UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTESA SANPAOLO, S.P.A.,	:	
Plaintiff,	:	
- against -	:	No. 12-cv-2683 (RWS)
CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CRÉDIT AGRICOLE SECURITIES (U.S.A.) INC., THE PUTNAM ADVISORY COMPANY, LLC, MAGNETAR CAPITAL LLC, MAGNETAR CONSTELLATION FUND LP, AND MAGNETAR CAPITAL FUND, LP,	:	**ECF CASE** **Electronically Filed**
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK AND CRÉDIT AGRICOLE SECURITIES (USA) INC. TO DISMISS THE COMPLAINT

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Defendants Crédit Agricole Corporate and Investment Bank and Crédit Agricole Securities (USA) Inc. (together, "CA-CIB") respectfully submit this memorandum of law in support of their motion, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), to dismiss the complaint ("Complaint") filed by Plaintiff Intesa Sanpaolo, S.p.A. ("Intesa") with prejudice.

PRELIMINARY STATEMENT

Intesa, a sophisticated, self-proclaimed leading European financial institution, brings this action in an attempt to capitalize on press reports and cases relating to transactions which did not involve CA-CIB. The core of Intesa's theory appears to be that because certain press reports stated, based on anonymous sources, that certain conduct allegedly occurred in these other transactions, the same conduct must have occurred in the transaction in which Intesa was involved. This widely discredited pleading tactic is not sufficient to support any claim.

In fact, when the hyperbole and generalized allegations relating to *other* CDO arrangers and collateral managers in connection with *other* CDOs are stripped away, it is clear that Intesa has not pled facts sufficient to make out even the basic elements of its fraud claims, let alone pled these claims with the particularity required by Rule 9(b) and the Private Securities Litigation Reform Act ("PSLRA"). The Complaint should be dismissed because:

First, Intesa has not identified any misstatement by CA-CIB in connection with the Pyxis 2006-1 CDO ("Pyxis") on which the Complaint is based. Intesa claims that it was misled concerning the selection and nature of the assets that made up the portfolio underlying Pyxis, but it does not – and cannot – point to even a single asset in the portfolio that failed to meet the very detailed eligibility criteria disclosed in the Pyxis Offering Memorandum. Intesa also claims that it was misled because Defendants Magnetar Capital LLC, Magnetar Constellation Fund, LP, and Magnetar Capital Fund, LP (collectively "Magnetar") allegedly

"hijacked" the collateral selection from Defendant The Putnam Advisory Company, LLC ("Putnam"), which served as the Pyxis collateral manager, but Intesa has not pointed to a single asset that was included in the portfolio without Putnam's exercise of independent judgment. Finally, although Intesa also claims that after the transaction closed, CA-CIB provided inaccurate "market valuations" of certain notes issued by Pyxis, Intesa fails to allege facts indicating that those "valuations" were not as represented.

Second, Intesa also has not pled scienter, failing to plead either motive or conscious misbehavior. Intesa attempts to plead scienter by alleging that CA-CIB's parent company had a goal of expanding its structured finance business, but the Second Circuit has repeatedly held that such general allegations of motive are insufficient. Moreover, Intesa's generalized allegations of motive are internally inconsistent and demolished by its own allegation that CA-CIB had a sizeable CDO business – both before and after the Pyxis transaction – which included only a very small number of deals in which Magnetar invested (*see* Compl. ¶ 40), and by the very strategy document on which Intesa relies for the theory that CA-CIB was looking to expand its business (*see infra* at 19-20). Intesa ignores that the strategy document reveals that, at the relevant time, CA-CIB's parent was the largest shareholder in Intesa and had a goal of developing further business with Intesa. Obviously, CA-CIB had no motive to cause economic harm to an entity in which its parent had a substantial investment and with which it was seeking to expand its business.

Third, Intesa has failed to plead loss causation because it has not pled facts demonstrating that it lost money due to the alleged fraud rather than as a result of the global financial meltdown, which effectively wiped out the CDO business.

Finally, Intesa's claims suffer from a number of additional legal deficiencies also mandating dismissal, including: (a) the Section 10(b) claim is barred by the statutes of repose

and limitations; (b) the transaction at issue is a foreign transaction beyond the reach of the federal securities laws; (c) the conspiracy claim cannot stand in the absence of an underlying tort; and (d) the request for punitive damages must be stricken because the alleged conduct does not involve egregious, morally reprehensible conduct directed at the public generally.

For all these reasons and as set forth below, the Complaint should be dismissed.

BACKGROUND

A. The Transaction

Pyxis was a $1.5 billion cash/synthetic hybrid CDO arranged by CA-CIB in 2006 and managed by Putnam. As alleged in the Complaint, "[a] CDO is a special purpose vehicle that purchases, or assumes the risk of, a portfolio of assets (the 'portfolio')—such as bonds or loans—and issues securities which then make payments to investors based on the income generated by the assets." (Compl. ¶ 29.)[1]

The portfolio of a cash/synthetic hybrid CDO such as Pyxis consists of assets purchased for cash, such as residential mortgage-backed securities ("RMBS"), as well as synthetic assets known as credit default swaps ("CDS") that are intended to replicate the performance of cash assets. To create the synthetic assets, which made up 77% of the Pyxis portfolio, "Pyxis sold protection to counterparties (*i.e.*, agreed to make payments in the event of specified credit events, such as failure by the security to make interest or principal payments) in exchange for premium payments." (Compl. ¶ 54.) By their nature, synthetic assets can only exist if investors can be found who are willing to take the short positions – which Intesa characterizes as a "bet[] against the credit quality" of the assets – to allow the CDO to take the

[1] While the allegations of the Complaint are, solely for purposes of this motion, accepted as true, "'conclusions of law or unwarranted deductions of fact are not admitted.' This principle applies with even greater force in a fraud case governed by the more stringent pleading requirements of Fed. R. Civ. P. 9(b)." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994) (citations omitted); *see also Bell v. Hubbert*, No. 95 Civ. 10456, 2007 WL 60513, *2 (S.D.N.Y. Jan. 8, 2007).

long position. (Compl. ¶¶ 2, 54.) *See also Loreley Fin. (Jersey) No. 7 Ltd. v. Crédit Agricole Corporate & Inv. Bank*, No. 650673/2010, slip op. at 4-5 (Sup. Ct. N.Y. County June 9, 2011).

Pyxis closed on October 3, 2006 and Pyxis ABS CDO 2006-1 Ltd. and/or Pyxis ABS CDO 2006-1 LLC (together, the "Co-Issuers") issued six classes of notes as well as equity in the form of preference shares. (*See* Compl. ¶¶ 57-58.) CA-CIB initially purchased the securities and sold most of them to investors. (*See* Kuck Decl. Ex. A, at i, 1; *see also* Compl. ¶ 58.)[2] Magnetar allegedly was one of those investors, purchasing the Class X Notes and the equity issued by Pyxis, which Intesa characterizes as the riskiest stake in the CDO. (Compl. ¶¶ 43, 58.)

B. Intesa Held Both Long and Short Positions on Pyxis

Intesa is indisputably a sophisticated party, describing itself as "the leading Italian banking group and one of the protagonists in the European financial arena."[3] Intesa was not an "investor" in Pyxis, but rather a swap counterparty that took both long and short synthetic positions on Pyxis notes. Instead of reselling the Class A-1 Pyxis Notes to investors, CA-CIB entered into a CDS with Intesa whereby Intesa "provided protection" (*i.e.*, took a long position) on $180 million of Class A-1 Notes. (Compl. ¶ 1.)[4] Intesa neglects to mention, however, that it

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[2] References to "Kuck Decl. Ex. __" refer to the exhibits to the Declaration of Lea Haber Kuck in Support of Motion to Dismiss the Complaint, dated June 1, 2012. "When presented with a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of and relied on when bringing suit, or *matters of which judicial notice may be taken*." *Naughright v. Weiss*, __ F. Supp. 2d. __, 2012 WL 760185, *4 (S.D.N.Y. Mar. 8, 2012) (emphasis added). A court may also take judicial notice of news articles to establish that such information has been publicly disseminated, s*ee Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406, 424-26 (2d Cir. 2008), and of websites and other publicly available information, *Finn v. Smith Barney*, No. 11-1270-CV, 2012 WL 1003656, *1, 8 n.1 (2d Cir. Mar. 27, 2012).

[3] Intesa Sanpaolo, *About Us*, http://www.bancaintesa.us/about/index.asp (last visited May 30, 2012).

[4] Through this transaction, Intesa obtained the economic benefits of ownership (*i.e.*, ongoing payments) without expending $180 million to purchase the notes. (*See* Compl. ¶ 61.) Intesa was, however, liable up to the $180 million notional amount of the notes upon the occurrence of certain adverse events. (*See id.*)

simultaneously entered into a second swap, in which Intesa *bought protection* (*i.e.*, took a short position) on Class B Pyxis Notes.[5] Intesa characterizes this type of position as "betting against the credit quality" of Pyxis. (Compl. ¶ 2.)

The swaps were governed by an ISDA Master Agreement between the parties and the Schedule thereto. (*See* Kuck Decl. Ex. B.) The Master Agreement states that "[t]he parties intend that they are legally bound by the terms of each Transaction from the moment they agree to those terms (whether orally or otherwise). A Confirmation shall be entered into as soon as practicable . . . ." (*Id.* at § 9(e)(ii); *see also id.*, Schedule at Part 5(a).) According to the Complaint, the parties reached "an understanding that they would enter into a CDS" in September 2006, in advance of the Pyxis closing. (Compl. ¶ 67.) The Confirmation for the Pyxis A-1 swap was sent in April 2007, reflecting a trade date and an effective date of October 3, 2006, the date Pyxis closed. (*See* Compl. ¶67; Kuck Decl. Ex. C.)

C. The Complaint Relies on General News Reports and Anecdotal Accounts Rather Than Specific Facts Relating to Pyxis

In the absence of any evidence to support its claims, Intesa relies solely on news reports that in turn rely on anonymous sources to speculate about Magnetar's general trading strategy, none of which even suggests that CA-CIB and Putnam were involved in executing this alleged strategy in connection with Pyxis. Indeed, while Intesa alleges that CA-CIB and Putnam were involved in a broad, overarching conspiracy to further Magnetar's strategy (*see, e.g.,* Compl. ¶ 104), the article from the website ProPublica on which Intesa relies for this theory lists **28** CDOs in which Magnetar allegedly invested, only **5** of which involved CA-CIB and only **2** of

[5] This short position is reflected in documents that Intesa refers to in the Complaint. (*See* Kuck Decl. Ex. D (email attaching the Term Sheet, referenced at Compl. ¶¶ 63, 107, 137, and reflecting the September 2006 "understanding" referenced at Compl. ¶ 67); *see also* Compl. ¶ 84 ("[CA-CIB] sent Intesa 'spread' valuations for the Pyxis Class A-1 and Class B notes.").) On a motion to dismiss, the Court may consider documents "possessed by or known to the plaintiff and upon which it relied in bringing the suit." *See ATSI Commc'ns Inc. v. Shaar Fund Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *see also Naughright*, 2012 WL 760185, *4.

which were managed by Putnam. (*See* Kuck Decl. Ex. E, at *Timeline*.)

In a further attempt to tar CA-CIB, Intesa makes the specious assertion that this transaction was "materially identical" to the widely reported case involving Goldman Sachs, a hedge fund run by John Paulson, and the ABACUS CDO. (Compl. ¶ 2.) However, this assertion is demonstrably false. In the ABACUS case, Goldman Sachs is alleged to have affirmatively misrepresented that the hedge fund was purchasing the equity in the transaction and thus had an interest in the CDO's success, when in fact the hedge fund was taking *only* a short position on the transaction and therefore would only profit if the CDO failed. *See SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 154 (S.D.N.Y. 2011).[6]

In stark contrast, Intesa alleges here that Magnetar made an equity investment in Pyxis (*i.e.*, took a *long* position). From there, Intesa cites general and anonymous reports of Magnetar's trading strategy to speculate that Magnetar must also have taken a short position on Pyxis, and that its short position must have been larger than its long position, but it offers no factual allegations whatsoever as to whether Magnetar took a short position on the CDO, and if so, the size of that position relative to its long position on Pyxis. (*See*, *e.g.*, Compl. ¶ 48.)

The allegations relating to other cases provide no support for Intesa's claim. *See Janbay v. Canadian Solar, Inc.*, No. 10 Civ. 4430, 2012 WL 1080306, *5 (S.D.N.Y. Mar. 30, 2012) ("Allegations contained in the complaint of an unrelated matter . . . cannot establish the particularized facts necessary to support this securities fraud claim.").

D. The Dispositive Decision in Prior Litigation

The allegations in Intesa's Complaint, while defective, are not new. In 2010, an

[6] Similarly, Intesa seeks to analogize to the SEC's settlement with J.P. Morgan (*see* Compl. ¶ 3), but the SEC alleged in that case that J.P. Morgan knew Magnetar had shorted $600 million (over half) of the notional value of the portfolio and had a long position of only $8.9 million, and nevertheless allowed Magnetar to influence collateral selection. Complaint at 6-9, *SEC v. J.P. Morgan Sec. LLC*, No. 11-CV-04206 (S.D.N.Y. June 21, 2011), ECF No. 1.

investor in Pyxis sued CA-CIB and Putnam in New York Supreme Court. The theory of the complaint as to Pyxis is identical to Intesa's claims in this action; namely, that Putnam "abdicated its role as asset manager of Pyxis, as part of an over-arching fraudulent scheme orchestrated by [CA-CIB] and an aggressive hedge fund, Magnetar" which in turn took short positions against Pyxis's assets. *Loreley Fin.*, slip op. at 6. Indeed, the plaintiffs heavily relied on the very same ProPublica article and other media sources that form the heart of Intesa's Complaint.

On June 9, 2011, Justice Schweitzer granted Putnam's motion to dismiss for failure to plead fraud with particularity,[7] noting that the plaintiffs had relied on general allegations "based on anecdotal print reports citing unidentified or confidential sources," and concluded that "[t]his will not carry the day." *Id.* at 9, 10. He singled out the plaintiffs' heavy reliance on the same ProPublica article on which Intesa so heavily relies as an example of "the deficient nature of the complaint." *Id.* at 10. His reasoning is equally applicable here.

ARGUMENT

I. INTESA FAILS TO PLEAD THE BASIC ELEMENTS OF FRAUD

A. Well-Established Heightened Pleading Standards Apply to Intesa's Claims

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that to survive a motion to dismiss, a plaintiff must allege facts that "raise a right to relief above the speculative level." 550 U.S. 544, 555 (2007). Thus, "a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 188 (2d Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). A claim is plausible "when the plaintiff pleads *factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added).

In addition, because Intesa's claims sound in fraud, they also are subject to the

[7] Before Justice Schweitzer ruled on CA-CIB's motion, the parties agreed to discontinue the case.

heightened pleading requirements of Rule 9(b) and the PSLRA, which are intended to "safeguard[] a defendant's reputation from 'improvident' charges and protect[] against strike suits." *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050, 2010 WL 3790810, *7 (S.D.N.Y. Sept. 28, 2010); *see also ATSI Commc'ns*, 493 F.3d at 99. Here, Intesa has failed to plead facts to make out the most basic elements of a fraud claim,[8] let alone with the requisite particularity.

B. Intesa Cannot Satisfy These Pleading Standards by Relying on News Reports About Other CDO Arrangers and Other Transactions

As the Second Circuit has made clear, speculation in the business press is not sufficient to support a fraud claim. *See Campo v. Sears Holdings Corp.*, 371 F. App'x 212, 215 (2d Cir. 2010); *see also Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1004 (2d Cir. 1988) ("It is not enough to quote press speculation about defendants' motives and press reports of other occasions on which [defendant] assertedly obtained greenmail from other corporate targets."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 308 F. Supp. 2d 249, 262 (S.D.N.Y. 2004) (plaintiff's reliance on news articles discussing similar transactions entered into by defendant's rivals to artificially inflate revenues amounted to "guilt by association" and "more is required to plead securities fraud"). Where news articles are cited in a complaint, they "still must indicate particularized facts about Defendants' conduct in order to support the Plaintiffs' claims." *Miller v. Lazard, Ltd.*, 473 F. Supp. 2d 571, 586 (S.D.N.Y. 2007).

Here, as in the prior Pyxis litigation, Intesa's allegations regarding Magnetar's

[8] To state a claim for securities fraud under Section 10(b), the plaintiff must adequately plead: "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Ashland Inc. v. Morgan Stanley & Co.*, 652 F.3d 333, 337 (2d Cir. 2011) (citation omitted). Under New York law, "[t]o make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury." *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 57 (1999).

involvement in Pyxis rely entirely on news reports and anecdotal accounts, none of which specifically discuss Pyxis. Indeed, Intesa specifically alleges that its basis for this case was an article published by ProPublica on April 9, 2010. (Compl. ¶ 104.) However, as Justice Schweitzer recognized in dismissing the prior Pyxis complaint, ProPublica's article based on anonymous reports is insufficient to make out a fraud claim:

> *ProPublica* . . . relies on anonymous sources to describe Magnetar's CDO trading strategy. Although that article broadly discusses more than 28 CDOs in which Magnetar allegedly invested, it makes no particularized allegations about Pyxis 2006-1 or about Putnam itself. Loreley's assertion that Magnetar colluded with the arranger and collateral manager of Pyxis 2006-1 to cherry-pick unsuitable collateral for that CDO is simply speculation.

Loreley Fin., slip op. at 10. Similarly, none of the other articles cited by Intesa discuss Pyxis or CA-CIB. Rather, they discuss SEC investigations of *other* arrangers, collateral managers and rating agencies in respect of *other* CDO transactions.[9]

Likewise, numerous federal courts have rejected complaints based on generalized allegations of wrongdoing in connection with the financial crisis that are not tied to the particular securities at issue. *See, e.g.*, *Footbridge*, 2010 WL 3790810, *14 (dismissing complaint based on "Countrywide's overall commercial practices"); *id.* at *13, 21; *see also N. J. Carpenters Health Fund v. Novastar Mort., Inc.*, No. 08 Civ. 5310, 2012 WL 1076143, *5 (S.D.N.Y. Mar. 29, 2012) (dismissing complaint under Rule 8(a) because "Plaintiff does not provide details that would tie its claim of loosened underwriting guidelines to the specific loans" underlying the

[9] *See* Compl. ¶ 3 (discussing suit settled by J.P. Morgan, and citing Marian Wang, *Merrill Lynch Investigated for CDO Deal Involving Magnetar*, ProPublica, June 15, 2011 (discussing Merrill Lynch and the Norma CDO); Marian Wang, *SEC Investigating Yet Another Magnetar CDO*, ProPublica, Sept. 15, 2011 (discussing Japanese bank Mizuho and the Tigris CDO); Marian Wang, *In a First, SEC Warns Rating Agency It May Bring Financial Crisis Lawsuit*, ProPublica, Sept. 26, 2011 (discussing Standard & Poor's rating of the Delphinus CDO arranged by Mizuho); Cora Currier, *SEC Warns Top Banker of Charges Over Magnetar Deal*, ProPublica, Feb. 12, 2012 (discussing the Delphinus CDO)) (*see* Kuck Decl. Ex. F for articles); Compl. ¶ 47 (description of Magnetar's strategy by former Goldman Sachs banker); Compl. ¶ 50 (alleged Magnetar e-mail exchange with collateral manager other than Putnam). Intesa also cites a consent order involving collateral manager State Street on an entirely different CDO. (*See* Compl. ¶ 3 (*In re State Street Global Advisors (Carina CDO, Ltd.),* No. 2011-0023 (February 28, 2012)).)

transaction at issue); *Emps.' Ret. Sys. of the Gov't of the Virgin Islands v. Morgan Stanley & Co.*, 814 F. Supp. 2d 344, 351-52 (S.D.N.Y. 2011) (dismissing fraud claims alleging that banks collaborated with rating agencies to produce false ratings where the allegations did not pertain to the CDO at issue).

Without any specific factual basis to support its allegation that Pyxis was designed to further Magnetar's purported trading strategy to the detriment of other investors, and that Magnetar selected inferior assets underlying the Pyxis CDO, Intesa's allegations are insufficient and the Complaint must be dismissed.

C. Intesa Fails to Allege Any Misstatement by CA-CIB

To satisfy the particularity requirement of Rule 9(b) and the PSLRA, a complaint must: "'(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) (citation omitted). Allegations that are "conclusory or unsupported by factual assertions are insufficient." *ATSI Commc'ns*, 493 F.3d at 99. Plaintiffs cannot simply claim that statements "were false and misleading; they must demonstrate with specificity why and how that is so," *Rombach*, 355 F.3d at 174. Intesa has entirely failed to do so. (*See* Compl. ¶¶ 70-99.)

1. Intesa Fails to Allege Any Actionable Pre-Closing Misrepresentation

As a threshold matter, Intesa generally alleges that it exchanged e-mails, documents and oral communications with CA-CIB prior to the Pyxis closing in October 2006 (*see, e.g.,* Compl. ¶¶ 62, 63, 71-77, 80-81, 91, 107), but none of those allegations are specific enough to state a claim. Intesa does not describe any oral statement or e-mail with any particularity, let alone the "who, what, when, where and how" necessary to support a fraud claim. It identifies only a few documents it received – a Pitchbook, a Term Sheet, a target portfolio and

preliminary spreadsheets listing warehoused assets (*see* Compl. ¶¶ 63, 81, 91, 95)[10] – and it does not allege any misstatement in the Master Agreement and Schedule governing the CDS or the Confirmation memorializing the terms of the trade. Indeed, in the transaction documents, Intesa represented that it was *not* relying on any pre-closing representation by CA-CIB.[11] This disclaimer defeats Intesa's claims as a matter of law. *See MBIA Ins. Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 81 A.D.3d 419, 419 (1st Dep't 2011).

Additionally, the Pyxis Pitchbook, Term Sheet and spreadsheets each specifically informed readers that they contained preliminary information and that a final Offering Memorandum "would supersede this information in its entirety." (Kuck Decl. Exs. D, G, I.) The Pitchbook cautioned that "[a]ny decision to invest . . . should be made after reviewing the Offering Memorandum, conducting such investigations as the investor deems necessary and consulting the investor's own legal, accounting, and tax advisors in order to make an independent determination of the suitability and consequences of an investment" and made clear that the investors could request "any additional information they may consider necessary or desirable in making an informed investment decision." (*Id.* Ex. G, at 2.)[12] The Term Sheet and spreadsheets were accompanied by similar disclaimers (*see id.* Exs. D, H, I), and the "target" portfolio, by definition, provided preliminary information.

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[10] Intesa also refers to a "launch e-mail" but does not allege misstatements in that e-mail. (*See* Compl. ¶¶ 72-73.)

[11] As set out in the Confirmation (Kuck Aff. Ex. C, at 1), Intesa agreed to be bound by the 2003 ISDA Credit Derivatives Definitions (Kuck Aff. Ex. O), in which the Buyer (CA-CIB) and the Seller (Intesa) agree that each party is deemed not to have made *any* representations with respect to Pyxis as of the Trade Date – *i.e.*, the October 3, 2006 closing date – on which the other party is relying. (Kuck Aff. Ex. O, at § 9.1.)

[12] It also clearly warned readers that (i) it contained information prepared "solely for informational purposes" and did not constitute an offer to buy or sell any security; (ii) any offer of securities would be made only pursuant to a definitive final offering memorandum which would contain additional information and which would supersede the information in the Pitchbook; (iii) CA-CIB was not making "any representation or warranty, express or implied, as to the accuracy or completeness of the information" contained in the Pitchbook; (iv) the Pitchbook did not "contain all of the information that may be required to evaluate the securities that may be issued" and any investor "should conduct its own independent analysis of the data referred to" in the Pitchbook; and (v) CA-CIB disclaimed any and all liability as to the information in the Pitchbook. (Kuck Decl. Ex. G, at 2.)

The Offering Memorandum likewise warned that "neither [the Pitchbook] nor any information contained therein may be relied upon in connection with a prospective investment in the Offered Securities" and that no person was "authorized" to give any representations aside from those in the Offering Memorandum. (*Id.* Ex. A, at ii, 50.) Consequently, as a matter of law, no investor could reasonably rely on the Pitchbook, Term Sheet, "target" portfolios or other statements outside of the Offering Memorandum. *See, e.g.*, *Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537, 2003 WL 23018888, *2, *14 (S.D.N.Y. Dec. 22, 2003) (investor could not reasonably rely on marketing materials referring to an offering memorandum which also stated that the marketing materials could not be relied upon), *aff'd*, 110 F. App'x 191 (2d Cir. 2004); *In re Dean Witter Managed Futures Ltd. P'ship Litig.*, 282 A.D.2d 271, 271 (1st Dep't 2001) (relying on brokers' statements rather than prospectus was "unjustifiable as a matter of law").

The Offering Memorandum itself stated that it had been prepared by the Co-Issuers and did not contain any representations by CA-CIB. (Kuck Decl. Ex. A, at ii-iii.)[13] Similarly, the sections of the Pitchbook and Offering Memorandum describing the collateral manager's role each stated that "[a]ll information in this section has been supplied herein by [the collateral manager]," and CA-CIB expressly disclaimed responsibility for these sections. (*Id.* Ex. G, at 21; *Id.* Ex. A, at 187; Compl. ¶ 64.) These explicit disclaimers are fatal to Intesa's fraud claims against CA-CIB. *See Emps.' Ret. Sys. of the Gov't of the Virgin Islands*, 814 F. Supp. 2d at 353 (dismissing claim against CDO arranger, stating, "Because the Offering Memorandum

[13] The Offering Memorandum stated that the "Co-Issuers accept responsibility for the information contained in this document," and investors were told that they could only look to the Co-Issuers of the notes, which would be without material assets other than the collateral, to satisfy the notes. (*See* Kuck Decl. Ex. A, at ii-iii.) The Offering Memorandum repeatedly cautioned investors to rely on their own judgment to invest in the CDOs: "IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE CO-ISSUERS AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED." (*See id.* at iii; *see also id.* Ex. D, Term Sheet at 7.)

was not a statement by [the arranger], it cannot, as Plaintiff alleges, constitute a materially false statement by [the arranger] to Plaintiff"); *see also Banco Espirito Santo*, 2003 WL 23018888, *4-5 & nn.1-2, *14.

2. Intesa Fails to Allege Any Misrepresentation Regarding Putnam's Role or Qualifications

Intesa cites a number of statements in the Pitchbook and Offering Memorandum regarding Putnam's qualifications and alleges that CA-CIB and Putnam "emphasized that Putnam would act diligently, independently and in good faith in the interests of Intesa in selecting the assets for the Pyxis portfolio." (Compl. ¶¶ 71-80.) However, Intesa makes no factual allegations to support its assertions that these representations were false. Despite its conclusory allegations that Magnetar "highjacked" the collateral selection process from Putnam, Intesa has not pointed to a single asset that was included in the Pyxis portfolio without the exercise of Putnam's independent judgment. (*See* Compl. ¶¶ 7-8, 51.)[14]

3. Intesa Has No Claim Based on the Composition of the Portfolio

Although Intesa complains that the final portfolio differed from the "target" portfolio (*see* Compl. ¶ 95), conspicuously absent is any allegation that Intesa made any effort to obtain the "final" portfolio, or the portfolio as it existed at closing, which it easily could have compared with the "target" portfolio. In this respect, this case is very similar to *HSH Nordbank AG v. UBS AG*, 941 N.Y.S.2d 59 (1st Dep't 2012), where the court held that the purchaser of CDO notes could not bring fraud claims for failing to disclose information that the purchaser never requested. *See id.* at 68. Dismissing the plaintiff's fraud claims, the court observed that

[14] Intesa alleges generally that "Magnetar insisted in its deals on having a 'veto' right over any asset that might become part of a CDO's reference portfolio" (Compl. ¶ 50), but once again Intesa fails to tie this generalized allegation to Pyxis. Its only support for the existence of such a veto right is that – in an unrelated transaction – Magnetar decided not to invest in that CDO because the collateral manager did not assemble a portfolio to its liking (*see id.*), a decision well within Magnetar's prerogative as a potential investor.

"nowhere does the amended complaint allege that HSH, in the course of the 'several months of due diligence' it allegedly conducted, ever asked UBS – which, after all was acting as a *salesman*, not as HSH's advisor – to produce any alternative analysis of the transaction in its possession." *Id.*; *see also In re Merrill Lynch Auction Rate Sec. Litig.*, __F. Supp. 2d. __, 2012 WL 523553, *18 (S.D.N.Y. Feb. 15, 2012) (dismissing Section 10(b) claims where the sophisticated plaintiff could have discovered the truth through its own due diligence); *Graham Packaging Co. v. Owens-Illinois, Inc.*, 67 A.D.3d 465, 465 (1st Dep't 2009) (sophisticated parties cannot claim fraud where they failed to request information). Likewise, as a sophisticated party, Intesa had "'a duty to exercise ordinary diligence and conduct an independent appraisal of the risk [it was] assuming,'" *HSH Nordbank*, 941 N.Y.S.2d at 66 (citation omitted), and it plainly had the ability to do so. (*See* Compl. ¶ 65 (claiming that Intesa had "performed rigorous due diligence . . . focusing on an analysis of . . . the assets included in the CDO's portfolio"); ¶¶ 68, 97-98 (describing the analysis Intesa performed after it had suffered losses).

Finally, while Intesa makes spurious allegations about the quality of the portfolio, the Complaint lacks any allegation whatsoever that any asset in the portfolio did not comply with the detailed eligibility criteria spanning 40 pages of the Offering Memorandum. (*See* Kuck Decl. Ex. A, at 115-55.) Thus, Intesa has no cause to complain about the portfolio's composition.[15]

[15] Intesa instead attempts to create and rely on new criteria not mentioned in the Offering Memorandum. For example, Intesa attempts to create a new requirement regarding the inclusion of securities in the Pyxis portfolio if they also were constituents of publicly-traded ABX Indices. (*See* Compl. ¶¶ 82, 94.) While the Offering Memorandum *does* specify restrictions on the amount of synthetic securities that *directly* reference the indices (Kuck Decl. Ex. A, at 118, 124), the Offering Memorandum *did not* prohibit the inclusion of particular securities simply because they also were individual components of an index. Similarly, although Intesa cites investments by Pyxis in (i) other CDOs in which Magnetar invested and (ii) assets in which those other CDOs also invested (Compl. ¶¶ 90-93), Intesa does not allege that the inclusion of these assets violates any of the eligibility criteria in the Offering Memorandum. And to the extent Intesa complains that Magnetar CDOs were added to the portfolio post-closing (*see* Compl. ¶¶ 38, 91), this has no bearing on claims against CA-CIB, which completed its role as an arranger at closing, particularly given that the Offering Memorandum made clear under "Risk Factors" that "a significant portion of the Collateral will be acquired by the Issuer after the Closing Date, and, accordingly, the financial performance of the Issuer may be affected by the price and availability of Collateral to be purchased." (Kuck Decl. Ex. A, at 28.)

4. Intesa Fails to Allege Any Misrepresentation As to the Identity of Any Short Counterparty

To the extent Intesa complains that it was unaware of the identity of short counterparties, or that parties wished to "bet[] against" the Pyxis collateral, hybrid CDOs such as Pyxis, holding large amounts of synthetic assets, *by definition* require a CDO to include assets that the short counterparty is willing to "bet against." (Compl. ¶¶ 54, 56.) As Justice Schweitzer noted in the prior Pyxis litigation:

> In sum, the arranger was charged with dealing with both sides of a trade. It had to assemble an asset pool attractive to a purchaser of the CDO's securities while, at the same time, attractive to a short-holder with respect to the same asset pool. The process was transparent. It was the nature of the structure. It is uncontroverted that the plaintiff here who invested in the hybrid or synthetic CDO arranged by [CA-CIB], and referenced in this motion to dismiss, was fully aware of this reality.

Loreley Fin., slip op. at 4-5.

The Offering Memorandum also made clear that investors would have extremely limited information as to the identities of the parties taking short positions on the assets in the portfolio. (*See* Kuck Decl. Ex. A, at 35-36, 49; Compl. ¶ 55.) Indeed, it also specifically disclosed that CA-CIB and Putnam could take short positions on the Pyxis notes and the underlying assets. (Kuck Decl. Ex. A, at 48-49, App. A at 28.) Intesa cannot sufficiently plead a fraud claim where it was on notice that it lacked certain information and proceeded anyway. *See Permasteelisa, S.p.A. v. Lincolnshire Mgmt., Inc.*, 16 A.D.3d 352, 352 (1st Dep't 2005); *Graham Packaging*, 67 A.D.3d at 465.

5. CA-CIB Did Not Misrepresent the Market Value of Any Pyxis Notes

Finally, Intesa alleges that after Pyxis closed, CA-CIB provided it with "*market* valuations" of the Class A-1 Notes (on which it took a long position) and the Class B Notes (on which it took a short position), which CA-CIB allegedly "represented that it generated . . . based on its knowledge of the market from its trading desk for RMBS and CDO securities." (Compl.

¶¶ 83-84 (emphasis added).) But Intesa never alleges that these valuations did not represent good faith *market* valuations of the notes based on information available to CA-CIB's trading desk at the time. Instead, Intesa invokes an apples-to-oranges comparison by claiming that the valuations did not reflect the securities' purported "intrinsic" value, which Intesa claims to have derived years after the fact from complicated modeling of "properties comparable to" those underlying Pyxis's assets. (Compl. ¶¶ 68, 97-98.) Given that CA-CIB did not purport to provide the "intrinsic" value of the securities, Intesa's allegations fail to support any claim that this information constituted a misrepresentation. *See Epirus Capital Mgmt., LLC v. Citigroup Inc.*, No. 09 Civ. 2594, 2010 WL 1779348, *6 (S.D.N.Y. Apr. 29, 2010) (dismissing CDO investors' complaint where claims amounted to a "simpl[e] disagree[ment] with defendants' valuation methods, which does not equate to alleging fraud").

Moreover, Intesa's claims are foreclosed by the document conveying the valuations. Contrary to Intesa's claim that "[t]he valuations that [CA-CIB] provided to Intesa purported to represent the price at which protection on the notes could be purchased" (Compl. ¶ 85), the document clearly stated that the information provided "does not reflect the price at which a sale of the relevant securities could actually be effected" and "does not represent the price at which [CA-CIB] would be willing to purchase, sell, enter into, . . . or settle any securities or transactions." (Kuck Decl. Ex. J.) CA-CIB also stated clearly in the document containing the "valuations" that:

- "The Indication is not necessarily indicative of values carried on [CA-CIB's] books and records. You should not rely upon this information to predict future value or for the maintenance of your own books and records . . . ."
- "You should obtain your own independent professional advice and/or valuation before acting on the enclosed Indication."
- The indication was based on "information provided by you, certain methodologies, market data and assumptions selected by [CA-CIB]. [CA-CIB] did not verify the accuracy of such information and [CA-CIB] makes no representation or warranty as to the accuracy, reliability, completeness or reasonableness of such methods,

market data or assumptions. Use of different methods, market data and/or assumptions may yield substantially different results."

- CA-CIB is "not responsible for any loss or damage arising out of any person's use of or reliance upon the Indication." (*Id.*)

In light of these statements, Intesa could not possibly have believed CA-CIB was providing a representation as to the "intrinsic" value of the notes, whatever that may mean. Notably, Intesa apparently waited until it suffered losses to perform its own "intrinsic" valuation, despite knowing in early 2007 that there already was deterioration in the subprime market (*see* Compl. ¶¶ 68, 86); it cannot now blame CA-CIB for its failure to do so earlier.

Also, where (as here) there is no allegation of an objective standard to assess value,[16] estimations of value are subjective opinions, actionable only where plaintiffs allege with the requisite particularity that defendants either did not believe the opinion when given or that they misrepresented how the opinion was formed. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 111-13 (2d Cir. 2011). Intesa has alleged neither.

Relatedly, Intesa attempts to bootstrap its after-the-fact "intrinsic" valuation into a claim that "the subordination had largely been eaten away by losses" at closing and that as a result, "on day one, Intesa had already suffered embedded losses in the Pyxis Swap of over $70 million." (Compl. ¶ 68.) Intesa's claim that the transaction lacked sufficient subordination misconstrues the Offering Memorandum's statements regarding subordination. The Offering Memorandum describes "subordination" solely as to the order of payments: "No payment of interest on and . . . no payments of principal of any Class of Notes will be made until all accrued and unpaid interest on the Notes of each Class that is Senior to such Class and that remain

[16] Indeed, the Offering Memorandum prominently warned that there was no actual market for the securities issued by the CDO, thus market value was inherently a matter of opinion. (*See* Kuck Decl. Ex. A, at 23.)

outstanding has been paid in full." (Kuck Decl. Ex. A, at 24.)[17] Nowhere does Intesa allege that more junior notes were improperly paid ahead of the Class A-1 Notes. Nor does Intesa allege that the Class A-1 Notes absorbed losses before more junior notes.[18]

D. The Allegations in the Complaint Defeat Any Assertion of Scienter

Intesa's fraud claims also must be dismissed because it has not sufficiently alleged scienter. As the Second Circuit recently noted, it has "'repeatedly required plaintiffs to plead the factual basis which gives rise to a strong inference of fraudulent intent.'" *Landesbank Baden-Wurttemberg v. Goldman Sachs & Co.*, No. 11-4443, 2012 WL 1352590, *1 (2d Cir. Apr. 19, 2012) (citation omitted); *see also Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 194 (2d Cir. 2008) (affirming dismissal of fraud claims involving the sale of ABS, noting that "[w]hile we normally draw reasonable inferences in the non-movant's favor on a motion to dismiss, [the PSLRA] . . . establishes a more stringent rule for inferences involving scienter"). In order to plead a strong inference of fraudulent intent, a plaintiff must allege particularized facts "(1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *ATSI Commc'ns*, 493 F.3d at 99. Intesa has failed to allege facts showing either motive or conscious misbehavior.

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[17] The Offering Memorandum also warned that: "The Collateral is subject to credit, liquidity and interest rate risk . . . . The amount and nature of the collateral . . . have been established to withstand certain assumed deficiencies in payment . . . . If any deficiencies exceed such assumed levels, however, payment of the Notes and the distributions on the Preference Shares could be adversely affected." (Kuck Decl. Ex. A, at 28.)

[18] In *Footbridge*, 2010 WL 3790810, the court rejected similar allegations that plaintiffs "believed that the subordination structure would protect them from losses, but that this was an incorrect perception because 'the collateral underlying the Securitizations was extremely risky and low quality.'" *Id.* at *11 (citation omitted). The court found that plaintiffs had not pled a fraud claim because they did "not allege that defendants made inaccurate representations about the structure of the Securitizations." *Id.*; *see also MBIA Ins. Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 27 Misc. 3d 1233(A), 2010 N.Y. Slip Op. 51027(U), *2, 5 (Sup. Ct. N.Y. County Apr. 9, 2010), *aff'd*, 81 A.D.3d 419 (1st Dep't 2011).

1. Intesa Fails to Plead Motive and Even Contradicts It

As to motive, Intesa's theory – that in order to grow its CDO business, CA-CIB conspired with Magnetar and Putnam to create a CDO that would fail – is both legally deficient and contradicted by Intesa's own allegations. As a matter of law, courts routinely dismiss generalized allegations of profit-seeking (*e.g.*, growing one's business) as insufficient to establish the requisite fraudulent intent because such motives could be attributed to almost any business. *See, e.g.*, *Landesbank*, 2012 WL 1352590, *2 (affirming dismissal where complaint failed to ascribe "any particular motive for committing fraud beyond a general profit motive common to all corporations, which does not suffice"); *Alki Partners, L.P. v. Windhorst*, No. 11-cv-1071, 2012 WL 933979, *2 (2d Cir. Mar. 21, 2012) ("[N]either a desire to earn transactional fees nor a desire to cultivate business relations is sufficient to establish scienter."); *see also Chill v. Gen. Elec. Co.*, 101 F.3d 263, 267-68 (2d Cir. 1996); *Footbridge*, 2010 WL 3790810, *20 ("a general allegation that defendants wanted to originate as many loans as possible in order to increase profits and market share, without more, is insufficient . . . ."); *Cohen v. Stevanovich*, 722 F. Supp. 2d 416, 429 (S.D.N.Y. 2010) ("[A] generalized motive to earn 'profits' is insufficient to allege scienter.").

Moreover, Intesa's motive allegations are defeated by other allegations in the Complaint. Intesa cites a "Strategic Development Plan" by CA-CIB's parent company and hypothesizes that because it allegedly "set an ambitious goal to become one of the world's top five companies in structured credit securitizations," (Compl. ¶¶ 40-41), CA-CIB must have entered into a scheme with Magnetar in which CA-CIB defrauded other investors in order to obtain investments from Magnetar. However, Intesa also alleges that, by mid-2006, CA-CIB was *already* "a prolific underwriter of CDOs collateralized by RMBS, underwriting over $75 billion in structured credit transactions" (Compl. ¶ 39), only $6 billion of which allegedly

involved Magnetar. (Compl. ¶ 49.)

Furthermore, the Strategic Development Plan also reveals that CA-CIB's parent was Intesa's largest shareholder (Kuck Decl. Ex. K, at 92, 94), and underscores CA-CIB's desire to further develop business with Intesa. (*Id.* at 71). It would have been irrational for CA-CIB to attempt to become an industry leader by arranging CDOs designed to lose money or for it to defraud a company in which its parent had a substantial investment and with which it sought to do increased business. As courts have repeatedly held, a fraud claim cannot be maintained where the alleged motive would be "clearly self-defeating, if not irrational." *Dooner v. Keefe, Bruyette & Woods, Inc.*, No. 00 Civ. 572, 2003 WL 135706, *3 (S.D.N.Y. Jan. 17, 2003); *see also Miller*, 473 F. Supp. 2d at 589.

2. Intesa Fails to Plead Conscious Misbehavior

Where, as here, plaintiffs have failed to plead evidence of motive, "'the strength of the circumstantial allegations must be correspondingly greater'" to plead conscious misbehavior or recklessness. *Campo*, 371 F. App'x at 216 (citation omitted). Thus, a plaintiff "must allege a degree of scienter 'approaching a knowledgeable participation in the fraud or a deliberate and conscious disregard of facts' and 'must detail specific contemporaneous data or information known to the defendants that was inconsistent with the representation in question.'" *Janbay*, 2012 WL 1080306, *11 (citation omitted); *see also Dynex Capital*, 531 F.3d at 196; *Cohen*, 722 F. Supp. 2d at 428-29.

Intesa has not alleged *any* particularized facts to show that CA-CIB knew or should have known the facts that it allegedly failed to disclose, so the Complaint lacks a sufficient allegation of scienter. *See Janbay*, 2012 WL 1080306, *3; *In re Aegon N.V. Sec. Litig.*, No. 03 Civ. 0603, 2004 WL 1415973, *16 (S.D.N.Y. June 23, 2004). Intesa contends that Pyxis was "built to fail" (Compl. ¶ 89), but refers only to the type of collateral selected (*see* Compl.

¶¶ 90-95), without alleging any violations of the CDO's collateral eligibility requirements or explaining how CA-CIB should have known the collateral was allegedly inferior. Moreover, Intesa claims the parties engaged in a broad conspiracy to further Magnetar's purported trading strategy (Compl. ¶¶ 44-51; 135-41), but the ProPublica article on which it relies indicates that Pyxis is the *only* CDO involving Magnetar, CA-CIB and Putnam (*see* Kuck Decl. Ex. E). And if there was a "correlation" between assets selected by Putnam for Pyxis and the assets held by other Constellation CDOs (*see* Compl¶ 93), Intesa fails to allege how CA-CIB would have known of the portfolios and collateral selection process of the 23 Constellation CDOs that it did not arrange, and Intesa's complaint that Magnetar CDOs were included post-closing in Pyxis ignores that CA-CIB was not involved with the portfolio post-closing. (*See* Compl. ¶¶ 38, 91.)[19]

E. Intesa Fails to Plead Facts Showing Loss Causation

Intesa also fails to plead facts showing "a causal connection between the material misrepresentations and the loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Intesa's alleged loss coincided with a mortgage industry-wide meltdown and the resulting decline in the value of mortgage-backed securities. Indeed, Intesa admits that by the time Pyxis closed in October 2006, "default rates on subprime mortgages [had begun] to rise" and the market further deteriorated in early 2007. (Compl. ¶¶ 42, 86.) As the Second Circuit has explained:

> [W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases, and a plaintiff's claim fails when it has not adequately ple[ ]d facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events.

Lentell v Merrill Lynch & Co., 396 F.3d 161, 174 (2d Cir. 2005) (quotation marks omitted); *see*

[19] Intesa includes a colorful quote from a CA-CIB bank analyst taken entirely out of context (*see* Compl. ¶ 53), but this allegation is entirely misleading because the bank analyst had no involvement whatsoever in CA-CIB's structured finance business and was speaking generally about "financial creativity" – not with respect to CDOs specifically or to CA-CIB's particular practices – and with the benefit of hindsight *long after* the financial markets had crashed. (*See* Kuck Decl. Ex. L, The Financial Crisis Inquiry Report, January 2011, at 6.)

also Footbridge, 2010 WL 3790810, *22. To avoid dismissal, Intesa must "allege[ ] facts that would allow a factfinder to ascribe some rough proportion of the whole loss to [defendants'] misstatements." *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007).

While Intesa claims that its damages flow from entering into the transaction, (Compl. ¶¶ 114, 139), it fails to draw a causal connection between the alleged misstatements and its alleged damages, or to differentiate between losses caused by the market-wide meltdown and losses allegedly caused by misrepresentations. Indeed, Intesa alleges that more than 45% of the $75 billion in CDOs that CA-CIB arranged had defaulted by December 2008, and that CA-CIB "led the league tables of CDO downgrades" even though less than 10% of the CA-CIB CDOs allegedly involved Magnetar. (Compl. ¶¶ 5, 53.) These allegations of a general failure of CDOs arranged by CA-CIB indicate that losses were caused by broader factors not specific to the Pyxis CDO, or even to the small portion of CA-CIB's CDOs in which Magnetar invested. In these circumstances, Intesa has failed to sufficiently plead loss causation.

II. INTESA'S FEDERAL SECURITIES CLAIM IS TIME-BARRED

Intesa's Section 10(b) claim is untimely under applicable statutes of repose and limitations. The five year statute of repose, *see* 28 U.S.C. § 1658(b), "begins to run from the time that the allegedly fraudulent representations were made." *Boudinot v. Shrader*, No. 09-CV-10163, 2012 WL 489215, *4 (S.D.N.Y. Feb. 15, 2012) (citing *In re J.P. Jeanneret Assocs., Inc.*, 769 F. Supp. 2d 340, 355 (S.D.N.Y. 2011); *Scantek Med., Inc. v. Sabella*, 583 F. Supp. 2d 477, 491 (S.D.N.Y. 2008)); *see also McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011) (Posner, J.); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007).

Where, as here, the Complaint purports to allege multiple misrepresentations, the repose period "begins when the last alleged misrepresentation was made." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, No. 05 Civ. 1898, 2005 WL 2148919, *5, 11

(S.D.N.Y. Sept. 6, 2005) (collecting cases); *In re Beacon Assocs. Litig.*, No. 09 Civ. 777, 2012 WL 1123728, *5 (S.D.N.Y. Apr. 4, 2012) (same). Accordingly, in order for Intesa's claims to be timely, the last misrepresentation alleged in the Complaint must have been made on or after April 6, 2007 (*i.e.*, five years prior to the filing of the Complaint on April 6, 2012). However, the last misrepresentation alleged in the Complaint relates to the market valuations purportedly provided to Intesa in March 2007, more than five years before the commencement of this action.

Further, Intesa's Section 10(b) claim is independently barred by the two year statute of limitations. *See* 28 U.S.C § 1658(b). Intesa filed this lawsuit on April 6, 2012, and for its claim to be timely, Intesa must not have learned of the facts on which it brought its case until after April 6, 2010. Facts are considered discovered for statute of limitations purposes when "a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint." *Pontiac Gen. Emps. Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011).

Intesa claims that it first learned of the "critical facts" necessary to bring its fraud claim on April 9, 2010, when ProPublica published an article that "disclosed *for the first time*" that (i) "Magnetar had been involved in the creation of Pyxis;" (ii) Magnetar put together its first Constellation CDO, Orion, with CA-CIB; and (iii) James Prusko of Magnetar previously worked at Putnam and he played a central role in marketing CDOs for Magnetar. (Compl. ¶ 104.) (emphasis added). However, all of these facts were widely publicly available long before the ProPublica article, and the statute of limitations therefore also bars the claim. (*See, e.g.*, Kuck Decl. Ex. M (Abigail Moses, *Ill. Fund Swallows Big Chunk of Synthetic ABS*, Derivatives Week, Aug. 11, 2006 (discussing Magnetar's stake in Pyxis and Orion and noting that "[m]arket participants speculate the fund is shorting other parts of the capital structure against its long equity positions"); Andrew Leckey, *Fired manager had helped Putnam 'A'*, The Chicago Tribune, Nov. 30, 2003 (discussing that Mr. Prusko recently was fired by Putnam); *Investor of the Year*,

Total Securitization, Mar. 16, 2007 (recognizing Mr. Prusko and Magnetar for CDO activity).)[20]

III. INTESA'S CDS IS A FOREIGN TRANSACTION BEYOND THE SCOPE OF 10(b)

The Supreme Court made clear in *Morrison v. National Australian Bank Ltd.* that Section 10(b) applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities,"130 S. Ct. 2869, 2884 (2010). In the CDS context, this requires analysis of the economic reality of the transaction; a CDS is "the functional equivalent of trading the underlying" securities, and if those securities are listed on a foreign exchange, Section 10(b) does not apply. *See Elliott Assocs. v. Porsche Automobil Holdings SE*, 759 F. Supp. 2d 469, 476 (S.D.N.Y. 2010), *appeal docketed*, No. 11-416 (2d Cir. Jan. 28, 2011).[21] Here, the A-1 Notes underlying the CDS were listed on the Cayman Islands Stock Exchange. (*See* Kuck Decl. Ex. A, at 21-22.) Under *Elliot*, Intesa's 10b-5 claim should be dismissed.

IV. INTESA HAS NOT PLED A CONSPIRACY CAUSE OF ACTION

New York does not recognize civil conspiracy as an independent tort, but rather as a theory under which a plaintiff may establish vicarious liability of co-conspirators for each other's offenses. Intesa's failure to plead fraud also requires dismissal of its conspiracy claim. *See, e.g.*, *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006); *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 610 (S.D.N.Y. 2011).

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[20] *See also*, *e.g.*, Kuck Decl. Ex. N (*Citi Offers Novel ABX CDO*, Derivatives Week, Oct. 27, 2006 (Magnetar "has invested in a slew of CDOs with astronomy-themed names"); N.K. & Abigail Moses, *Magnetar Launches Long/Short Mortgage Fund*, Derivatives Week, Mar. 9, 2007 (noting that Magnetar and other managers may have weathered the recent downturn in the subprime market by buying "the equity of so-called triggerless CDOs, which pay high coupons no matter the capital losses, and [going] short the mezzanine tranche of the same CDOs"); Serena Ng & Carrick Mollenkamp, *A Fund Behind Astronomical Losses*, The Wall Street Journal, Jan. 14, 2008 (discussing Magnetar's hedging strategy and its constellation CDOs, referring to Orion and CA-CIB); Nicoletta Kotsianas, CDO Equity Funds Flex Their Muscle, Derivatives Week, Feb. 2, 2007 (discussing Magnetar and other investors "taking a more activist role in [CDOs] structuring and pricing")).

[21] The Second Circuit addressed *Morrison* in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), but focused on the purchase of penny stocks and did not address the entirely different context of swap agreements. In any event, even under the standard set forth in *Absolute Activist*, Intesa's bald legal conclusion that it became "irrevocably committed to the contract" in New York cannot survive a motion to dismiss. *See id.* at 70 (stating that "transactions took place in the United States" is insufficient).

V. THE PUNITIVE DAMAGES REQUEST MUST BE STRICKEN

Punitive damages are not appropriate here because Intesa has not alleged the type of tortious conduct "aimed at the public generally" that evinces "'a high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *Rocanova v. Equitable Life Assurance Soc'y*, 83 N.Y.2d 603, 613 (1994); *see HSH Nordbank AG*, 941 N.Y.S.2d at 76 (fraud alleged in connection with a CDS did not involve "egregious conduct that was 'part of a pattern of similar conduct directed at the public generally'"); *CIFG Assurance N. Am., Inc. v. Goldman, Sachs & Co.*, No. 652286/2011, 2012 WL 1562718, *16 (N.Y. Sup. Ct. May 9, 2012) (fraud alleged in connection with sale "between sophisticated parties" of mortgage-related assets "did not involve the type of egregious, morally reprehensible tortuous conduct directed at the public generally for which an award of punitive damages is appropriate"). Accordingly, Intesa's request for punitive damages should be stricken.

CONCLUSION

For the foregoing reasons, CA-CIB respectfully requests that the Complaint be dismissed in its entirety with prejudice.

Dated: June 1, 2012
New York, New York

Respectfully submitted,

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