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LINKS: 36, 37

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re COUNTRYWIDE FINANCIAL
CORP. MORTGAGE-BACKED
SECURITIES LITIGATION

Case No. 11-ML-02265-MRP
(MANx)

ASSET MANAGEMENT FUND, d/b/a
AMF FUNDS, *et al.*,
Plaintiff,

Case No. 12-CV-04775-MRP
(MANx)

v.

Order Re Motions to Dismiss

BANK OF AMERICA
CORPORATION, *et al.*,
Defendants.

1 **I. Background**

2 Plaintiffs Asset Management Fund, d/b/a AMF Funds, AMF Intermediate
3 Mortgage Fund, AMF Ultra Short Fund, AMF Ultra Short Mortgage Fund, AMF
4 Short U.S. Government Fund and AMF U.S. Government Mortgage Fund
5 (collectively, “Plaintiffs” or “Asset Management”) purchased approximately \$193
6 million in residential mortgage-backed securities (“RMBS”) created, structured
7 and prepared by the defendants “Bank of America,”¹ “Countrywide”² and “Merrill
8 Lynch”³ (collectively, the “Defendants”). According to Plaintiffs, the documents
9 used to create and market the securities (the “Offering Documents”) contained
10 false and misleading statements. The Plaintiffs filed summons with notice in New
11 York state court on March 1, 2012 against the Defendants. The matter was
12 removed to federal court on May 11, 2012 and transferred to this Court on May 23,
13 2012 as part of the Countrywide Multi-District Litigation. Plaintiffs filed its
14 complaint here on September 7, 2012. The Defendants now move to dismiss.

15 The RMBS purchased by the Plaintiffs (also called “certificates”) were
16 produced by securitization of pools of loans. In securitization, an entity called an
17 “originator” extends loans to permit the purchase of homes. The originator decides
18 to make certain loans through “underwriting,” and the guidelines it follows to
19 ensure that loans are extended to borrowers able to repay them are called
20 “underwriting guidelines.” The loans are pooled and sold to trusts that issue
21 certificates entitling the holders to receive cash flows from the pool. Investors like
22 the Plaintiffs purchase the certificates, which are sold in tiers, called “tranches,”
23 portions of the loan pool with different characteristics, like priority of payment,
24 interest rate or credit protection. Upon issuance, each tranche is assigned a credit

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26 ¹ Bank of America Corporation, Bank of America, N.A., NB Holdings Corporation,
27 Merrill Lynch, Pierce, Fenner & Smith, Inc. (f/k/a Banc of America Securities LLC), Banc of
28 America Funding Corporation and Bank of America Mortgage Securities, Inc.

² Countrywide Financial Corporation, Countrywide Home Loans, Inc. and CWMBBS, Inc.

³ Merrill Lynch Mortgage Lending, Inc. and Merrill Lynch Mortgage Investors, Inc.

1 rating by the credit rating agencies. Investors can select certificates in the tranches
2 depending on their preferences as to the degree of risk and rate of return. Each
3 certificate can only issue upon the filing of the Offering Documents with the SEC.

4 In their complaint, Plaintiffs assert that the Offering Documents contained
5 false statements, regarding the transfer of title of the loans to the issuing trusts,
6 compliance with underwriting guidelines, rate of occupancy of the homes by the
7 borrowers and the ratio of the loan to the value of the home. Such false statements,
8 according to Plaintiffs, constitute common law fraud, fraudulent concealment or in
9 the alternative, negligent misrepresentation, and aiding and abetting the fraud of
10 others. The Plaintiffs also allege that Bank of America is liable as the successor-
11 in-interest to the Countrywide Defendants.

12 The Defendants move to dismiss. All Defendants argue that the claims are
13 time-barred by the statutes of limitations New York courts would apply on these
14 facts. If the complaint is not time-barred, Defendants argue that the complaint fails
15 to state a claim, since it does not include actionable misstatements or other
16 required elements of the causes of actions. Bank of America argues once again
17 that the Plaintiffs fail to sufficiently plead successor liability claims.

18 Two basic legal matters must first be resolved. The Court must apply New
19 York state law, including its choice-of-law rules, to any issue of state law. *Bank*
20 *Hapoalim B.M. v. Bank of America Corp.*, No. 12-CV-4316, slip op. at 4 (Dec. 21,
21 2012). Second, the complaint will only survive this motion to dismiss if it includes
22 sufficient factual allegations, not legal conclusions, to state a plausible claim for
23 relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The causes of action here all
24 require that plaintiffs meet the heightened pleading standard of particularity. *Bank*
25 *Hapoalim*, slip op. at 4–5 (citing case law explicating the pleading standard for
26 fraud, negligent misrepresentation, fraudulent concealment and aiding abetting
27 fraud). The “particularity standard requires ‘precise allegations explaining how the
28 alleged misstatements were misleading or untrue when made.’” *Id.* at 5.

1 ***II. Asset Management Fund’s Claims, Except as to the Title-Transfer***
2 ***Allegations, are Time-Barred***

3 None of the Plaintiffs have their place of incorporation or principal place of
4 business in the state of New York. Complaint, ECF No. 23 (“Compl.”) ¶¶ 25–30;
5 Pls.’ Req. for Judicial Notice in Supp. of Their Opp., Ex. A (“SEC Filings”). That
6 means that the Plaintiffs suffered its economic injuries outside New York. *Global*
7 *Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529–30 (1999). “A cause of action
8 accrues where the injury is sustained.” *Id.* at 529. In such cases where a plaintiff’s
9 claim accrues outside the state, the complaint is untimely if “commenced after the
10 expiration of the time limited by the laws of either [New York] or the place
11 without the state where the cause of action accrued.” N.Y.C.P.L.R. § 202. In other
12 words, if Plaintiffs’ claims were time-barred in the state where they suffered
13 economic injury, the complaint is untimely.

14 According to the complaint, the Plaintiffs are a Delaware statutory trust and
15 five mutual funds, all of which have a principal place of business in Florida.
16 Compl. ¶¶ 25–30. Under Florida law, all actions “founded on negligence” or
17 “founded on fraud” must be brought within four years. FLA. STAT. § 95.11(3)(a),
18 (j). The statute of limitations begins to run when a plaintiff “has information
19 sufficient to make him or her aware of circumstances that a reasonable person
20 would investigate, where such an investigation would uncover the fraudulent
21 activity.” *Begualg Inv. Mgmt., Inc. v. Four Seasons Hotel Ltd.*, No. 10–22153,
22 2012 WL 1155128, at *4 (S.D. Fla. Apr. 5, 2012); *Sickler v. Melbourne State*
23 *Bank*, 159 So. 678, 679 (Fla. 1935). This Court has previously held that “a
24 reasonable investor was on inquiry notice of RMBS claims relating to
25 Countrywide’s loan origination practices by February 14, 2008,” more than four
26 years before the filing of this suit on March 1, 2012. *Am. Int’l Grp., Inc. v.*
27 *Countrywide Fin. Corp.*, 834 F. Supp. 2d 949, 961 (C.D. Cal. 2012) (citing
28 *Stichting Pensionenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125,

1 1140 (C.D. Cal. 2011)). By February 14, 2008, there was “widespread public press
2 coverage” of problems with underwriting at Countrywide, and two different sets of
3 plaintiffs had filed class action lawsuits alleging that Countrywide had falsely
4 represented its underwriting and origination practices. *Stichting*, 802 F. Supp. 2d
5 at 1140. That information was “enough to alert a reasonable person to wrongdoing
6 in Countrywide’s loan origination business.” *Id.* That means that when Plaintiffs
7 filed this lawsuit on March 1, 2012, four years had already passed since a
8 “reasonable person would investigate” the wrongdoing and uncover the fraud, and
9 the claim is time-barred under Florida law.

10 The result is the same under Delaware law. Delaware has a three-year
11 statute of limitations for claims of fraud and negligent misrepresentation. 10 DEL
12 CODE ANN. tit. 10, § 8106 (“no action to recover damages caused by an injury
13 unaccompanied with force . . . shall be brought after the expiration of 3 years from
14 the accruing of the cause of such action”); *Leonard v. Fireman’s Fund Ins. Cor.*,
15 692 A.2d 413 (Del. 1997) (mentioning the “three year limitations period for fraud
16 actions”). The limitations period accrues at the “time of the injury,” “even if the
17 plaintiff is ignorant of the cause of action.” *Krahmer v. Christie’s Inc.*, 903 A.2d
18 773, 778 (Del. Ch. 2006) (citations omitted). For fraud and negligent
19 misrepresentation claims such as these, the injury is suffered when the plaintiff
20 purchases the product based on defendant’s false representations. *Id.* The
21 Plaintiffs purchased all of their securities before March 1, 2009, three years before
22 the filing of this action. Compl. ¶ 46. The complaint offers no facts to support any
23 of the tolling doctrines found in Delaware law.⁴

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28 ⁴ Plaintiffs do not offer any arguments under Florida or Delaware law supporting the
timeliness of their case.

1 Therefore, with respect to most of the allegations,⁵ neither of the potential
2 statutes of limitation permit the Court to conclude that Plaintiffs' claims are timely,
3 so the complaint must be dismissed.

4 Plaintiffs attempt to avoid the statute of limitations of Florida and Delaware
5 with precisely one argument.⁶ Alongside their opposition brief, Plaintiffs include
6 the SEC Filings as part of their request for judicial notice. Those filings, which are
7 each entitled "certified shareholder report of registered management investment
8 companies," list the "address of principal executive offices" of Asset Management
9 Fund as located within Chicago, Illinois. According to the Plaintiffs, those
10 documents mean that their principal place of business was located in the state of
11 Illinois, and their claims are subject to the Illinois statute of limitations.

12 As Plaintiffs seem to recognize, this attempt at an argument is objectionable
13 on its face for myriad reasons, and must be rejected out of hand. First, plaintiffs
14 are not allowed to amend or supplement their complaint using an opposition brief.
15 *Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)
16 ("The 'new' allegations contained in the [plaintiff's] opposition motion, however,
17 are irrelevant for Rule 12(b)(6) purposes. In determining the propriety of a Rule
18 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's
19 moving papers, such as a memorandum in opposition to a defendant's motion to
20 dismiss."); *In re A-Power Energy Gen. Sys. Ltd. Sec. Litig.*, No. MDL 11-2302-
21 GW(CWx), 2012 WL 1983341, at *12 n.16 (C.D. Cal. May 31, 2012). Plaintiffs
22 offer no reason that the SEC Filings should be considered, and the Court cannot
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24 ⁵ Plaintiffs' claims that Defendants did not properly transfer title to the mortgage loans are
25 not time-barred. There were no lawsuits or public press reports pressing such claims before, at
26 least, April 27, 2009, meaning causes of actions based on such allegations are timely under
27 Florida law. *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, No. 11-cv-07166-MRP,
2012 WL 1097244, at *6 (C.D. Cal. Mar. 9, 2012). There is no need to decide where Florida or
28 Delaware law applies, though, since the claim is insufficiently pled. *See infra*.

⁶ As mentioned, Plaintiffs do not argue that fraudulent concealment tolling under either
Delaware or Florida applies, and the complaint lacks any facts to support such tolling.

1 find any, since the complaint offers no mention or implication of these filings. *See,*
2 *e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998), *superseded by*
3 *statute on other grounds as noted in Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th
4 Cir. 2012) (recognizing that a district court “may consider a document the
5 authenticity of which is not contested, and upon which the plaintiff’s complaint
6 necessarily relies.”). Second, Plaintiffs offer no analysis of why the mailing
7 “address of principal executive offices” of Asset Management Fund should control
8 the location of the principal place of business for all six of the Plaintiffs’ entities.
9 Finally, this Court must accept all of the factual allegations in the complaint as
10 true. *Iqbal*, 556 U.S. at 678. The complaint does not, at any point, mention
11 Illinois, and in fact plainly states that the principal place of business for each entity
12 is located in Miami. Compl. ¶ 25–30. The Court “need not wait for discovery
13 before conducting choice of law analyses where the pleadings, construed in the
14 plaintiff’s favor, contain all necessary facts.” *Hamby v. Ohio Nat’l Life Assur.*
15 *Corp.*, Civil No. 12–00122 JMS–KSC (D. Haw. June 29, 2012) (citations omitted).
16 Here, there is no need to conduct a “fact-intensive choice-of-law determination.”
17 *Harper v. LG Elec. USA, Inc.*, 595 F. Supp. 2d 486, 490 (D.N.J. 2009). The
18 Plaintiffs’ complaint, “which contains the only statements this Court may consider
19 on a motion to dismiss,” points to only two jurisdictions with relevant contacts to
20 the New York borrowing statute. *Liebman v. Prudential Fin., Inc.*, No. CIV.A. 02-
21 2566, 2002 WL 31928443, at *4 (E.D. Pa. Dec. 30, 2002). The Plaintiffs’ claims
22 are time-barred under the statute of limitations of both Delaware and Florida law.

23 ***III. The Title-Transfer Allegations do not State a Claim***

24 The only claims not time-barred under Florida law are the allegations that
25 the Defendants failed to properly transfer title of the mortgages to the issuing
26 trusts. According to Plaintiffs, that failure means that the Offering Documents
27 misstated that the securities were “mortgage-backed.” The Court has already
28 rejected this inventive argument. *Bank Hapoalim*, slip op., at 16–17. The Offering

1 Documents were merely stating a straightforward description of the requirements
2 of the Pooling and Servicing Agreement. *Id.* at 16. That description can support
3 an action for breach of contract or breach of fiduciary duties, but not fraud. *Id.* In
4 fact, the Pooling and Servicing Agreement itself transferred proper title to the
5 issuing trusts. *Id.* at 17. The complaint also fails to state that the lack of title-
6 transfer has caused Plaintiffs any injury, a required element of a fraud claim,
7 instead speculating about potential future harm. That speculation is not a substitute
8 for the particularized allegations needed to support a plausible claim for fraud. *Id.*

9 ***IV. Leave to Replead is not Granted as to any Securities Purchased Before***
10 ***March 1, 2007***

11 Normally, “leave to replead is to be liberally granted.” *Slayton v. American*
12 *Exp. Co.*, 460 F.3d 215, 230 (2d Cir. 2006). However, when it is clear that “the
13 complaint could not be saved by amendment,” the Court can dismiss with
14 prejudice. *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.
15 2003). No facts could save Plaintiffs’ claims for securities purchased before
16 March 1, 2007 even under Illinois law, so such claims are dismissed with
17 prejudice.⁷

18 As mentioned, the only argument Plaintiffs offer for the timeliness of their
19 actions relies upon the application of Illinois law. In Illinois, securities claims
20 must be brought within five years of the purchase of the security. *In re*
21 *Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 860 F. Supp. 2d 1062, 1076
22 (citing 815 Ill. Comp. Stat. 5/13(D), which states “in no event shall the period of
23 limitation so extended be more than 2 years beyond the expiration of the 3 year
24 period otherwise applicable.”). That subsection begins by defining the discovery
25

26 ⁷ Those are BAFC 2005- D (tranche B1); BAFC 2006-A (tranche 1B2); BAFC 2007-A
27 (tranches M1, M2 and M3); MANA 2007-A1 (tranche B1); MLMI 2006-A4 (tranche 1A);
28 CWHL 2003-56 (tranche M); CWHL 2006-20 (tranche 1A17); and CWHL 2006- 20 (tranche
1A4). See Compl. ¶ 46, Table 1.

1 rule for securities claims in Illinois, and was intended to cover any fraudulent
2 concealment. *Cortes v. Gratkowski*, No. 90 C 2904, 1991 WL 632, at *5 (N.D. Ill.
3 Jan. 3, 1991) (the subsection, created by statutory amendment, ““was designed
4 particularly to cover cases of fraudulent concealment,”” citing the interpretative
5 comments of the Illinois legislature). Since that section specifically defined the
6 delaying of the statute of limitations based on fraudulent concealment by the
7 defendants, no other fraudulent concealment toll can apply, and the statute of
8 repose is absolute. *Wilhelm v. A.G. Edwards & Sons, Inc.*, 61 F. App’x 272, 276
9 (7th Cir. 2003) (since the statute of repose specifically states that ““in no event
10 shall the period of limitation so extended be more than 2 years beyond the
11 expiration of the 3 year period otherwise applicable,”” without “any indication that
12 the Illinois legislature intended to create” an exception to the statute of repose,
13 “this court will not infer the existence of such an exception.”) The statute of
14 repose is an absolute bar, so any securities purchased before March 1, 2007 could
15 not be the subject of litigation on March 1, 2012.

16 **V. Conclusion**

17 Plaintiffs’ claims are dismissed as time-barred in full. The complaint fails to
18 include any plausible facts that the place of injury was in a jurisdiction where the
19 causes of action would be timely. Any repleading on the securities purchased
20 before March 1, 2007 would be futile, since they would be time-barred even in the
21 jurisdiction Plaintiff now relies upon. Those claims are dismissed with prejudice.
22 Only claims regarding the remaining securities are dismissed without prejudice,
23 with the right to replead within 20 days from this order.

24
25 IT IS SO ORDERED.

26 DATED: January 10, 2013



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Hon. Mariana R. Pfaelzer
United States District Judge