

## UBS Nabs \$1B Trial Win In Highland Capital Funds Dispute

By **Dean Seal**

*Law360 (January 30, 2020, 3:45 PM EST)* -- UBS AG has scored a \$1 billion judgment against two defunct affiliates of the bankrupt Highland Capital Management LP in a decade-old contract dispute over the bank's agreement to "warehouse" certain securities that were tanked by the 2008 financial crisis.

In an order made public Wednesday, a New York state judge ruled that the terms of the bank's deals with Highland CDO Opportunity Master Fund LP and Highland Special Opportunities Holding Co. entitled UBS to recover losses on a failed securitization of collateralized loan obligations and credit default swaps.

"Although inartfully drafted, the [agreement] is not ambiguous," Judge Marcy Friedman said of a contract for the credit default swaps securitization. "If the contract is read as a whole, and all of the provisions are given meaning, it is reasonably susceptible to only one meaning — namely, that CDS losses for retained assets may be recovered."

UBS alleged in February 2009 that it lost \$745 million on a pair of deals to purchase and warehouse certain securities and assume certain obligations under credit default swaps for the two Highland-affiliated offshore funds, under the expectation that the funds would eventually purchase the securities and assume those obligations.

In its complaint, UBS asserted breach of contract claims against the funds for allegedly reneging on their promise to post collateral that would mitigate and offset any UBS losses and then trying to siphon away assets to other affiliates. The funds responded with their own counterclaims that UBS had been the one to breach the agreements and unjustly enriched itself by holding onto \$30 million in purchased collateral obligations.

The case saw a variety of settlements and dismissals of related defendants until May 2018, when Judge Friedman decided to bifurcate a trial on the suit's claims, taking up the breach of contract and counterclaims herself in a bench trial and saving a variety of fraud and breach claims — that the Highland funds misled UBS into restructuring an \$86 million debt securities transaction — for a jury trial.

Though the jury trial remains on the docket, the bench trial took place across three weeks in July 2018, and led to an extensive post-trial briefing phase in which the judge combed through the complicated agreements at issue.

She ultimately handed down an order last November finding in UBS' favor on its contract claims against the funds and signed a judgment on Jan. 22 that awarded UBS nearly \$520 million in damages and that same amount in statutory interest, bringing the total award to well over a billion dollars.

The judge's order noted that \$70.5 million of that amount is still in dispute, as the bank received that amount in settlements with other defendants in the case, though the details of those deals remain confidential. Judge Friedman was not, however, swayed by the funds' attempt to offset the damages, and rejected their counterclaims.

No date has been set for the jury trial on UBS' remaining claims, for which it seeks punitive damages.

Latham & Watkins LLP's Andrew Clubok has represented UBS in the matter for years, and said Thursday that the bank was "pleased with the result of the trial and looks forward to final resolution of the matter."

Highland Capital Management is currently in the midst of a Chapter 11 bankruptcy that it filed for back in October, just before a Delaware Chancery Court hearing on summary judgment approval for a \$189 million arbitration award it lost to investors in one of Highland's funds following a multiyear battle. Counsel for Highland in that case said the firm had some \$2.5 billion in assets under management, but that many are not readily converted to cash.

"While this order and its underlying claims are not against Highland Capital Management, L.P. (HCMLP), the potential for a decision on this matter and subsequent proceedings in this case were considered in HCMLP's decision to initiate reorganization proceedings in October," a spokesperson for Highland Capital Management said in a statement to Law360 on Thursday. "HCMLP is seeking to resolve all matters related to this case through the current reorganization process."

UBS is represented by Andrew Clubok, Elizabeth Deeley, Susan Engel, Kuan Huang and Alysha Naik of Latham and Michael Onufer of Kirkland & Ellis LLP.

The Highland funds are represented by Angela J. Somers, Jeffrey E. Gross and Yonah Jaffe of Reid Collins & Tsai LLP.

The case is UBS Securities and UBS AG London Branch v. Highland Capital Management LP et al., index number 650097/2009, in the Supreme Court of the State of New York, County of New York.

--Editing by Abbie Sarfo.