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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PHOENIX LIGHT SF LIMITED, BLUE HERON FUNDING II LTD., BLUE HERON FUNDING V LTD., BLUE HERON FUNDING VI LTD., BLUE HERON FUNDING VII LTD., BLUE HERON FUNDING IX LTD., SILVER ELMS CDO PLC, SILVER ELMS CDO II LIMITED and KLEROS PREFERRED FUNDING V PLC,

Plaintiffs,

-against-

J.P. MORGAN SECURITIES LLC, GOLDMAN SACHS & CO., CREDIT SUISSE SECURITIES (USA) LLC, MORGAN STANLEY, RBS SECURITIES, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, EMC MORTGAGE LLC, J.P. MORGAN MORTGAGE ACQUISITION CORP., CHASE HOME FINANCE LLC, STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., CHASE MORTGAGE FINANCE CORPORATION, J.P. MORGAN ACCEPTANCE CORPORATION I, BEAR STEARNS ASSET BACKED SECURITIES I LLC, JPMORGAN CHASE & CO., THE BEAR STEARNS COMPANIES LLC, GOLDMAN SACHS MORTGAGE COMPANY, GS MORTGAGE SECURITIES CORP., THE GOLDMAN SACHS GROUP, INC., DLJ MORTGAGE CAPITAL, INC., CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., ASSET BACKED SECURITIES CORP., CREDIT SUISSE AG, MORGAN STANLEY & CO. LLC, MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, MORGAN STANLEY ABS CAPITAL I, INC., SAXON CAPITAL, INC., SAXON FUNDING MANAGEMENT LLC, SAXON ASSET SECURITIES COMPANY, MORGAN STANLEY CAPITAL I INC., GREENWICH CAPITAL FINANCIAL

Motion Sequence No. __

Index No. 651755/2012
Part 53 (Ramos, J.)

Oral Argument Requested

PRODUCTS, INC., RBS ACCEPTANCE INC., FINANCIAL ASSET SECURITIES CORP., THE ROYAL BANK OF SCOTLAND GROUP PLC, MERRILL LYNCH MORTGAGE LENDING, INC., FIRST FRANKLIN FINANCIAL CORPORATION, MERRILL LYNCH MORTGAGE INVESTORS, INC. and MERRILL LYNCH & CO.,

Defendants.

JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

December 14, 2012

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EXPLANATION OF CITATION FORMS

The following citation forms are used in this memorandum:

- References to numbered paragraphs refer to the October 5, 2012 Complaint in this matter (the "Complaint") unless otherwise stated.

- Exhibit [] to Declaration of Daniel Slifkin In Support of Defendants' Motion to Dismiss to the Complaint ("Ex. []")

- Appendix [] to the Joint Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint ("Appendix []")

- Residential mortgage-backed securities ("RMBS")

- References to Prospectus Supplements will be in the following format: [Offering name] at [page number]. For example, JPALT 2006-A7 at S-38 refers to the 38th page of the Prospectus Supplement for that particular Offering.

- JPMorgan Chase & Co., The Bear Stearns Companies LLC, J.P. Morgan Mortgage Acquisition Corp., Chase Home Finance LLC, EMC Mortgage LLC, J.P. Morgan Acceptance Corporation I, Chase Mortgage Finance Corporation, Bear Stearns Asset Backed Securities I LLC, Structured Asset Mortgage Investments II Inc., and J.P. Morgan Securities LLC (together, the "JPMorgan Defendants")

- The Goldman Sachs Group, Inc., Goldman, Sachs & Co., Goldman Sachs Mortgage Company, and GS Mortgage Securities Corp. (together, the "Goldman Sachs Defendants")

- RBS Securities Inc., RBS Financial Products Inc., RBS Acceptance Inc., The Royal Bank of Scotland Group plc, and Financial Asset Securities Corp. (together, the "RBS Defendants")

- Morgan Stanley, Morgan Stanley & Co. LLC, Morgan Stanley Mortgage Capital Holdings LLC, Morgan Stanley ABS Capital I Inc., Morgan Capital I Inc., Saxon Capital, Inc., Saxon Funding Management LLC, and Saxon Asset Securities Company (together, the "Morgan Stanley Defendants")

- Merrill Lynch, Pierce, Fenner & Smith Incorporated, Merrill Lynch Mortgage Lending, Inc., First Franklin Financial Corporation, Merrill Lynch Mortgage Investors, Inc., and Merrill Lynch & Co., Inc. (together, the "Merrill Lynch Defendants")

- Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., Credit Suisse First Boston Mortgage Securities Corp., Asset Backed Securities Corp., and Credit Suisse AG (together, the "Credit Suisse Defendants")

- WestLB AG ("WestLB")

- Phoenix Light SF Limited ("Phoenix Light")

- Harrier Finance Ltd. ("Harrier")
- Greyhawk Funding LLC ("Greyhawk")
- Kestrel Funding PLC. ("Kestrel")
- Silver Elms CDO PLC ("Silver Elms")
- Silver Elms II CDO PLC ("Silver Elms II")
- Kleros Preferred Funding V PLC ("Kleros")
- Blue Heron Funding [] Ltd. ("Blue Heron []"). Blue Heron II, III, IV, V, VI, VII and IX are referred to collectively as the "Blue Herons".
- Phoenix Light SF Limited v. Ace Securities Corp., Case No. 650422/2012 (Kornreich, J.) ("Deutsche Bank")

PRELIMINARY STATEMENT

At the height of the housing bubble, and with the benefit of extensive disclosures detailing the associated risks, WestLB—a highly sophisticated German bank—made an informed decision to invest billions of dollars in United States RMBS so that it could repackage those securities into complex investments and sell them to other, equally sophisticated, investors. This action is Plaintiffs' attempt to shift onto Defendants the risks that WestLB chose to take on.

Between 2005 and 2007, Special Purpose Vehicles ("SPVs") created and controlled by WestLB—each a quintessential sophisticated investor—purchased over $2.79 billion of certificates (the "Certificates") issued in 163 RMBS offerings (the "Offerings"). During the global financial crisis in 2007, those SPVs suffered substantial losses, leading to German government bailouts and the creation of Plaintiff Phoenix Light to effect a "comprehensive ring-fencing of [WestLB's] risks . . . ."[1] Now, four years after the collapse of their investment strategy and the establishment of the Phoenix Light risk shield, Plaintiffs belatedly bring this suit claiming that they did not understand the nature and risks of the investments that they were purchasing and repackaging for sale to others. In their 522-page Complaint (the "Complaint"), Plaintiffs assert claims against six separate sets of affiliated financial institutions: the JPMorgan Defendants, Goldman Sachs Defendants, Credit Suisse Defendants, RBS Defendants, Morgan Stanley Defendants and Merrill Lynch Defendants (collectively, "Defendants")[2], all of which purportedly simultaneously and independently perpetrated a "massive, systematic fraudulent scheme" on Plaintiffs. (¶4.)

For the reasons set forth below, each of Plaintiffs' claims fails and should be dismissed pursuant to Rules 3016(b) and 3211(a) of the New York Civil Practice Law and Rules.

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[1] Ex. A, WestLB AG, Single-Entity Accounts 2008, at 6.

[2] Plaintiffs are asserting nearly identical claims against Deutsche Bank (Case No. 650422/2012) and Bank of America (Case No. 653431/2012) in two cases pending before this Court.

First, Plaintiffs have not adequately alleged standing. Plaintiffs allege that they bring their claims as assignees or transferees of various nonparties and unspecified "agents", but their vague allegations do not identify or describe any of the purported assignments on which their claims are premised. Those allegations are insufficient to demonstrate that Plaintiffs are entitled to seek the relief requested. (Part I.)

Second, Plaintiffs' claims are barred by the statute of limitations. Pursuant to New York's borrowing statute, Plaintiffs' fraud claims are subject to the three-year limitations period provided by German law. That limitations period expired at the end of 2011, at the latest—more than three years after Plaintiffs had notice of the facts purportedly giving rise to their fraud claims, and five months before Plaintiffs filed their initial pleading. (Part II.)

Third, Plaintiffs have failed adequately to allege the elements of their fraud-based claims. Plaintiffs have failed to identify any actionable misrepresentation upon which they justifiably relied. According to the Complaint, Plaintiffs made their purchases before the bulk of the prospectus supplements containing the alleged misrepresentations were even created or filed, and, as some of the most sophisticated investors in the world, Plaintiffs had an affirmative duty to conduct an independent investigation into the risks associated with their investments, all of which were disclosed and/or were the subject of widespread public scrutiny and discussion throughout the period in which Plaintiffs made their investments. (Parts III.A-B.)

Plaintiffs' allegations also fall well short of the particularized pleading required to state a claim for fraud under N.Y. C.P.L.R. § 3016(b). Although Plaintiffs claim to have been defrauded with respect to 163 separate Offerings as a result of misrepresentations made by Defendants about the loans backing those Offerings, Plaintiffs fail to offer a single non-conclusory allegation that relates specifically to those particular Offerings or the underlying

loans. Rather, the Complaint consists only of generalizations about the failures of the mortgage industry and conclusory assertions about purportedly unsound origination and securitization practices by various Defendants and certain non-party affiliates of Defendants. Plaintiffs are not relieved of their obligation to plead fraud with particularity merely because they have chosen to bring suit on a very large number of Offerings sponsored or underwritten by six distinct groups of Defendants and backed by loans made by scores of different originators. (Part III.C.)

Plaintiffs have also failed adequately to plead scienter. The allegation that Defendants occasionally disagreed with third-party due diligence vendors' opinions regarding compliance of loans with a set of underwriting guidelines misconstrues the due diligence process and, in any event, does not establish a strong inference of fraudulent intent with respect to the Offerings. Moreover, Plaintiffs' allegations regarding Defendants' alleged "close relationships" with non-party originators are insufficient to establish Defendants' knowledge of any particular facts rendering the statements in the Offering Documents false and misleading. (Part III.D.)

In addition, Plaintiffs fail to allege that any of their losses were proximately caused by the alleged misstatements and omissions as opposed to, as WestLB itself has termed it, "the worst economic crisis since the Great Depression".[3] (Part III.E.)

Fourth, Plaintiffs' negligent misrepresentation claim fails because Plaintiffs do not adequately allege a "special or privity-like relationship" with Defendants. (Part IV.)

Finally, Plaintiffs fail to state a claim for rescission because they fail to allege the existence of a mutual, material mistake at the time the parties entered into the contracts. (Part V.)

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[3]Brief for WestLB, Justinian Capital SPC v. WestLB AG, No. 600975/2010 (SWK), Dkt. 24 at 7 (N.Y. Sup. Ct. Jan. 10, 2011).

BACKGROUND

Plaintiff Phoenix Light sues in its purported capacity as assignee of the claims of WestLB, Harrier, Greyhawk, Kestrel, Blue Heron III and Blue Heron IV. (¶¶23-24.)[4] The remaining Plaintiffs—Silver Elms, Silver Elms II, Kleros, and Blue Heron Funding II, V, VI, VII, IX—sue as purported assignees of claims held by unidentified "external agents" and "professional investors". (¶¶25-32.) Plaintiffs allege that WestLB is incorporated in Germany; Harrier and the Blue Herons in the Cayman Islands; Greyhawk in Delaware; and Kestrel, Silver Elms, Silver Elms II and Kleros in Ireland. (¶¶23-32.)

The Certificates were issued in 163 separate securitizations and are backed by loans issued by numerous non-party originators (the "Originators"). The Complaint alleges that the Certificates were purchased between February 24, 2005, and September 25, 2007, and that Defendants made fraudulent misrepresentations or omissions on which Plaintiffs relied regarding (i) compliance with applicable underwriting guidelines (¶¶128-30); (ii) loan-to-value ("LTV") ratios (¶¶765-81); (iii) owner occupancy rates (¶¶782-94); (iv) credit ratings (¶¶795-813); (v) the nature of the investments, as purportedly demonstrated by the fact that certain Defendants had "bet the Certificates would decline in value" (¶¶814-23); and (vi) transfer of title (¶¶824-46). The Offering Documents for the securitizations at issue described the Certificates, summarized data provided by the Originators about the underlying loans, and summarized the applicable loan underwriting guidelines. As each Offering typically was supported by thousands of loans,

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[4] Allegations in the Complaint, if well pleaded, are assumed to be true only for the purpose of this motion to dismiss, and only to the extent that they are not inconsistent with judicially noticeable facts. See Gomez-Jimenez v. New York Law School, 943 N.Y.S.2d 834, 846 n.8 (N.Y. Sup. Ct. 2012) (taking judicial notice of publicly available articles in deciding motion to dismiss); Grebow v. City of New York, 661 N.Y.S.2d 441, 445 (N.Y. Sup. Ct. 1997) ("The court may take judicial notice of newspaper publications"); In re Pfizer Inc. Sec. Litig., 584 F. Supp. 2d 621, 631 (S.D.N.Y. 2008) ("In deciding a motion to dismiss, a court may consider documents which are integral to the complaint or are incorporated by reference in the pleadings" as well as "facts 'not subject to reasonable dispute'").

Defendants—who are sued only in their capacities as depositors, sponsors or underwriters of the Offerings—were neither required nor reasonably expected to review every loan file. The Offering Documents provided detailed risk disclosures and specifically disclosed the possibility that the underlying collateral would include loans that did not comply with the stated underwriting guidelines. (See Appendix 1.) Plaintiffs often purchased Certificates from the "mezzanine" tranches, which means they deliberately selected riskier securities that offered the prospect of a higher return than more senior tranches.

ARGUMENT

I. PLAINTIFFS LACK STANDING

A. Legal Standard

Standing is an "aspect of justiciability which, when challenged, must be considered at the outset of any litigation". Soc'y of Plastics Indus. v. Cnty. of Suffolk, 77 N.Y. 2d 761, 769 (1991). In order to have standing, Plaintiffs must allege an "injury in fact—an actual legal stake in the matter being adjudicated". Id. at 772. Plaintiffs, as purported assignees, have the burden of establishing standing. Id. at 769; see also T&G Med. Supplies, Inc. v. State Farm Mut. Auto. Ins. Co., 2005 WL 1021510, at *5 (N.Y. Civ. Ct. Feb. 4, 2005). Under New York law, the assignment of fraud and other tort claims must be explicit. Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank, 57 F.3d 146, 151 (2d Cir. 1995) ("[T]he assignment of the right to assert contract claims does not automatically entail the right to assert tort claims arising from that contract."). Thus, "in the absence of an explicit assignment of a cause of action based on fraud, 'only the . . . assignor may rescind or sue for damages for fraud and deceit; the representations were made to [the assignor] and [the assignor] alone had the right to rely upon them'". Id.; see also State of Cal. Pub. Emps.' Ret. Sys. v. Shearman & Sterling, 95 N.Y.2d 427, 435-436 (2000) (dismissing claims based on ineffective assignment).

B. Plaintiffs' Standing Allegations are Insufficient

The Complaint does not properly allege that Plaintiff Phoenix Light, as the purported assignee of WestLB, Greyhawk, Harrier, Kestrel, Blue Heron III and Blue Heron IV (¶23), has standing to assert the tort claims at issue here. The Complaint alleges only that certain "claims" or "causes of action" were assigned to Phoenix Light. (¶¶23, 34.) It does not allege the nature of those purported agreements nor describe any of the terms thereof. That is insufficient. See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 2012 WL 2250138, at *2-3 (C.D. Cal. June 15, 2012) (German "risk shield's" claim that an SPV transferred the "causes of action" was insufficient, without review of the actual transaction documents, to apprise the court that tort claims were assigned); see also State Farm Mut. Ins. Co. v. Anikeyeva, 2012 WL 1020963, at *5 (N.Y. Sup. Ct. 2012) ("Whether such an assignment includes additional rights [to assert tort claims] depends on, inter alia, the specific language of the assignment instrument".); Int'l Design Concepts, LLC v. Saks Inc., 486 F. Supp. 2d 229, 236 (S.D.N.Y. 2007) ("[W]hether tort claims are encompassed within the assignment is a matter of contract interpretation . . . . The words of the assignment are of paramount importance.").[5]

The Complaint's standing allegations with respect to the remaining Plaintiffs—vague assertions that "external agents and professional investors" bought the Certificates and "transferred or assigned any claims to [the SPVs]" (see ¶¶25-32)—fail for the same reason. Moreover, opaque references that do not identify the transferors or the nature of the purported assignment are insufficient to allege standing. See In re TFT-LCD (Flat Panel) Antitrust Litig., 2009 WL 4874872, at *4 (N.D. Cal. Oct. 6, 2009) (granting motion to dismiss where the

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[5] Alternatively, this Court should require Plaintiffs to produce the relevant agreements governing the purported assignments prior to a decision on the motions to dismiss. See Countrywide, 2012 WL 2250138, at *3 (ordering plaintiffs to produce "the complete set of transaction documents for every transaction pursuant to which [Plaintiffs] allege[] that any party transferred or assigned any of the causes of action asserted in this case").

complaint "neither identifies the assignor of plaintiff's claims, nor alleges sufficient facts to demonstrate that its assignor would be entitled to relief"); T&G Med. Supplies, 2005 WL 1021510, at *2 (assignment invalid where the plaintiff did not identify parties to the assignment and the date of assignment); Midwest Special Surgery, P.C. v. Anthem Ins. Cos., 2010 WL 716105, at *6 (E.D. Mo. Feb. 24, 2010) (dismissing claims based on "nebulous" assignment).

II. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. New York's Borrowing Statute

New York's borrowing statute provides that claims brought in New York courts by nonresidents must be timely under both the laws of New York and the place "where the cause of action accrued". N.Y. C.P.L.R. § 202. For tort claims, the cause of action accrues "in the place of the injury". Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 529 (1999). "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." Id. An exception to that rule occurs where a plaintiff "maintains a separate financial base" from its residence and "the impact of the financial loss [is ultimately] felt at that location". Baena v. Woori Bank, 2006 WL 2935752, at *6 (S.D.N.Y. Oct. 11, 2006); see also Global Fin., 93 N.Y.2d at 530. For statute of limitations purposes, an assignee "is not entitled to stand in a better position than that of its assignor". Portfolio Recovery Assocs., LLC v. King, 901 N.Y.S.2d 575, 577 (2010).

Although Plaintiffs are incorporated in Germany, the Cayman Islands and Ireland, Germany's statute of limitations applies to all Plaintiffs under the "financial base" doctrine. Germany's statute of limitations for tort claims is three years.[6] German law provides that this

[6] See Ex. C, Declaration of Dr. Juergen Johannes Witte ("Witte Decl."), dated July 13, 2012, ¶¶ 4-5. Defendants hereby give notice to Plaintiffs that they intend to request that the Court take judicial notice of the relevant foreign law and hereby request that the Court take such notice. (See N.Y. C.P.L.R. § 4511(b).)

three-year statute begins to run on December 31 of the calendar year in which Plaintiffs were put on notice of their claims.[7] As discussed infra, Plaintiffs were on notice of their claims prior to December 31, 2008. As such, the Summons with Notice, filed May 22, 2012, was untimely.[8] [9]

B. Germany's Statute of Limitations Applies Under the "Financial Base" Doctrine

Under the financial base doctrine, the relevant question for determining the applicable statute of limitations is "who became poorer and where did they become poorer?" Baena, 2006 WL 2935752 at *7 (citing Appel v. Kidder Peabody & Co. Inc., 628 F. Supp. 153, 156 (S.D.N.Y. 1986)). In Baena, the South Korean subsidiary of a Belgian company (L & H Belgium) allegedly engaged in fraud in South Korea. 2006 WL 2935752, at *1-2. In holding that the Belgian statute of limitations applied, the court reasoned that although "South Korea [was] the site of events underlying all of plaintiff's causes of action, the economic impact of the injury was ultimately felt by L & H Belgium in Belgium", because the "capital contributions to L & H Korea and the payment [at issue] came from the corporate treasury of L & H Belgium in

[7] Ex. C, Witte Decl. ¶ 5 n.7.

[8] In addition, the German statute of limitations for negligence tort claims and contract-based claims (such as rescission) is three years from the date of purchase. Ex. C, Witte Decl. ¶ 4. As Plaintiffs' last purchase was on September 25, 2007, and the Summons with Notice was filed on May 22, 2012, Plaintiffs' claims for negligent misrepresentation (¶¶1206-22) and rescission (¶¶ 1223-29) are time-barred regardless of when Plaintiffs obtained notice of their claims. Alternatively, Plaintiffs' negligent misrepresentation claim is also time-barred under New York law. Plaintiffs have "expressly disclaim[ed] any claim of fraud or intentional or reckless misconduct" for this cause of action. (¶1206.) In New York, a negligent misrepresentation claim not involving fraud is subject to a three-year statute of limitations, which runs from the date the alleged misstatement was made. See N.Y. C.P.L.R. § 214(4); Colon v. Banco Popular N. Am., 59 A.D.3d 300, 300-301 (1st Dep't 2009).

[9] On November 17, 2011 and February 16, 2012, the Goldman Sachs Defendants entered into, respectively, a Tolling Agreement and Amended Tolling Agreement with Plaintiffs. The only claims against the Goldman Sachs Defendants covered by the Tolling Agreement are those asserted by Phoenix Light, and those claims fail for lack of standing. (See supra § I.) Although the Amended Tolling Agreement applies to claims asserted by the remaining Plaintiffs, it cannot revive those claims because it was entered into, and became effective, only after the expiration of the relevant statute of limitations.

Belgium . . . [the] payments were approved by the board of directors of L & H Belgium and the direct impact of the alleged events was to cause financial harm to L & H Belgium". Id. at *7 (emphasis added). Thus, "Belgium was the location of economic injury and, therefore, the place of accrual for purposes of the borrowing statute." Id.

In this case, it is clear that Plaintiffs maintained their "financial base" in Germany, the same location where the "economic impact" of any losses will ultimately be felt.

- **The Phoenix Light "Risk Shield" was funded by WestLB to protect its interests in Germany:** According to WestLB's public filings, WestLB "provid[ed] the funding of the SPV", Phoenix Light, which was established to create "a stable, sustainable basis for WestLB's future development" in Germany. The "risk shield" consisted of a "guarantee from the owners of WestLB [under which they] will meet any possible losses from [the Phoenix Light] securities portfolios" up to € 2 billion, with Germany responsible for subsequent losses up to € 3 billion.[10]
- **WestLB's successor in Germany, EAA, "bears the consequences" of any losses from the SPVs**: As EAA, explained in its 2011 Annual Report, "[i]n the USA, securitised loans are a matter for the courts. What does this mean for the EAA? Many of the US mortgage loans in EAA's portfolio are directly held by special purpose vehicles. Generally speaking, the more returns these generate, the more they can distribute to EAA. In other words, EAA bears the consequences if these returns do not materialise."[11]
- **WestLB controlled, funded and bore the risk of loss for the SPVs from its financial base in Germany.** WestLB's public filings also make clear that it controlled and bore the risk of losses for the non-Phoenix Light SPVs at issue. WestLB's 2007 Annual Report explained that WestLB "consolidated"—which it defines, in detailed fashion, as "controlled"—the Silver Elms, Silver Elms II, Kleros, Kestrel, Greyhawk and Harrier SPVs.[12] Other publicly-available sources confirm that WestLB, through its affiliate, Brightwater Capital Management ("Brightwater"), funded and sponsored the Blue Herons.[13]

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[10] Ex. D, WestLB AG, Suppl. No. 2 to Debt Issuance Programme Prospectus, Sept. 8, 2008, at 3.
[11] See Ex. E, Erste Abwicklungsanstalt, Annual Report 2011 at 23; (see also ¶ 23(c).)
[12] Ex. B, WestLB Group, Annual Report 2007, at 70-71: "Determining whether to consolidate an SPE requires the analysis of a series of factors . . . : (a) are the activities of the SPE being conducted on behalf of [WestLB] according to its specific business needs so that [WestLB] obtains benefits from the SPE's operation; (b) does [WestLB] have the decision-making powers to obtain the majority of the benefits; (c) does [WestLB] obtain the majority of the benefits of the SPE's operation and (d) does [WestLB] retain the majority of the residual or ownership risks related to the SPE's assets in order to obtain benefits from its activities? If the analysis reveals that WestLB Group controls a special purpose entity, the entity must be consolidated."
[13] See Ex. F, Fitch Affirms Various Blue Heron High Grade CDOs, BUSINESS WIRE, August 3, 2005 ("Fitch currently has short-term ratings on the class A notes of the seven Blue Heron CDOs. Liquidity and credit support for these notes is provided in the form of a put option

Because Germany is the "financial base" of the SPVs and the "economic impact" of any losses "ultimately" will be felt there, Germany's statute of limitations should apply.[14] Baena, 2006 WL 2935752, at *7; see also Lang v. Paine, Webber, Jackson & Curtis, Inc., 582 F. Supp. 1421, 1423, 1426 (D.C.N.Y. 1984) (applying the shorter Massachusetts statute of limitations to Canadian plaintiff's fraud claims where plaintiff maintained the Massachusetts "financial base" as a "hedge against political events in Canada").[15]

C. Plaintiffs Were on Notice of Their Claims Prior to 2009

Plaintiffs were unquestionably on notice of their claims prior to December 31,

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agreement with WestLB . . . that ensures the timely repayment of 100% of the maturing class A notes (including any accrued interest) upon each annual maturity date"); Justinian Capital SPC v. WestLB AG, 37 Misc. 3d 518, 519 (N.Y. Sup. Ct. Aug. 15, 2012) (WestLB "served as the sponsor and asset manager" of Blue Heron VI and VII); Ex. G, WestLB Sweetens Pot for Brightwater Buyers, ASSET-BACKED ALERT, August 4. 2006 ("WestLB also owns most of the senior bonds and equity from a series of collateralized debt obligations that Brightwater issued under the Blue Heron Funding banner."); Ex. H, Press Release, Standard & Poors, Blue Heron Funding I Rating On Class A Lowered To 'A-2' Due To WestLB AG Direct Link Oct 05 (Oct. 14, 2005) ("Blue Heron I is has a direct link to the short-term rating on WestLB AG, which acts as put counterparty and liquidity provider").

[14] Even if Germany's three year statute of limitations did not apply under the financial base doctrine, claims by Phoenix Light as purported assignee of WestLB (a German corporation) and Greyhawk (a Delaware corporation) (¶ 23(c)-(d)) would be time-barred. See Ex. C, Witte Decl.; 10 Del. C. § 8106 (Delaware's three-year statute of limitations); see also Portfolio Recovery Assocs., 901 N.Y.S.2d at 577. In addition, any of Plaintiffs' purchases made prior to May 22, 2006 (six years prior to the filing of the Summons with Notice) would be time-barred under New York's six year statute of limitations. N.Y. C.P.L.R. § 213(8) ("[T]he time within which the action [for fraud] must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.") As Plaintiffs were on notice of their claims by December 31, 2008 at the latest (see infra § II.C)—and certainly before May 22, 2010, two years before they filed suit—the six year statute of limitations would bar any claims related to purchases that took place prior to May 22, 2006. A list of affected Certificates is attached as Appendix 3.

[15] In addition, to the extent Plaintiffs sue on the basis of assignments by "external agents and professional investors" (¶¶ 25-32) that reside in jurisdictions with a three year statute of limitations—the Complaint makes it impossible to divine which such "agents" and "professional investors" made which purchases—claims based on those direct purchases would have to be dismissed as well, even if the financial base doctrine did not apply.

2008.[16] First, as numerous courts have found, information in the market prior to 2009 apprised Plaintiffs of claims related to the practices of many of the specific Originators at issue here. See, e.g., Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1136 (C.D. Cal. 2011) ("Other complaints and public press reports make clear that a reasonable investor would have been aware of problems with underwriting at Countrywide by early 2008."); Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc., 2012 WL 3028803, at *27 (D. Kan. July 25, 2012) ("A reasonably diligent investor . . . would have been alerted to discover facts prior to March 20, 2008 which would support a plausible claim against the issuers, underwriters and sellers of the Fremont certificates."); see also Boilermakers Nat. Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1, 748 F. Supp. 2d 1246, 1258 (W.D. Wash. 2010) (dismissing as time-barred "appraisal allegations predicated upon the NY Attorney General's complaint against First American and eAppraiseIT," filed on November 1, 2007.")

Second, the Complaint itself contains a litany of news articles and information from other lawsuits from prior to 2009 that put Plaintiffs on notice of their claims, including but not limited to the following:[17]

- In March 2007, the FDIC issued a "cease and desist order" against Fremont due to "operating with a large volume of poor quality loans" and "unsatisfactory lending practices". (¶220.)

[16] Under German law, "a plaintiff has sufficient knowledge of the circumstances that give rise to the claim and the liable person at that moment when he would be able to file a suit which has a reasonable chance of success." Ex. C, Witte Decl. ¶¶ 6-7. A "claimant is grossly negligent in not obtaining knowledge of the circumstances that give rise to the claim if, in light of the circumstances, it fails to recognize basic insights that are apparent to a reasonable person, if it refuses to draw obvious conclusions, or if it does not make use of sources of information that are readily available to it." Id. at ¶ 7.

[17] Widespread media and governmental reports issued prior to 2009—including before and during the period in which Plaintiffs purchased the Certificates—referred to loosened underwriting standards, questionable appraisal practices and borrower occupancy representations, and discussed mounting concerns about many of the originators at issue here. A list of these sources, including many cited in the Complaint itself, is attached as Appendix 2. Id.

- Congressional testimony in September 2007 by Michael Kanef of Moody's explained that "[r]egardless of the quantity of data we assess, if the data we receive is faulty—e.g., as a result of misrepresentation—the quality of our [credit ratings] will be jeopardized. . . . [I]t is clear that a constant erosion of underwriting standards between 2003 and 2006—including misrepresentations by mortgage brokers, appraisers and borrowers—was a major contributor to the housing bubble and subsequent correction." (¶¶106-07.)
- Kanef specifically noted appraisal and owner occupancy problems: "Numerous sources have indicated that home values, borrowers' incomes as well as other information may have been overstated and the intended use of the home was often misstated (i.e., as a primary residence rather than an investment property)." (Id.)
- According to Plaintiffs, testimony by Alan E. Hummel before the House Committee on Financial Services on October 24, 2007 exposed a "complete lack of independence by appraisers" who "experience[d] systematic problems with coercion". (¶145.)[18]
- A December 30, 2007 Kansas City Star article, entitled "American Dreams Built on a Shaky Foundation of Subprime Loans" "painted a picture of a systematic abandonment of underwriting guidelines by lenders during . . . 2004-2007". (¶150.)
- A February 29, 2008 examination into New Century's bankruptcy "confirmed that New Century routinely failed to follow its stated underwriting guidelines". (¶158.)
- Information contained in five separate complaints by state Attorney Generals in 2007 and 2008 evidenced, according to Plaintiffs, "Countrywide's general abandonment of its stated underwriting guidelines". (¶185.)
- A February 5, 2008 article in The Oregonian revealed that Encore "ignored its stated underwriting guidelines, falsified incomes, did not determine whether the borrowers could afford to repay their loans, forged documents and put borrowers into loans they obviously could not afford to repay". (¶270.)
- A December 2008 Miami Herald article described "fraudulent" applications at Argent, including high percentages of "non-existent employers, grossly inflated salaries and sudden, dramatic increases in the borrower's net worth." (¶419.)

Third, the 2008 collapse of WestLB and the failure of many subprime originators in 2007 and 2008—many of which are identified in the Complaint as the originators of the loans underlying the Certificates at issue (¶¶131-36)—put Plaintiffs on notice that there were issues in that market prior to 2009. See Ballhaus v. Morgan Guar. Trust of N.Y., 232 A.D.2d 320, 320 (1st Dep't 1996) (dismissing complaint under the applicable statute of limitations because bankruptcy of the entity whose stock plaintiffs purchased put them on notice of their claims). Likewise, extensive media coverage of the failure of these subprime originators shows that the

[18] Incorrect appraisals lead to incorrect LTV ratios—another premise of Plaintiffs' claims.

purported factual underpinnings of Plaintiffs' claims were in the public domain prior to 2009.[19] While Defendants disagree that such generalized allegations not specific to the loans or Offerings at issue are sufficient to state a fraud claim (see infra § III.C), the fact remains that the information upon which Plaintiffs rely was available to them years ago.

Fourth, ratings downgrades of the securities at issue and loan delinquencies put Plaintiffs on notice. See, e.g., Fed. Housing Fin. Agency v. UBS Americas, Inc., 858 F.Supp. 2d 306, 320-21 (S.D.N.Y. 2012) (ratings downgrades are sufficient to trigger the statute of limitations); NCUA, 2012 WL 3028803, at *22, 37 (credit ratings downgrades can be a "critical" factor for statute of limitations purposes). By the end of December 2008, the ratings of nearly all the Certificates had been downgraded, many to below investment grade.[20] In addition, according to the Complaint, a number of the Certificates ceased making payments in 2008. (¶¶807-12.)

Plaintiffs also had knowledge of the facts upon which they premise their allegations of scienter. Plaintiffs have alleged, here and in the Deutsche Bank case, that information released by the FCIC in September 2010 was the only source that could have apprised Plaintiffs of Defendants' scienter.[21] That is a red herring. The purportedly "new" information released by the FCIC in September 2010 was known in the market in 2008. In addition, Plaintiffs' 522-page Complaint contains numerous other scienter-related allegations that, while similarly devoid of merit, have nothing to do with the information in the FCIC report.

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[19] See Appendix 2; see also (¶ 158) (discussing New Century's bankruptcy in 2007); In re Aegis Mort. Corp., No. 07-11119 (Bankr. D. Del. filed Aug. 13, 2007) (voluntary Ch. 11 bankruptcy filing); In re Alliance Bancorp, No. 07-10942 (Bankr. D. Del. filed July 13, 2007) (same); In re Am. Home Mortg. Holdings, Inc., No. 07-11047 & 07-11048 (Bankr. D. Del. filed Aug. 6, 2007) (same); In re First Magnus Fin. Corp., No. 07-01578 (Bankr. D. Ariz. filed Aug. 21, 2007) (same); In re SouthStar Funding, LLC, No. 07-65842 (Bankr. N.D. Georgia filed Apr. 11, 2007) (voluntary Ch. 7 bankruptcy filing).

[20] See Appendix 4 (list of first downgrade dates for the Certificates).

[21] (See, e.g., ¶¶ 595-96, 1157); Deutsche Bank Opp. Br. at 7-10.

First, the purported "revelation" about waiver rates contained in the FCIC report was derivative of other information plainly in the market prior to 2009. (¶1136). See Stichting, 802 F. Supp. 2d at 1139 ("The SEC complaint may perhaps include more detail than earlier-filed complaints, but it does not contain any fundamentally new revelation.") Numerous articles discussed purported loan defects identified in the due diligence process and investment banks' inclusion of those loans in RMBS. See, e.g., Ex. I (N.Y. Times, January 27, 2008) ("Starting in 2005, [Clayton] saw a significant deterioration of lending standards and a parallel jump in lending exceptions"); Ex. J (N.Y. Times, January 12, 2008) ("Investment banks often bought the exception loans . . . and packaged them into securities").[22] Such "evidence" serves only to confirm that the facts upon which Plaintiffs now rely as indicative of fraud were readily available in the public domain.[23]

Second, Plaintiffs simply ignore that the FCIC report is not the only fact upon which they premise their scienter allegations. For instance, Plaintiffs allege that Defendants gained "intimate knowledge of the endemic abandonment of loan underwriting guidelines" by virtue of their ownership of originators or other industry participants.[24] (¶¶853, 861.) But allegations that those originators had purportedly "abandoned their guidelines" were being made publicly before 2009 (see, e.g., ¶¶259, 270), and Defendants' ownership of those entities was

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[22] See also Amir Efrati, "Due-Diligence Firm to Aid New York Subprime Probe", Wall St. J., January 28, 2008 (according to Clayton's chairman and chief executive, "about 30% of loans examined by Clayton had some kind of exception. . . . [but] investment banks . . . purchased many of the loans regardless of our findings."); (¶ 259) (describing similar events in May 2008).
[23] However, these types of generalized allegations are insufficient to sustain Plaintiffs burden to plead specific facts about the Offerings actually at issue to demonstrate that Defendants acted with scienter. (See § III.D.)
[24] Such general, conclusory allegations do not satisfy C.P.L.R. § 3016(b). See Wint v. ABN Amro Mortg. Grp., Inc., 19 A.D.3d 588, 589 (2d Dep't 2005). Moreover, while Plaintiffs allege that Goldman Sachs acquired an originator, Senderra, they do not allege that that acquisition occurred until 2007—after the alleged purchase of most of the Goldman Sachs Offerings (¶ 862).

also public. Thus, the core information on which Plaintiffs rely to allege that Defendants acted with scienter was available before 2009.

In sum, the very same generalized allegations upon which Plaintiffs now rely were available publicly before 2009. If Plaintiffs now contend those allegations are sufficient to state a claim—they are not—then Plaintiffs must admit that the same information was sufficient to put them on notice of their claims prior to 2009. See Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F. Supp. 2d 1164, 1180 (C.D. Cal. 2011)") ("Allstate is faced here with a Hobson's choice. If it is correct in its big-picture argument that systemic abandonment is sufficient to state an RMBS § 10(b) claim, then it was on notice of that claim before December 27, 2008."). Plaintiffs' claims are therefore time-barred.

III. PLAINTIFFS' FRAUD-BASED CLAIMS FAIL

Plaintiffs allege that the Offering Documents contained (i) narrative misrepresentations concerning compliance with originators' underwriting guidelines (¶¶128-30) and transfer of title (¶¶824-46) and (ii) statistical misrepresentations related to LTV ratios (¶¶765-81), owner occupancy rates (¶¶782-94) and credit ratings (¶¶795-813).[25] Each of those claims fails.

To state a claim for fraud, Plaintiffs must plead "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559 (2009). "[T]he central issue" in determining whether a statement was misleading "is not whether the particular

[25] Plaintiffs' allegation that certain Defendants concealed the fact that they were shorting their RMBS investments is addressed in the Goldman Sachs Defendants' and Merrill Lynch Defendants' individual briefs. The JPMorgan Defendants join and incorporate by reference the sections of the Goldman Sachs Defendants' and Merrill Lynch Defendants' individual briefs on this topic, and any other topic insofar as they bear on claims asserted against the JPMorgan Defendants.

statements, taken separately, were literally true, but whether defendants' representations, taken together and in context, would have misl[ed] a reasonable investor about the nature of the [securities]". Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2, 5-6 (2d Cir. 1996) (dismissal appropriate where the RMBS "prospectuses warn[ed] investors of exactly the risk the plaintiffs claim was not disclosed"). Plaintiffs must also show "that the alleged misrepresentations or other misconduct were the direct and proximate cause of the losses claimed." Laub v. Faessel, 297 A.D.2d 28, 30 (1st Dep't 2002).[26]

A. Plaintiffs Fail Adequately to Plead Reliance

To plead reliance, Plaintiffs must first "specifically allege that they actually read and relied on" the purported misrepresentation. DeBlasio v. Merrill Lynch & Co., 2009 WL 2242605, at *24 n.15 (S.D.N.Y. July 27, 2009). Plaintiffs must also establish that such reliance was justifiable or reasonable. Colasacco v. Robert E. Lawrence Real Estate, 890 N.Y.S.2d 114, 116-17 (2d Dep't 2009). To assess the reasonableness of claimed reliance, "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions" at issue. Global Minerals & Metals Corp. v. Holme, 35 A.D.3d 93, 100 (1st Dep't 2006); see UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney, 288 A.D.2d 87,

[26] Because Plaintiffs' claims of fraudulent inducement (Count 2) and aiding and abetting fraud (Count 3) are dependent on adequate pleading of an underlying fraud, those claims fail for the same reasons set forth herein. See In re AHT Corp., 292 B.R. 734, 745-46 (S.D.N.Y. 2003) aff'd, 123 F. App'x 17 (2d Cir. 2005). Additionally, Plaintiffs have not pled with particularity what any individual Defendant knew about any other Defendant, instead referring to all affiliated Defendants with one term (e.g., "Bear Stearns" or "Credit Suisse"). This is insufficient to demonstrate that any Defendant had actual knowledge of, or substantially assisted in the commission of, any alleged fraud by another Defendant. See MediaXposure Ltd. (Cayman) v. Omnireliant Holdings, Inc., 2010 WL 4225939, at *9 (N.Y. Sup. Ct. Oct. 25, 2010).

88 (1st Dep't 2001) (dismissing on reliance grounds where plaintiff "failed to make use of the means of verification available to it").

1. Plaintiffs Do Not Allege Actual Reliance

Plaintiffs cannot purport to have actually relied on the Prospectus Supplements they claim contained material misrepresentations and omissions for the simple reason that most of them did not exist at the time Plaintiffs made their investment decisions. Plaintiffs purchased 170 of the 272 Certificates before the relevant Prospectus Supplements were issued. See Compl. Appx. A-F (compare "Issue Date" row to "Purchase Date" row). As such, claims related to those Certificates must be dismissed. See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 592 F. Supp. 2d 608, 629 (S.D.N.Y. 2009) (plaintiffs could not have relied on statements they did not receive before they invested); Gabriel Capital, L.P. v. NatWest Fin., Inc., 177 F. Supp. 2d 169, 174 (S.D.N.Y. 2001) ("plaintiffs cannot possibly prove that they relied on the alleged misrepresentations" because they did not have them at the time of purchase).

For the remaining Certificates, purchased after the Prospectus Supplements were issued, Plaintiffs' allegations of reliance are so vague and conclusory as to require dismissal. The Complaint simply recounts the procedures generally utilized by Plaintiffs' investment advisors and fails to identify who—if anyone—actually read and relied on the Offering Documents at issue before deciding to invest.[27] That is insufficient under New York's

[27] As to Greyhawk, Kestrel, Harrier, and the Blue Herons, Plaintiffs allege only that their investment advisor, Brightwater, analyzed the RMBS based on "term sheets" and other preliminary materials, and note conclusorily that an unnamed credit analyst "read marketing materials . . . including prospectus supplements." (¶¶ 1109-15.) Strategos Capital Management LLC, Kleros's investment manager, is alleged to have "reviewed the data" in a list of "RMBS offering documents" such as pitch books, term sheets and prospectus supplements. (¶¶ 1116-25.) Princeton Advisory Group, the investment manager for Silver Elms and Silver Elms II, is alleged to have conducted "credit due diligence focus[ed] on originators, RMBS collateral, the structure of each RMBS and cash flow analyses of RMBS" based on various "data", including "prospectus supplements." (¶¶ 1126-47.) WestLB was advised by Dynamic Credit Partners, who purportedly

heightened standard for pleading fraud. See People ex rel. Cuomo v. Wells Fargo Ins. Serv., Inc., 2008 WL 162147, at *3 (N.Y. Sup. Ct. Jan. 14, 2008) (a complaint alleging fraud must include the "specific instance[s]" of Plaintiffs' reliance upon a material misrepresentation").[28]

2. Plaintiffs Cannot Allege That Any Reliance Was Justifiable

Plaintiffs' purported blind reliance on certain representations related to underwriting guidelines and statistical data in the Offering Documents concerning LTV ratios, owner occupancy rates and credit ratings (¶¶765-813) was unreasonable given the disclosures in the Offering Documents, which made clear that little or no investigation would be conducted on various metrics. See Ambac Assurance Corp. v. DLJ Mortgage Capital. Inc., 2011 WL 4861862, at *8 (N.Y. Sup. Ct. Oct. 7, 2011) (reliance was "prima facie unreasonable" where the Prospectus Supplement disclosed that 66.65% of the loans "were loans for which either no verification of the mortgagor's stated income [or assets] was undertaken"); HSH Nordbank AG v. UBS AG, 95 A.D.3d 185, 188 (1st Dep't 2012) (no justifiable reliance where plaintiff "was explicitly warned of the risks it was undertaking in this highly leveraged and complex transaction").[29] Given the significant percentage of "low documentation" and "no documentation loans" disclosed in the Offerings—over 90% in some cases—Plaintiffs were

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reviewed "all offering documents, risk statistics, and structural protections". (¶¶ 1148-53.) Plaintiffs further allege that a "skilled professional" from WestLB reviewed the offering documents for Kleros, Silver Elms, Silver Elms II and WestLB. (¶¶ 1124, 1135, 1145, 1152.)

[28] Plaintiffs claim that they relied on "term sheets" and "marketing materials" containing LTV ratios, owner occupancy rates and credit ratings data that they allege was misleading. See ¶¶ 1109-53. As sophisticated investors, Plaintiffs knew that the Prospectus Supplements were the only source of the disclaimers and warnings—and thus the context—about that statistical data. An investor who simply read a term sheet listing owner occupancy rates knowingly would be missing critical disclosures in the prospectus supplement, such as the fact that such statistics would not be verified. As such, Plaintiffs' sole reliance on the computational materials and term sheets was prima facie unreasonable.

[29] While the Ambac court ultimately permitted discovery in order to "benefit from a complete record", Defendants submit that further discovery is unwarranted here given the specific misrepresentations alleged and the extensive risk disclosures directly refuting those allegations.

apprised that much of the data at issue would not be verified, and thus could have been misrepresented by borrowers.[30] See Bank Hapoalim B.M. v. WestLB AG, N.Y. Branch, No. 603458/2009, at 19 (N.Y. Sup. Ct. Sept. 21, 2012) (a "heightened degree of diligence is required where the victim of fraud had hints of its falsity").

Thus, for example, Plaintiffs cannot establish that their reliance on owner occupancy statistics was justifiable because, in many instances, the Prospectus Supplements—in addition to listing the exact percentages of "low doc" and "no doc" loans—specifically informed Plaintiffs that owner occupancy rates reflected unverified representations by borrowers.[31] As sophisticated investors, Plaintiffs should have considered the risk that borrowers might misrepresent such information. See Orlando v. Kukielka, 836 N.Y.S.2d 252, 255 (2d Dep't 2007) (reliance on financial information was not reasonable where plaintiffs, who were sophisticated investors, ignored disclosures that the information would not be verified).

In addition, Plaintiffs' purported unquestioning reliance on the appraisals, LTV ratios and credit ratings in the Offering Documents was not justifiable. The Offering Documents expressly disclosed that the valuations of the underlying properties were susceptible to a range of influences and would likely fluctuate and even decline over time.[32] See Republic Bank & Trust Co. v. Bear, Stearns & Co., Inc., 707 F. Supp. 2d 702, 712-13 (W.D. Ky. 2010) (dismissing appraisal claims where the offering documents warned that property values may fluctuate and

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[30] See, e.g., BSMF 2006-AR3 at A-5, A-8; BSMF 2007-SL1 at A-6.

[31] See, e.g., JPALT 2006-A7 at S-38 ("Occupancy Types . . . Based upon representations of the related mortgagors at the time of origination."); GSR 2006-8F at S-61 ("These loans are generally categorized as owner-occupied if the individual applicant states in the application that, as of the closing of the related loan, the property will be occupied by one or more applicants.").

[32] See, e.g., JPALT 2007-A1, at S-26 ("No assurance can be given that the value of any Mortgaged Property has remained or will remain at the level that existed on the appraisal or sales date."); GSR 2006-8F at S-47; LBMLT 2006-A at 1 ("[F]or some mortgage loans, the values of the related mortgaged properties may have substantially declined since the appraisals were obtained in connection with the origination of those mortgage loans.").

defendant "could offer no assurances that property values would remain where they were"); Tsereteli v. Residential Asset Securitization Trust 2006-A8, 692 F. Supp. 2d 387, 393 (S.D.N.Y. 2010) (dismissing appraisal claims). Plaintiffs also had access to extensive public information describing conflicts and issues at appraisal firms. (Supra § II.C.) With regard to the credit ratings, the Offering Documents also explicitly warned Plaintiffs to analyze for themselves the default, market and other risks associated with the Offerings, and alerted Plaintiffs to specific risks relating to falling home prices, emergent market stresses and difficulties experienced by loan originators.[33] See UST Private Equity, 288 A.D.2d at 88 (plaintiffs' reliance was not justified where they "failed to make use of the means of verification available to it").

Likewise, Plaintiffs' purported reliance on isolated representations in the Offering Documents that underwriting guidelines were "generally intended to: (1) assess the borrower's creditworthiness and/or ability to repay the loans; and/or (2) evaluate the adequacy of the underlying property" (¶128) was unreasonable in light of the disclosures in the Offering Documents detailing the minimal investigation (if any) that that assessment would typically entail. For example, the Offering Documents informed investors that under "reduced documentation" or alternative lending programs, the Originators typically did not undertake to verify a mortgagor's income or assets, and might in fact rely solely or primarily on the value of the underlying property and the borrower's credit score.[34] While Plaintiffs may question the

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[33] See, e.g., JPALT 2007-A1 at S-16 ("Recently, the residential mortgage market in the United States has experienced a variety of difficulties and changed economic conditions that may adversely affect the yield on your certificates."); GSAMP 2007-NC1 at S-17 ("Recently, the Subprime Mortgage Loan Market has Experienced Increasing Levels of Delinquencies and Defaults; Increased Use of New Mortgage Loan Products by Borrowers May Result in Higher Levels of Delinquencies and Losses Generally.").

[34] See, e.g., GSAA 2006-20 at 29 ("A lender may originate mortgage loans under a reduced documentation program . . . . Under a reduced documentation program, more emphasis is placed

wisdom of such origination practices in hindsight, following the collapse of the U.S. housing market, they were aware of such facts at the time of purchase and thus assumed the risks inherent in such origination programs. See Global Minerals, 35 A.D.3d at 100 ("When a party fails to make further inquiry [or take other steps] for its protection, it has willingly assumed the business risk that the facts may not be as represented.")[35]

B. Plaintiffs Do Not Allege an Actionable Misrepresentation or Omission

1. Plaintiffs Fail to State a Claim Concerning Underwriting Guidelines

First, Plaintiffs' attempt to allege the Originators' non-compliance with their guidelines in connection with the loans by pointing to a litany of conclusory statements by unrelated third-parties should be rejected. These assertions are entitled to no more weight than the other non-specific claims made by Plaintiffs themselves. See, e.g., Tsereteli, 692 F. Supp. 2d at 393 ("That the conclusory assertion comes not from plaintiffs but from [a third party] makes[s] it no less conclusory."); In re Citigroup Inc. Sec. Litig., 753 F. Supp. 2d 206, 244-45 (S.D.N.Y. 2010) (rejecting "vague and conclusory" allegations by purported "confidential witness"). Moreover, Plaintiffs' citation to unproven or irrelevant claims asserted in other litigations are immaterial as a matter of law. Footbridge Ltd. v. Countrywide Home Loans, Inc., 2010 WL 3790810, at *5 (S.D.N.Y. Sept. 28, 2010). In fact, a number of the complaints Plaintiffs cite in the Complaint as evidence of Defendants' fraud have been dismissed, including for failure to state a claim. (E.g., ¶¶283, 498). Moreover, Plaintiffs' sweeping and generalized assertion that Originators systematically abandoned underwriting standards (and that

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on property underwriting than on credit underwriting and certain credit underwriting documentation concerning income and employment verification is waived.").

[35] Moreover, certain of Plaintiffs' certificates were purchased in the secondary market long after the Prospectus Supplements were issued. (See, e.g., Compl. Appx. D (listing Issue Date of 3/28/2006 and Purchase Date of 9/17/2007 for ACCR 2006-1.) Plaintiffs cannot claim to have justifiably relied on the statements in the Prospectus Supplements when more current loan delinquency data was available to them and they failed to review or consider it.

Defendants' were aware of such alleged abandonment) cannot survive Defendants' motion to dismiss for the separate reason that this type of impermissible group pleading is "insufficient to satisfy the stringent pleading requirements for an action sounding in fraud." Scott v. Fields, 2010 WL 2163787, at *6 (Sup. Ct. Nassau Cnty. May 3, 2010). Plaintiffs fail to describe with the requisite particularity the ways in which each specific originator purportedly deviated from the practices represented to Plaintiffs with respect to the offerings at issue. See, e.g., Nicosia v. Bd. of Managers of Weber House, Condo., 77 A.D.3d 455, 456-57 (1st Dep't 2010).

Second, Plaintiffs have failed to establish that the loans in the Offerings deviated from underwriting guidelines any more than Defendants said they could. Plaintiffs' allegations that trending reports prepared by Clayton Holdings, Inc. ("Clayton Report") "confirmed that the Offering Documents were false and misleading" is wrong. (¶¶595-99.) As an initial matter, the percentages listed in the Clayton Report do not necessarily reflect the percentage of loans that did not comply with underwriting guidelines. To the contrary, certain Defendants, such as Morgan Stanley, instructed Clayton to grade certain loans as a level "3" even if those loans complied with underwriting guidelines so that Morgan Stanley would have the ability to review and make the final determination on those loans. (See Morgan Stanley Defs.' Supp. Mem. of Law at 3-4.) And even if the Clayton Report did reflect loans that Clayton believed did not comply with underwriting guidelines, it still would not support an inference of scienter in this case. For example, in Clayton's opinion, only 16% of loans earmarked for Bear/EMC deals (11,771 loans out of 72,379) did not comply with underwriting guidelines. (Ex. K, Clayton Report at 2). According to Plaintiffs, the percentage of loans reviewed by Clayton that were deemed defective and "waived in" to securitizations by Defendants was even smaller: for Bear Stearns/EMC deals, only 7% (4,923 of 72,379; id. at 2). Even if accepted as true, such rates of

deviation are consistent with the risk disclosures in the Offering Documents, which made clear to investors that the originators were free to make exceptions to their stated guidelines. Indeed, the Offering Documents described specific mechanisms for repurchasing or substituting non-compliant loans, which made clear to investors that there might be noncompliant loans. See Lone Star Fund V (US), L.P. v. Barclays Bank PLC, 594 F.3d 383, 389-90 (5th Cir. 2010) ("'[R]epurchase or substitute' clauses . . . change the nature" of disclosures about underlying mortgages by making clear to all investors that the mortgage pools could contain noncompliant loans); Footbridge, 2010 WL 3790810, at *16; Appendix 1.

Plaintiffs' understanding of the Clayton Report is also deeply flawed. Clayton itself has submitted to the FCIC that it does not know whether any particular loan it reviewed was ultimately securitized,[36] which fatally undermines Plaintiffs' claim that Defendants waived defective loans into to their securitizations. (E.g., ¶108.) Moreover, Plaintiffs fail to allege any connection between the loans at issue in the Report, and the loans at issue here, which also undermines Plaintiffs' attempt to impute the characteristics from one set of loans to the other. See Landesbank Baden-Württemberg v. Goldman, Sachs & Co., 821 F. Supp. 2d 616, 622 (S.D.N.Y. 2011) (dismissing complaint that "fail[ed] to allege any connection between the mortgages reviewed in the Clayton Report and those collateralizing [the Offering at issue]").

Third, Plaintiffs' claim that Defendants misrepresented the nature and purpose of the underwriting guidelines fails as a matter of logic. (¶129.) The disclosures said that the Originators' guidelines were "intended to assess" borrowers' ability to repay and the adequacy of the underlying collateral, not, as Plaintiffs would have it, that they would "ensure" or "guarantee" that a given loan would not result in a loss. Moreover, the truth of those statements

[36] Ex. L, Written Testimony of V. Beal Before the FCIC, Sept. 23, 2010, at 8.

must be evaluated in the context in which they were made, not with the hindsight knowledge of the unprecedented crash in housing prices and mass unemployment that upended many of the assumptions previously held in the marketplace.

2. Plaintiffs Fail to State a Claim Concerning Owner Occupancy Rates

Plaintiffs fail to plead an actionable misstatement or omission regarding owner occupancy rates. As set forth above, Plaintiffs knew that the owner occupancy rates in the Offering Documents were "[b]ased upon representations of the related mortgagors at the time of origination" and were not verified by Defendants.[37] Plaintiffs do not allege that Defendants inaccurately relayed the occupancy status information that the borrowers provided to the loan originators. Plaintiffs thus have failed to establish that Defendants made any false statement with respect to owner occupancy rates. See Footbridge, 2010 WL 3790810, at *9 ("The statements in the [offering documents] include additional limiting language that explains that the percentages reported are 'based upon representations of the related borrowers at the time of origination.' . . . The [complaint] does not allege that the percentages reported in the [offering documents] are inaccurate representations of the data received from borrowers."); Fed. Home Bank Loan of Seattle v. Banc of Am. Sec., LLC, 2011 WL 2693115, at *4 (Wash. Super. Ct. June 23, 2011) (dismissing owner-occupancy claims for failure to allege defendants had falsely reported borrowers' representations). Because the "critical language" in the Offering Documents revealed that such representations would not be verified, Plaintiffs' after-the-fact analysis of whether tax roll information matched the address stated in the borrowers' application (¶¶782-94) cannot establish the existence of a misstatement. Id.; see also Mass. Mut. Life Ins. Co. v.

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[37] See, e.g., JPALT 2006-A7 at S-38 ("OCCUPANCY TYPES . . . *Based upon representations of the related mortgagors at the time of origination.")

Residential Funding Co., LLC, 843 F.Supp.2d 191, at 204-05 (D. Mass. Feb. 14, 2012) (dismissing owner-occupancy claims despite plaintiffs' post hoc forensic analysis).

3. Plaintiffs Fail to State a Claim Concerning LTV Ratios (Appraisals)

Plaintiffs fail to plead an actionable misrepresentation or omission concerning LTV ratios—namely that the appraised property values underlying such ratios were inflated. Appraisals are "fact-based opinions" of the appraisers, respectively, and thus are non-actionable unless the plaintiff can show that the opinions were not believed at the time they were given. Tsereteli, 692 F. Supp. 2d at 393 ("[N]either an appraisal nor a judgment that a property's value supports a particular loan amount is a statement of fact[, rather, it is] a subjective opinion based on the particular methods and assumptions the appraiser uses."); LaBate v. Urban Found. Eng'g LLC, 2008 WL 552887, at *3 (N.Y. Sup. Ct. Feb. 14. 2008) ("[A]n expression of opinion will not sustain an action for fraud.")

With respect to appraisals, Plaintiffs have failed to plead facts supporting a plausible inference that any appraiser "did not truly have" its stated opinion as to value at the time of the appraisal, nor has it alleged facts suggesting that Defendants did not accurately report the appraisals as given. Tsereteli, 692 F. Supp. 2d at 393-94. Plaintiffs' reliance on vague accounts that some appraisers allegedly provided inflated appraisals does not call into question the subjective opinions of the appraisers who actually evaluated the properties at issue here.[38] In addition, the Prospectus Supplements warned that appraisals may not equal actual property values and stated that property values could fluctuate.[39]

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[38] Indeed, Plaintiffs do not even identify who the appraisers of the properties at issue were, let alone allege that (i) any particular appraisal was wrong; (ii) any particular appraisal did not reflect the true opinion of the appraiser; or (iii) any appraiser of the mortgaged properties failed to follow the standards set forth in the Offering Documents.

[39] See, e.g., BALTA 2006-3 at S-45 ("No assurance can be given that values of the mortgaged properties have remained or will remain at their levels on the dates of origination of the

Nor can Plaintiffs' after-the-fact analysis of property values save their claims. Plaintiffs cite the results of an Automated Valuation Model ("AVM") that they ran before filing this lawsuit. (¶¶772-78.) The Complaint provides virtually no information about the assumptions and inputs used in the AVM and thus fails to satisfy N.Y. C.P.L.R. § 3016(b). See U.S. ex rel. Nowak v. Medtronic, 806 F. Supp. 2d 310,351 (D. Mass. 2011) (claims that "rely heavily on inferences and statistical extrapolations" do not satisfy pleading requirements for fraud). In any event, that Plaintiffs' AVM estimated lower property values than human appraisers did at the time of loan origination shows, at most, that different methodologies yield different results. Where the determination of an asset's value "will vary depending on the particular methodology and assumptions used", the falsity of such an opinion cannot be shown by alleging that a different result was reached using different inputs or assumptions. Fait v. Regions Fin. Corp., 655 F.3d 105, 110-11 (2d Cir. 2011). Moreover, to the extent that any AVM analysis used after-the-fact data unavailable at the time of the original appraisal, Plaintiffs' reliance is doubly misplaced because the results say nothing about the accuracy of the appraisals when made. See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 775 (1st Cir. 2011) ("Defendants are not liable under the securities laws when their opinions . . . simply turn out later to be inaccurate.").

4. Plaintiffs Fail to State a Claim Concerning Credit Ratings

With respect to the credit ratings, Plaintiffs allege that the Certificates should "not have received the ratings they did, and should have received much lower ratings because the certificates were not safe, 'investment grade' securities." (¶796). But credit ratings, like property valuations, are opinions, and Plaintiffs' allegations are insufficient to support an inference that the ratings agencies did not actually believe that the ratings they had assigned were

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related mortgage loans.")

supported by the factors they said they had considered. See In re IndyMac Mortg.-Backed Sec. Litig., 718 F. Supp. 2d 495, 511-12 (S.D.N.Y. 2010) (dismissing ratings-related claim for failure to allege that ratings agencies did not truly hold their opinions when made); N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 271 (S.D.N.Y. 2010) ("The [issuing] Trusts actually received the ratings listed in the prospectus supplements, and Plaintiffs do not allege to the contrary, so there is no misstatement on the face of the documents.")[40] Plaintiffs' allegations related to credit ratings are particularly deficient given that the Offering Documents disclosed that such ratings could be lowered at any time and should not be treated as investment recommendations.[41]

5. Plaintiffs Fail to State a Claim Concerning Transfer of Title

Plaintiffs assert that the Offering Documents misrepresented that the loans at issue would be validly assigned and transferred to the issuing trusts (¶¶824-46). But the Offering Documents simply contained a description of the Pooling and Servicing Agreements ("PSA") that governed such transfers and assignments and explicitly provided for the possibility of related issues by noting that the trustee would "review each mortgage file" and provide notice if any file was "missing or defective".[42] Plaintiffs cannot claim to have been misled about the possibility

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[40] Moreover, Plaintiffs' reliance on the downgrades of the Certificates as proof that the ratings were flawed when made (¶¶ 806-12), is another improper attempt to plead fraud by hindsight. See Landesbank, 2011 WL 4495034. at *6; In re Merrill Lynch Auction Rate Sec. Litig., 2011 WL 536437, at *12-13 (S.D.N.Y. Feb. 9, 2011).

[41] See, e.g., BALTA 2006-3 at S-45 to S-46 ("[T]here can be no assurance that the ratings assigned to any offered certificate on the date on which the offered certificates are initially issued will not be lowered or withdrawn by a rating agency at any time thereafter. In the event any rating is revised or withdrawn, the liquidity or the market value of the related offered certificates may be adversely affected.")

[42] See, e.g., JPMAC 2006-WMC3 at S-93 to S-94. The Offering Documents also disclosed that the mortgages could be assigned in a variety of ways, including that they would be assigned to the trustee, or a custodian for the trustee, and that mortgage notes would be endorsed either in blank or to the trustee. See, e.g., LBMLT 2006-1 at 27 ("The depositor will, with respect to each mortgage asset, deliver or cause to be delivered to the trustee, or to the custodian, the mortgage

that certain loans would not be properly transferred when the Offering Documents made no specific representations regarding the means by which loans would be assigned or transferred and outlined a procedure for remedying any defects. See Lone Star, 594 F.3d at 389-90; Republic Bank, 707 F. Supp. 2d at 710-11. In the face of these extensive disclosures, Plaintiffs' allegations are not sufficient to support a claim regarding assignments. See W. & S. Life Ins. Co. v. Countrywide Fin. Corp., No. 2:11-ML-07166-MRP (MANx), ECF No. 246, slip. op. at 7-13 (C.D. Cal. June 29, 2012) [Ex. M] (dismissing assignment and transfer claims where offering documents contained explicit disclosures, including "language indicat[ing] that the section is meant as a description of the [PSA] rather than an independent manifestation of present intent".)

C. Plaintiffs Fail to Plead Fraud with Sufficient Particularity

Even if Plaintiffs had identified an actionable misstatement upon which they reasonably and justifiably relied, their fraud claims would nevertheless fail because Plaintiffs have failed to plead fraud with sufficient particularity. Under New York law, claims sounding in fraud are subject to the heightened pleading standard of N.Y. C.P.L.R. § 3016(b), which requires that "the circumstances constituting the wrong shall be stated in detail". (Emphasis added). Accordingly, fraud claims "must be pleaded with the requisite particularity", Eurycleia, 12 N.Y.3d at 559, and the complaint must include "specific instance[s] of [plaintiffs] justifiably relying upon a material misrepresentation known by the maker to be false" and "specific instances in which any persons or entities were adversely affected by defendants' conduct", see People ex rel. Cuomo, 2008 WL 162147, at *3.

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note, an assignment (except as to any mortgage loan registered on the MERS® System) (as defined below) and unless otherwise indicated in the applicable prospectus supplement) to the trustee or in blank of the mortgage in a form for recording or filing as may be appropriate in the state where the mortgaged property is located.")

Plaintiffs' fraud claim, in essence, is that Defendants misrepresented the quality of the loans backing the Offerings in which Plaintiffs invested. None of Plaintiffs' fraud allegations, however, relate to those particular Offerings or the specific loans backing them. Rather, Plaintiffs make general allegations about allegedly unsound origination and securitization practices in the mortgage industry. (¶¶138-52.) Plaintiffs hypothesize that those practices must have resulted in the securitization of at least some loans—Plaintiffs do not allege which ones or even how many—of lesser quality than was represented by Defendants in the specific offerings in which Plaintiffs invested. (¶¶1159-98.) That is plainly insufficient.

None of the general statements from confidential witnesses referenced in the Complaint (e.g., ¶¶163-64, 444-49) or the allegations based on third-party due diligence reports (such as the Clayton Report) (¶¶595-99) is linked to any of the Offerings at issue; nor are the anonymous appraisers alleged to have provided valuations with respect to any of the loans at issue (e.g., ¶¶224, 312). Moreover, none of Plaintiffs' allegations regarding allegedly unsound origination and underwriting practices at certain non-Defendant originators suggests that the loans included in the Offerings in which Plaintiffs invested were affected by those alleged practices. (¶¶153-594.) Nor can Plaintiffs purported "investigation" of allegedly deficient title transfers for six of the 163 offerings link their general, industry-wide allegations to the loans at issue here. (¶¶840-45.) Further, Plaintiffs' post hoc, anecdotal description of a single adversely-selected loan from each Offering (each of which was backed by thousands of loans) does nothing at all to demonstrate a systematic abandonment of guidelines, much less the existence of a misstatement in the Prospectus Supplements, which disclosed that exceptions to the guidelines could and would be made. (¶¶600-764.) Such generalized allegations fall well short of the particularized pleading required by Rule 3016(b).

D. **Plaintiffs Fail to Allege Scienter**

To establish scienter, Plaintiffs must allege with particularity facts sufficient to infer that Defendants knew their statements about material facts were false and possessed "an actual intent to deceive, manipulate, or defraud". Zutty v. Rye Select Broad Mkt. Prime Fund, L.P., 2011 WL 5962804, at *11 (N.Y. Sup. Ct. Apr. 15, 2011). Plaintiffs fail to allege for each of the 163 Offerings what Defendants knew about any alleged misstatements and when they knew it. Instead, Plaintiffs' scienter allegations boil down to the assertion that, by virtue of their roles and experience in the securitization process, Defendants must have known that statements in the Offering Materials were false or misleading. Such allegations do not raise a strong inference of fraudulent intent.

First, Plaintiffs' allegations regarding Defendants' purportedly deficient due diligence practices and "waiving into" securitizations loans that Clayton, in its own opinion, initially deemed not to conform with applicable underwriting standards are factually inaccurate and, in any event, do not establish a strong inference of fraudulent intent. (¶¶867-75.) In Landesbank, plaintiffs similarly alleged that defendant hired Clayton to perform due diligence, and nevertheless securitized most of the loans rejected by Clayton. The court held that such an allegation was insufficient to plead scienter required for common law fraud because plaintiffs "fail[] to allege any connection between the mortgages reviewed in [Clayton's report to defendant noting the "defective" loans] and those collateralizing [the securitization at issue]". 821 F. Supp. 2d at 622; see also N.J. Carpenters Health Fund v. NovaStar Mortg., Inc., 2012 WL 1076143, at *4-5 (S.D.N.Y. Mar. 29, 2012). Moreover, Plaintiffs' conclusory assertions that Defendants' due diligence "necessarily revealed to them" the existence of defective loans (¶850) amount to nothing more than unsupported inferences and speculation, and therefore fails to satisfy N.Y. C.P.L.R. § 3016.

Second, Plaintiffs' attempt to impute to Defendants the alleged knowledge of certain originators affiliated with Defendants by routinely conflating allegations with respect to each, is insufficient to establish Defendants' scienter. See Bianco v. AXA Equitable Life Ins., 2009 WL 3780684, at *4 (N.Y. Sup. Ct. Oct. 23, 2009) ("collective or generic references to the defendants" in connection with alleged misstatements are not sufficient). Plaintiffs do not allege that any of the Defendants themselves actually originated loans underlying the 163 Offerings; indeed, Defendants are named only as sponsors, depositors and/or underwriters, not originators. (¶¶35-84.) Thus, allegations regarding Defendants' affiliates' purported knowledge are insufficient to plead a strong inference of fraudulent intent with respect to the Defendants. See Eurycleia, 883 N.Y.S.2d at 150 (dismissing fraud claim where the complaint failed to include any "firm factual pleadings" about a specific defendant's scienter). Plaintiffs must allege more than just a parent-subsidiary or affiliate relationship. Cf. Pub. Empls.' Ret. Sys. of Miss. v. Merrill Lynch & Co., 714 F. Supp. 2d 475, 485 (S.D.N.Y. 2010) ("The parent/subsidiary relationship is an insufficient basis from which to infer control . . . [because] a parent corporation and its subsidiary are regarded as legally distinct entities.")

Third, Plaintiffs' allegation that a significant number of the loans backing the securitizations at issue were not assigned to the securitization trust or were missing intervening assignments does not establish a strong inference of intent. (¶¶887-89.) The Complaint is devoid of any non-conclusory allegation that Defendants knew that mortgages would not properly be assigned.[43] (¶889.) Plaintiffs' claim that the alleged improper transfers caused harm to Plaintiffs also is unavailing (¶1177), as the Complaint does not allege that any defaulted loans

[43] Plaintiffs make their title transfer allegations against Defendants generally, but allege that the depositor is responsible for depositing the notes and security instruments into the trust. (¶ 99.) Thus, those allegations are properly limited to the depositor Defendants only.

were unable to be restructured or foreclosed upon due to title issues, much less that any losses were caused by such inability.[44]

E. Plaintiffs Fail Adequately to Plead Loss Causation

"When factors other than the defendant's fraud are an intervening direct cause of a plaintiffs' injury, that same injury cannot be said to have occurred by reason of the defendant's actions." Saleh Holdings Group, Inc. v. Chernov, 2011 WL 452999, at *3 (N.Y. Sup. Ct. Jan. 31, 2011); Lentell v. Merrill Lynch & Co., 396 F.3d 161, 174 (2d Cir. 2005) ("[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors", plaintiff must allege specific facts "which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events"); Citibank N.A. v. K-H Corp., 968 F.2d 1489, 1496-97 (2d Cir. 1992) (affirming dismissal of common law fraud claim because the plaintiff did not adequately allege that the damages suffered were proximately caused by the alleged misrepresentations of defendants). Plaintiffs allege no specific facts showing that Plaintiffs' losses were caused by Defendants' alleged fraudulent conduct as opposed to the global financial crisis and housing market crash.

In fact, Plaintiffs agree with Defendants that "2007 marked the beginning of the worst economic crisis since the Great Depression" and that "[b]illions of dollars of investments in mortgage-backed securities were wiped out".[45] Plaintiffs simply assert that the RMBS they purchased have been downgraded by rating agencies and experienced delinquencies, like

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[44] In addition Plaintiffs allegations based on unproven allegations from other lawsuits and investigations (¶¶ 890-1094) are insufficient to allege scienter against Defendants. See, e.g., RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009) ("[P]aragraphs in a complaint that are either based on, or rely on, complaints in other actions that have been dismissed, settled, or have otherwise not resolved, are, as a matter of law immaterial"); see also Me. State Ret. Sys. v. Countrywide Fin. Corp., 2011 WL 4389689, at *20 (C.D. Cal. May 5, 2011) ("Plaintiffs cannot rely on allegations from complaints in other cases if the Plaintiffs themselves have not investigated the allegations.")

[45] Brief for WestLB, Justinian Capital, No. 600975/2010 (SWK), Dkt. 24 at 7.

countless other RMBS in the wake of the housing market collapse. But such general poor loan performance is not only compatible with, but indeed more likely explained by, factors other than any misrepresentations—namely, the economic crisis. N.J. Carpenters Health Fund v. NovaStar Mortg., Inc., 2011 WL 1338195, at *11 (S.D.N.Y. Mar. 31, 2011) (dismissing plaintiff's allegation that "the subprime market melted down and Defendants were market participants, so they must be liable for my losses in my risky investment").

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION

To sustain a claim of negligent misrepresentation, Plaintiffs must show they had a "special or privity-like relationship" with Defendants that gives rise to a duty to provide accurate information. See J.A.O. Acquisition Corp. v. Stavitsky, 8 N.Y.3d 144, 148 (N.Y. 2007). That special relationship requires that Defendants either "(1) possesse[d] unique or specialized expertise or (2) occupie[d] a special position of confidence and trust with the injured party". EED Holdings v. Palmer Johnson Acquisition Corp., 387 F. Supp. 2d 265, 281 (S.D.N.Y. 2004).

Plaintiffs do not allege any relationship of trust and confidence existed between the relevant Defendants and themselves. (¶¶1206-22.) When, as here, sophisticated parties engage in "arms-length business transactions", a special relationship is not present. See Harbinger Capital Partners Master Fund I, Ltd. v. Wachovia Capital Mkts., LLC, 2010 WL 2431613, at *10 (N.Y. Sup. Ct. May 10, 2010) ("[A]n arms length [financial] relationship is not of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation"); see also DynCorp v. GTE Corp., 215 F. Supp. 2d 308, 329 (S.D.N.Y. 2002) (same). Plaintiffs' assertion that they have relied on Defendants' "unique and special knowledge" regarding mortgage loans and underwriting for multiple investments over the course of two years is insufficient to establish such a relationship. (¶1213.) "[T]he number of years of

transactions undertaken by two business entities does not create a relationship of trust." MBIA Ins. Co. v. GMAC Mortg. LLC, 30 Misc. 3d 856, 864 (N.Y. Sup. Ct. 2010).[46] In addition, Plaintiffs' vast investment and securitization expertise belies their claim that Defendants—financial institutions just like WestLB—possessed "unique or specialized expertise". WestLB, through many of the Plaintiffs here, was purchasing RMBS in large part to package and sell them to other equally sophisticated investors. Plaintiffs should not be allowed to claim that they had no idea what they were buying (and then selling) to others.

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR RESCISSION

In order to state a claim for rescission based on mutual mistake, Plaintiffs must demonstrate that there was no "meeting of the minds" due to "a mistake in contracting [that] is both mutual and substantial". Brauer v. Cent. Trust Co., 433 N.Y.S.2d 304, 307 (App. Div. 1980). The mutual mistake must be "so material that . . . it goes to the foundation of the agreement", and a court will only order relief in "exceptional situations". Simkin v. Blake, 19 N.Y.3d 46, 52 (2012) (citation omitted). "[A] claim predicated on mutual mistake must be pleaded with the requisite particularity necessitated under N.Y. C.P.L.R. 3016(b)." Id.

Plaintiffs fail adequately to allege that a "mutual mistake . . . exist[ed] at the time the contract [was] entered into". Gould v. Bd. of Educ. of Sewanhaka Cent. High Sch. Dist., 81 N.Y.2d 446, 453 (1993). Plaintiffs do not allege any deficiencies in the Offering Documents

[46] Additionally, Defendants' alleged "unique and special knowledge" regarding the RMBS allegedly acquired through the due diligence they performed does not give rise to any special duties. Plaintiffs allege that the Underwriter Defendants had access to non-public information concerning the mortgages, including loan files and due diligence results. (¶ 1210.) Under New York law, however, "knowledge of the particulars of [a] company's business . . . does not constitute the type of 'specialized knowledge' that is required in order to impose a duty of care in the commercial context". Gusmao v. GMT Grp., Inc., 2008 WL 2980039, at *15 (S.D.N.Y. Aug. 1, 2008); see also GMAC Mortg. LLC, 30 Misc. 3d at 864-65 (RMBS issuer did not have superior knowledge of deviations from underwriting guidelines simply by virtue of its proximity to loan and servicing files).

when they were executed, but rather that Defendants subsequently failed to transfer title of the loans at issue. (See ¶827.) Because Plaintiffs do not allege that a mutual mistake existed "at the time" they purchased the securities, their claims must be dismissed. See Matter of Liquidation of N.Y. Agency & Other Assets of Bank of Credit & Commerce Int'l, S.A., 90 N.Y. 2d 410, 424 (1997) (affirming Appellate Division's finding of an absence of mutual mistake where the parties "were not mistaken . . . at the time of the contract"); Simkin, 19 N.Y.3d at 54-55 (motion to dismiss granted where there was no mistake "at the time the agreement was executed").

Plaintiffs' cause of action for rescission is also fatally deficient because it fails to allege a mutual mistake with the level of particularity required by N.Y. C.P.L.R. § 3016(b). "[A]n action for reformation or rescission, founded upon . . . mistake . . . will be dismissed for legal insufficiency if the complaint does not allege the particular facts warranting equitable relief." N.Y. Fruit Auction Corp. v. City of New York, 439 N.Y.S. 2d 648, 161-62 (App. Div. 1981) (dismissing claim that recited "no factual details"). The Complaint merely alleges that the underwriters and Plaintiffs believed that the mortgages or notes would be "timely or properly assigned to the trust and/or trustees at the time the certificates were purchased by plaintiffs", but allegedly "many" were not. (¶¶6, 19, 1225.) Plaintiffs also proffer news reports suggesting that this practice was common, (¶¶833-34) but that says nothing about whether the loans at issue were properly assigned. Plaintiffs must allege more than that some unspecified quantity or sample of loans were not properly or timely transferred. See Simkin, 19 N.Y.3d at 52. Their rescission claims should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss each of the claims set forth in the Complaint with prejudice, and grant such other and further relief as the Court deems just and proper.

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