SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT: _____ Justice **PART** 54

Index Number : 652996/2011
BASIS YIELD ALPHA FUND
vs
GOLDMAN SACHS GROUP, INC.
Sequence Number : 001
COMPEL

INDEX NO. _____
MOTION DATE 5/18/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 10-36
Answering Affidavits — Exhibits _____ **No(s).** 44, 48
Replying Affidavits _____ **No(s).** 53

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 10/18/12

_____ **J.S.C.**
SHIRLEY WERNER KORNREICH

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BASIS YIELD ALPHA FUND (MASTER),

Index No.: 652996/2011

Plaintiff,

-against-

DECISION & ORDER

GOLDMAN SACHS GROUP, INC., GOLDMAN SACHS & CO., GOLDMAN SACHS INTERNATIONAL, and GOLDMAN SACHS & PARTNERS AUSTRALIA PTY, LTD.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 001, 002, and 003 are consolidated for disposition.

Defendants Goldman Sachs Group, Inc. (GSG), Goldman Sachs & Co. (GSC), Goldman Sachs International (GSI), and Goldman Sachs & Partners Australia Pty Ltd (GS Australia) (collectively, Goldman) move: (1) for an Order compelling arbitration; (2) to dismiss the complaint; and (3) for an Order staying discovery. Defendants' motions are granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

This action arises from allegedly false and misleading statements made by Goldman to plaintiff Basis Yield Alpha Fund (Master) (BYAFM). The statements led to the sale of a security based upon a collateralized debt obligation (CDO) arising from subprime residential home mortgages and two credit default swaps (CDSs).[1]

[1]A CDO is an investment in a bundle of fixed income securities. The investor in a CDO is betting that the underlying securities will succeed and generate revenue (ex. that homeowners

A. Complaint

As this decision involves a motion to dismiss, the facts recited are taken from the complaint.

BYAFM is an exempted company incorporated with limited liability under the laws of the Cayman Islands. Complaint ¶ 9. BYAFM was the Master Fund into which Basis Yield Alpha Fund, a regulated Cayman Islands Mutual Fund, invested. *Id.* BYAFM was managed by Basis Capital Funds Management Limited (BCFM), which is headquartered in Sydney, Australia. *Id.*

GSG is a Delaware corporation. ¶ 10. GSC is a limited partnership registered as a United Stated broker dealer with its principal office located in New York. ¶ 11. GSI is a company with offices in London and New York and operates in conjunction with GSC and GSG. ¶ 12. GS Australia is a corporation organized under the laws of Australia with offices in Melbourne, Sydney, and New York. ¶ 13.

Between February and April 2007, at GSC's urging, George Maltezos of GS Australia solicited BYAFM to convince it to purchase an interest in a security based upon a CDO arising from subprime residential home mortgages, Point Pleasant 2007-1, Ltd (Point Pleasant). ¶ 45. Goldman was the structuring underwriter and placement agent for Point Pleasant. ¶ 43. Goldman recommended Point Pleasant to BYAFM as an investment that was suitable for

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will make payments on their mortgages instead of defaulting). CDOs are commonly structured with multiple "tranches" with varying levels of risk. The riskier tranches incur the first losses and have a higher rate of return, while the less risky tranches have a lower rate of return because they only incur losses after the liability of the riskier tranches has been exhausted. A CDO-squared is an investment in a bundle of tranches from other CDOs. A CDS is a security that provides insurance on the default of asset-backed securities. A synthetic CDO is a pool of CDSs that can be used to speculate on the performance of a portfolio of securities.

BYAFM's "bond/liquidity" portion of its portfolio, which is supposed to be more liquid than the "equity" portion of its portfolio. ¶ 48. On April 13, 2007, Maltezos addressed BYAFM's concern about the potential returns on Point Pleasant by representing that Point Pleasant's cash flows were "rock solid." ¶ 49. BYAFM alleges that Goldman's representations that Point Pleasant was a good investment were knowingly false because internal Goldman emails demonstrate that Goldman believed that Point Pleasant was a bad investment generally, and, specifically, a bad investment for BYAFM. ¶ 50. BYAFM's core allegation is that Goldman knew that Point Pleasant would decline in value and that Goldman's strategy was to offload Point Pleasant onto its clients to avoid taking a loss. ¶ 3.

On April 17, 2007, BYAFM purchased Point Pleasant securities with a face value of $15 million (with a unit price of $81.72) for $12,258,000. ¶ 51. BYAFM and Goldman entered into a Repurchase Facility under which Goldman could make a margin call if it decreased its mark (unit price) on the Point Pleasant securities. ¶ 52. On April 27, 2007, Goldman made a margin call on BYAFM for $3.2 million, $3.091 million of which was attributed to the Point Pleasant securities. ¶ 54. When BYAFM questioned the margin call, Goldman revised it down to $720,000, with approximately $600,000 attributable to Point Pleasant, reflecting a drop in the unit price of the Point Pleasant securities to $76.72. ¶ 55. After further discussions between Goldman and BYAFM, Goldman further revised the margin call to $35,000 based on the representation that the decrease in the unit price was due to a system error. ¶ 56. Shortly thereafter, Goldman reported that there was no margin call and that the unit price was still at the purchase price level. *Id.* In response to an email on May 21, 2007, in which BYAFM inquired about Goldman's valuation of Point Pleasant, Maltezos wrote "For end April, these were marked at the same level [BYAFM] bought the bonds at, i.e. 81-23 (81.71875%)." ¶ 57. On June 12,

2007, Goldman made another margin call on BYAFM and indicated that the unit price had decreased to $75. ¶ 58. Maltezos told BYAFM that "the 75 mark for end-May is the first adjustment we've made since you bought the bonds." *Id.* BYAFM alleges that Goldman did previously lower its internal mark on the Point Pleasant securities, but withdrew the margin calls to give BYAFM a false sense of security so that Goldman could induce BYAFM to buy more toxic securities that Goldman sought to offload. ¶¶ 54, 57.

After the Point Pleasant transaction, Maltezos began soliciting BYAFM to purchase CDSs that referenced AAA and AA rated securities from a CDO known as Timberwolf 2007-1, Ltd (Timberwolf). ¶ 68. Goldman was the structuring underwriter, placement agent, initial purchaser, and equity investor in Timberwolf. ¶ 60. In March 2007, Goldman and non-party Greywolf Capital Management LP (Greywolf) began to market Timberwolf. *Id.* Goldman represented that the synthetic securities that comprised Timberwolf would consist of single-name CDSs, that the CDSs would name a tranche of a particular CDO as a reference obligation, and that all assets would be purchased from the market. ¶ 62. Goldman designated GSI to act as the intermediary between Timberwolf and the broker-dealers who were the buyers of protection on the reference obligation; thus, GSI would have been the counterparty to Timberwolf in a nominal or intermediary capacity. *Id.* BYAFM alleges that, in fact, Goldman sourced 36% of the synthetic assets from its own books, placing Goldman in a 36% short position on Timberwolf. *Id.* Goldman further represented that Timberwolf's assets and reference securities were selected by Greywolf, an independent third-party collateral manager. ¶ 63. BYAFM alleges that Greywolf was not independent and that Goldman exercised substantial influence and control over all the assets Greywolf selected and retained the absolute right to reject any securities suggested by Greywolf. *Id.*

On March 27, 2007, GSC acquired Timberwolf from its issuer and urged its selling agents to aggressively offer sale interests in Timberwolf. ¶ 64. After Maltezos exchanged emails with John Murphy of BCFM on April 23 and 24, 2007, he provided BCFM with a Pitchbook and Cashflow Analysis for Timberwolf which represented, *inter alia*, that Timberwolf was structured to "generate positive performance for the benefit of both debt and equity investors"; that Goldman would invest in 50% of the equity position in Timberwolf, thereby representing that its interests were aligned with [BYAFM]'s interests; that Timberwolf was structured with "an emphasis on downside risk and an objective of zero loss for CDO debt investments"; and that all of Timberwolf's assets and reference securities were sourced from the market, again representing that their price was established by the market and that they were not from Goldman's own portfolio. ¶¶ 69-71.

BYAFM had concerns about the pricing of the Timberwolf securities due to its ongoing margin call issues with Point Pleasant. ¶¶ 72-73. In a conference call on June 13, 2007, David Lehman of GSC represented that he expected Timberwolf to experience price stability going forward, that Goldman only had one mark for its securities, and that if Goldman had more Point Pleasant securities to trade at a lower price, Goldman would show them to BYAFM. ¶ 74. Based on the above mentioned representations, BYAFM agreed to enter into CDSs worth a total of $80,820,000 that referenced: (1) AAA rated securities from Tranche A2 of Timberwolf at a price of $84.33 for$42,165,000; and (2) AA rated securities from Tranche B of Timberwolf at a price of $77.31 for $38,655,000. ¶ 75. Pursuant to the CDS terms, on June 18, 2007, BYAFM paid GSI a down payment of $11,250,000. ¶ 76. The balance of the purchase price was financed by Goldman. *Id.* As with Point Pleasant, GSI was entitled to make margin calls if it made a downward price revision on Timberwolf. ¶ 77.

On July 3, 2007, Goldman made another margin call on Point Pleasant for $4.4 million, dropping the mark to $50. ¶ 59. On July 4, 2007, Goldman made a Timberwolf margin call for $5,040,000, which BYAFM paid. ¶ 78. On July 11, 2007, Goldman made a second Timberwolf margin call for $5,100,000. ¶ 79. On July 12, 2007, Goldman made a third Timberwolf margin call for $8,190,000. ¶ 80. On July 16, 2007, Goldman made a fourth Timberwolf margin call for $12,400,000. ¶ 81. Goldman also marked down the Point Pleasant securities to $10 on July 16. ¶ 59. On July 17, 2007, Goldman made a fifth Timberwolf margin call for $5,100,000. ¶ 82. BYAFM did not meet the Timberwolf margin calls of July 11, 12, 16, or 17, which totaled more than $30 million. ¶¶ 82, 84. During that time period, Goldman refused to provide data to support its downward adjustments for the marks on Point Pleasant or Timberwolf. ¶ 83.

On July 24, 2007, GSI notified BYAFM that it was in default on Timberwolf. ¶ 84. Goldman closed out BYAFM's Repurchase Facility and took the Point Pleasant securities back onto its books. ¶ 59. In less than three months, BYAFM lost approximately $10,758,000 on Point Pleasant. *Id.* In less than six weeks, BYAFM lost approximately $56,290,000 on Timberwolf. ¶ 86. These losses caused BYAFM to go into provisional liquidation in the Cayman Islands in August 2007 and Official Liquidation in December 2007. ¶ 85. In the summer of 2008, as part of the Official Liquidation of BYAFM, the Official Liquidators distributed $40 million from the BYAFM estate to GSI as payment on claims for margin principal and interest. *Id.*

B. Goldman's Documentary Evidence

In support of its motions, Goldman submitted the agreements that governed the underlying transactions. The transactions were governed by separate confirmations, which incorporate the 2003 ISDA Credit Derivatives Definitions, and the 1992 ISDA Master

Agreement as supplemented by Credit Support Annex. Goldman also submitted an unsigned agreement entitled "Goldman Sachs International General Terms and Conditions" (the GTC).

Goldman contends that in November 2006, BYFAM opened an account with GSI and agreed to the terms of the GTC. Section 2.6 of the GTC provides that "All rights, limitations of liability and obligations of GS in the Agreement are for the benefit of GS and each of its present and future Affiliates." GS is defined as FSA regulated Goldman entities, such as GSI, but would exclude entities such as GSG (which is a U.S. entity and regulated by the U.S. regulators, not the FSA). Affiliates is defined as "any entity controlled, directly or indirectly by GS, any entity that controls, directly or indirectly, GS, or any entity directly or indirectly under common control with GS." This would include the other Goldman co-defendants. Section 27 of the GTC provides that the Affiliates are third party beneficiaries of the GTC and may enforce and rely on the GTC as if they were a party to it. Section 32.1 of the GTC provides that the GTC is governed by English law. Section 32.2 of the GTC provides that "any dispute arising out of or connected with the Agreement, including a dispute as to the validity or existence of the Agreement and/or this Clause 32, shall be referred to and finally be resolved by arbitration in England . . . unless the parties agree otherwise." Goldman's motion to compel arbitration is based on Section 32 of the GTC.

In contrast, while the other documents governing the underlying transaction are also governed by English law, they do not have an arbitration clause. BYAFM denies that it ever entered into the GTC or opened an account with GSI, and contends that the applicable law does not mandate arbitration of the claims in this case.

C. Procedural History

In 2010, BYAFM commenced an action for federal securities fraud and common law

fraud against Goldman in the United States District Court for the Southern District of New York. In an Order dated July 21, 2011, the court dismissed the case on the ground that the underlying transactions were not domestic securities transactions and, therefore, not subject to federal securities laws. *See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 798 FSupp2d 533 (SDNY 2011) (accord *Morrison v National Australia Bank Ltd.*, 130 SCt 2869 (2010)). Pursuant to 28 USC § 1367, the court declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed the case without prejudice. *See Basis Yield*, 798 FSupp2d at 538.

As a result, BYAFM commenced this action on October 27, 2011. BYAFM asserts eight causes of action against Goldman: (1) common law fraud; (2) fraudulent inducement; (3) fraudulent concealment; (4) breach of contract; (5) negligent misrepresentation; (6) breach of the implied covenant of good faith and fair dealing; (7) unjust enrichment; and (8) rescission.

II. Motion Seq. No. 001

A. Arbitration

Goldman moves to compel arbitration, arguing that Section 32 of the GTC is a binding agreement between the parties to arbitrate the claims in this case. At the outset, the Court must determine what law governs the question of arbitrability.

Pursuant to 9 USC § 202, an arbitration agreement between companies incorporated outside of the United States that relates to a commercial transaction is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the Convention). *U.S. Titan, Inc. v Guangzhou Zhen Hua Shipping Co.*, 241 F3d 135, 146 (2d Cir 2001). "In a judicial proceeding to compel arbitration under the [Convention], questions of arbitrability are presumptively to be decided by courts, not the arbitrators themselves. This

presumption can be rebutted only by *clear and unmistakable evidence* from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *The Republic of Iraq v BNP Paribas USA*, 472 FedAppx 11, 12 (2d Cir 2012) (emphasis in original; internal citations and quotation marks omitted). In this case, it is far from clear that the parties intended to arbitrate the underlying claims or if Section 32 of the GTC applies to the Point Pleasant and Timberwolf transactions. Consequently, this Court must determine if this case if subject to arbitration.

Pursuant to Article II, § 2 of the Convention, a dispute is only subject to arbitration if there is a written agreement to arbitrate that is either (1) signed by the parties or (2) "contained in an exchange of letters or telegrams." *Gabriel Capital, L.P. v Caib Investmentbank Aktiengesellschaft*, 28 AD3d 376, 377 (1st Dept 2006).

It is undisputed that the GTC was unsigned. However, Goldman argues that it is enforceable because it was emailed as an attachment to BYAFM in November 2006 in conjunction with a GSI account that was allegedly opened for BYAFM. Assuming it is true that the email was sent and the account was opened, the GTC is still unenforceable because an attachment in a single email does not constitute an "exchange of letters or telegrams." In *Gabriel Capital*, *supra*, at 378, the Appellate Division held that a series of faxes exchanged between the parties in which the parties negotiated the final terms of a signed written agreement that contained an arbitration clause constituted an "exchange of letters or telegrams." Here, in contrast, the GTC was sent in a single email, the parties did not engage in negotiations over the terms of the GTC, and the GTC was never signed. Moreover, Goldman's contention that the parties "operated" under the GTC is unavailing because such conduct does not satisfy the requirements of the Convention, and a mere exchange of forms, without any substantive

discussions over their terms does not constitute an "exchange of letters or telegrams." *Glencore Ltd. v Degussa Engineered Carbons L.P.*, 848 FSupp2d 410, 436 (SDNY 2012) (citing *AGP Industries SA, (PERU) v JPS Elastromerics Corp.*, 511 FSupp2d 212, 215 (D Mass 2007) ("The phrase 'exchange of letters or telegrams' suggests a level of interchange that is not present during a mere exchange of forms.")); *see also Bothell v Hitachi Zosen Corp.*, 97 FSupp2d 1048, 1053 (WD Wash 2000) (denying motion to compel arbitration under Convention where buyers sent purchase orders to seller that attached "General Terms and Conditions" that included mandatory arbitration provision, to which seller never responded). Hence, Goldman's motion to compel arbitration is denied.

B. Forum Non Conveniens

The decision as to forum non conveniens is a matter of discretion, and the party challenging the forum bears the burden of demonstrating inconvenient forum. *Islamic Republic of Iran v Pahlavi,* 62 NY2d 474, 478-79 (1984). Among the factors traditionally considered in determining the issue are: the hardship faced by the defendant in defending in New York; the availability of an alternate forum; and the residence of the parties and the jurisdiction in which the transaction occurred. *Id.* The rule of forum non conveniens is flexible and has as its goal, fairness, justice and convenience. *Id.*

Goldman has not demonstrated that it would suffer an undue hardship by litigating this case in this Court. While the underlying transactions involved international companies, Goldman's headquarters is in this county and many of the relevant Goldman witnesses are located in New York. Also, numerous third-party witnesses, such as Greywolf and the ratings agencies, are headquartered in New York. Although this litigation might be capable of being conducted elsewhere, this Court is a logical venue for this case given that the conduct giving rise

to the underlying claims was allegedly orchestrated and coordinated by Goldman employees who work in New York. Finally, the ruling in the dismissed federal action has no bearing on whether New York is an appropriate forum because the fact that the underlying transactions are not considered domestic securities transactions for the purposes of federal securities laws is based on the ruling of the United States Supreme Court in *Morrison* and has no bearing of the viability of BYAFM's state law claims or the proper venue in which they belong.

C. Failure to State a Claim

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty* Corp., 60 NY3d 491 (2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citing *McGill v Parker*, 179 AD2d 98, 105 (1992)); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.* (citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250 (citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326

(2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

1. Fraud, Fraudulent Inducement, and Fraudulent Concealment

Goldman notes that the choice of law provisions in the agreements governing the underlying transactions may call for the application of English law to BYAFM's fraud claims. However, the parties do not dispute that there is no conflict between the applicable English and New York laws of fraud. *See Elson v Defren*, 283 AD2d 109, 114 (1st Dept 2001) (Court will apply New York law where there is no dispute over conflict of law). To properly plead a cause of action for fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance, and injury. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999). Also, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.*

Goldman argues that its representations were merely expressions of opinion that cannot give rise to a fraud claim and that BYAFM disclaimed reliance on such opinions. Goldman further argues that BYAFM's losses were caused by the collapse of the housing market, not anything Goldman said or did. BYAFM contends that Goldman made both misrepresentations of fact and dishonest expressions of opinion. BYAFM avers that while the collapse of the housing market obviously led to the value of its investments deteriorating, BYAFM's decisions to make those investments were reasonably based on Goldman's representations, and that the negatives outcomes were exactly those contemplated when such representations were made.

There are two categories of representations at issue: representations of fact and expressions of opinion. The representations of fact include Goldman's representations to BYAFM about its internal marks, the manner in which the reference securities were selected,

and Goldman's position as a real counterparty. BYAFM has properly pled all elements of fraud as to these representations with substantial detail. BYAFM alleges that Goldman's false representations during the time period between the Point Pleasant and Timberwolf transactions were material to BYAFM's decision to purchase the Timberwolf securities. BYAFM has properly pled scienter, the requisite intent to defraud, by alleging that Goldman made these false representations to induce BYAFM to purchase the Timberwolf securities for the purpose of avoiding a loss on securities that Goldman believed to be toxic, while also putting itself in a position to short these securities and make more money off them at BYAFM's expense. While it is obviously true that the collapse of the housing market led to BYAFM incurring a loss on the securities, causation has been established because, but for Goldman's representations, BYAFM alleges it would never have purchased the securities and suffered a loss that was foreseeably related to Goldman's representations.

As for the expressions of opinion, Goldman is correct that it had no affirmative duty to opine on the future performance of the Point Pleasant and Timberwolf securities. However, "an opinion may still be actionable if the speaker does not genuinely and reasonably believe it or if it is without a basis in fact." *Abu Dhabi Commercial Bank v Morgan Stanley & Co. Inc.*, 651 FSupp2d 155, 176 (SDNY 2009) (quoting *In re IBM Corp. Sec. Litg.*, 163 F3d 102, 109 (2d Cir 1998)). BYAFM alleges that Goldman expressed a very positive opinion on the quality of the Point Pleasant and Timberwolf securities, when, in fact, Goldman believed that the securities were highly toxic. It also claims that the solicitation and sale of the securities to BYAFM was part of Goldman's corporate strategy to expunge these toxic assets from Goldman's balance sheet. Assuming this is true, the false opinions that Goldman expressed to BYAFM may give

rise to a fraud claim because Goldman did not genuinely or reasonably believe the opinions, yet expressed them to BYAFM for the purpose of inducing it to purchase the securities with the anticipation that BYAFM would suffer a loss.

Finally, Goldman attempts to rely on caselaw holding that written disclaimers saying plaintiff "would not rely on defendants' advice" preclude liability for fraud. *See* Def. Mem., p.20 (citing *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419 (1st Dept 2011)). However, the instant case does not merely involve false representations in offering materials. Rather, Goldman allegedly made numerous and repeated representations to BYAFM in emails and during conferences calls that specifically addressed the concerns at issue in this case. Additionally, Goldman cannot rely on disclaimers in the offering documents to avoid liability for misrepresenting facts in Goldman's exclusive control, such as Goldman's internal marks.

Aside from the specific misrepresentations alleged by BYAFM, BYAFM's claims for fraud, fraudulent inducement, and fraudulent concealment survive this motion to dismiss for the same reasons given by the court in *Dodona I, LLC v Goldman, Sachs & Co.*, 847 FSupp2d 624 (SDNY 2012). In *Dodona*, the court held that allegations that Goldman engaged in a "risk reduction strategy," whereby Goldman sought to purge its balance sheet of assets that had exposure to the subprime mortgage market by unloading such assets onto its clients, sufficed to properly plead causes of action for federal securities fraud and common law fraud. *See id.* at 632-33. Tellingly, the court noted that plaintiff's "theory of securities law violations rests not upon a single decisive action which manifestly demonstrates Goldman's alleged wrongdoing, but on a series of interrelated events which, viewed as a whole, represent the big picture of

fraudulent conduct." *Id.* at 640.

In this case, BYAFM paints a picture that is substantially similar to *Dodona*. Consequently, Goldman's arguments as to why each of its specific representations do not give rise to a fraud claim are inapposite. The gravamen of BYAFM's complaint is that the scheme that Goldman allegedly engaged in is fraudulent on its face. Here, as in *Dodona*, this Court finds that plaintiff has not only adequately pled its fraud causes of action based on the representations and omissions alleged in the complaint, but also for the "big picture of fraudulent conduct" that is alleged as well.

2. Breach of Contract

BYAFM's breach of contract claim relates to Goldman's obligation to have the Timberwolf tranches rated AAA and AA. *See* Complaint ¶¶ 200-206. BYAFM does not dispute that Goldman provided the promised ratings. Instead, BYAFM alleges that Goldman knew that the Timberwolf tranches "were far riskier than securities with AAA or AA ratings." ¶ 203. The Appellate Division has rejected this argument, holding that a promise to provide a specific rating does not constitute a "promise of credit quality." *MBIA*, *supra*, 81 AD3d at 420. Providing the promised rating, as Goldman did, fulfills the contractual obligation. *Id.* Ergo, the breach of contract claim is dismissed.

3. Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable

reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky,* 8 NY3d 144, 148 (2007). "To establish liability for negligent misrepresentation arising out of a commercial transaction, a party must demonstrate that the person making the misrepresentation possessed specialized or unique experience, or the persons involved are in a special relationship of confidence and trust such that reliance on the negligent misrepresentation is justified." *Salesian Socy., Inc. v Nutmeg Partners Ltd.,* 271 AD2d 671, 673 (2d Dept 2000) (citing *Kimmell v Schaefer,* 89 NY2d 257, 263 (1996)). The special relationship is limited to situations involving a "fiduciary relationship or a position of trust or confidence . . . [and][c]ommercial parties acting at arms' length in negotiating a contract are not in a special relationship." *Mitsubishi Power Sys. of Am., Inc. v Babcock & Brown Infrastructure Group US, LLC,* 2010 WL 303492 (Del Ch Ct 2010) (citing *H & R Project Assoc. v City of Syracuse,* 289 AD2d 967 (4th Dept 2001)); *Fleet Bank v Pine Knoll Corp.,* 290 AD2d 792 (3d Dept 2002); *see also HSH Nordbank AG v UBS AG and UBS Sec. LLC,* 2008 WL 4819599 at *5 (Sup Ct, NY County 2008).

Goldman argues that BYAFM cannot maintain a cause of action for negligent misrepresentation because there was no special or fiduciary relationship between the parties. Ordinarily, Goldman would be correct because a claim for negligent misrepresentation does not usually arise from contracts for the sale of securities between sophisticated parties. *See, e.g., Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 (1st Dept 2010). However, in this case, BYAFM alleges that the information that would have revealed that Goldman was making a misrepresentation was in Goldman's exclusive control, such as Goldman's internal marks and the details of the collateral. The questions of fact as to whether BYAFM could or should have known the facts that form the basis for this claim preclude dismissal.

4. Breach of the Implied Covenant of Good Faith and Fair Dealing

There is no question that English law governs the contracts in this case. Goldman correctly argues that under English law, there is no implied covenant of good faith and fair dealing. Def. Mem., p.24 (citing *Medline Industries Inc. v Maersk Medical Ltd.*, 230 FSupp2d 857, 864 (ND Ill 2002) ("It is well established that English case law does not recognize any general implied duty of good faith and fair dealing.")). However, even if Goldman was bound by the duty of good faith and fair dealing, this cause of action is not viable because BYAFM's claims relate to Goldman's pre-contract actions. *See St. Paul Fire and Marine Ins. Co. v Heath Fielding Ind. Broking, Ltd.*, 1993 WL 187778, at *8 (SDNY 1993). The cause of action is dismissed.

5. Unjust Enrichment

Generally, "the 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 NY2d 382, 388 (1987). However, in this case, the causes of action arising from an alleged breach of contract are dismissed, and the remaining claims relate to Goldman's actions before the contracts were entered into. On a motion to dismiss, a plaintiff may maintain a cause of action for unjust enrichment where, as here, there is a viable claim for fraudulent inducement. *See Eric Solstein Productions, Inc. v Rabanne*, 236 AD2d 216 (1st Dept 1997). If BYAFM is ultimately successful on its cause of action for fraudulent inducement and is granted the relief of rescission, it may recover on a cause of action for unjust enrichment. *See id.*

6. Rescission

As discussed in Part II.C.1 and Part II.C.5., *supra*, BYAFM has properly pled a cause of action for fraudulent inducement and may eventually be entitled to rescission. *See Gosmile, Inc. v Levine,* 81 AD3d 77, 82 (1st Dept 2010).

III. Motion Seq. No. 002

GS Australia moves to dismiss for lack of personal jurisdiction.

"A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted. The test for 'doing business' is a 'simple [and] pragmatic one,' which varies in its application depending on the particular facts of each case. The court must be able to say from the facts that the corporation is 'present' in the State 'not occasionally or casually, but with a fair measure of permanence and continuity.'" *Landoil Resources Corp. v Alexander & Alexander Services, Inc.*, 77 NY2d 28, 33-34 (1990) (internal citations omitted).

Jurisdictional discovery is necessary to determine if this Court has personal jurisdiction over GS Australia. BYAFM has made a "sufficient start" in demonstrating that GS Australia does business in New York by submitting evidence that GS Australia represents that it operates in New York on its website and in response to telephone inquiries. *See HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665, 666 (1st Dept 2011) (citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463 (1974)). However, GS Australia contends that BYAFM is confusing GS Australia with other similarly named Goldman entities, such as Goldman Sachs

Australia, Inc., and that GS Australia does not actually operate in or conduct business in New York. This question of fact can easily be resolved through discovery. The Court will set jurisdictional discovery deadlines at a status conference, which is ordered *infra*.

IV. Motion Seq. No. 003

Goldman's motion for a stay of discovery is denied. Accordingly, it is

ORDERED that the motion to compel arbitration by Defendants Goldman Sachs Group, Inc., Goldman Sachs & Co., Goldman Sachs International, and Goldman Sachs & Partners Australia Pty Ltd against plaintiff Basis Yield Alpha Fund (Master) is denied; and it is further

ORDERED that the motion to dismiss by Defendants Goldman Sachs Group, Inc., Goldman Sachs & Co., Goldman Sachs International, and Goldman Sachs & Partners Australia Pty Ltd against plaintiff Basis Yield Alpha Fund (Master) is granted on the causes of action for breach of contract (Count IV) and breach of the implied covenant of good faith and fair dealing (Count VI), and is otherwise denied; and it is further

ORDERED that the motion to dismiss by Goldman Sachs & Partners Australia Pty Ltd against plaintiff Basis Yield Alpha Fund (Master) for lack of personal jurisdiction is denied, and the parties are directed to conduct jurisdictional discovery; and it is further

ORDERED that the motion to stay discovery by Defendants Goldman Sachs Group, Inc., Goldman Sachs & Co., Goldman Sachs International, and Goldman Sachs & Partners Australia Pty Ltd against plaintiff Basis Yield Alpha Fund (Master) is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y., for a status conference on October 30, 2012 at 10:00 in the forenoon.

Dated: October 18, 2012

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH J.S.C.