Jul-2016	2.158623240%	0.000000000%	100.000000000%	-	2,158,623.2
2 Jan-2017	17.035019730%	100.000000000%	0.000000000%	17,035,019.7	-
2 Jul-2017	13.140099070%	0.000000000%	100.000000000%	-	13,140,099.1

Waterford Undivided Interest 3 (US Dollars)	$ 53,600,000.0			**Basic Rent**	
Date	**% of Facility Cost**	**Advance**	**Arrears**	**Advance**	**Arrears**
2 Jan-2016	2.834062640%	100.000000000%	0.000000000%	1,519,057.6	-
2 Jul-2016	2.406660920%	0.000000000%	100.000000000%	-	1,289.970.3
2 Jan-2017	16.110083590%	100.000000000%	0.000000000%	8,635,004.8	-
2 Jul-2017	12.173543080%	0.000000000%	100.000000000%	-	6,525.019.1

(R. 123.)[7]

Moreover, that was the same $123.273 million described in Entergy's Form 10-K: "$60 million cash payment represents the purchase price to acquire the undivided interests in the plant" and that the $123.273 million were "future minimum lease payments" (*see* R. 460-61 (emphases added)) in 2016 and 2017:

[7] When the 2016 and 2017 "advance" and "arrears" amounts are rounded up to the nearest thousand, they total to exactly the $123.273 million referenced in Entergy's 10-K (*see* R. 444).

As of December 31, 2015, Entergy Louisiana, in connection with the Waterford 3 sale and leaseback transactions, had future minimum lease payments (reflecting an overall implicit rate of 7.45%, and which include the equity portion of lease payments which will, upon the acquisition of the beneficial interests, be payable under the mortgage bond described above) that are recorded as long-term debt, as follows:

	Amount
	(In Thousands)
2016	$16,938
2017	106,335
2018	—
2019	—
2020	—
Years thereafter	—
Total	123,273
Less: Amount representing interest	14,308
Present value of net minimum lease payments	$108,965

(R. 461.)

Procedural History

More than six months after the residual value of the Plant was settled at $60 million, Appellant commenced this action in the Commercial Division. The Complaint advanced causes of action for breach of contract, breach of fiduciary duty, fraud in the inducement, fraud, and a purported separate cause of action for punitive damages. (R. 526-33.)

Respondents moved to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7). (R. 484, 491.) On November 30, 2016, the Commercial Division heard oral argument. Pursuant to Appellant's request, the Commercial Division directed Respondents to produce five additional documents concerning the settlement of the residual value dispute between Entergy and Fortress and ordered supplemental briefing. (R. 40.) Following the exchange of the requested settlement

documentation and the submission of further briefing, on December 19, 2016, the Commercial Division dismissed the causes of action for breach of fiduciary duty, fraud, fraud in the inducement, as well as the request for punitive damages. (Dismissal Decision at R. 19-20.)

With respect to Appellant's claim for breach of contract, the Commercial Division found that "[a]t this early stage of the proceedings, plaintiff is not obliged to show that it actually sustained damages but only that 'damages attributable to [defendants' conduct] might be reasonably inferred'" and that Appellant's allegations were "sufficient to sustain its breach of contract claim which seeks $99 million in damages." (*Id.* at R. 16.)

On January 17, 2017, Appellant noticed this appeal. (R. 6-7.)

STANDARD OF REVIEW

This Court "shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal." CPLR § 5501(c).

The "pervasive review power allows the appellate court at the first tier of appeal to stand in the place of the nisi prius judge and do whatever that judge should have done." Siegel, N.Y. Prac. § 529 (5th ed.); *see also MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 A.D.3d 836, 839, 929 N.Y.S.2d 571,

575 (1st Dep't 2011) (applying same standard as motion court to review CPLR 3211 motion to dismiss).

As demonstrated herein, the Commercial Division correctly dismissed the Complaint's causes of action for breach of fiduciary duty and fraud and the request for punitive damages.[8]

ARGUMENT

I. THE COMMERCIAL DIVISION CORRECTLY DISMISSED THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION

A. There Was No Fiduciary Duty: Appellant and Respondents Were Arm's-Length Counterparties to an Option Agreement

Under New York law, a fiduciary relationship is "'grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions.'" *Oddo Asset Mgmt. v. Barclays Bank PLC*, 19 N.Y.3d 584, 593, 950 N.Y.S.2d 325, 330 (2012) (quoting *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005)). As observed by the Court of Appeals in *Oddo* (and the Commercial Division in the Dismissal Decision), if parties "do not create their own relationship of higher trust, courts should not ordinarily transport

[8] As further demonstrated herein, although the Commercial Division did not find it necessary to reach all bases for dismissal of those causes of action, there are a number of additional grounds which compel affirmation of the Dismissal Decision. *See, e.g.*, *Chen v. Daly*, 150 A.D.3d 506, 506 (1st Dep't 2017) ("We affirm the dismissal of the complaint, albeit on different grounds than the motion court cited.").

them to the higher realm of" fiduciary status. (Dismissal Decision at R. 16 (quoting *Oddo*, 19 N.Y.3d at 593).)

The Elmrock Options were an arm's-length business transaction between sophisticated, experienced counterparties. For example, the Outline stated:

> The Recipient [Appellant] represents that it is sophisticated and experienced in lease-related transactions. The information and data contained herein are not a substitute for the Recipient's independent evaluation and analysis and should not be considered as a recommendation by Citi or any of its affiliates that any Recipient enter into the Transaction.

(R. 60 (emphasis added).) Appellant also represented in the Elmrock Options that it had "received all the information it considers necessary or appropriate for deciding whether to purchase the Option" and that Elmrock had "independently evaluated the risks and merits of purchasing the Option." (R. 81, Ex. 2 at § 8(f).)[9]

In fact, vitiating any reliance on Respondents as its fiduciary is the fact that Appellant conducted its own independent analysis of the Plant and its value by

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[9] Appellant's citations to cases where an advisory relationship was pleaded (*see* App. Br. at 17-18) are inapplicable. *See, e.g.*, *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 20, 799 N.Y.S.2d 170, 175 (2005) ("Here, the complaint alleges an advisory relationship that was independent of the underwriting agreement."); *Frydman & Co. v. Credit Suisse First Boston Corp.*, 272 A.D.2d 236, 236, 708 N.Y.S.2d 77, 79 (1st Dep't 2000) ("The complaint further alleges that CSFB, in addition to committing to provide financing, furnished investment banking advice and negotiating services to Frydman in connection with the contemplated transaction."); *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 123, 672 N.Y.S.2d 8, 15 (1st Dep't 1998) ("Here, plaintiffs alleged that Meyer had acted on their behalf in assuming negotiations with Crossland, and that they had relied upon him specifically because of Lazard's expertise and reputation, because of Meyer's alleged 'inside connection' with a highly placed Crossland executive and because Crossland apparently preferred to deal with plaintiffs through Lazard rather than directly with plaintiffs.").

retaining its own valuation consultant. (R. 320-36.); *see, e.g.*, *MP Cool Invs. Ltd. v. Forkosh*, 142 A.D.3d 286, 290-93, 40 N.Y.S.3d 1, 5-7 (1st Dep't 2016) (affirming grant of motion to dismiss holding that there was no fiduciary duty between the counterparties to an option agreement because "[t]he transactions at their inception were arm's length transactions between sophisticated commercial parties" and the plaintiff hired its own investment adviser and engineer), *lv. den.*, 28 N.Y.3d 911 (2016).[10]

As the Commercial Division correctly found, "[a]ll the parties involved in these complex transactions were highly sophisticated; it cannot be said that any one party relied upon the superior expertise of the other or that any fiduciary relationship was created by the arm's length transaction beyond the terms of the contract." (Dismissal Decision at R. 17.)[11]

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[10] *See also Conwill v. Arthur Andersen LLP*, 12 Misc. 3d 1171(A), at *11, 820 N.Y.S.2d 842 (Sup. Ct. N.Y. Cty. 2006) ("[A]n arm's length transaction with a large financial institution acting as the counterparty on an option transaction, will not generally give rise to a fiduciary duty unless one is created by agreement." (citing *CIBC Bank & Trust Co. (Cayman) Ltd. v. Credit Lyonnais*, 270 A.D.2d 138, 138, 704 N.Y.S.2d 574, 575 (1st Dep't 2000)).

[11] Appellant failed to dispute its sophistication in its opposition to the motion to dismiss. Rather, Appellant merely argued that "any sophistication of Elmrock" was legally irrelevant. (R. 704 at n.22.) Appellant cannot now dispute its sophistication because a party may not "argue on appeal a theory never presented to the court of original jurisdiction." *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276, 534 N.Y.S.2d 374, 376 (1st Dep't 1988). In any event, Appellant's sophistication is demonstrated by the Outline's statement that the Elmrock Options were offered only to "sophisticated and experienced" investors as well as Appellant's representations that it: (i) "received an appraisal" from DAI that was "satisfactory to [Appellant] in its sole discretion;" (ii) "received all the information it considers necessary or appropriate for deciding whether to purchase the Option;" and, (iii) "independently evaluated the risks and merits of purchasing the Option." (R. 74, 81.)

B. The Fiduciary Duty Cause of Action Is Duplicative of the Breach of Contract Cause of Action

On appeal, Elmrock attempts to reinvent its fiduciary duty cause of action by arguing that "Elmrock had no contractual relationship with ESSL 2" and that the Elmrock Options "created an independent obligation for ESSL 2 to act on behalf of Elmrock in negotiating with Entergy, which ESSL 2 breached." (App. Br. at 16-17.) But the Complaint advances a breach of contract cause of action against ESSL 2 which is proceeding (R. 526-28) and the Elmrock Options are fully integrated instruments reflecting the "entire agreement" of the parties (R. 90-91, Ex. 2 at § 19).

The Complaint alleged that it was a breach of an alleged fiduciary duty to "negotiate a settlement" of the residual value appraisal dispute rather than "litigating" the issue and that "Citi failed to keep Elmrock informed of the negotiations with Entergy. . . ." (R. 528-29 at ¶¶ 78-79.) That is the exact same predicate supporting the breach of contract claim. Using nearly identical language, the Complaint alleged that by failing to "commence litigation" challenging the Appraisal Decision, "agreeing to a purchase price for the undivided interests in Waterford 3" and "failing to provide Elmrock with material information concerning the negotiations with Entergy and the eventual settlement with Entergy . . ." Citi breached the Elmrock Options. (R. 526-27 at ¶¶ 68, 70, 72.)

As the Commercial Division correctly held, where, as here, a cause of action for "breach of fiduciary duty is duplicative of [a] breach of contract claim [it] cannot stand." (Dismissal Decision at R. 17 (citing *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 302, 851 N.Y.S.2d 500, 501 (1st Dep't 2008).)[12]

C. The Fiduciary Duty Cause of Action Seeks Impermissibly Speculative Damages

The fiduciary duty cause of action seeks impermissibly speculative damages that are not "capable of measurement with reasonable certainty." *Kantor v. 75 Worth St., LLC*, 95 A.D.3d 718, 718, 945 N.Y.S.2d 245, 245 (1st Dep't 2012) (quoting *Ashland Management v. Janien*, 82 N.Y.2d 395, 403 (1993)); *Cosentino v. Sullivan Papain Block McGrath & Cannavo, P.C.*, 47 A.D.3d 599, 599, 849 N.Y.S.2d 436, 436 (1st Dep't 2008) (affirming dismissal of fiduciary duty claim because the "damages sought are speculative or otherwise not recoverable.").

Here, Appellant's claim is predicated entirely on the speculation that if Respondents commenced suit against Entergy in a Louisiana State Court (which Appellant declined to do (*see* R. 440 at Ex. 9)), Respondent would have obtained recovery in excess of $70.72 million and Appellant's option therefore would have

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[12] *See also ABL Advisor LLC v. Peck*, 147 A.D.3d 689, 691, 49 N.Y.S.3d 35, 37 (1st Dep't 2017) ("The breach of fiduciary duty claim should have been dismissed as duplicative of the breach of contract claim."). The case Appellant cites (*Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 167-68, 521 N.Y.S.2d 672, 675-76 (1st Dep't 1987)) is inapposite. (App. Br. at 17.) That case involved a counterclaim for breach of fiduciary duty based on a consultant's alleged disparagement of his employer's business separate and distinct from contractual claims concerning alleged failures to perform duties under a consultancy agreement.

been in the money by some indeterminate amount. But, such a claim seeks damages that are speculative, and thus unrecoverable, as a matter of law. *See, e.g.*, *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 200 (E.D.N.Y. 2003) ("[T]he Second Circuit has foreclosed speculation about the outcome of litigation in the corporate context."); *In re de Kleinman*, 156 B.R. 131, 140 (Bankr. S.D.N.Y. 1993) ("While the Debtors blithely treat these lawsuits as 'money in the bank' when suggesting their plan, this court cannot be so sanguine and will not approve a plan whose sole source of funding are the speculative proceeds of various lawsuits in which the Debtors have not yet prevailed and whose resolutions do not seem likely in the near future.").

II. THE COMMERCIAL DIVISION CORRECTLY DISMISSED THE THIRD AND FOURTH CAUSES OF ACTION FOR FRAUD AND FRAUD IN THE INDUCEMENT

"[B]undled, bare-boned and conclusory allegations do not establish the basic elements of fraud, namely a 'representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.'" *MP Cool Invs. Ltd.*, 142 A.D.3d at 291, 40 N.Y.S.3d. at *5-6; *see also Eurycleia*

Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 149 (2009).[13]

The Commercial Division found: (i) "no indication that Citi knowingly misrepresented" the facts at issue "nor that Citi had the intent to deceive Elmrock" and (ii) that "even if a misrepresentation had been made, each sophisticated party was in a position to evaluate the information on its own, precluding justifiable reliance." (Dismissal Decision at R. 18.) The Dismissal Decision should be affirmed on those and additional grounds.

A. The Commercial Division Correctly Held That There Was No Actionable Misrepresentation

Appellant's fraud in the inducement theory (Count III) is predicated on alleged statements "where Citi <u>predicted</u> the Plant's expected useful economic life through 2044 by anticipating a grant of a 20-year license extension by the Nuclear Regulatory Commission." (Dismissal Decision at R. 17-18 (emphasis added).) But statements of prediction and expectation such as these are not actionable in fraud. *See Pacnet Network Ltd. v. KDDI Corp.*, 78 A.D.3d 478, 479, 912 N.Y.S.2d 180 (1st Dep't 2010) (statements of "prediction or expectation" will not support a fraud claim); *Naturopathic Labs. Int'l, Inc. v. SSL Ams. Inc.*, 18 A.D.3d 404, 404,

[13] The elements of a cause of action for fraud and fraudulent inducement are substantially the same. *See, e.g.*, *Perrotti v. Becker, Glynn, Melamed & Muffly LLP,* 82 A.D.3d 495, 498, 918 N.Y.S.2d 423, 426 (1st Dep't 2011).

795 N.Y.S.2d 580, 581 (1st Dep't 2005) (statements that "amount to no more than statements of prediction or expectation . . . are not actionable").[14]

Appellant's additional fraud cause of action (Count IV) is equally infirm. This claim turns on Appellant's simple misreading of Entergy's public disclosure to suggest that the residual value of the Plant was $123.273 million greater than the $60 million that it was. The disclosure upon which this accusation is based states:

> The <u>$60 million</u> cash payment represents <u>the purchase price to acquire the undivided interests in the plant</u>. Following the purchase, Entergy Louisiana will also continue to make payments on the lessor debt which remains outstanding. The combination of payments due on the approximately $52 million mortgage bond issued and the debt service on the lessor debt are equal in timing and amount to <u>the remaining lease payments due from the expected closing of the transaction through the remainder of the lease term. . . . . Payments include $7.8 million in July 2016 and $106.3 million in 2017. An additional lease payment of $9.2 million was made in January 2016, prior to the closing of this transaction</u>.

(R. 460 at Ex. 13 (emphasis added).) The additional $123.273 million were "future minimum lease payments" due through 2016 and 2017 under the Facility Leases. (*Id.*). And those payments were excluded from the Elmrock Options which expressly do "<u>not</u> include (i) <u>payments of Basic Rent</u> received with respect to the

[14] Appellant's reliance on *Wyle v. ITT Corp.*, 130 A.D.3d 438, 438-39, 13 N.Y.S.3d 375, 376-77 (1st Dep't 2015) and *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 293, 928 N.Y.S.2d 229, 233 (1st Dep't 2011), is misplaced. In those cases, this Court distinguished a misrepresentation as to a "<u>present</u> fact" from an alleged misrepresentation that concerned "future performance" or "future intent."

period ending on or prior to July 1, 2017." (R. 68, Ex. 2 at § 1 (emphasis added).)[15]

B. The Commercial Division Correctly Held That Justifiable Reliance Was Not Adequately Pleaded

A "sophisticated investor[]" cannot claim "justifiable reliance" if it could have "discovered the underlying condition" through "ordinary intelligence or with reasonable investigation." *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495-96, 815 N.Y.S.2d 547, 548 (1st Dep't 2006); *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 188-89 (1st Dep't 2012) ("sophisticated commercial entity" could not "satisfy the element of justifiable reliance, inasmuch as the undisputed documentary evidence establishes that [the plaintiff] agreed that it was not relying on any advice" from a bank).

Here, the Elmrock Options were sold to investors that were "sophisticated and experienced in lease-related transactions" (R. 60) and Appellant affirmatively represented to Respondents that it "received all the information it considers necessary or appropriate" and "independently evaluated the risks and merits" of the transaction (R. 81, Ex. 2 at § 8(f).)

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[15] Appellant's reliance on *Houbigant Inc. v. Deloitte & Touche, LLP*, 303 A.D.2d 92, 95, 753 N.Y.S.2d 493, 496 (1st Dep't 2003) is misplaced. *Houbigant* involved a fraud claim against an accounting firm that detected "significant deficiencies" set forth in a "private letter" to its client's audit committee that were omitted from the auditor's reporting and were later disclosed to account for an overstatement of its audited financials by $200 million. *Houbigant* has no bearing here.

In any event, Appellant's diligence included its own commissioning of the DAI Analysis which concluded, among other things, that "[a]s of May 1, 2010, the remaining economic useful life of the facility is estimated to be slightly greater than thirty-five years, through December 18, 2044" (R. 323-24 (emphasis added)) and included a "Future Value Table" projecting valuations for Waterford 3 through December 31, 2044. (R. 333.)

Appellant's argument that Citi allegedly withheld "Entergy's position that the undivided interests reverted in 2024" (App. Br. at 20) is baseless. The reversion of the undivided interests in 2024 (as opposed to 2044) was set forth in the Ground Leases that Appellant confirmed it reviewed as a closing condition to the transaction. Moreover, Appellant's claimed reliance on Respondents is belied by its reliance on the DAI Analysis. (R. 73-74 at § 3(a)(ii)(A)-(B).)

The fraud causes of action are not viable because, as a matter of law, justifiable reliance fails. *See, e.g.*, *Sebastian Hldgs., Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 447, 912 N.Y.S.2d 13, 15 (1st Dep't 2010) ("Plaintiff's alleged reliance on defendant's superior knowledge and expertise . . . ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties.").[16]

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[16] None of *Basis Yield Alpha Fund Master v. Morgan Stanley*, 136 A.D.3d 136, 137, 142-43, 23 N.Y.S.3d 50, 52-53 (1st Dep't 2015), *IKB Int'l S.A. v. Morgan Stanley*, 142 A.D.3d 447,

C. The Commercial Division Correctly Held That Fraudulent Intent Was Not Adequately Pleaded

The Complaint's scienter allegations also are insufficient. The Complaint alleged — "on information and belief" — that Citi "knew from its interactions with Entergy that Entergy took the position that, on the day after the expiration of the Ground Leases on December 18, 2024, the undivided interests would vest in Entergy without more." (R. 529 at ¶ 83.) But allegations based on "information and belief" are insufficient to support a fraud claim under CPLR 3211. *See, e.g.*, *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615, 23 N.Y.S.3d 173, 179 (1st Dep't 2015) (affirming grant of motion to dismiss because "[s]tatements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud."), *leave to appeal denied*, 28 N.Y.3d 903 (2016).

Nor were there were any factual allegations in the Complaint that the Respondents knew when the options were executed in 2010 the positions that

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448-49, 36 N.Y.S.3d 452, 454-55 (1st Dep't 2016), *CIFG Assur. N. Am., Inc. v. Goldman, Sachs & Co.*, 106 A.D.3d 437, 437-38, 966 N.Y.S.2d 369, 371 (1st Dep't 2013), *Steinhardt Grp. Inc. v. Citicorp*, 272 A.D.2d 255, 255-57, 708 N.Y.S.2d 91, 92-93 (1st Dep't 2000), *MBIA Ins. Co. v. GMAC Mortg. LLC*, 30 Misc. 3d 856, 862-63, 914 N.Y.S.2d 604, 608-09 (Sup. Ct. N.Y. Cty. 2010), applies here. Each case involved the sale of residential mortgage-backed securities based on allegedly non-public information. *Basis Yield*, 136 A.D.3d at 136; *IKB*, 142 A.D.3d at 448-49; *CIFG*, 106 A.D.3d at 437-38; *Steinhardt*, 272 A.D.2d at 255-57; *MBIA*, 30 Misc. 3d at 862-63. Nor is *Harbinger Capital Partners Master Fund I., Ltd. v. Wachovia Capital Mkts.*, 27 Misc. 3d 1236(A), *3, *8, 910 N.Y.S.2d 762, *2, *7 (Sup. Ct. N.Y. Cty. 2010) applicable. There, the plaintiff did not have access to information the defendant had that allegedly would have revealed the truth.

Entergy would take years later during the disputed appraisal process. In fact, the Commercial Division found the opposite to be true: holding that Appellant "further concedes that the three appraisers retained in 2014 and 2015, more than 4 years after [Appellant] entered into the [Elmrock Options] with Citi, also grappled with the appropriate valuation assumptions of the undivided interest in the Plant." (Dismissal Decision at R. 18.)[17] The Commercial Division correctly held that "there is no indication Citi knowingly misrepresented the expected useful life of the Plant through 2044, nor that Citi had the intent to deceive Elmrock in so stating." (*Id.*)

D. The Complaint Failed to Plead Causation

The Complaint alleges merely that because of Citi's alleged misrepresentations, Appellants purchased the Elmrock Options, resulting in damages consisting of "the difference between the income stream it thought it had purchased and what it has been paid, which is at least $99,636,317.62." (R. 530 at ¶ 86.) Alternatively, the Complaint alleges that "[a]s a result of Citi's material misrepresentations, Elmrock has been damaged by the difference between the true

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[17] Appellant's reliance upon *Aozora Bank, Ltd. v. J.P. Morgan Sec. LLC*, 144 A.D.3d 440, 441, 39 N.Y.S.3d 784, 784 (1st Dep't 2016) where, apart from the "information and belief" allegations, the complaint "had sufficient facts to support the reasonable inference of fraud and scienter" is inapplicable here. Appellant's only allegation that Respondents knew Elmrock's position that the undivided interests would vest with Entergy the day after the expiration of the Ground Leases "at the time it made representations to Elmrock" is based on "information and belief." (R. 529 at ¶ 83.)

value of the Option Property and what Elmrock has been paid, which is at least $99,636,317.62." (R. 531 at ¶ 92.)

The allegation fails because a "[p]laintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Meyercord v. Curry*, 38 A.D.3d 315, 316, 832 N.Y.S.2d 29, 30 (1st Dep't 2007) (quotation omitted and emphasis added).

Rather than allege facts from which to infer that the residual value of Waterford 3 could have exceeded $60 million, the Complaint conceded the Appraisal Decision resulted in a $26 million valuation. (R. 524-25; *see also* R. 414-20.) The settlement: (i) achieved a recovery of more than 130 percent over the Appraisal Decision's valuation; and (ii) reflected a deficiency of more than $10 million Fortress would have collected before the Elmrock Options would have been in the money. (R. 524 at ¶ 54; R. 414-20 at Ex. 7.)

Accordingly, the Complaint failed to plead causation. *See, e.g.*, *Loreley Fin. (Jersey) No. 4 Ltd. v. UBS Ltd.*, 42 Misc. 3d 858, 863, 978 N.Y.S.2d 615, 620 (Sup. Ct. N.Y. Cty. 2013) ("[P]laintiff must plead facts that indicate that the information concealed by the defendants' misrepresentations was the reason the transaction turned out to be a losing one.") (citation omitted) (quotation marks

omitted)), *aff'd in part, appeal dismissed in part*, 123 A.D.3d 413, 998 N.Y.S.2d 172 (1st Dep't 2014).

E. The Fraud Claims Are Barred by New York's "Out-of-Pocket" Rule

The fraud causes of action also failed to allege any "out-of-pocket" loss, *i.e.* an "actual loss," and not the hypothetical benefit of the bargain damages Appellant seeks. *See, e.g.*, *Lama Holding Co. v. Smith Barney Inc*., 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 80 (1996). This Court recently explained that:

> Damages may only properly compensate plaintiffs for "what they lost because of the fraud, not . . . for what they might have gained," and "there can be no recovery of profits which would have been realized in the absence of fraud."

Norcast S.ar.l. v. Castle Harlan, Inc., 147 A.D.3d 666, 667, 48 N.Y.S.3d 95, 97 (1st Dep't 2017) (citing *Lama Holding*, 88 N.Y.2d at 421). In *Norcast*, this Court affirmed the dismissal of fraud claims as "impermissibly speculative" where there was no "suggestion that the agreed price [in a commercial transaction] was unfair, as it was voluntarily accepted by plaintiffs, who had their own financial advisors, as the result of a competitive bidding process and was $20 million higher than the next highest bid." *Id.*

The Complaint's fraud causes of action sought damages of the: (i) "difference between the income stream it thought it had purchased and what it has been paid, which is at least $99,636,317.62" (R. 530 at ¶ 86); and (ii) "difference

between the true value of the Option Property and what Elmrock has been paid, which is at least $99,636,317.62" (R. 531 at ¶ 92). These damages are unavailable as a matter of law because, under New York's "out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud." *Lama Holding*, 88 N.Y.2d at 421.

III. THE COMMERCIAL DIVISION CORRECTLY DISMISSED APPELLANT'S REQUEST FOR PUNITIVE DAMAGES

In dismissing the Complaint's purported separate punitive damages cause of action (Count V), the Commercial Division stated that "[p]unitive damages are available only in those limited circumstances where the conduct is 'morally reprehensible' and of 'such wonton dishonesty as to imply a criminal indifference to civil obligations.'" (Dismissal Decision at R. 19 (quoting *Racanova v. Equit. Life Assur. Soc. of U.S.*, 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339, 343 (1994)).)

That principle (as well as the principle that "punitive damages" are not separate causes of action) was recently recognized by this Court. *See, e.g.*, *Gedula 26 LLC v. Lightstone Acquisitions III LLC*, 150 A.D.3d 583, 584 (1st Dep't 2017) ("The claim for punitive damages should be dismissed, because the complaint does not allege the requisite egregious tortious conduct that is part of a pattern of similar conduct directed at the public generally, and a demand for punitive damages is not a separate cause of action." (citing *Rocanova*, 83 N.Y.2d at 617)).

In an effort to manufacture a public link, the Complaint alleged that Appellant's claims were "consistent with (Citi's) pattern of activity this century against numerous investors in securitized income streams, including investors in residential mortgage-backed securities." (Dismissal Decision at R. 19.) But, as the Commercial Division held, the "alleged 'egregious' conduct by Citi towards Elmrock is not directed at the public generally, and the plaintiff's attempt to link a commercial dispute between two entities to unrelated mortgage-backed securities is unavailing." (*Id.*)

Neither of the cases cited by Appellant (App. Br. at 23-24) supports its position. In *MBIA Ins. Corp. v. Morgan Stanley*, 42 Misc. 3d 1213(A), *7, 984 N.Y.S.2d 633, *9 (Sup. Ct. Westchester Cty. 2011) the court specifically identified the fact that the fraudulent concealment claim survived as the reason why the punitive damages claim could proceed. *MBIA*, 42 Misc. 3d at *7. Similarly, in *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 22 Misc. 3d 1104(A), at *6, 880 N.Y.S.2d 222, *6 (Sup. Ct. N.Y. Cty. 2008), the court emphasized that punitive damages could only be awarded "assuming that Bank Hapoalim proves its fraud claims." *Bank Hapoalim*, 22 Misc. 3d at *6.

Because punitive damages are "generally not available for claims arising from a mere breach of contract," this Court should also uphold the Commercial Division's dismissal of the punitive damages claim. *See, e.g.*, *Fisher Bros. Sales,*

Inc. v. United Trading Co. Desarrollo y Comercio, S.A., 191 A.D.2d 310, 312, 595 N.Y.S.2d 175, 177 (1st Dep't 1993).

CONCLUSION

Respondents respectfully request that the Court affirm the Dismissal Decision.

Dated: New York, New York
August 9, 2017

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