5672
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DEXIA SA/NV; DEXIA HOLDINGS, INC.; FSA ASSET MANAGEMENT LLC; DEXIA CREDIT LOCAL SA,

Plaintiffs,

-v-

DEUTSCHE BANK AG; DEUTSCHE BANK SECURITIES, INC.; DB STRUCTURED PRODUCTS INC.; ACE SECURITIES CORP.; and DEUTSCHE ALT-A SECURITIES INC. LLC,

Defendants.

11 Civ. 5672 (JSR)

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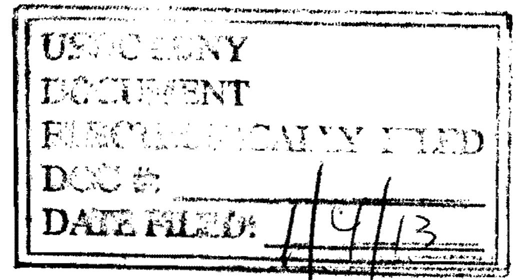

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TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,

Plaintiff,

-v-

DEUTSCHE BANK AG; DEUTSCHE BANK SECURITIES, INC.; DB STRUCTURED PRODUCTS, INC.; ACE SECURITIES CORP.; and DEUTSCHE ALT-A SECURITIES, INC.,

Defendants.

11 Civ. 6141 (JSR)

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MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

These two actions are brought by, respectively, Dexia SA/NV, Dexia Credit Local SA, Dexia Holdings, Inc., and FSA

Asset Management LLC (collectively, "Dexia"); and the Teachers Insurance and Annuity Association of America ("TIAA") against Deutsche Bank AG and several of its subsidiaries. The two Complaints, together nearly 300 pages in length, allege four violations of New York State law: 1) fraud; 2) fraudulent inducement; 3) aiding and abetting fraud; and 4) negligent misrepresentation relating to 43 separate residential mortgage-backed securities ("RMBS") in which the plaintiffs invested. The Court consolidated these two actions for purposes of discovery and pretrial motions.

Defendants moved to dismiss both Complaints in their entirety pursuant to Rule 12(b)(6), Fed. R. Civ. P. By bottom-line order dated February 6, 2012, this Court granted the motion to dismiss the Complaints and dismissed the majority of the case without prejudice to repleading.[1] The Court, however, dismissed with prejudice those claims that were based on loans not sponsored by defendant Deutsche Bank Structured Products. This Memorandum explains the reasons for those rulings and sets a schedule for any further proceedings.

[1] The dismissal of the Complaints renders moot defendants' motions to strike. The Court notes, however, that in any repleaded complaint, the Court would strike, pursuant to Lipsky v. Commonwealth United Corp., 551 F.2d 887, 892-94 (2d Cir. 1976), any paragraphs based on unproven allegations in unresolved cases. See RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009), aff'd, 387 F. App'x 72 (2d. Cir. 2010).

In ruling on motions to dismiss under Rule 12(b)(6), the Court may consider the well-pleaded allegations in the Complaints as well as those documents "incorporated in [the Complaints] by reference" and "matters of which judicial notice may be taken." SEC v. Apuzzo, 689 F.3d 204, 207 (2d Cir. 2012) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002)). In addition, the Court may consider "legally required public disclosure documents filed with the SEC." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007).

The pertinent allegations, viewed in the light most favorable to the plaintiffs, are as follows. Plaintiffs invested in 43 RMBS sold by the defendants.[2] Those 43 RMBS (the "Offerings") were all rated investment-grade at issuance, with many rated AAA. Dexia Compl. ¶¶ 36, 52; TIAA Compl. 30, 236. Plaintiffs allege that from 2005 to 2007, the defendants concealed defects in the mortgage loan collateral in the Offerings, caused by the lax origination standards of the 26 separate originators who originated those loans. Dexia Compl. ¶¶ 36, 64-226; TIAA Compl. ¶¶ 30, 59-178.

[2] Dexia purchased Certificates issued in 32 Offerings. Dexia Compl. ¶ 36. TIAA purchased Certificates issued in 11 Offerings. TIAA Compl. ¶ 30.

Defendant Deutsche Bank Securities, Inc. ("DBSI") underwrote the RMBS in all of the Offerings. Dexia Compl. ¶ 24; TIAA Compl. ¶ 18. Defendant Deutsche Bank Structured Products, Inc. ("DBSP"), was the "sponsor" for seventy-five percent of the Offerings, and in that role, acquired mortgage loans for securitization by purchasing them directly from loan originators. By purchasing these loans from the loan originators, DBSP assumed the risk of default on those loans before they were sold into the securitization. The DBSP-sponsored loans were primarily originated by non-party Deutsche Bank AG subsidiaries DB Home Lending LLC and MortgageIT, Inc. Dexia Compl. ¶¶ 30, 33; TIAA Compl. ¶¶ 24, 27. For those Offerings in which DBSP served as a sponsor, defendants Ace Securities Corp. ("Ace") and Deutsche Alt-A Securities Inc. ("DBALT") acted as "depositors" by purchasing the loans from the sponsor and placing them in a trust. Dexia Compl. ¶ 33; TIAA Compl. ¶ 27. For Offerings in which DBSP was not the sponsor, DBSI as underwriter was the only defendant directly involved in the Offering.

For those Offerings that were sponsored by DBSP, DBSP claimed that it only acquired loans from approved loan sellers that met DBSP's minimum requirements. Dexia Compl. ¶ 3. DBSP also asserted in at least some of the prospective supplements (the "ProSupps") that "all of the Mortgage Loans" that were

included in the Offering were vetted by DBSP underwriters to ensure that they met both DBSP's and the loan sellers' underwriting guidelines. Id. ¶ 325.

For at least some[3] of the loans for which DBSP was the sponsor, the ProSupp stated as follows:

> The Mortgage Loans were originated by various third party originators pursuant to the underwriting standard described in this section and were reviewed by the Sponsor to ensure conformity with such underwriting standards. The Sponsor's underwriting standards are primarily intended to assess the ability and willingness of a borrower to repay the debt of the mortgage loan and to evaluate the adequacy of the related mortgaged property as collateral for the mortgage loan . . . In underwriting a mortgage loan, the Sponsor considers, among other things, a mortgagor's credit history, repayment ability and debt service-to-income ratio . . . as well as the value, type and use of the mortgaged property.

Dexia Compl. ¶ 70.

In order to conduct this due diligence, the defendants contracted with third-party mortgage consultant Clayton Holdings, Inc. ("Clayton"). Dexia Compl. ¶ 4. Defendants knew that more than one-third of the loans that Clayton sampled from 2006 to 2007 contained "egregious" departures from the originators' underwriting guidelines. Id. ¶¶ 4, 238-41.

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[3] Plaintiffs' vague reference to the frequency of this statement in the ProSupps will be discussed further below because it is evidence of the Complaints' failure to meet the standards set forth in Rule 9(b), Fed. R. Civ. P. In short, plaintiffs state that "[f]or example" this "and/or similar representations" were made in six ProSupps, in addition to the ProSupp that is explicitly quoted in the Complaint. Dexia Compl. ¶ 70.

Nonetheless, the defendants overruled these findings and "waived in" 50% of the flagged loans. Id. Although Clayton tested only 30% of the loans in the Offerings, the Financial Crisis Inquiry Commission ("FCIC") concluded that, "one could reasonably expect [the untested loans] to have many of the same deficiencies, at the same rate, as the sampled loans." Dexia Compl. ¶ 244.[4] But the non-sampled loans were not evaluated and were instead waived in as well. Dexia Compl. ¶¶ 243, 245.

The Complaints are full of colorful language about RMBS from Greg Lippman, the Global Head of Asset-Backed Securities Trading at defendant DBSI, and his traders. Although some of that language applied to RMBS across the board,[5] some of the language refers to loans specifically purchased by the plaintiffs. For example, Lippman and his traders described two Offerings at issue in this case as respectively "a pig," and a deal that "stinks, though I didn't mention it." Dexia Compl. ¶ 277; TIAA Compl. ¶ 227. Lippman emailed another trader about

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[4] Defendants' factual challenges to this reading of the FCIC report, see, e.g., Supplemental Memorandum in Support of Defendants' Motion to Strike ("Def. Supp. Mem.") at 7-8, are inappropriate for resolution at this stage.

[5] For example, in a November 2005 email, one of Lippman's traders parodied "Ice Ice Baby" by Vanilla Ice, with the following lyrics: "Yo vip let's kick it! CDO oh baby, CDO oh baby…. Print, even if the housing bubble looms. There are never ends to real estate booms. If there is a problem, yo, we'll solve it. Check out the spreads while my structurer revolves it. CDO oh baby, CDO oh baby." Dexia Compl. ¶ 277 n. 33

one of the Offerings stating, "DOESN'T THIS DEAL BLOW," to which the trader responded "yes it blows I am seeing 20 to 40% writedowns." Dexia Compl. ¶ 277. Lippman told traders that defendant ACE was "horrible," and he advised at least one investor that the investor should short two of the Offerings that were purchased by Dexia. Id.

Although defendants assert that the Shorting Report was public and based on public information, one of Lippman's traders wrote in an email, "[W]e have to make money. Customer happiness is a secondary goal but we cannot lose sight of the trading desk[']s other role of supporting new issue[6] and the customer franchise." Dexia Compl. ¶¶ 10, 280. Lippman also wrote to one investor who was interesting in shorting RMBS, "[p]lease please do not forward these emails outside of your firm. . . . I do not want to be blamed by the new issue people [at Deutsche Bank] for destroying their business." Dexia Compl. ¶ 280.

DBSI took a $10 billion short position against RMBS sold by defendants, including some of those that it sold to plaintiffs. This deal was approved by senior Deutsche Bank executives and resulted in "the largest profit obtained from a single position in Deutsche Bank history." Id. ¶¶ 1, 9-12, 270-80. Deutsche Bank executives "told Lippman to make sure to update them on how

[6] Defendants' "new issue" business involved securitizing and selling RMBS and collateralized debt obligations to clients like the plaintiffs here. Dexia Compl. ¶ 280.

the trade was going, keeping the leash tight" on Lippman. Dexia Compl. ¶ 272.

Lippman's traders documented their view of the RMBS in the "Shorting Report," a presentation labeled as "highly confidential" and prepared no later than September 2005. The Shorting Report states that it was "prepared by Deutsche Bank AG or one of its affiliates. Declaration of Demian Ordway, Oct. 21, 2011 ("Ordway Decl."), Ex. 34 (the "Shorting Report"). The Shorting Report highlighted a particular risk factor in the loans: the debt-to-income ("DTI") ratios of the borrowers of many of the adjustable rate mortgage loans was incorrectly calculated at the initial "teaser" rates rather than at the fully indexed rates. Dexia Compl. ¶¶ 258-69. The Shorting Report concluded that a borrower with a DTI ratio above 50% would likely not be able to afford to repay his loan, and concluded that correctly-calculated DTI ratios for RMBS, including some of those in the Offerings, regularly exceeded that limit by a significant margin. Id. ¶¶ 258-69.

Many of the Offerings experienced delinquency rates of over fifty percent, Dexia Compl. ¶52, and the Certificates for the Offerings are all now rated as "junk." Dexia Compl. ¶ 13; TIAA Compl. ¶ 300.

The Court turns first to the claims for fraud, fraudulent inducement, and aiding and abetting fraud. In order to make out

a claim for fraud under New York law, the plaintiffs must plausibly allege "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). The plaintiffs must plead the same elements in order to make out a claim for fraudulent inducement. Centro Empresarial Cempresa S.A. v. America Movil S.A.B. de C.V., 17 N.Y.3d 269, 276 (2011) (a plaintiff alleging fraudulent inducement must "establish the basic elements of fraud."). To state a claim for aiding and abetting fraud plaintiffs must allege (1) the existence of an underlying fraud, (2) knowledge of the fraud, and (3) substantial assistance in the commission of the fraud. VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP, 348 F. Supp. 2d 255, 269 (S.D.N.Y. 2004) (emphasis added).

For each of these three claims, plaintiffs also must meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which applies to any claim that "sounds in fraud," Rombach v. Chang, 355 F.3d 164, 166, 170-71 (2d Cir. 2004), including claims for aiding and abetting fraud. Lerner v. Fleet Bank, N.A., 459 F.3d 273, 292-93 (2d Cir. 2006).

The question of whether Rule 9(b) applies to the negligent misrepresentation claim is slightly more complicated.[7] Although the Second Circuit has not yet determined whether Rule 9(b) applies to negligent misrepresentation claims, see Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 188 (2d Cir. 2004), district courts in this District have routinely concluded that the Rule is applicable to negligent misrepresentation claims that are premised on fraudulent conduct. See, e.g., Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162, 200 (S.D.N.Y. 2011); Naughright v. Weiss, No. 10 Civ. 8451, 2011 WL 5835047, at *7 (S.D.N.Y. Nov. 18, 2011); Bettinger v. Doueck, No. 10 Civ. 7653, 2011 WL 2419799, at *5 (S.D.N.Y. June 3, 2011); Maalouf v. Salomon Smith Barney, Inc., No. 02 Civ. 4770, 2003 WL 1858153, at *4, *8 n. 10 (S.D.N.Y. Apr. 10, 2003).

Plaintiffs seek to analogize to In re Refco, Inc. Sec. Litig., 503 F. Supp. 2d 611, 631-32 (S.D.N.Y. 2007), where then-

[7] In order to state a claim for negligent misrepresentation, plaintiffs must plead "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." Hydro Investors, Inc. v. Trafalgar Power, Inc., 227 F.3d 8, 20 (2d Cir. 2000).

district Judge Lynch held that if a claim brought under Section 11 of the Securities Act[8] did not overlap with a fraud claim and was instead based on distinct allegations, the claim need not comply with Rule 9(b). The Court need not decide whether to adopt the categorical rule applying Rule 9(b) to all negligent misrepresentation claims, because even if the Court were to analogize from Refco to this negligent misrepresentation claim, the fraud and negligent misrepresentation claims here are largely overlapping and are principally based on the same allegations of, in essence, fraudulent conduct. Therefore, at least as the Complaints are currently pled, the negligent misrepresentation claims must meet the strictures of Rule 9(b).

In short, all of the claims in both Complaints must comply with Rule 9(b). Turning therefore to the rule itself, Rule 9(b) instructs that "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). In order to satisfy Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). Because none of the four claims

[8] Fraud is not an element of a Section 11 claim, and a plaintiff need only allege negligence to state a claim under Section 11. Refco, 503 F.3d at 631.

meets the requirements of that rule, the Complaints must be dismissed, but, except as noted below, without prejudice to repleading.

First, plaintiffs have not alleged any misstatements for 16 of the 43 Offerings at issue in these cases. Instead, for these 16 Offerings, plaintiffs assert that there were unspecified fraudulent statements in the "Offering Materials," which include "registration statements, term sheets, prospectuses, draft prospectus supplements, prospectus supplements and other materials and communications." Dexia Compl. ¶ 2; TIAA Compl. ¶ 2. Plaintiffs contend that the Complaints "identify various topics, and then explain that the misrepresentations on [those topics] are substantially similar." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl. Mem.") at 24. But, this alone is insufficient under the particularity requirements of Rule 9(b). In fact, courts have dismissed fraud claims for failing to specify where in a single, lengthy document the allegedly false statement was located. See, e.g., In re Alcatel Sec. Litig., 382 F. Supp. 2d 513, 534 (S.D.N.Y. 2005) (finding that the complaint did not meet the pleading standards of Rule 9(b) or the PSLRA). Yet, for these sixteen Offerings, the plaintiffs have not alleged where the misstatements were located in the set of lengthy Offering

Materials for each of those RMBS or exactly what the misrepresentations were.

Plaintiffs argue that they do not need to point to specific statements once they have alleged that similar statements were made in the other ProSupps by that same originator because "the prospectus language across offerings by a single underwriter is largely boilerplate." Pl. Mem. at 24 n. 19 (citing PERS of Miss. v. Merrill Lynch & Co., Inc., No. 08 Civ. 10841, 2011 WL 3652477, at *15 (S.D.N.Y. Aug. 22, 2011)). But, unlike the situation in PERS, plaintiffs' assertion that the relevant language here is boilerplate is not accurate, for there were material differences among the ProSupps. For example, they differ in their cautionary language. THus, a 2007 ProSupp in one of the Offerings states:

> Recently, the residential mortgage market in the United States has experienced a variety of difficulties and changed economic conditions that may adversely affect the performance and market value of your securities. Delinquencies and losses with respect to residential mortgage loans generally have increased in recent months, and may continue to increase, particularly in the subprime sector. . . In addition, numerous residential mortgage loan originators that originate subprime mortgage loans have recently experienced serious financial difficulties and, in some cases, bankruptcy. Those difficulties have resulted in part from declining markets for mortgage loans as well as from claims for repurchases of mortgage loans previously sold under provisions that require repurchase in the event of early payment defaults, or for material breaches of representations and warranties made on the mortgage loans, such as fraud claims.

Ordway Decl. Ex 15, ProSupp, DB-ALT 2007-AR2. But the cautionary language in other of the ProSupps is materially different.

As to the other twenty-seven Offerings, plaintiffs also fail to state with particularity the alleged misstatements and where they appear in the Offering Materials. As just one example, the Dexia Complaint refers to a statement in one of the ProSupps, quoted above, where DBSP discussed the re-underwriting that it would undertake as sponsor and the standards that it would employ in that re-underwriting process to ensure that the loans complied with DBSP's and the originators' underwriting standards. But in the Dexia Complaint, plaintiffs only provide one example of this statement in a ProSupp and assert that "*[f]or example,* Deutsche Bank made this *and/or similar* representations in the Offering Materials regarding the loans acquired by DBSP for securitization in the ACE 2006-ASP1, ACE 2006-ASP4, ACE 2006-ASP6, ACE 2007-ASP1, ACE 2007-ASP2, and ACE 2007-HE5 RMBS." Dexia Compl. ¶ 70 (emphases added). This is plainly insufficient under Rule 9(b).[9]

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[9] If all of the statements in the ProSupps were indeed identical, plaintiff would have a better argument. But, the ProSupps were not identical. For example, some ProSupps stated that exceptions to underwriting criteria would make up an *insignificant* portion of the loans, and others stated that exceptions would be a *significant* portion of the loans. Compare Dexia Compl. ¶ 70 with Dexia Compl. ¶ 221. And, as discussed

An additional deficiency in particularity is that plaintiffs have failed to allege the dates on which they purchased securities in the Offerings. See Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080, 1088 (S.D.N.Y. 1977) ("[T]he plaintiff has failed to plead the nature and amount of securities purchased and the specific dates of the transactions as required by Rule 9(b)."). This is especially important in this case because it appears that plaintiffs' investments in twenty-eight of the forty-three Offerings occurred before the ProSupps were even issued. See Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def. Mem.") at 26 & n.18.

Plaintiffs now argue that they relied on draft ProSupps that were substantially similar to the final versions. See Pl. Mem. at 33. But, even if that is true, the Complaints did not comply with Rule 9(b). In the Complaints, plaintiffs alleged that they invested based on "registration statements, term sheets, prospectuses, draft prospectus supplements, prospectus supplements and other materials and communications" containing false statements. Dexia Compl. ¶¶2, 346; TIAA Compl. ¶ 2. It is true that the term draft prospectus supplements is included in that long list of materials. But, plaintiffs must allege this with particularity in the Complaints; they cannot simply assert

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above, the ProSupps written in 2007 began to include warnings about problems in the subprime market.

that this is the case in their brief. The Complaints do not allege that the drafts and final versions of the ProSupps are identical and they do not identify any specific misstatements in the draft ProSupps. This kind of vague pleading is exactly what is prohibited by Rule 9(b). The Court is mindful of the difficulty in bringing a fraud suit involving 43 separate offerings, especially considering the ever tightening pleading standards that plaintiffs must meet in order to survive a motion to dismiss.[10] Nonetheless, that cannot excuse compliance with the clear mandates of Rule 9(b).

Finally, the Complaints lack particularity because they do not always state who is responsible for particular statements. As discussed above, to meet the particularity requirements of 9(b), the Complaints must identify the "speaker" of the fraudulent statement. Shields, 25 F.3d at 1128. Plaintiffs do not consistently meet this requirement. For example, immediately after stating that DBSP sponsored eight of the 11 RMBS purchased by TIAA, and that ACE and DB-ALT served as the depositors for those 8 RMBS, plaintiffs allege, "[i]mportantly, *Deutsche Bank* provided the information that TIAA used to decide

[10] To the extent that the plaintiffs seek to rely on ratings agencies or appraisal claims, those assertions either rely on unproven allegations from other complaints that would be struck in an amended complaint, or they rely on the same fraudulent statements from the ProSupps discussed above. Again, those statements fail to meet the particularity requirements of Rule 9(b).

whether to purchase the securities." TIAA Compl. ¶ 27 (emphasis added). The TIAA Complaint does not state which entity it is referring to, or whether this allegation applies to all eleven RMBS or just the eight sponsored by DBSP. Although in some cases it is possible to identify which entity the plaintiffs are referring to, and the Court might not have dismissed for lack of particularity based on this problem alone, when combined with the other problems discussed above, this serves as an additional reason for dismissing the Complaints.

Having determined that dismissal is necessary under Rule 9(b), the Court must then determine whether the dismissal should be with or without prejudice. The defendants ask the Court to dismiss both Complaints in their entirety with prejudice. When dismissing a case on Rule 9(b) grounds, however, a court must not deny a plaintiff leave to amend unless "the plaintiff has acted in bad faith or the amendment would be futile." Caputo v. Pfizer, Inc., 267 F.3d 181, 191 (2d Cir. 2001).

Here, the Court cannot conclude that both Complaints should be dismissed in their entirety with prejudice because it is not clear at this stage that amendment would be futile as to those Offerings sponsored by DBSP. For the seventy-five percent of Offerings sponsored by DBSP, DBSP purchased the loans at the beginning of the process and bore the risk of loss for that loan. Clayton then conducted due diligence on a sample of the

loans purchased by DBSP. See, e.g., Dexia Compl. ¶¶ 4, 240, 245. DBSP also made specific representations that it had reviewed the loans to ensure that the loans conformed with DBSP's underwriting standards as well as the originator's underwriting guidelines, and that DBSP had conducted "quality control procedures, including a full re-underwriting of a random selection of mortgage loans to assure asset quality." See, e.g., Dexia Compl. ¶¶ 65, 70, 72.

Well-pleaded and particularized Complaints based on those Offerings might well be able to state a claim, particularly in light of 1) the Clayton findings that at least 30% of the loans in the DBSP-sponsored Offerings had "egregious" deficiencies; 2) the Shorting Report, especially that report's specific discussion about the delinquencies that might result from the failure to calculate DTI using the fully-indexed rate, see Shorting Report at 35-37; and 3) DBSI's large short position on RMBS.[11]

Moreover, Lippman and his traders also had very negative views about some of the DBSP-sponsored Offerings in this case, describing one Offering as "a pig," and stating that another "stinks, though I didn't mention it." Dexia Compl. ¶ 277; TIAA

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[11] The defendants' assertion that they also lost money with their long position on RMBS is not properly before the Court at this stage, and moreover, even if it were, this factual dispute would not be proper for resolution at this stage.

Compl. ¶ 227. In addition, Lippman advised at least one investor that he should take a short position on two of the Offerings. Dexia Compl. ¶ 277.

Defendants argue that Lippman was only one trader, and, furthermore, that his opinion was widely-publicized and based on public information. But Lippman was kept on a "tight leash," the defendants made a $10 billion short position on the basis of Lippman's analysis, and Lippman was careful about whom he shared his information with in order to keep the "CDO machine" humming along. Dexia Compl. ¶ 229. Every page of the Shorting Report stated both that it was "strictly private and confidential" and that confidential treatment was requested by DBSI. Shorting Report at 1-73. As one of Lippman's traders wrote, "[W]e have to make money. Customer happiness is a secondary goal but we cannot lose sight of the trading desk['] s other role of supporting new issue and the customer franchise." Dexia Compl. ¶¶ 10, 280. Lippman also wrote to one investor who was interested in shorting RMBS, "[p]lease please do not forward these emails outside of your firm. . . . I do not want to be blamed by the new issue people [at Deutsche Bank] for destroying their business." Dexia Compl. ¶ 280. Therefore, the plaintiffs can rely on Lippman and the Shorting Report in their amended complaints. Accordingly, although these claims cannot be evaluated on the merits until the Complaints are pleaded with

particularity, it is far from clear that amendment would be futile with respect to the DBSP-sponsored Offerings.

With respect to those Offerings not sponsored by DBSP, however, amendment would be futile. First, the allegations related to those Offerings are based in significant part on allegations lifted from other complaints, and the Court has already stated that it would strike those allegations in any Amended Complaint to the extent that they are simply copied from unproven allegations in unresolved cases. See supra, n.1.

Second, the allegations related to these Offerings are far too attenuated to state a claim. The Court does agree with the plaintiffs that Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011), does not apply to the state law fraud claims. See Allstate, 824 F. Supp. 2d at 1186 (holding that Janus does not apply to New York fraud claims). But plaintiffs concede that fraud liability only lies if a party "makes," "authorizes," or "causes" a false statement to be made. See Pl. Mem. at 22 (quoting Allstate, 824 F. Supp. 2d at 1186). For twenty-five percent of the Offerings, the Originators themselves created the issuing trust and acted as sponsor and depositor. Unlike the DBSP-sponsored Offerings, where the defendants and their subsidiaries were involved in originating, sponsoring, depositing, and underwriting, only DBSI (serving as

the underwriter) participated in the non DSBP-sponsored Offerings.

Even if an amended complaint could somehow plausibly allege that the defendants caused the false statements to be made, the false statements for these Offerings are far different from those alleged with respect to the DBSP-sponsored Offerings. The alleged false statements for these Offerings are primarily that the loans complied with the originators' underwriting guidelines, but the originators are not parties here. For the Offerings that DBSP sponsored, DBSP specifically promised to undertake a re-underwriting process to ensure that the loans complied with the originators' standards as well as DBSP's own standards. Moreover, DBSP was aware from the Clayton reviews of those loans that many of the loans had "egregious" deficiencies. By contrast, for these Offerings, DBSP did not promise that it would re-underwrite the loans to ensure compliance, and it did not do so. In fact, DBSP was not involved with these loans or Offerings in any way. Because DBSI had only a limited and attenuated role in these Offerings (and no other defendants were involved at all), even if the plaintiffs could allege a false statement caused by one of the defendants, they would not be able to plausibly allege that the defendants had the requisite *scienter* or that the plaintiffs justifiably relied on these

representations.[12] The inability to plead these elements would render futile any amendment with respect to the non DBSP-sponsored Offerings.[13]

There are a multitude of other issues raised by both parties, but when faced with Complaints that do not meet the requirements of Rule 9(b), the Court need not and will not reach the merits of those issues at this time. The Court therefore reaffirms its bottom-line order and dismisses the Complaints without prejudice as to those Offerings sponsored by DBSP, and with prejudice as to those Offerings not sponsored by DBSP. If the plaintiffs wish to replead the Complaints on the basis of the Offerings that were sponsored by DBSP, they must do so within 30 days of the date of this Memorandum Order, following which the parties should promptly telephone Chambers to schedule further proceedings.

SO ORDERED.

Dated: New York, New York

[12] This should not be read to imply that the plaintiffs would necessarily be unable to plead justifiable reliance as to the DBSP-sponsored Offerings. As discussed at length above, defendants played a much more active role in the DBSP-sponsored Offerings and had a far deeper knowledge of the loans and loan deficiencies in those Offerings. Therefore, reliance on the more detailed statements for those Offerings *may* have been justified. The Court cannot and will not rule on this issue until the Complaints are pled with particularity.

[13] The inability to plead justifiable reliance would be fatal not only to the fraud claims, but also to the negligent misrepresentation claim.

January 4, 2013 JED S. RAKOFF, U.S.D.J.