UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE MORGAN STANLEY MORTGAGE
PASS-THROUGH CERTIFICATES LITIGATION

Master File No. 09 Civ. 2137 (LTS)(MHD)

This Document Relates to All Actions

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MEMORANDUM ORDER

Plaintiffs[1] have filed a Third Amended Complaint ("TAC") asserting claims on behalf of a putative class of investors against various Morgan Stanley entities and several individuals for violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "33 Act"), 15 U.S.C. §§ 77k, 771(a)(2), 77o, in connection with the sale of mortgage-backed security ("MBS") pass-through certificates ("Certificates") that were offered for sale by means of documents that allegedly contained untrue statements and material omissions. Defendants have moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the TAC, arguing that the Plaintiffs' claims are time-barred and that Plaintiffs have failed to sufficiently plead the time and circumstances surrounding the discovery of their claims, as required under Section 13 of the '33 Act, 15 U.S.C. § 77m. The Court has jurisdiction of this matter under 28 U.S.C. § 1331. For the reasons stated below, Defendants' motion is denied.

The background of this case is detailed in In re Morgan Stanley Mortg.

[1] Plaintiffs in this action are Public Employees' Retirement System of Mississippi ("MissPERS"), West Virginia Investment Management Board ("WVIMB"), Members United Corporate Federal Credit Union ("Members"), NECA-IBEW Health and Welfare Fund ("NECA"), United Western Bank ("Western"), Pompano Beach Police and Firefighters' Retirement System ("Pompano"), and Pension Fund of West Virginia ("West Virginia"). WVIMB, Members, Western, Pompano, and West Virginia are hereinafter referred to as "New Plaintiffs."

Pass-Through Certificates Litig. ("MS II"), 810 F. Supp. 2d 650 (S.D.N.Y. 2011), and In re Morgan Stanley Mortg. Pass-Through Certificates Litig. ("MS I"), 09 Civ. 2137(LTS), 2010 WL 3239430 (S.D.N.Y. Aug. 17, 2010). The parties' familiarity with those decisions is presumed.

DISCUSSION

On a motion to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), the movant bears the burden of demonstrating that the complaint fails to state a claim upon which relief may be granted. Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003). To survive a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must "plead enough facts to state a claim that is plausible on its face." Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008) (internal quotation marks omitted) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

Section 13 of the '33 Act requires that all Section 11 and Section 12(a)(2) claims be "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C.A. § 77m (West 2011). A plaintiff bringing a Section 11 or 12(a)(2) claim must affirmatively plead facts demonstrating that they are within the statute of limitations. See, e.g., Zola v. Gordon, 685 F. Supp. 354, 360 (S.D.N.Y. 1988). In MS I and MS II, this Court dismissed the Consolidated Amended Complaint and Second Amended Complaint, respectively, for failing to plead such facts. Both times, the Court granted Plaintiffs leave to replead "the time and circumstances of discovery of the alleged conduct in order to demonstrate compliance with timing requirements of Section 13." See MS II, 810 F. Supp. 2d at 663.

> Relying on In re Chaus, Defendants argue that each Plaintiff is obligated to plead:
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> (1) the time and circumstances of the discovery of the [actionable misrepresentation or omission]; (2) the reasons why it was not discovered earlier (if more than one year has lapsed); and (3) the diligent efforts which plaintiff undertook in making or seeking such discovery.

In re Chaus Sec. Litig., 801 F. Supp. 1257, 1265 (S.D.N.Y. 1992) (quoting Quantum Overseas, N.V. v. Touche Ross & Co., 663 F. Supp. 658, 662 (S.D.N.Y. 1987)). Defendants argue that the TAC fails to plead these facts with sufficient particularity. They also contend, based on forty newly proffered news reports, that Plaintiffs had inquiry notice of their claims more than one year before their claims were brought.

Defendants' arguments are flawed in several respects. First, while the Court has cited In re Chaus for the proposition that plaintiffs alleging '33 Act claims must plead compliance with Section 13, see MS I, 2010 WL 3239430, at *6, the Court never adopted In re Chaus's three-prong pleading requirement, and for good reason: the claims in In re Chaus sounded in fraud and were, consequently, subject to the more stringent Rule 9(b) pleading standard. See Fed. R. Civ. P. 9(b). Plaintiffs' claims, by contrast, are governed by the notice pleading standard set forth in Fed. R. Civ. P. 8(a), which requires only that Plaintiffs include "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; In re Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 358 (2d Cir. 2010). Second, as this Court recently recognized, the inquiry notice standard no longer governs claims subject to Section 13; rather, the statute of limitations will only commence where "a plaintiff could have pled '33 Act claims with sufficient particularity to survive a 12(b)(6) motion." See In re Bear Stearns Mortg. Pass-Through Certificates Litig., ("In re Bear Stearns") — F. Supp. 2d —, 08 Civ. 8093(LTS), 2012 WL 1076216, at *11-13 (S.D.N.Y. Mar. 30, 2012) (citing Merck & Co. v. Reynolds, 130 S. Ct. 1784 (2010) and City of Pontiac Gen.

Emps. Ret. Sys. v. MBIA, Inc., 637 F.3d 169 (2d Cir. 2011)). Third, as this Court held in MS II, under American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), the filing of the original complaint on December 8, 2008, tolled the statute of limitations for each of the New Plaintiffs' claims. See MS II, 810 F. Supp. 2d 650, 666-70. The corollary of these three points is thus: to prevail at this stage, Plaintiffs need only plead facts sufficient to allege plausibly that a reasonable investor could not have brought a complaint, prior to December 8, 2007, that could have withstood a Rule 12(b)(6) motion. Thereafter, the burden shifts to Defendants to show that "'uncontroverted evidence irrefutably demonstrates [that the] plaintiff discovered or should have discovered' facts sufficient to adequately plead a claim" prior to December 8, 2007. In re Bear Stearns, 2012 WL 1076216, at *13 (quoting Newman v. Warnaco Group, Inc., 335 F.3d 187, 193 (2d Cir. 2003)).

Plaintiffs have met their pleading burden; Defendants have not met theirs. The TAC alleges that, as institutional investors, Plaintiffs were prohibited from carrying non-investment-grade securities, and that the "earliest a reasonably diligent investor, like [Plaintiffs], could have discovered the probability of a claim" was when its Certificates were downgraded to below investment-grade. (Id. ¶¶ 99, 101, 103, 105.) As of December 8, 2007, none of Plaintiffs' Certificates had lost their investment-grade rating. (Id.); see also MS II, 810 F. Supp. 2d at 664.

Defendants' exhibits do not persuade the Court that, by December 8, 2007, there was enough information in the public domain for Plaintiffs to have filed a complaint a complaint that could survive a 12(b)(6) motion. The exhibits paint a vivid picture of a distressed MBS industry, but not one references by name any of the entities that were involved in the origination, packaging, and sale of the Certificates at issue here. They are, in short, qualitatively no different from the evidence Defendants adduced in support of their failed motion to dismiss the Second Amended Complaint on untimeliness grounds. See MS II, 810 F. Supp. 2d 650, 665. The lack of

specificity, combined with the fact that Plaintiffs' Certificates retained their unblemished ratings into 2008, is fatal to Defendants' motion. As this Court held in In re Bear Stearns when addressing the same argument (and a nearly identical array of news reports), "it is difficult to see how a plaintiff could have plausibly pled that the epidemic of indiscretions in the MBS industry had infected his or her Certificates. A complaint couched in nothing more than the sweepingly general allegations contained in Defendants' exhibits would almost certainly stop[ ] short of the line between possibility and plausibility of entitlement to relief." 2012 WL 1076216, at *14 (internal quotation marks omitted).

Accordingly, the Court finds that the TAC adequately pleads compliance with the statute of limitations and that the claims are timely.

CONCLUSION

For the foregoing reasons, Defendants motion to dismiss the TAC is denied. This Memorandum Order terminates docket entry no. 138. An initial pre-trial conference is scheduled for August 14, 2012 at 3:30pm.

SO ORDERED.

Dated: New York, New York
July 16, 2012

LAURA TAYLOR SWAIN
United States District Judge