SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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SUSAN KOZA,

Plaintiff,

- v -

MUTUAL FUND SERIES TRUST, ALPHACENTRIC ADVISORS LLC, NORTHERN LIGHTS DISTRIBUTORS, LLC, JERRY SZILAGYI, BERT PARISER, TOBIAS CALDWELL, TIBERIU WEISZ, ERIK NAVILOFF, GARRISON POINT CAPITAL, LLC, FREDRICK SCHMIDT

Defendant.

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INDEX NO. 655297/2020

MOTION DATE 08/09/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 83, 84, 85

were read on this motion to/for DISMISSAL.

In this putative class action alleging strict liability and negligence claims against defendants for their alleged violation of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the Securities Act), defendants Mutual Fund Series Trust (the Trust), AlphaCentric Advisors LLC (AlphaCentric), Northern Lights Distributors, LLC (Northern Lights), Jerry Szilagyi, Fredrick Schmidt, Erik Naviloff, Bert Pariser, Tobias Caldwell, and Tiberiu Weisz (collectively, movants) move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the amended complaint in its entirety against them. Plaintiff opposes the motion.

Background

This action concerns the AlphaCentric Income Opportunities Fund (the Fund) which lost about $2 billion in a fire sale to meet a large amount of redemption requests during the coronavirus pandemic (NYSCEF # 8 - amended complaint, ¶¶ 3, 9-10). Plaintiff Susan Koza purchased shares of the Fund during the period of October 14, 2017 through March 22, 2020, inclusive (the Class Period) pursuant to the offering materials at issue (*id.*, ¶¶ 1, 16).[1]

[1] The "offering materials" referenced in this order include the Fund's Registration Statements on July 27, 2018 (the 2018 Registration Statement) and July 26, 2019 (the 2019 Registration Statement), prospectuses filed on August 1, 2018 (the 2018 Prospectus) and

Defendant Trust is the Fund's registrant and an open-end management investment company, and the Fund is one of the "series" of mutual funds within the Trust (*id.*, ¶ 17). Defendant AlphaCentric was retained by the Fund under a Management Agreement to act as the Fund's investment advisor, responsible for managing the investment of the Fund's assets (*id.*, ¶ 19). AlphaCentric retains defendant Garrison Point Capital, LLC (Garrison Point) to serve as the Fund's sub-advisor to select securities for the Fund's investment (*id.*, ¶ 20).[2] Defendant Northern Lights is the Fund's principal underwriter and distributor, also serving as the Trust's agent for the continuous public offering of the Fund's shares (*id.*, ¶ 21).

The Trust is governed by a board of trustees, which includes defendants Jerry Szilagyi, Tobias Caldwell, Tiberiu Weisz and Bert Pariser (collectively, Trustee Defendants) (*id.*, ¶¶ 22-26). Other defendants are Erik Naviloff, the Trust's Treasurer and Principal Financial Officer, and Fredrick Schmidt, the Chief Compliance Officer of the Fund (together, Individual Defendants) (*id.*, ¶¶ 27-28).

In the amended complaint, plaintiff alleges that the Fund's offering materials were false and materially misleading in violation of the Securities Act since the Fund, *inter alia*, portrayed itself as devoted to "capital preservation" while it was heavily invested in highly illiquid, risky and distressed assets such as legacy non-agency residential mortgage-backed securities (RMBS) (*id.*, ¶¶ 2-4, 50-53).

In particular, plaintiff alleges that the Fund's portfolio contained a much higher level of illiquid assets than reported in the offering materials and the 15% limit that the U.S. Securities and Exchange Commission (SEC) requires for mutual funds (*id.*, ¶¶ 35, 39, 53). Next, plaintiff alleges that the Fund made misstatements and omissions concerning the makeup and diversification of its holdings, the Fund's investment objectives, and its management (*id.*, ¶¶ 102-109, 116-117). For instance, while the Fund represented that it held "over 25% of its assets" in RMBS and was primarily invested in "credit card receivables, automobiles, aircraft, student loans, equipment lease and non-agency residential and commercial mortgages," it was in fact over 90% invested in just one type of assets: risky legacy RMBS and CMBS bonds (*id.*, ¶ 106). Plaintiff also alleges that the offering materials misstates the Fund's valuation since the Fund's net asset value (NAV) did not reflect the true value of the illiquid securities held by the Fund and for which the Trust "could (and would) face a no-bid market" (*id.*, ¶¶ 109-114). In addition, plaintiff alleges that the

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August 1, 2019 (the 2019 Prospectus), and published Summary Prospectuses, Statements of Additional Information, Annual Reports, Forms N-Q, and Fact Sheets filed with the SEC during the Class Period (*id.*, ¶¶ 46, 97).

[2] Garrison Point makes a separate motion to dismiss the sole claim for violation of Section 12(a)(2) of the Securities Act against it (motion sequence no. 2), in which Garrison Point states that it joins in and incorporates by reference the arguments made by movants in this motion (NYSCEF #s 20, 29).

offering materials contained material misstatements regarding the redemptions process and the Fund's systems, controls and compliance, as defendants failed to identify the illiquid securities and control the risk (*id.*, ¶¶ 115-122).

Plaintiff further alleges that the risk warnings contained in the offering documents are boilerplate and insufficient to disclose the significant risks to investors. For instance, the Fund identified "Liquidity Risk" as "particular investments of the Fund [that] would be difficult to purchase or sell" that may "possibly [require] the Fund to dispose of other investments at unfavorable times or prices. . . " (*id.*, ¶¶ 123, 125). Other boilerplate risk factors are the "Market Risk" which fund is affected by "domestic economic growth and market conditions, interest rate levels and political events . . ." ; and the "Management Risk" which informs that the portfolio manager may make incorrect judgment and fail to produce the desired results (*id.*, ¶¶ 124, 126). The Fund also disclosed "Non-diversification Risk" that "the portfolio may focus on a limited number of investment and will be subject to potential for volatility than a diversified fund" (*id.*, ¶ 127). Lastly, plaintiff adds that defendants failed to disclose known trends or uncertainties pursuant to SEC Regulation S-K Items 303 and 105 (*id.*, ¶ 129).

According to the amended complaint, in March 2020, the Fund experienced "a sudden, dramatic drop" in the value of its shares as it had to meet the large increase in redemption requests, losing over $1.8 billion of Fund value in a matter of days (*id.*, ¶¶ 9-10, 85-91). Plaintiff alleges that the drop was not caused by the general economic decline but "by Defendants' failure to adhere to the Fund's stated investment objectives and risky amassing of illiquid securities" (*id.*).

Plaintiff commenced the action on October 14, 2020 by filing a summons and complaint (NYSCEF # 1) and subsequently filed an amended complaint on February 26, 2021, adding Garrison Point as defendant[3] (NYSCEF # 8). The amended complaint alleges causes of action (i) against the Trust, Northern Lights, and Individual Defendants for violation of § 11 of the Securities Act, (ii) against all defendants for violation of § 12(a)(2) of the Securities Act, and (iii) against AlphaCentric, Trustee Defendants, and Individual Defendants for violation of § 15 of the Securities Act (*id.*, ¶¶ 136-156).

Movants make the motion to dismiss the amended complaint in its entirety, arguing that (i) plaintiff has not alleged any misrepresentations regarding diversification or liquidity, valuation, redemptions or systems, controls and compliance, (ii) plaintiff fails to allege that defendants are statutory sellers under § 12(a)(2), and (iii) plaintiff's § 15 claim must fail since she fails to state a cause of action under § 11 and § 12.

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[3] Defendant Garrison Point moved to dismiss the complaint against it in MS002; its motion was granted.

In opposition, plaintiff maintains that the amended complaint sufficiently pleads material misstatements and omissions, defendants' statutory seller status, and control liability. In addition, plaintiff requests that the court reject the exhibits submitted by movants in their motion to dismiss since they cannot point to evidence outside the four corners of the complaint.

Discussion

On a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff with "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]). While plaintiff requests that the court reject movant's exhibits as they went outside the four corners of the complaint, under New York law, a defendant can submit evidence in support of a CPLR 3211(a)(7) motion attacking the facial sufficiency of a pleading (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014], citing *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]).

A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted "only if the documentary evidence submitted conclusively establish a defense to the asserted claims as a matter of law" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citations and quotations omitted]). Under these circumstances, "legal conclusions and factual allegations [in the complaint] are flatly contradicted by documentary evidence [such that] they are not presumed to be true or accorded every favorable inference" (*id.* [internal citation and quotation omitted]).

Also, to survive a motion to dismiss, claims brought under Sections 11, 12(a)(2), and 15 of the Securities Act need not meet the heightened pleading standard of CPLR 3016(b) and shall only satisfy CPLR 3013's notice pleading requirements (*see Feinberg v Marathon Patent Group Inc.*, 193 AD3d 568, 570-571 [1st Dept 2021]).

I. Material Misstatements under Sections 11 and 12(a)(2)

Sections 11 and 12(a)(2) of the Securities Act impose liability on certain participants in a registered securities offering when the publicly filed offering materials contain material misstatements or omission (15 USC §§ 77k[a], 77l[a][2]; *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F3d 347, 360 [2d Cir 2010]). "Whether a statement is materially false and misleading is viewed at the time such statement is made—not retroactively, in hindsight" (*In re Matter of Netshoes Sec. Litig.*, 64 Misc 3d 926, 933 [Sup Ct, NY County 2019]). In this action, plaintiff points to several categories of statements about the Fund that contain material misstatements and omissions, including statements regarding the Fund's (1)

liquidity, (2) valuation, (3) composition, (4) nature and investment objectives, and (5) the redemption process, control and compliance.
Statements regarding Liquidity

For each relevant year in the Class Period, the offering materials stated that "[t]he Fund may hold up to 15% of its net assets in illiquid securities," which is consistent with the longstanding guideline from the SEC that mutual funds should not exceed a 15% limitation on illiquid investments (amended complaint, ¶¶ 35, 39, 103). The Fund's Forms N-Q and Annual Reports also listed less than 1% of the Fund's assets as illiquid (*id.*, ¶ 63; *see e.g.* NYSCEF # 44- Form N-Q [total illiquid securities represent 0.11% of net assets as of June 30, 2018]; NYSCEF # 39 - Annual Report [total illiquid securities represent 0.22% of net assets as of March 31, 2019]). Plaintiff alleges that those statements were false and misleading since far more than 15% of the Fund's assets were illiquid (amended complaint, ¶ 106).

Illiquid assets are investments that "the fund reasonably expects cannot be sold or disposed of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment" (17 CFR § 270.22e-4). Under this definition, trading volume is generally indicative of liquidity (17 CFR Parts 210, 270, 274, Release Nos. 33-10233, at 165 ["[h]igh average trading volume also tends to be correlated with greater liquidity"]). On the other hand, as movants point out, the SEC also notes that low trading volume does not necessarily correlate with low liquidity (17 CFR Parts 210. 270, 274 at 167). Other factors, such as capital structure, the credit quality of a particular asset class, bid-ask spreads, and maturity, may also be relevant in assessing the liquidity of those low-trading investments (*id.* at 167-168).

Here, the amended complaint alleges that plaintiff engaged industry experts to perform an analysis, finding that almost 90% of the Fund's portfolio had little to no observable trading activity and mostly were credit-sensitive "Alt-A" and "subprime" legacy non-agency mortgage-backed securities that "do not trade without a significant price haircut" in a stressed environment (amended complaint, ¶¶ 58-59, 64-69, 72-74). Given every favorable inference, the allegations in the amended complaint, including the industry experts' analysis, are sufficient at the pleading stage to support the inference that the Fund's illiquidity statements were inaccurate and materially misleading to reasonable investors (*In re Oppenheimer Rochester Funds Group Sec. Litig.*, 838 F Supp 2d 1148, 1171 [D Colo 2012] [finding a plausible claim for misstating illiquidity since "these assets were illiquid under any definition because they were never traded on an exchange at all and 'in many cases went for months or years without being bought or sought in private transactions'"]).

Movants argue that the lack of trading was a result of the Fund's buy-and-hold strategy that does not evince the securities' illiquidity. While this may explain

why the Fund did not trade its securities, the question remains as to whether the Fund was able to sell the securities in a short time without negatively impacting the prices. In view of the parties' arguments, the court finds that this claim raises questions of fact that are not subject to resolution at the pleading stage (*In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 705 F Supp 2d 86, 93 [D Mass 2010] [denying the motion to dismiss since there is a factual issue concerning the illiquidity level of the assets]; *see also White v Heartland High-Yield Mun. Bond Fund*, 2005 WL 8164901, *2-3 [ED Wis, May 11, 2005] [denying summary judgment where a genuine issue of material fact exists regarding whether the fund's illiquidity exceeded 15%]; *Woodmen of the World Life Ins. Socy. v U.S. Bank Natl. Assn.*, 2012 WL 12884739, *3 [D Neb, Dec. 12, 2012] [issue that whether the illiquid securities exceeded the 15% limit as they were "backed by subprime and Alt-A mortgage-backed securities" is not suitable to resolution in a motion to dismiss"]).

Statements regarding Valuation

Plaintiff also alleges that the statements regarding the valuation of the Fund's portfolio were false and misleading because, contrary to what was represented in the offering materials, the Fund's assets were not "valued at their market value" (amended complaint, ¶¶ 110-112). However, since the Fund disclosed that the Fund's assets might be – and in fact were – valued not at their daily market price but by an independent pricing service relying on other inputs and assumptions, this claim cannot stand.

The Fund's Statements of Additional Information (SAI) represented that, for assets where market quotations are available, their value is determined as market value at the close of trading (NYSCEF #s 38-40 – 2017 SAI at 52, 2018 SAI at 56, 2019 SAI at 53). For certain securities, such as those that "have no available recent market value" and those that "have few outstanding shares and therefore infrequent trades" or "lack [a] consensus on the value," the SAIs stated that "they may be valued on the basis of valuations provided by an independent pricing service when such prices the Trustees believe reflect the fair value of such securities" (*id.*). During the Class Period, the Fund's Forms N-Q disclosed that most of the Fund's assets followed the latter approach and were valued by independent pricing service relying on inputs other than quoted price from regular trading ("Level 2 input") or assumptions about market participants ("Level 3 input") (NYSCEF #s 42, 44, 46 – 2017-2019 Forms N-Q).

The disclosures are also consistent with plaintiff's allegations that the Fund's assets were highly illiquid and had no active trading market. As such, no reasonable investor would assume that the Fund's assets were valued based on daily market trades (*see Fraternity Fund Ltd. v Beacon Hill Asset Mgt. LLC*, 376 F Supp 2d 385, 396 ["valuation of such securities was not a matter of looking up closing prices in the *Wall Street Journal*, but involved the exercise of judgment"]).

That plaintiff challenges the judgment of the independent pricing service is improper for a misstatement claim about the Fund's valuation process and, thus, not actionable.[4] Therefore, the aspect of plaintiff's allegations regarding the Fund's valuation is dismissed.

Statements regarding Composition and Diversification

The offering materials, including the 2018 and 2019 Registration Statements and Prospectuses, described the Fund's investment strategy as one to invest in an array of asset-backed fixed income securities, including "over 25% of its assets in residential mortgage-backed securities (agency and non-agency) and commercial mortgage-backed securities" (NYSCEF # 8, ¶ 105). Plaintiff alleges that these statements were materially misleading as they failed to state that, in fact, the Fund was comprised of over 75% legacy non-agency RMBS and CMBS (*id.*, ¶ 106).

Taken separately and viewed alone, the Fund's statement that it would invest "over 25%" of the assets in RMBS and CMBS could be misleading since a reasonable investor would not expect the portion of these asset types to go over 25% by that much. But the more appropriate question is "whether defendant's representations, taken together and in context, would have misled a reasonable investor about the nature of the securities" (*Olkey v Hyperion 1999 Term Trust, Inc.*, 98 F3d 2, 5 [2d Cir 1996]; *In re ProShares Trust Sec. Litig.*, 728 F3d 96, 105 [2d Cir 2013] ["The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context."]).

Here, the Prospectuses cautioned in its "Principal Investment Strategies" section that "the Fund expects to focus its investment in non-agency residential mortgage backed securities" and that "[t]he Fund does not limit its investments to a particular credit quality and may invest in distressed asset backed securities and other below investment grade securities (commonly referred to as "junk") without limitation" (NYSCEF # 33 – 2018 Prospectus, at 7; NYSCEF # 34 – 2019 Prospectus, at 4). The prospectuses also disclosed its "Non-diversification Risk" that the Fund may focus on a limited number of investments (NYSCEF # 33, at 11). The Fund's Fact Sheets similarly disclosed that the Fund is "non-diversified" and will "primarily focus" its investments in non-agency RMBS and other asset-backed fixed income securities (NYSCEF #'s 52-60 – 2017-2019 Fact Sheets). Moreover, the quarterly Fact Sheets, as part of the offering materials, specified the Fund's portfolio allocation and revealed how much of the Fund was invested in non-agency

[4] Plaintiff also points to a disparity between the Fund's valuation of 43 of its 448 holdings and the valuations from Bloomberg of the same as of March 31, 2020 (amended complaint, ¶ 113). However, the comparison does little to strengthen plaintiff's allegations since the Bloomberg valuations are dated outside the Class Period and it is not established that the 43 holdings are representative of the Fund's entire portfolio.

RMBS (*id.*). Therefore, viewing the disclosures and representations together and in context (*In re ProShares Trust*, 728 F3d at 105), the court finds the offering materials sufficiently and specifically disclosed facts about the Fund's composition and non-diversification so that a reasonable investor would not have been misled (*see I. Meyer Pincus & Associates, P.C. v Oppenheimer & Co., Inc.*, 936 F2d 759, 762 [2d Cir 1991] [dismissing the claim since the prospectus "states exactly the 'fact' that [plaintiff] contends has been covered up"]).

Statements regarding the Nature of the Fund

In connection with the Fund's composition, the amended complaint also asserts that the Fund misstated its nature of prioritizing "capital preservation." (amended complaint, ¶¶ 3-4, 50, 106). This is also not actionable. While the Fund stated once in its 2017 Prospectus that "[i]n selecting securities for investment, Garrison Point prioritizes capital preservation,"[5] it is undisputable that the Fund's investment objective had always been stated as "current income" (NYSCEF # 32-34 - 2017 Prospectus, at 7-8; 2018 Prospectus, at 6-7; 2019 Prospectus, at 3-4). As to the Fund's principal investment strategies, the offering materials consistently stated that "[t]he Fund seeks to achieve its investment objective by primarily investing in asset-back fixed income securities." As discussed in the composition section, plaintiff fails to allege adequately that the representations about the Fund's nature, taken together and in context, were false or misleading (*Olkey v Hyperion 1999 Term Trust, Inc.*, 98 F3d 2, 5 [2d Cir 1996]).

Further, those representations were vague and lacking in specificity and did not describe actionable factual conditions (*Lopez v Ctpartners Exec. Search Inc.*, 173 F Supp 3d 12, 27-28 [SD NY 2016] ["statements that are too vague or general or are merely reflections of corporate puffery are not actionable"]; *cf. Evergreen*, 705 F Supp 2d at 92 [finding the statements about the Fund's objectives actionable since they "laid down the basic ground rules [the Trust] would follow" and were "clarified by the context" and "surrounded by other more specific statements regarding the Fund's objectives"]).

Statement regarding Redemptions Process, Controls and Compliance

Similarly, statements regarding the Fund's redemptions process were vague and not actionable (*Ctpartners*, 173 F Supp 3d at 27-28). The amended complaint does not allege that the Fund failed to "pay redemptions" from a number of payment methods; rather, it seems to allege that defendants failed to pressure-test the assets to "prepare[] for stressed market conditions and increased redemptions" (amended complaint, ¶¶ 121-122). These allegations are not supported by specific allegations,

[5] From 2018, the Fund stopped making that statement or referring to "capital preservation" in its offering materials.

and the Fund did redeem shares when the redemption requests rose steeply at the beginning of the pandemic.

With respect to the Fund's control and compliance, although the court finds the statements regarding 15% illiquidity cap actionable at this stage, plaintiff's mere allegations that "[t]he Fund was clearly not running stress tests because even a basic analysis would have identified the high level of illiquid assets" (*id.*, ¶ 120) are insufficient since they are conclusory and not backed by specific allegations (*In re N.Y. Community Bancorp, Inc., Sec. Litig.*, 448 F Supp 2d 466, 478-479 [ED NY 2006] ["[g]eneralized statements regarding a company's ... risk management amount to no more than inactionable puffery"]).

Items 303 and 105 of SEC Regulation S-K

Lastly, movants seek to dismiss plaintiff's allegations that defendants failed to disclose "known trends or uncertainties" and "significant risks" pursuant to Items 303 and 105 of SEC Regulation S-K (17 CFR § 229.303[a][3][ii], § 229.105) (amended complaint, ¶ 129). The parties dispute whether Items 303 and 105 apply to open-end funds that file Form N-1A instead of Form S-1 such as this Fund. Yet, even if they apply, plaintiff has not sufficiently alleged how the "Principal Risks" section in the Prospectuses failed to describe the alleged risk adequately. Further, as to the "trends" regarding "rapidly increasing redemptions," which were related to the pandemic, plaintiff alleges that the "market started experiencing signs of stress at the beginning of 2020" and "[b]y mid-February it became clearer the impact of the virus was far greater than anticipated" (amended complaint, ¶¶ 79-80). As the Fund experienced losses in mid-March 2020, the approximately one-month rise in redemption requests did not establish a "trend" requiring disclosure (*Blackmoss Invs. Inc. v ACA Capital Holdings, Inc.*, 2010 WL 148617, *10 [SD NY, Jan. 14, 2010] [a two-month period did not constitute a "trend"]; *Kapps v Torch Offshore, Inc*, 379 F3d 207, 218 [5th Cir 2004] [a five-month decline in gas price was not a "trend"]). Accordingly, allegations relating to Items 303 and 105 are dismissed.

II. Statutory Seller under Section 12(a)(2)

Section 12(a)(2) imposes liability under similar circumstances to that of Section 11 against certain "statutory sellers" by means of a prospectus or oral communication (*Litwin v Blackstone Group, L.P.*, 634 F3d 706, 715 [2d Cir 2011]; *Youngers v Virtus Inv. Partners Inc.*, 195 F Supp 3d 499, 520 [SD NY 2016]). A "statutory seller" is someone who passed title or other interest in the security to the buyer for value, or successfully solicited the sale for financial gain (*Pinter v Dahl*, 486 US 622, 644 [1988]; *Youngers*, 195 F Supp 3d at 522). In this action, plaintiff asserts § 12(a)(2) liability against all defendants.

For Individual Defendants, while they served as officers of the Fund and were responsible for disclosure controls and compliances, there is no fact to support plaintiff's conclusory allegation that they solicited the purchase of the securities. For Trustee Defendants, plaintiff additionally alleges that they signed the Fund's Registration Statements and took on various roles in connection with the Fund (amended complaint, ¶¶ 22-25). However, "review[ing] and sign[ing] the registration statements ... is insufficient to establish that they are statutory sellers" (*Chester County Empls. Retirement Fund v Alnylam Pharms., Inc.*, 193 AD3d 638, 639 [1st Dept 2021]; *Citiline Holdings Inc v iStar Fin. Inc.*, 701 F Supp 2d 506, 512 [SD NY 2010] ["an individual's signing a registration statement does not itself suffice as solicitation under Section 12[a][2]"]). Accordingly, in the absence of factual allegations showing that they directly sold the securities or otherwise actively solicited the purchases, the claim must be dismissed against Trustee Defendants and Individual Defendants.

The section 12(a)(2) claim against AlphaCentric and Northern Lights also fails.[6] As the Fund's advisor, AlphaCentric manages the investment of the assets by making investment decisions, retaining a sub-advisor, and providing continuous supervision of the investment portfolio (amended complaint, ¶ 19). Northern Lights served as the Fund's underwriter and national distributor and as the Trust's agent for the continuous public offering of the Fund's shares (*id.*, ¶ 21). Those allegations do not establish that they sold or solicited any sale of the securities (*cf. Perry v Duoyuan Print., Inc*, 2013 WL 4505199, *12 [SD NY, Aug 22, 2013] [finding the underwriters qualified as statutory seller since they "negotiated the IPO price, controlled the contents and dissemination of the Registration Statement and Prospectus, and offered to engage in transaction to stabilize, maintain or otherwise affect the price of the common shares during and after the offering" and in return "received approximately four million dollars"].

Thus, the § 12(a)(2) claim is dismissed against all movants except for the Trust, which is the registrant and issuer for the Fund (*Citiline*, 701 F Supp 2d at 512 ["with respect to [the fund] itself, this argument is foreclosed by SEC Rule 159A, which provides that an issuer is a statutory seller for the purposes of Section 12[a][2] regardless of the form of underwriting"]).

III. Control Person Liability under Section 15

Plaintiff also alleges that AlphaCentric, Trustee Defendants and Individual Defendants violated § 15 of the Securities Act, which imposes liability for individual or entities that control any person liable under § 11 or § 12 (15 USC § 77o; *In re Morgan Stanley*, 592 F3d at 360).

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[6] As sub-advisor Garrison Point separately moves to dismiss on the ground that it is not a statutory seller, the § 12(a)(2) claim against Garrison Point is addressed in the court's decision and order on that motion.

Movants do not dispute that AlphaCentric, Trustee Defendants and Individual Defendants were control person; instead, they move to dismiss on the ground that the § 15 claim cannot stand because plaintiff fails to state a cause of action under § 11 and § 12. However, as discussed above, the aspect of the § 11 claim regarding the Fund's 15% illiquidity representation is actionable and the § 12(a)(2) claim can proceed with respect to the Trust defendant. Thus, the § 15 claim is not dismissed with respect to those parts of the claims.

Conclusion

In view of the above, it is

ORDERED that the branch of movants' motion to dismiss plaintiff's first cause of action for violation of § 11 of the Securities Act is granted, with exception to the claim regarding the Fund's statements about its 15% illiquidity level; it is further

ORDERED that the branch of movant's motion to dismiss plaintiff's second cause of action for violation of § 12(a)(2) of the Securities Act is granted, with exception to defendant Mutual Fund Series Trust regarding the Fund's statements about its 15% illiquidity level; it is further

ORDERED that the branch of movant's motion to dismiss plaintiff's third cause of action for violation of § 15 of the Securities Act is denied in accordance with the court's decision regarding plaintiff's §§ 11 and 12(a)(2) claims as set forth above; it is further

ORDERED that defendants are to serve an answer to the amended complaint within 20 days of the entry of this order; and it is further

ORDERED that a preliminary conference shall be held on April 13, 2023, at 2:30 p.m. via Microsoft Teams with the link to be provided by the court.

2/16/2023
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

655297/2020 KOZA, SUSAN vs. MUTUAL FUND SERIES TRUST
Motion No. 003