

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THEO BULLMORE, et ano., etc.,

Plaintiffs,

-against-

05 Civ. 10206 (LAK)

BANC OF AMERICA SECURITIES LLC, et al.,

Defendants.
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ORDER

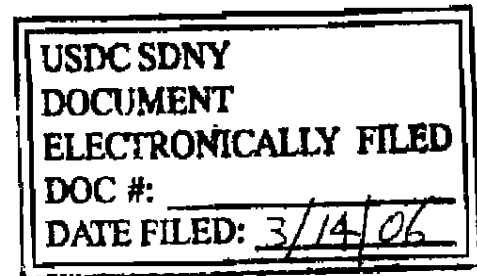
LEWIS A. KAPLAN, *District Judge.*

The motion of Banc of America Securities LLC to dismiss the complaint pursuant to Fed. R. Civ. P. 9(b) and 12(c) is denied in all respects. In so doing, it places enormous reliance on *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC*, 376 F. Supp.2d 385 (S.D.N.Y. 2005), a related case but one involving a different complaint, in which this Court granted in part and denied in part motions to dismiss by several defendants.

The complaint now before the Court differs in significant respects from that at issue in *Fraternity Fund*. Nevertheless, it appears to suffer from at least some of the same defects.¹

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For example, plaintiffs in *Fraternity Fund* alleged that the Beacon Hill Defendants used an improper two-part methodology to value the Funds' positions, the first step being to calculate "hedge-adjusted" prices and then use of computer program that "changed the 'prices of the [collateralized mortgage obligations in [Beacon Hill Master] to adjust the value of the long side portfolio in the opposite direction, but in approximately the same amount, as the change in the value of the hedge.'" *Fraternity Fund Ltd.*, 376 F. Supp.2d at 397. This then allegedly was followed by manual manipulation to inflate the prices in the Funds' portfolios to report positive returns when the Funds actually were losing money. *Id.* The Court rejected that claim as insufficiently particular, noting that "[p]laintiffs do not allege . . . the dates or amounts of the manual adjustments or any other particulars about the manipulation." *Id.* at 397-98. Plaintiffs here make similar allegations. While they have added detail, they arguably have not overcome the problem the Court found with the comparable allegations in *Fraternity Fund*.



Although this case was filed only recently, this action is at an unusually advanced stage. Plaintiffs' counsel represents plaintiffs in other related cases. Plaintiffs have had access to the Liquidator's Report and presumably to a great deal of discovery, as well as the benefit of the Court's rulings on motions to dismiss in the related cases. In consequence, it is not too much to expect them to put their best foot forward in their complaint. Moreover, it would be exceedingly wasteful for the Court to consider the present motion and perhaps to grant it, in whole or in part, with leave to replead, thus probably provoking another round of motion practice.

Accordingly, plaintiffs shall exercise either of two options by filing an appropriate notice with the Clerk on or before March 21, 2006. The first option is that plaintiffs may elect to stand on the present complaint, in which case the Court will decide the pending motion but leave to amend in light of the Court's decision will not be granted. The second option is that plaintiffs may elect to file an amended complaint taking their last, best shot at a pleading. Should they elect to do so, the amended complaint shall be filed on or before March 31, 2006. The pending motion will be denied as moot. Defendants will be free to answer or move with respect to the amended complaint as they see fit.

SO ORDERED.

Dated: March 14, 2006



Lewis A. Kaplan
United States District Judge