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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SEALINK FUNDING LIMITED, *Plaintiff*, v. DEUTSCHE BANK AG; DEUTSCHE BANK SECURITIES INC.; DB STRUCTURED PRODUCTS, INC.; ACE SECURITIES CORP.; and DEUTSCHE ALT-A SECURITIES, INC., *Defendants*.	Adv. Proc. No. 12-2051 (MG)

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

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Defendants[1] respectfully submit this memorandum of law, together with the affidavit of Stephen Auld QC ("Auld Affidavit"), the declaration of David J. Woll, and its annexed exhibits ("Ex. __"), in support of their motion to dismiss the Amended Complaint (the "Complaint" or "AC") under Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 9(b), and Fed. R. Bankr. P. 7012(b).

PRELIMINARY STATEMENT

Plaintiff Sealink Funding Limited claims to be the successor in interest to a network of special purpose vehicles ("SPVs") that were created and controlled by Sachsen, a state-owned German bank. Saschen and its affiliates were highly sophisticated investors who purchased complex financial instruments, including the residential mortgage-backed securities ("RMBS") at issue here, for the purpose of creating even more complex financial instruments—structured investment vehicles ("SIVs")—which they sold to other sophisticated investors. When the real estate bubble burst, the German government orchestrated a bail-out of Saschen that removed the RMBS at issue from Saschen's books and, according to Plaintiff, transferred to Sealink the the right to assert the fraud-based claims set forth in the Complaint. The implausible premise of Plaintiff's Complaint is that the financial engineers who structured the intricate web of SPVs and SIVs through which Saschen made its RMBS investments did not know what they were buying, despite exhaustive disclosures and disclaimers in the relevant offering documents detailing the well-known risks associated with the subprime and Alt-A loans underlying those investments. Plaintiff's far-fetched pleading is facially flawed in numerous respects and should be dismissed.

Plaintiff has not established standing. Plaintiff brings suit as purported assignee based on a series of complex transactions among Sealink and numerous nonparties during 2007 and 2008. Plaintiff, however, fails to meet its threshold burden to establish standing because the

[1] ACE Securities Corp. ("ACE"), Deutsche Alt-A Securities, Inc. ("DBALT"), DB Structured Products, Inc. ("DBSP"), Deutsche Bank Securities Inc. ("DBSI"), and Deutsche Bank AG ("DBAG") ("DB" or "Defendants").

Complaint does not address each purported assignment in the alleged chain of transfers and fails to establish that the right to sue in tort was ever assigned under governing English law.

Plaintiff fails to adequately allege the elements of its claims. Sealink's Complaint contains an array of vague allegations regarding origination practices and made-for-litigation analyses purporting to show problems with a fraction of the thousands of loans at issue. Plaintiff take an impermissible "group pleading" approach by making undifferentiated allegations against all Defendants, padded with mischaracterizations of unrelated events and reports not tied to the offerings at issue. Moreover, Sealink's claims are unsupported by particularized factual allegations and are contradicted by express disclosures in the prospectus supplements on which Plaintiff bases its claims (the "ProSupps" or "PS"). The Complaint also fails to adequately plead reliance. It says almost nothing about what due diligence was performed at purchase and admits that Sealink's predecessors did not even review the ProSupps before deciding to invest. Finally, the Complaint fails to demonstrate how any damages resulted from anything other than the unprecedented meltdown in the housing market and the international financial markets generally.

BACKGROUND

Plaintiff alleges that in 2006 and 2007, 28 RMBS certificates (the "Certificates") issued in 19 RMBS offerings (the "Offerings") allegedly sponsored or underwritten by Defendants were acquired at the direction of Sachsen LB Europe Plc ("Sachsen Europe"), a subsidiary of Landesbank Sachsen Girozentrale, a German state-owned bank ("Sachsen LB"; together with Sachsen Europe, "Sachsen") for the portfolios of SIVs and "SIV-Lites" it sponsored.[2] SIVs were among the first casualties of the global financial crisis, and sponsor banks such as Sachsen incurred significant losses as their SIVs drew down on emergency liquidity facilities provided by

[2] *See In re Citigroup Sec. Litig.*, 753 F. Supp. 2d 206, 215-16 (S.D.N.Y. 2010) (discussing SIVs); *Oddo Asset Mgmt. v. Barclays Bank plc*, 19 N.Y.3d 584, 588 (N.Y. 2012) (discussing "SIV-Lites").

their sponsors after the asset-backed commercial paper markets froze. Following an August 2007 German government bailout, Sachsen was acquired by nonparty Landesbank Baden-Württemberg ("LBBW"). (AC ¶ 39.) Sachsen's SPVs and their portfolios, including the Certificates, were excluded from the sale to LBBW, and were instead allegedly transferred to Plaintiff Sealink, an SPV specifically created to hold these assets. (*Id.*)[3]

The Offerings were structured and issued in accordance with industry-standard practices. First, a sponsor purchased loans from originators. DBSP sponsored 14 of the Offerings (AC ¶ 28); the other five were sponsored by nonparties.[4] Next, the sponsor sold a pool of loans to an SPV called a depositor, which then transferred them to a trust created to hold the loans and distribute loan payments. ACE was the depositor in five Offerings and DBALT was the depositor in eight others (*id.* ¶¶ 29-30).[5] The trust then issued securities known as certificates, which entitled their holders to shares of borrowers' payments on the loans, and were issued in different tranches which corresponded to different levels of risk and return. Finally, underwriters sold the certificates to investors. DBSI served as an underwriter in each Offering. (AC ¶ 27.)

Sachsen was no babe in the woods when it came to real estate investments, and had been "loading up on asset-backed securities and derivatives" through Sachsen Europe since 2002.[6]

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[3] German government bodies have issued guarantees which "cover all risks arising from the portfolios transferred to Sealink." Ex. A, Landesbank Baden-Württemburg, *Financial Stability Board Report as of 30 June 2012*, at 27.

[4] DBSP sponsored ACE 2007-ASAP1, ACE 2007-ASAP2, ACE 2007-WM1, DBALT 2006-AR4, DBALT 2006-AR6, DBALT 2007-1, DBALT 2007-AR1, DBALT 2007-AR2, DBALT 2007-BAR1, DBALT 2007-OA1, DBALT 2007-OA2, DBALT 2007-OA4, DMSI 2006-PR1, and MHL 2007-1. The third party sponsored offerings are INDX 2007-AR27 (sponsored by IndyMac), NHEL 2007-1 (sponsored by NovaStar), PHHAM 2007-2 (sponsored by PHH Mortgage), RALI 2007-QO2 and RAMP 2007-RS1 (both sponsored by Residential Funding).

[5] ACE was the depositor for ACE 2007-ASAP1, ACE 2007-ASAP2, ACE 2007-WM1, DBALT 2007-1, and DBALT 2007-OA4; DBALT was the depositor for DBALT 2006-AR4, DBALT 2006-AR6, DBALT 2007-AR1, DALT 2007-AR2, DBALT 2007-BAR1, DBALT 2007-OA1, DBALT 2007-OA2, and PHHAM 2007-2.

[6] Ex. B, Bloomberg, *Lehman Toxic Debt Advice Led Leipzig to Ruin via Dublin*, (October 28, 2008) (discussing how Sachsen LB executives "milked [Sachsen Europe] for profit" and how Sachsen "pressed ahead" with its subprime investments despite the fact that "warning signs" about increasing defaults had "prompted Germany's central bank … to ask Sachsen and others about their investments in mortgages to American homeowners with dubious credit histories").

Sachsen had access to term sheets and other preliminary materials known as "free writing prospectuses" before investing, and received the final offering documents, such as the ProSupps, once the deal closed. (AC ¶ 286.) The Offerings were backed by loans issued in rapidly appreciating real estate markets to borrowers with nonstandard credit, often under guidelines which did not require documentation of income, assets, and/or employment, and which often bore high, adjustable interest rates. This was all disclosed in the offering documents, which contained extensive risk disclosures, including that weakness in the housing market or the broader economy would likely lead to borrower defaults. During the financial crisis, an unprecedented decline in housing prices led to increased borrower defaults and, consistent with these risk disclosures, caused the value of the Certificates to decline.

ARGUMENT

I. PLAINTIFF HAS NOT ESTABLISHED STANDING TO SUE

Dismissal is required under Rule 12(b)(1) because the Complaint fails to demonstrate Sealink's standing to sue. To survive a motion to dismiss for lack of standing, a plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue," *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011), and if "the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Sealink Funding Ltd. v. Countrywide Fin. Corp.*, 2012 WL 2250138, at *2 (C.D. Cal. June 15, 2012). Since it brings suit as a purported assignee, "Sealink's standing to pursue the claims in this case will rise or fall with the assignment issue." *Id.* at *3 (finding Sealink's nearly identical standing allegations inadequate). The Complaint alleges a convoluted set of transactions from Sachsen's SPVs to Sealink, but fails to demonstrate that these transfers, which were governed by English

law, effectively conveyed the right to sue in tort.[7] The Complaint must therefore be dismissed.

According to the Complaint, sixteen of the Certificates were initially purchased by Ellis Quay, Eden Quay, Ormond Quay, or Merchants Quay (the "Irish SPVs") and twelve were initially purchased by Barclays Capital. (AC ¶¶ 21, 32.) The Certificates held by the Irish SPVs were then transferred to Castleview I, Castleview II, and Castleview III (the "Cayman SPVs") pursuant to "Global Master Repurchase Agreements" ("GMRAs"). (*Id.* ¶ 38.) The Certificates purchased by Barclays were allegedly transferred to an SPV called Saschen Funding I, Ltd. ("Sachsen Funding") under a "Warehouse Agreement." (*Id.* ¶ 21.) Subsequently, every Certificate was allegedly transferred to Sealink pursuant to Sale and Purchase Agreements ("SPAs") and a Master Framework and Definitions Schedule ("MFDS"). (*Id.* ¶ 39.) These transactions are described in detail in the Affidavit of Stephen Auld QC. The Complaint only includes brief snippets of some of these agreements, but based on Plaintiff's allegations, none contained language sufficient to transfer tort claims under governing English law.

As an initial matter, Plaintiff's standing allegations do not fully address every assignment in the chain of transfers it claims occurred, much less that the right to sue was also assigned at each step in the chain. For instance, although Plaintiff claims that Sachsen Europe established a warehouse facility with Barclays through the Warehouse Agreement,[8] the Complaint does not quote any relevant language from this agreement or explain how it resulted in the Certificates or any corresponding tort claims being transferred to Saschen Funding, much less to Sealink. Plaintiff also fails to specify which language assigned the right to sue in connection with the purported transfer of ACE 2007-WM1 A2C from Castleview I to Castleview II. (AC ¶ 32.)

[7] Defendants hereby give notice pursuant to Fed. R. Civ. P. 44.1 that they intend to raise an issue of foreign law. As Sealink has conceded, English law governs the assignments alleged in the Complaint. *See* Ex. C Mem. of L., *Sealink Funding Limited v. Morgan Stanley, et al.*, No. 650196/2012 (N.Y. Sup. Oct. 5, 2012).

[8] The Complaint's references to "Sachsen Funding WH" (AC ¶ 32) appear to refer to the warehouse facility.

The language Plaintiff does quote is likewise insufficient to assign tort claims under English law. According to the Complaint, the GMRAs transferred "all right, title and interest" in the Certificates to the Cayman SPVs. (AC ¶ 38.) However, under English law, a transfer of the right to sue in tort can only be accomplished using explicit terms referencing the tort claims which the assignor seeks to transfer, and, as such, this language is inadequate. (Auld Aff. ¶ 24.) Although no specific formula is required (*id.* ¶ 22), the terms should clearly refer to the legal claims that the parties wish to assign, and not merely to the assignment of the assets on the basis of which such causes of action may be alleged. (*Id.* at ¶ 26.)[9] The need for such specificity arises out of the English courts' traditional "reluctance to allow claims in tort to be assigned" (*id.* ¶ 73) and the "fundamental" principle "that [an] English court will not construe a written contract on the basis of subjective hindsight." (*Id.* ¶ 40.) In order to assign the right to sue, the words actually used must demonstrate an express assignment of tort claims, and an English court will not read in such language where it is not already present.

The language Plaintiff quotes from the agreements governing the transfers to Sealink also fails to assign tort claims, even assuming the intermediate holders of the Certificates owned any tort claims they could assign. The SPAs merely state that the seller "with full title guarantee and as beneficial owner hereby agrees to sell, and the Purchaser [Sealink] hereby agrees to purchase" the assets. (AC ¶ 39.) This language makes no reference to tort claims. The MFDS allegedly provides that the term "'assets' includes present and future properties, revenues and rights of every description." (*Id.*) Once again, this language makes no specific reference to tort claims and, thus, is not sufficient under English law to transfer such claims. (Auld Aff. ¶ 74 (2).)

[9] *See also* Auld Aff. ¶ 72 ("the transfer of an asset does not automatically or necessarily carry with it the transfer of associated causes of action, such as claims against third parties for compensation for a decline in an asset's value of for a failure to disclose defects in the asset, which mean that it is worth less than the price paid or its assessed value without those defects. Otherwise the purchaser of a defective asset who sells it in order to mitigate his loss would lose his cause of action.").

II. PLAINTIFF'S FRAUD AND FRAUDULENT INDUCEMENT CLAIMS FAIL

A complaint based on "labels and conclusions" and "naked assertions devoid of further factual enhancement" cannot survive a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, Plaintiff's claims are also subject to Rule 9(b), which requires Plaintiff to state the circumstances constituting fraud with particularity, and to "plead the factual basis which gives rise to a strong inference of fraudulent intent." *Landesbank Baden-Württemberg v. Goldman, Sachs & Co.*, 478 F. App'x 679, 681 (2d Cir. 2012). The essential elements of claims for fraud or fraudulent inducement are "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 (N.Y. 2009), as well as "direct and proximate caus[ation]." *Laub v. Faessel*, 745 N.Y.S.2d 534, 536 (App. Div. 2002). Where, as here, a plaintiff fails to adequately plead each element, dismissal is required.

A. The Complaint Does Not Raise A Strong Inference Of Scienter

To plead scienter, a plaintiff must allege sufficient facts to raise a "strong inference of fraudulent intent" with respect to each defendant. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). The inference "must be cogent and at least as compelling as any opposing inference of nonfraudulent intent," and the Court should consider "plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310 (2007).[10] As a threshold matter, Plaintiff's scienter allegations are defective because they are made indiscriminately against "Deutsche Bank," defined so as to refer to every Defendant. Such group pleading is patently improper. Plaintiff must plausibly allege scienter with respect to each Defendant. *See, e.g., In re*

[10] "[T] he "same pleading standard" applies "to common law and securities fraud cases after *Tellabs*." *Harborview Value Masterfund, L.P. v. Freeline Sports, Inc.*, 2012 WL 612358, at *9 (S.D.N.Y. Feb. 23, 2012).

CRM Holdings, Ltd. Sec. Litig., 2012 WL 1646888, at *30 (S.D.N.Y. May 10, 2012) (Scienter is "an element that cannot be established through group pleading."); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 406 (S.D.N.Y. 2010) (same). Similarly flawed is Plaintiff's attempt to demonstrate "Deutsche Bank's" scienter through its diligence, its relationships with originators, and its ostensible "short position" on the housing market. As discussed below, these speculative allegations are contradicted by their sources and are otherwise defective.

1. DB's Mortgage Loan Due Diligence

Plaintiff alleges that Clayton Holdings, LLC ("Clayton") reviewed samples of loans slated for purchase by DBSP; that according to Clayton's "Trending Reports," Clayton initially flagged 36% of these loans for rejection; and that DBSP ultimately purchased 50% of such loans. (AC ¶¶ 81-83.) Plaintiff then alleges that loans initially flagged by Clayton for rejection materially violated underwriting guidelines, and that the Trending Reports' 36% "rejection" rate thus demonstrates Defendants' knowledge that around 36% of the loans in the Offerings breached underwriting guidelines. (*Id.* ¶¶ 83-85.)[11] This false premise is contradicted by the same Financial Crisis Inquiry Commission ("FCIC") testimony on which Plaintiff relies. Clayton's Vicki Beal (*see id.* ¶ 72) explained that Clayton "graded a lot of loans during our review for Deutsche Bank as threes per [DB's] instructions"[12] because "Deutsche Bank really looked at things very conservatively," and that these "3s" reflected not only loans that deviated from guidelines, but also loans flagged pursuant to DB's "credit overlays" (as to which no

[11] Plaintiff cites statements from the FCIC Report that Clayton's records "rais[e] the question of whether the disclosures were materially misleading, in violation of the securities laws" (AC ¶ 86), but Plaintiff is bringing common-law fraud claims, not securities claims. More importantly, this generic statement is "a legal conclusion not entitled to the assumption of truth," and the fact that it "comes not from plaintiffs but from [a government body] makes it no less conclusory." *Tsereteli v. RAST 2006-A8*, 692 F. Supp. 2d 387, 393 (S.D.N.Y. 2010).

[12] Under Clayton's loan grading system, loans initially flagged for rejection were graded "3" and loans which a client decided to purchase despite receiving an initial "3" were re-graded "2-W," meaning "waiver."

representations were made in any offering document).[13] Also, Joe Swartz's FCIC testimony (*see* AC ¶¶ 80-84, 91-92) explains that the loan samples DB had Clayton review "were mostly adversely selected" and aimed at removing the riskiest loans.[14] Thus, the Trending Reports cannot be fairly read as reflecting rates of material deviations from guidelines, cannot be meaningfully extrapolated across loan populations, and are not specific to any of the Offerings.

Other courts have found that similar "allegations concerning Clayton's due diligence reports" fail to demonstrate scienter, and this Court should find the same. *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 643 (S.D.N.Y. 2012); *see Woori Bank v. RBS Sec., Inc.*, 2012 WL 6703352, at *5 (S.D.N.Y. Dec. 27, 2012) ("attempt to ascribe general conduct, supported by [the Trending Reports] to the disclosures here is the very antithesis of specifity"); *Landesbank Baden-Württemberg v. Goldman, Sachs & Co.*, 821 F. Supp. 2d 616, 622 (S.D.N.Y. 2011), *aff'd*, 478 F. App'x 679 (2d Cir. 2012) (rejecting allegations based on the Trending Reports, as well as allegations that defendants "received information contradicting their public statements because they were middlemen in the mortgage securitization business, had access to loan-level information unavailable to other investors, and conducted extensive due diligence").

Plaintiff further misrepresents DB's diligence process by tying its Clayton allegations to a statement in the ACE 2007-ASAP1 ProSupp that loans "were reviewed by [DBSP] to ensure conformity with [applicable] underwriting standards" (AC ¶ 88) and using this disclosure as an example of how DB purportedly "touted its diligence" in every ProSupp. (*Id.* ¶ 90.) This

[13] FCIC Staff Interview of Vicki Beal at 1:39:33-40:24, *available at* http://fcic.law.stanford.edu/interviews. Because (among other things) the Trending Reports did not differentiate between these different types of "3s," Clayton itself stated that the FCIC "should not draw any conclusions from the Trending Reports." Ex. D (Sept. 2010 letter from Clayton's CEO to the FCIC Chairman).

[14] FCIC Staff Interview of Joe Swartz at 42:29-43:35, *available at* http://fcic.law.stanford.edu/interviews. Plaintiff also misrepresents Swartz's testimony concerning the dynamic between DB and originators by omitting the crucial counterweight "we," *i.e.*, DB, "always wanted to sample more" from Swartz's statement that "they," *i.e.*, originators, "always wanted us to sample less." (*Compare* AC ¶ 84 *with* Swartz Interview at 38:25-38:45.)

disclosure is, however, found only in the ProSupps for ACE 2007-ASAP1 and ACE 2007-ASAP. These offerings were backed by loans acquired through DB's "correspondent lending" program and were vetted by Lydian, not Clayton. (*Id.* ¶ 161,)[15] As this example makes clear, Plaintiff's pattern of providing "one example of [a] statement in a ProSupp" (which does not even support the proposition for which it is cited) and baldly asserting that similar statements can be found in others "is plainly insufficient under Rule 9(b)." *Dexia SA/NV v. Deutsche Bank AG*, 2013 WL 98063, at *5 (S.D.N.Y. Jan. 4, 2013) ("*Dexia*") (dismissing fraud complaint by Plaintiff's counsel concerning some of the same Offerings at issue here).

2. DB's Relationships with Originators

Plaintiff also attempts to plead scienter through allegations concerning DB's relationships with originators and involvement in the RMBS market.[16] However, these allegations merely demonstrate that DB held, and sought to profit from, housing-related investments, and the same could be said of Sachsen. "[I]t is not sufficient to allege goals that are possessed virtually all corporate insiders, such as the desire to … sustain the appearance of corporate profitability or the success of an investment." *S. Cherry St. LLC v. Hennessee Grp., LLC*, 573 F.3d 98, 109 (2d Cir. 2009); *see also In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d 512, 528 (S.D.N.Y. 2012) (allegations that defendant had motive to "expand the potential customer base for [its] CDO products," "avoid taking substantial write downs for its extensive portfolio of unsold CDO notes," and "avoid reporting a massive loss" are "not concrete enough to infer scienter").

[15] Plaintiff's "Exhibit A," which purports to contain both underwriting and diligence disclosures, in fact contains no diligence-related disclosures other that these ACE 2007-ASAP1 and ACE 2007-ASAP2 disclosures.

[16] Plaintiff's allegation that "Deutsche Bank's" relationship with ACE demonstrates scienter (AC ¶¶ 113-16) is incoherent. ACE, a depositor, is an SPVs with no assets that acted as a conduit from sponsors to trusts. *See, e.g.*, Ex. E (ACE 2007-WM1 PS at S-147). A sponsor's use of a depositor is an industry-standard practice which in no way suggests scienter. *See* SEC, Final Rule, Asset Backed Sec., Release Nos. 33-8518, 34-50905, 70 F.R. 1506-01, 1511 (Jan. 7, 2005) (a "typical[ ]" securitization structure involves a transfer "to an intermediate entity, often a limited purpose entity created by the sponsor for a securitization program and commonly called a depositor").

Plaintiff's allegations about non-party MortgageIT Inc. ("MortgageIT") also do not demonstrate scienter. First, the fact of a corporate relationship does not support an inference of shared knowledge. *Defer LP v. Raymond James Fin., Inc.*, 654 F. Supp. 2d 204, 218 (S.D.N.Y. 2009) (scienter cannot be shown by "aggregat[ing] the knowledge of … separate corporate entities on the basis that they share the same parent," since "no [] rule requir[es] the imputation of a subsidiary's knowledge to its parent"). Second, MortgageIT did not become a subsidiary of any Defendant until January 2007, and Defendants' subsequent knowledge is necessarily irrelevant to claims that put prior conduct at issue. *Landesbank Baden-Württemberg*, 821 F. Supp. 2d at 622 (report dated 2007 irrelevant to fraud claim regarding securities offerings in 2006). Additionally, MortgageIT only served as an originator in five offerings, two of which predated its acquisition. (AC ¶ 102.) Clearly, any Defendant's knowledge concerning MortgageIT is not relevant to the 14 Offerings in which MortgageIT was not involved.[17]

Nor can Plaintiff rely on DB's lending relationships to establish DB's knowledge of originators' underwriting practices either generally or, more importantly, in connection with the specific loans underlying the Offerings. Plaintiff's "warehouse lending" allegations amount to nothing more than (1) an extremely general statement that warehouse lenders "have detailed knowledge of the lender's operations"; (2) an unclear assertion from a confidential witness that "[DB] was a more liberal mortgage broker"; and (3) unabashed speculation from Keith Johnson, a former Clayton executive, that (unspecified) warehouse lenders may have purchased more "defective" loans. (AC ¶¶ 118-21.) Similarly inadequate are Plaintiff's "correspondent lending"

[17] Similarly irrelevant is the Complaint's citation of allegations in a False Claims Act suit brought against MortgageIT and certain Defendants in 2011. (*Id.* ¶¶ 110-12). This suit concerned MortgageIT's participation in the Federal Housing Administration's "Direct Endorsement Lender" program. That program is not at issue here and had its own distinct requirements. There is no allegation that any loan at issue in that suit collateralized any relevant Offering. *See Tsereteli*, 692 F. Supp. 2d at 394 (finding report cited by plaintiff irrelevant where it did not "contain any suggestion" that the loans at issue in the report "were in the pools underlying the Certificates").

allegations, which hypothesize that DB was "able to assert even more control over the loans that it purchased" through the correspondent lending program and cursory allegations concerning three correspondent lender bankruptcies and irrelevant legal proceedings concerning three others. (*Id.* ¶¶ 122, 126-27.) These allegations simply do not demonstrate anything about any Defendant's knowledge of any issue concerning any loan or any Offering. *See, e.g.*, *Plumbers & Steamfitters Local 773 Pension Fund v. CIBC*, 694 F. Supp. 2d 287, 299-300 (S.D.N.Y. 2010) ("accusations founded on nothing more than a defendant's corporate position are entitled to no weight," and "[access] to raw data is not sufficient").[18]

3. DBSI Trader Greg Lippmann's "Short Position"

Plaintiff contends that DBSI trader Greg Lippmann's short position on the housing market demonstrates scienter. (AC ¶¶ 129-48.) Plaintiff, however, has no basis for alleging that Lippmann based his opinions on nonpublic information or was involved with any of the Offerings, and Lippmann's perspective concerning "a general economic trend does not equate to harboring a mental state to deceive, manipulate, or defraud." *Plumbers & Steamfitters*, 694 F. Supp. 2d at 300. Instead, Plaintiff (1) cherry-picks statements made by Lippmann which merely demonstrate that he believed RMBS were poor investments; (2) speculates that unspecified traders "directed by Lippmann" might have had access to unspecified due diligence results; and (3) asserts that Lippmann worked "on the same floor" as DB loan diligence personnel. These allegations are inadequate. *See In re PXRE Grp., Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 537 (S.D.N.Y.), *aff'd*, 357 F. App'x 393 (2d Cir. 2009) (employee's "concerns" regarding accuracy of loss estimates, absent specific reasons substantiating these concerns, did not suggest

[18] Plaintiff's allegations concerning suits filed by DBSP to "force … loan sellers to repurchase [early payment default ("EPD")] loans" (AC ¶ 125) are meaningless. Plaintiff identifies a total of 42 loans across six Offerings which were the subject of these suits. However, Plaintiff cannot allege that the ProSupps guaranteed that no EPD loans would be present, or that a seven loan per deal EPD rate was inconsistent with any disclosure.

corporation's scienter); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 196 (2d Cir. 2008) (if plaintiffs allege that "defendants had access to contrary facts, they must *specifically* identify the reports or statements containing this information").[19]

Plaintiff's allegation that Lippmann's short position was kept secret from investors is not remotely credible. To the contrary, Michael Lewis's *The Big Short* (cited by Plaintiff) (Ex. F) states that in 2005, "Lippmann, a copy of [the Shorting Report] tucked under his arm, launched himself at the institutional investing public" (80 (2010)), and a Wall Street Journal article published in March 2007 discusses a September 2006 event with "several dozen" attendees held by Lippmann to promote his short position, demonstrating that the investing public was well aware of this position at the time Sachsen purchased the RMBS. (Ex. G). Equally insupportable is Plaintiff's allegation that Lippmann's position represented the views of DB as a whole. Gregory Zuckerman's *The Greatest Trade Ever* (also cited by Plaintiff) (Ex. H) explains that as a result of his short position, "within [DB] Lippmann had become an object of derision" (170); that his superiors at DB permitted him to keep the position only "reluctantly" (167) and "grudgingly" (248); and that even in early 2008, Lippmann's "superiors seemed skeptical as ever" (265).

The April 13, 2011 report of the Senate Permanent Subcommittee on Investigations (the "Senate Report") (Ex. I) confirms these accounts, reporting that DB's "senior management disagreed with [Lippmann's] negative views, and used the bank's own funds to make large proprietary investments in mortgage related securities," and that as late as spring 2007, "Mr. Lippmann held the only large short position on behalf of the bank, then about $4 to 5 billion in size." Because of this, the Senate Report notes, "[d]espite [Lippmann's] gain, in 2007, due to its substantial long investments, Deutsche Bank incurred an overall loss of about $4.5 billion from

[19] *See also infra* note 30 (discussing testimony by Lippmann's analyst Eugene Xu that Lippmann's analysis used data from public loan databases in wide use by mortgage investors).

its mortgage related proprietary investments." *Id.* at 320, 345; *accord Greatest Trade Ever* at 265 (DB's housing market losses "dwarf[ed] Lippmann's gains"). Indeed, DB's major net long position in RMBS throughout the relevant timeframe renders Plaintiff's scienter allegations implausible. *Davidoff v. Farina*, 2005 WL 2030501, at *11 n.19 (S.D.N.Y. Aug. 22, 2005) (allegations of scienter "made no economic sense" in light of defendants' substantial investment in a venture which plaintiffs alleged they knew would fail).

B. The Complaint Does Not Allege Actionable Misrepresentations[20]

1. Underwriting Guidelines

Plaintiff alleges that originators engaged in risky and imprudent lending practices which contravened "numerous representations" in the offering documents "about the purportedly conservative mortgage underwriting standards applied by the mortgage originators." (AC ¶ 3.) In support, Plaintiff cites statements from "confidential witnesses" and public reports to the effect that originators had "loose" guidelines and approved "risky" loans. (*E.g.*, AC ¶¶ 161-62, 184, 216.) Vague allegations that loans were "risky" or insufficiently "conservative" do not state a claim. *See, e.g.*, *Repub. Bank & Trust Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 257 (6th Cir. 2012) (dismissing claim that defendants "failed to disclose that prudent underwriting standards were not followed").[21] Indeed, Plaintiff indentifies no disclosures that the Certificates were "conservative" investments, and regardless, "statements about [] 'conservative' underwriting and risk management constitute corporate puffery rather than actionable misrepresentations." *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 354 (S.D.N.Y.

[20] As discussed in Section IV below, Plaintiff's allegations are also deficient because several of the Defendants are not alleged to have made the alleged misstatements.

[21] Plaintiff's heavy reliance on "confidential witnesses" is misplaced. *See In re Citigroup Inc. Sec. Litig.*, 753 F. Supp. 2d 206, 244-45 (S.D.N.Y. 2010) ("Plaintiffs cannot rely on assertions that the information presented by confidential witnesses was known or common knowledge within the company; these assertions are too vague and conclusory" to suggest scienter.).

2011). Additionally, Plaintiff's allegations are contradicted by the ProSupps' risk disclosures, not to mention common sense. *See, e.g., AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 254 F. Supp. 2d 373, 385-86 (S.D.N.Y. 2003) (allegations that "defendants promoted the Certificates as 'conservative' investments" were inactionable where documents disclosed that the lender "extended credit by providing *flexible-terms* to customers"). As the following disclosures and many others made clear, and as any moderately informed investor had to know, the subprime and Alt-A loans at issue were not originated pursuant to "conservative" underwriting standards:

- "The underwriting standards of the Originator … may experience rates of delinquency, foreclosure and bankruptcy … that may be substantially higher, than those experienced by mortgage loans underwritten in accordance with [Fannie Mae and Freddie Mac] guidelines." ACE 2007-WM1 PS at S-12.
- "It is expected that a substantial number of the mortgage loans to be included in the trust will represent [ ] underwriting exceptions." ACE 2007-WM1 PS at S-58.
- "Many of the mortgage loans have underwriting exceptions and other attributes that may increase risk of loss on the mortgage loans." RAMP 2007-RS1 PS at S-14.
- "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, in recent months housing prices and appraisal values in many states have declined or stopped appreciating, after extended periods of significant appreciation." MHL 2007-1 PS at S-28.
- "[N]umerous 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." DBALT 2007-BAR1 PS at S-24.
- "Borrowers with adjustable payment mortgage loans are being exposed to increased monthly payments when the related mortgage interest rate adjusts upward from the initial fixed rate or a low introductory rate … [and] may no longer be able to find available replacement loans at comparably low interest rates." DBALT 2007-OA1 PS at S-21.
- "The high percentage of mortgaged properties located in California may cause the rate of delinquencies, defaults and losses on the mortgage loans to be higher. … If the residential real estate market in California should experience an overall decline in property values, the rates of delinquency, foreclosure, bankruptcy and loss on those mortgage loans … may increase substantially." DBALT 2007-AR2 PS at S-21.
- "Mortgage loans made to borrowers whose income is not verified, including borrowers who may not be required to state their income, which constitute 93.7% of the mortgage pool by principal balance, may increase the risk that the borrower's income is less than represented."

RALI 2007-QO2 PS at S-20.

- "Some of the mortgage loans included in the trust … are either currently delinquent in or have been delinquent in the past. … Mortgage loans with a history of delinquencies are more likely to experience delinquencies in the future." RAMP 2007-RS1 PS at S-18. [22]

Moreover, to the extent Plaintiff alleges that originators disregarded or abandoned their underwriting guidelines, the materiality of these allegations is vitiated by Plaintiff's general allegations that those guidelines were meaningless. For example, Plaintiff alleges that originator American Home's underwriting guidelines "were so lax as to be rendered essentially meaningless" (AC ¶ 180), and on the very same page that "American Home abandoned its underwriting guidelines." (*Id.* ¶ 182.) The immateriality of deviations from an "essentially meaningless" standard is obvious. *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, 2010 WL 3790810, at *12 (S.D.N.Y Sept. 28, 2010) (dismissing claim where "[i]n essence, plaintiffs allege that they were told that the loans would be issued under a 'more flexible' set of underwriting guidelines, but that defendants were too flexible in the underwriting decisions"). [23]

Finally, Plaintiff's allegations concerning debt to income ("DTI") ratios are also fatally flawed. Plaintiff appears to assert that these ratios were incorrect insofar as they were calculated for adjustable rate ("ARM") loans using the initial lower rate rather than the higher rate to which the loan would later reset. (AC ¶¶ 99-101.) This, however, was expressly disclosed. *See* DBALT 2006-AR6 P.S. at 31[24] ("the borrower under each mortgage loan or contract generally will be qualified on the basis of the mortgage rate or contract rate in effect at origination," and

[22] Ex. J catalogues similar disclosures made in the ProSupps for the 19 Offerings at issue in this action.

[23] Plaintiff also fails to support such allegations with any specific examples of loans that departed from any underwriting guidelines. In fact, Plaintiff does not cite to or quote any underwriting guidelines and, instead, asserts that departures from unspecified guidelines are "confirmed" by its analysis of property valuations, owner occupancy rates, and title transfer (AC ¶ 236). This "analysis" – which, as discussed below, is not actionable in any event – does not demonstrate any guideline departures. For example, whether a loan was subsequently transferred to a trust says nothing about the borrower's credit or the loan's compliance with predatory lending laws.

[24] *See also* DBALT 2006-AR6 PS at 3 (loans "were underwritten on the assumption that the borrowers would be able to make higher monthly payments in a relatively short period of time. In fact, however, the borrowers' income may not be sufficient to meet their loan payments as payment amounts increase"); Ex 10 at 18-22.

"the repayment of any of these mortgage loans or contracts may therefore be dependent on the ability of the borrower to make larger level monthly payments following the adjustment of the mortgage rate or contract rate.") These disclosures completely defeat Plaintiff's DTI allegations.[25]

2. Property Valuations

The offering materials disclosed the underlying property values through loan-to-value ("LTV") ratios, percentages calculated by dividing loan amounts by property values, which were derived from appraisals, or, for purchase money mortgages, the sales price, if lower.[26] They also stated that appraisals were generally made in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). Plaintiff alleges these ratios were understated because an automated valuation model ("AVM") subsequently employed by Plaintiff yielded lower values, and that disclosures concerning the appraisal process were false because originators exerted pressure on appraisers to provide higher appraisals. (AC ¶¶ 243, 293.) These allegations do not state a claim for fraud.

First, Plaintiff does not differentiate between LTV ratios based on appraisals and those based on purchase prices. LTVs based on purchase prices have nothing to do with appraised value and, thus, could not possibly be rendered misleading even if the appraiser's "opinion" were somehow deemed to be "wrong." For instance, 60.45% of the loans underlying DBALT 2007-AR1 were purchase money mortgage loans. DBALT 2007-AR1 PS at S-33. Thus, some, and

[25] Plaintiff asserts that underwriting ARM loans at the fully indexed rate was "federally required," citing the October 4, 2006 Interagency Guidance on Nontraditional Mortgage Product Risks, 71 F.R. 58609-01, at 58614 (AC ¶¶ 59, 100). These guidelines, which applied only to insured financial institutions and their affiliates, were not, however, mandatory; "[f]ederal agencies did not adopt binding regulations, which required subprime lenders to verify the borrower's ability to pay the fully amortized interest rate, until June 2008." Wilmarth, *The Dark Side of Universal Banking*, 41 CONN. L. REV. 963, 1023 n. 302 (May 2009).

[26] For example, the ProSupp for DBALT 2007-AR1 disclosed that "loan to value ratios were based upon (i) with respect to purchase money Mortgage Loans, the lesser of (a) the purchase price paid for the related Mortgaged Property and (b) the appraisal of the Mortgaged Property." DBALT 2007-AR1 PS at S-27. *See also* Ex. J at 23-27.

maybe substantially all, of the LTVs for these loans were based on the purchase price and not on the appraisal. Plaintiff does not account for this in generating its made-for-litigation AVM statistic that 48.65% of the LTV ratios were "overstate[d]." (AC ¶ 243.) This basic defect renders Plaintiff's allegations facially inaccurate and insufficiently particular under Rule 9(b).

Second, the fact that Plaintiff used a computerized AVM and came up with different appraisal values years after origination does not provide a plausible basis for concluding that the original human appraisal opinions were "wrong," much less intentionally wrong. Plaintiff provides no details on the AVM model it used to generate its allegations or the data on which it was based, including whether that data included all of the information, and only that information, that was available to the appraiser when the original appraisal was issued.

Moreover, under New York law, appraisals of real property are treated as opinions. *Newman v. Wells Fargo Bank, N.A.*, 924 N.Y.S 2d 264 (App. Div. 2011); *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.").[27] For such statements to be rendered actionable, Plaintiff must show "that the appraiser did not truly believe the appraisal at the time it was issued," *In re IndyMac MBS Litig.*, 718 F. Supp. 2d. 495, 511 (S.D.N.Y. 2010), and to set forth a viable fraud claim, Plaintiff must also demonstrate that Defendants knew or was reckless in not knowing of this falsity. *In re Simon II Litig.*, 211 F.R.D. 86, 140 (E.D.N.Y. 2002), *rev'd on other grounds*, 407 F.3d 125 (2d Cir. 2005) ("If defendant claims that the truth of its representation is derived from the assertion of a third-party then defendant will only be responsible for misrepresenting

[27] Indeed, the ProSupps made clear that property valuations were subject to change. *See, e.g.*, DBALT 2006-AR4 at P.S. at S-39 ("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."); *see also* Ex. J at 28-32.

that it reasonably believed it to be true."). Plaintiff has done neither.[28] Plaintiff only bothers to make specific allegations about three originators (IndyMac, GMAC, and DHI), and these are not connected to any the loans or Offerings at issue. *See, e.g.*, *Footbridge*, 2010 WL 3790810, at *13 (allegations that defendant pressured appraisers to give inflated assessments were insufficient where they were not linked to the securitizations at issue).[29] Moreover, even if this was sufficient on its own terms, it would not demonstrate any Defendant's knowledge, and thus would still fail to render Plaintiff's claims viable. Even rulings that have sustained RMBS fraud claims have found scienter lacking with respect to LTV claims, and this court should do the same. *See FHFA v. Deutsche Bank AG*, 2012 WL 5471864, at *2 (S.D.N.Y. Nov. 12, 2012).[30]

3. Owner Occupancy

Plaintiff alleges that the ProSupps "materially overstated the percentage of mortgages that were secured by owner occupied residences." (AC ¶ 249.) However, the ProSupps disclosed that owner-occupancy data was based on "represent[ations] by the mortgagor in its loan application." DBALT 2007-AR2 P.S. at S-32.[31] The Complaint does not allege that the ProSupps misreported these representations, or that any Defendant had, or could have had, such knowledge, instead relying solely on the results of "tests [by Plaintiff] to determine whether

[28] Sealink's attempt to use its AVM analysis to show scienter is a classic example of pleading "fraud by hindsight." *Landesbank Baden-Württemberg*, 821 F. Supp. 2d at 623. Nor can Sealink use the fact that its AVM found "large percentages" of the LTV ratios to be misstated (AC ¶ 243), as "alleging a large fraud on its own does not carry plaintiff's burden to allege scienter with particularity." *Defer LP*, 654 F. Supp. 2d at 219.

[29] One of these allegations—that the OIG found "instances where IndyMac officials accepted appraisals that were not in compliance with [USPAP]" (AC ¶ 188)—was characterized as "exceptionally misleading" by Judge Kaplan, who found that it "does not even remotely support the allegation that the loans in the pool underlying the Certificates were made on the basis of appraisals that did not conform to USPAP." *Tsereteli*, 692 F. Supp. at 393-94.

[30] Plaintiff's statement that Eugene Xu "testified before the FCIC that Deutsche Bank traders were aware of 'inflated appraisal' which they thought was 'fraud'" (AC ¶ 165) is a mischaracterization. In this testimony, Xu, who is not alleged to have participated in any of the offerings at issue, discussed research on mortgage fraud using "Loan Performance, you know, paid subscription, but most Wall Street firms should have that and most investors should have that too, so it's not like we have a secret source." *See* FCIC Staff Interview of Eugene Xu at 1:18:31-19:04, *available at* http:fcic.law.stanford.edu/resources/interviews. The fact that Xu did research using widely accessible public data says nothing about any Defendant's state of mind concerning any relevant appraisal or related disclosure.

[31] *See also* Ex. J at 33-35.

borrowers occupied the residences securing the mortgages," each of which uses data post-dating the origination and securitization of the loans at issue. (AC ¶ 250.) Clearly, Plaintiff's finding of "a strong indication that the borrower did not live at the mortgaged property" says nothing about any Defendant's state of mind when reporting such data, and thus fails to state a claim.[32]

4. Credit Ratings

Plaintiff alleges that Defendants are also liable for fraud because the Certificates' credit ratings misrepresented the actual risk of loss on the Certificates.[33] Plaintiff does not allege that the rating agencies disbelieved their own ratings or that the offering documents misstated the assigned ratings, and Plaintiff cannot argue that DBSP is liable simply because the ratings did not in some fashion accurately predict losses on the Certificates. *See, e.g., Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acc. Corp.*, 632 F.3d 762, 774-76 (1st Cir. 2011) ("That a high rating may be mistaken … does not make the report of the rating false or misleading."). Nor can Plaintiff otherwise state fraud claims concerning credit ratings through general allegations of rating agency conflicts of interest and vague assertions that DB exerted "pressure" on the ratings agencies. The Complaint lacks "allegations specific to the [Offerings]," and thus "fails to plead sufficient factual content from which the Court can draw any reasonable inference regarding [Defendants'] alleged involvement (with the rating agencies) generating the [ ] ratings at issue." *Emps.' Ret. Sys. of V.I. v. Morgan Stanley & Co., Inc.*, 814 F.

[32] As with LTV allegations, rulings that otherwise have sustained RMBS fraud claims have held that the relevant complaints contain no facts supporting Defendant's knowledge of occupancy misrepresentations. *See, e.g., FHFA v. Deutsche Bank AG*, 2012 WL 5471864, at *2. Indeed, such claims have been dismissed for similar reasons even in cases bringing strict liability or negligence claims. *See, e.g., Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 843 F. Supp. 2d 191, 205 (D. Mass. 2012) ("The disclosures specifically stated that all owner-occupancy rates were based only on borrowers' representations" and "thus put investors on notice that none of the owner-occupancy information had been verified by Defendants and that the rates represented only the self-reported data provided by borrowers, which might be inaccurate."); *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 3578666, at *2 (C.D. Cal. Aug. 17, 2012) (same).

[33] Plaintiff alleges that the data at issue was provided to the rating agencies by "the securitization's 'arranger' or sponsor" (AC ¶ 268), so allegations apply solely to DBSP, and are only relevant to DBSP-sponsored offerings.

Supp. 2d 344, 352 (S.D.N.Y. 2011) (dismissing claims supported by "general statements regarding the relationship between 'issuers and arrangers such as [defendant] and the rating agencies"). Finally, because, as discussed herein, the Complaint fails to otherwise allege any intentional misrepresentations, Plaintiff's credit rating allegations, which arise from DBSP's alleged provision of the same information to the rating agencies, necessarily also fail.

5. Title Transfer

Plaintiff alleges that DB represented that "the issuing trusts possessed good title to the mortgage loans" but then "fail[ed] to ensure the proper transfer of title." (AC ¶ 263.) The relevant disclosures, however, are merely descriptions of the terms of the Pooling and Servicing Agreements ("PSAs") which govern the trusts, and Plaintiff does not allege that these descriptions were inaccurate, but rather that the procedures in the PSA were not always properly followed.[34] Other courts analyzing materially similar allegations have rejected them, and this court should do the same. *See, e.g.*, *Dexia Holdings, Inc. v. Countrywide Fin. Corp.*, 2012 WL 1798997, at *5 (C.D. Cal. Feb. 17, 2012) (dismissing "allegations related to transfer of title" where "[t]he language emphasized by Plaintiffs appears to be a straightforward description of the PSA's requirements").[35] Furthermore, Plaintiff's sole attempt to allege scienter with respect to title transfer defects is a cursory reference to "a series of [DBNTC] memoranda to RMBS servicers beginning in August 2007 detailing increasing concerns that 'good housekeeping'

[34] In an apparent attempt to allege materiality, the Complaint also baldly asserts that transfer of title issues "caused significant harm to the securitizations, prompting numerous actions – many successful – that voided the initial transfer and left the RMBS without good title to the mortgage loans" without specifying what "numerous" or "many" mean or whether these actions actually concerned any of the securitizations at issue. This nonspecificity renders unsupportable any inference that could be made as to the materiality to investors of these purported defects.

[35] Courts have also recognized that breaches of PSAs should be dealt with under the PSAs. *See W. & S. Ins. Co. v. Countrywide Fin. Corp.*, No. 11 Civ. 7166, Dkt. No. 246, slip op. at 10 (C.D. Cal. June 29, 2012) (Ex. K) ("To the extent that [transfer of title issues] are actionable, it would be as claims for breach of contract or breach of fiduciary duty. Courts must be sensitive to the distinctions between such cases and misrepresentation cases; more so when a contract provides specific mechanisms for redress as the PSAs do here. Failure to maintain the distinctions between contract and fraud cases raised the potential for duplicative litigation and double recoveries. As importantly, serious violence is done to the contract by failing to respect the contractual remedies that each party has agreed to.").

measures were not being followed to establish the RMBS trust's ownership of the mortgage loans." (AC ¶¶ 260.) Obviously, the existence of memoranda between nonparties which are not alleged to relate to the Offerings does nothing to demonstrate scienter, and in any event this allegation more plausibly reflects conscientious performance by nonparty DBNTC of its duties as trustee than it does recklessness by DBNTC or any Defendant.[36] Plaintiff's title transfer allegations thus fail to state a fraud claim even if they alleged an actionable misrepresentation.

C. The Complaint Does Not Plausibly Allege Reasonable Reliance

1. Plaintiff Fails To Plead Sachsen's Pre-Purchase Due Diligence

"[R]easonableness of reliance is properly considered at the motion to dismiss stage," *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441, 449 (S.D.N.Y. 2010), *aff'd*, 450 F. App'x. 32 (2d Cir. 2011), and in assessing reasonableness, a court must consider "the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 195 (2d Cir. 2003), *aff'g* 165 F. Supp. 2d 615 (S.D.N.Y. 2001) ("*Stonepath I*").[37] Here, Plaintiff merely alleges that unspecified personnel at nonparty Sachsen Europe "prepared credit risk assessments in the ordinary course of business, noting, among other things, the credit ratings of the Certificates, the identity of the loan originators, and the quality of the loans in the designated mortgage pool." (AC ¶ 287.) This generic assertion fails to satisfy even minimal pleading standards. *See, e.g.*, *Int'l Fund Mgmt.,*

[36] Furthermore, DBNTC did not serve as trustee for any of the ACE- or DBALT-issued trusts, so any concerns DBNTC might have had regarding title transfer issues were not related to any Defendant's practices in this regard.

[37] *See also HSH Nordbank AG v. UBS AG*, 941 N.Y.S.2d 59, 61 (App. Div. 2012) (dismissing claim where "[plaintiff]—a sophisticated commercial entity—cannot satisfy the element of justifiable reliance."); *Repub. Bank & Trust Co.*, 683 F.3d at 258 (reliance allegations inadequate where plaintiff was "a financial institution," not "a country bumpkin"); *SRM Global Fund Ltd. v. Countrywide Fin. Corp.*, 2010 WL 2473595, at *14 (S.D.N.Y. June 17, 2010) ("Plaintiff has failed to state a claim for common law fraud because, as a (very) sophisticated investor, its reliance upon these alleged misstatements or omissions would not be considered justifiable.").

S.A. v. Citigroup, Inc., 822 F. Supp. 2d 368, 386 (S.D.N.Y. 2011) (allegations that plaintiffs "read and relied on [the documents] alleged herein to be false or misleading" are insufficient).

The Complaint's "reliance" allegations are particularly deficient with respect to the Certificates initially purchased by Barclays, a major international financial institution unaffiliated with Saschen that itself served as sponsor in connection with many RMBS during the relevant period. Plaintiff makes no allegations that anyone at Barclays relied, reasonably or otherwise, on any of the purported misstatements referenced in the Complaint. Nor does the Complaint contain any reliance allegations with respect to Sachsen Funding, the alleged subsequent transferee of the Certificates initially purchased by Barclays.

Moreover, Sachsen was a sophisticated investor with significant experience in RMBS, and a "sophisticated investor … must show that he or she has made an independent inquiry into all available information." *Stonepath I*, 165 F. Supp. 2d at 623; *see also Global Minerals & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 215 (App. Div. 2006) ("New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations … by investigating the details of the transactions."). Plaintiff does not allege that Sachsen could not have conducted, prior to purchase, the same analyses it performed to bolster the Complaint, and it is not sufficient for Plaintiff to allege in conclusory fashion that Sachsen "did not know (and could not have known)" of the alleged misrepresentations (AC ¶ 288), or—without alleging it ever sought this information—that Sachsen "did not have access to [the underlying] loan files, nor could [it] have received such access upon request." (*Id.* ¶¶ 49, 68.) *See HSH Nordbank*, 941 N.Y.S.2d at 68 ("[Plaintiff] simply assumes that, in the absence of a request, [defendant] was obligated to disclose its internal analyses.… [H]owever, [defendant] had no obligation to disclose internal analyses for which [plaintiff] made no request."). This requires dismissal of

Plaintiff's claims. *Id.* at 66 ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it.").

2. Sachsen Did Not Rely On The ProSupps

The misrepresentations cited in the Complaint are sourced exclusively to the ProSupps. However, Plaintiff does not allege that Sachsen relied on the ProSupps. Instead, it alleges that Sachsen "relied on the accuracy of the information that Defendants provided in [ ] term sheets and free writing prospectuses" and that the ProSupps were "subsequently" sent to "[Sachsen] and other investors," implying that Sachsen purchased the Certificates before the ProSupps were even issued. (AC ¶ 286.) Indeed, in an apparent attempt to obscure the issue, Plaintiff does not allege the dates of purchase, but instead vaguely asserts that the Certificates were "purchased on the offering." This is insufficient under Rule 9(b). *Dexia*, 2013 WL 98063, at *5 ("An additional deficiency in particularity is that plaintiffs have failed to allege the dates on which they purchased securities in the Offerings. This is especially important in this case because it appears that plaintiffs' investments … occurred before the ProSupps were even issued."); *Fraser v. Fiduciary Trust Co. Int'l*, 2005 WL 6328596, at *4 (S.D.N.Y. July 23, 2005) ("[T]he plaintiff has failed to plead … the specific dates of the transactions as required by Rule 9(b).").

Therefore, as a matter of law, Plaintiff cannot establish reliance on any of the allegedly false statements in the ProSupps. *See, e.g.*, *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) (plaintiff cannot establish reliance on statements not received before investment); *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 177 F. Supp. 2d 169, 174 (S.D.N.Y. 2001) (dismissing claim where the "Complaint only refers to false and misleading statements made in the [final] Offering Memorandum," but plaintiff "was provided with the final Offering Memorandum" only "after it decided to purchase

the [ ] notes"). While Plaintiff asserts that disclosures in preliminary offering materials (which Plaintiff never once cites) were "subsequently included … with minor variations in the [ProSupps]" (AC ¶ 285), the differences between these documents are substantial.[38] Term sheets, for instance, do not contain narrative descriptions of underwriting guidelines or transfer of title, so reliance on term sheets could not support claims concerning such disclosures.[39] Plaintiff's allegations thus fail to meet fraud pleading standards, which "serve[ ] the purpose of putting the defendant on notice of the specific misstatements and omissions that are at issue," and thus require the plaintiff to specify the allegedly false statements on which it relied. *In re Regeneron Pharmaceuticals Inc. Sec. Litig.*, 2005 WL 225288, at *12 (S.D.N.Y. Feb. 1, 2005); *see also Dexia*, 2013 WL 98063, at *6 ("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).").[40]

D. The Complaint Fails To Adequately Plead Causation

The Complaint fails to adequately allege that the SPVs suffered losses on the Certificates, much less "that [Defendants'] misrepresentations directly caused the loss about which [P]laintiff

[38] These documents also expressly state that they are "preliminary" and "subject to completion or change," rendering reliance on them unreasonable. *See, e.g.*, *Good Hill Partners L.P. v. WM Asset Holdings Corp. CI 2007-WM2*, 583 F. Supp. 2d 517, 520 (S.D.N.Y. 2008) ("[A]ny reliance on the … Term Sheet was expressly disclaimed by means of cautionary language including 'preliminary,' 'expected to change,' and 'based on numerous assumptions.'").

[39] *See, e.g.*, Ex. L (DBALT 2007-OA4 Term Sheet); Ex. M (ACE 2007-ASAP1 Term Sheet).

[40] Judge Cote's recent contrary ruling in *FHFA v. Deutsche Bank AG*, 2012 WL 5471864, is, respectfully, incorrect and should not be followed. In *FHFA*, Judge Cote found that "allegations regarding the falsity of the [ProSupps] are [ ] sufficient to plead the falsity of overlapping information in the Preliminary Materials" because the plaintiff alleged "that the data 'incorporated into the [ProSupps] was the very same data included in the Preliminary Materials." *Id.* at *3. First, even if such allegations are sufficient with respect to "overlapping information," some types of information—for instance, underwriting guidelines disclosures—are simply absent from certain preliminary offering materials, so no "overlap" exists. Moreover, there is no question that, at trial, Plaintiff would be required to prove its claims on the basis of the specific documents and statements on which Sachsen actually relied, and there is no basis in law or logic to permit Plaintiff to plead its claims with reference to different statements in different documents. *See Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 200 (S.D.N.Y. 2011) (Plaintiff "must identify [specific] documents and the specific statements within them that were false or misleading."); *Hunt v. Enzo Biochem, Inc.*, 530 F. Supp. 2d 580, 601 (S.D.N.Y. 2008) (finding allegations "insufficiently particularized under Rule 9(b) because they do not identify any specific statements").

complains." *Water St. Leasehold LLC v. Deloitte & Touche LLP*, 796 N.Y.S.2d 598, 599-600 (App. Div. 2005). Loss causation is not adequately alleged where, as here, "the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors," and plaintiff fails to allege facts "which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005). The "marketwide phenomenon causing comparable losses" here is the collapse of the mortgage market, but the Complaint (*see* AC ¶¶ 292-93) ignores this obvious intervening event. In short, Plaintiff's theory of loss causation—that "the subprime market melted down and Defendants were market participants, so they must be liable for [Plaintiff's] losses in [its] risky investment"—is inadequate. *NJ Carpenters Health Fund v. NovaStar Mortg., Inc.*, 2011 WL 1338195, at *11 (S.D.N.Y. Mar. 31, 2011).

III. THE AIDING AND ABETTING FRAUD CLAIMS FAIL

The elements of aiding and abetting fraud are "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *UniCredito Italiano SpA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003). Preliminarily, since the underlying fraud claims fail, the aiding and abetting claims necessarily fail as well. *See, e.g., Abu Dhabi Comm. Bank v. Morgan Stanley & Co., Inc.*, 651 F. Supp. 2d 155, 187 (S.D.N.Y. 2009). These claims also fail because every Defendant is both a primary and aiding and abetting fraud defendant. *See, e.g., Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1089-90 (C.D. Cal. 2011) (applying New York law) ("The [aiding and abetting] claim against CFC fails because Allstate has alleged that CFC is a primary violator and it is impossible to aid and abet oneself.").

Additionally, to state a claim for aiding and abetting fraud, a plaintiff must also allege "substantial assistance" with particularity, and "where the primary violations consist of either

misrepresentations in, or omissions from, a document, the substantial assistance must relate to the preparation or dissemination of the document itself." *Morin v. Trupin,* 711 F. Supp. 97, 113 (S.D.N.Y. 1989). The Complaint's aiding and abetting allegations, however, are no more than a generic summary of the underlying fraud allegations which fails to differentiate between Defendants. (AC ¶ 315.) This is insufficient. *See In re Agape Litig.*, 773 F. Supp. 2d 298, 324 (E.D.N.Y. 2011) ("[C]onclusory allegations cannot satisfy the Plaintiff's burden of alleging substantial assistance with the requisite particularity."); *Filler v. Hanvit Bank,* 2003 WL 22110773, at *3 (S.D.N.Y. Sept. 12, 2003) ("complaints fail[ed] to plead aiding and abetting common law fraud" because they did not distinguish between defendants).[41]

IV. PLAINTIFF'S CLAIMS ARE OTHERWISE SUBJECT TO DISMISSAL

A. Claims Against DBAG Must Be Dismissed

Nowhere does Plaintiff allege that DBAG made any misrepresentations. Instead, Plaintiff asserts that DBAG should be held liable because it is the "corporate parent" of the other Defendants, and as such, "directed their activities." (*Id.* ¶¶ 27, 296, 305, 313.) However, "whether [a subsidiary] defrauded plaintiffs and whether its parent [ ] defrauded plaintiffs are different questions." *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). The Complaint asserts that DBAG was party to an unrelated suit concerning MortgageIT (AC ¶¶ 110-13); certain DBAG personnel were aware of Greg Lippmann's short position (*id.* ¶ 136); DBAG "was also heavily involved in the Gemstone 7 CDO" (*id.* ¶ 141 n.17); DBAG was a "Swap Provider" or "Hedge Provider" in certain offerings (*id.* ¶¶ 150, 151, 153, 154); and "NovaStar [ ]

[41] These claims are also defective because allegations of recklessness are insufficient to plead aiding and abetting fraud. *See Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996) ("actual knowledge" of the fraud "is required to impose liability on an aider and abettor"), *aff'd*, 152 F.3d 918 (2d Cir. 1998). While the Complaint asserts that, "as alleged above," "[d]efendants knew of the fraud perpetrated by them" and "had actual knowledge of their own acts" (AC ¶ 314), the underlying fraud claims allege knowledge and recklessness in the alternative (*id.* ¶¶ 296, 298, 306, 308), and "[p]leading knowledge in the alternative with an allegation of reckless disregard is insufficient to state a claim." *In re WorldCom, Inc. Sec. Litig.*, 382 F. Supp. 2d 549, 560 (S.D.N.Y. 2005).

maintained a warehouse line of credit with defendants DBAG and DBSI." (*Id.* ¶ 152.) None of these allegations are germane to any of the issues in this case, nor do they suggest that DBAG had any involvement in the preparation or dissemination of any allegedly false statement.[42] Therefore, DBAG is not a proper defendant even if the Complaint otherwise states viable claims. *See, e.g.*, *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) ("The Complaint does not allege facts from which it may be inferred that [the parent] dominated [the subsidiary's] administration of the [ ] program, or that [the parent's] employees themselves acted to defraud Plaintiffs. We accordingly conclude that [the parent] is not an appropriate defendant."). [43]

B. Claims Against DBSP, ACE and DBALT Must Be Dismissed

While Plaintiff alleges that DBSP sold loans to the depositor Defendants and verified certain of the originators' underwriting guidelines, it does not allege that DBSP made a statement to Sachsen and, as such, claims against DBSP must be dismissed even as to the Offerings it sponsored. *See Dexia*, 2013 WL 98063, at *6 (allegation that "Deutsche Bank provided the information" lacked particularity where it "d[id] not state which entity it is referring to, or whether this allegation applies to all eleven RMBS or just the eight sponsored by DBSP"); *Stichting Pensioenfonds ABP v. ACE Sec. Corp.*, No. 652460-2011, Tr. at 118:14-15 (N.Y. Sup. July 27, 2012) (Ex. O) (dismissing RMBS fraud claim against DBSP and DBAG). Moreover, DBSP did not sponsor, and is not alleged to have sponsored, the five third-party offerings. (*See supra* note 4.) Similarly, ACE is only alleged to have been the depositor for five, and DBALT

[42] The Complaint also asserts that "defendant DBAG, through defendant DBSP, instituted a program to purchase nonprime loans for its RMBS from several correspondent mortgage originators" (AC ¶ 122), and sources this to a 2004 *American Banker* article which states only that the correspondent lending program was run by a "Deutsche Bank AG unit." Ex. N. Regardless, even if this allegation was not based on a misreading of its source, it would be irrelevant, as the institution of this program is not in and of itself relevant to Plaintiff's claims.

[43] *See In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 835-36 (S.D.N.Y. 2005) (allegations of knowledge based on an affiliation or business relationship are insufficient); *Baker v. Andover Assoc. Mgmt. Corp.*, 30 Misc.3d. 1218(A), at *2 (N.Y. Sup. 2009) (dismissing parent company where "[t]he crux of Plaintiff's [aiding and abetting] allegations … are based on [defendant's] status as [a corporate] parent").

for eight, Offerings. (*See supra* note 5.) Plainly, any claims in the Complaint against DBSP, DBALT, or ACE in connection with Offering with which they were not involved must also be dismissed on this basis.

C. Claims Concerning Third Party Offerings Must Be Dismissed

Plaintiff clearly fails to state a claim against Defendants regarding the five Offerings in which only DBSI, as underwriter, had any role.[44] At best, the Complaint alleges that DBSI could have, but failed to, investigate the practices of the third-party issuers (AC ¶¶ 150-56), and mere negligence does not establish scienter. *See, e.g., In re Laser Arms Corp. Sec. Litig.*, 794 F. Supp. 475, 491 (S.D.N.Y. 1989), *aff'd* 969 F.2d 15 (2d Cir. 1992) (dismissing fraud claims premised on underwriters' "fail[ure] to exercise their duty of inquiry" before participating in securities transaction).[45] Plaintiff's claims concerning these Offerings also fail because "fraud liability only lies if a party 'makes,' 'authorizes,' or 'causes' a false statement to be made." *Dexia*, 2013 WL 98063, at *8; *see also Garelick v. Carmel*, 529 N.Y.S.2d 126, 128 (App. Div. 1988) ("[I]n order to plead a valid cause of action sounding in fraud, the complaint must set forth … the making of material representations by the defendant to the plaintiff."). "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

[44] Plaintiff implies that liability can be imputed against all Defendants based in part on non-party Deutsche Bank Trust's role as trustee, and DBAG's role as a "Swap Counterparty" for a limited number of these deals. (AC ¶¶ 150-56.) Such allegations fail. *See Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 126 (S.D.N.Y. 1997) ("an equivocal allegation, *which fails to differentiate the actions of the defendant from a non-party*, is insufficient to give rise to" a common law fraud claim); *M&T Bank Corp v. Gemstone CDO VII, Ltd.*, 23 Misc. 3d 1105(A), at *16-17 (N.Y. Sup. 2009), *aff'd as modified*, 891 N.Y.S.2d 578 (App. Div 2009) (rejecting liability premised on DBAG's "[s]ervice as a counterparty to a credit default swap"). Likewise, Deutsche Alt-A's limited role a depositor for PHHAM 2007-2 does not impose liability against Defendants, as that offering made clear that it served only "limited purposes." Ex. P (PHHAM 2007-2 PS at S-76).

[45] Allegations of DBSI's "economic interests in the securitizations" (AC ¶ 150), also fail. *See Geiger v. Solomon-Page Group, Ltd.*, 933 F. Supp. 1180, 1190-92 (S.D.N.Y. 1996) (profit motive does not "sustain a strong inference of fraudulent intent" even where underwriter has relationship with issuer and role in preparing offering documents).

justifiably relied on these representations." *Dexia*, 2013 WL 98063, at *8 (dismissing claims against all defendants concerning "non DBSP-sponsored Offerings" with prejudice).

D. Claims Concerning DMSI 2006-PR1 Must Be Dismissed

The Complaint does not contain any loan-level data analysis for DMSI 2006-PR1. (AC ¶ 236 & n.23.) Nor does it make any allegations concerning the origination practices of the sole originator, Doral Financial Corporation ("Doral").[46] Moreover, DMSI 2006-PR1 (1) is a private placement containing unique disclosures (*see* Ex 10 at 36); (2) consists entirely of loans made by Doral, which did not originate loans underlying other Offerings, exclusively to Puerto Rican borrowers; (3) was issued through non-defendant depositor Deutsche Mortgage Securities, Inc. (AC ¶ 66); and (4) has the lowest delinquency and default rate of any of the Offerings (*id.* ¶ 14), so there are no grounds for extrapolation from allegations concerning other Offerings. As such, the Complaint fails on its own terms to state a claim concerning DMSI 2006-PR1.

E. Plaintiff Is Not Entitled To Punitive Damages

"[P]unitive damages are not available for a private wrong," including "ordinary fraud." *Mom's Bagels of N.Y., Inc. v. Sig Greenebaum, Inc.*, 559 N.Y.S.2d 883, 885 (App. Div. 1990). Plaintiff does not allege conduct "aimed at the public generally," *Kelly v. Defoe Corp.*, 636 N.Y.S.2d 123, 123 (App. Div. 1996), or conduct involving "a high degree of moral turpitude that demonstrates such wanton dishonestly as to imply criminal indifference to civil obligations." *Princes Point, LLC v. AKRF Eng'g, P.C.*, 944 N.Y.S.2d 493, 494 (App. Div. 2012). Plaintiff's request for punitive damages should therefore be stricken or dismissed.

[46] While the Complaint asserts that "Plaintiff's loan-level analysis reveals that the loans originated by Doral, Impac, SunTrust, and National City … were replete with the same egregious defects" (AC ¶ 235), the inclusion of Doral appears erroneous since the very next paragraph states that DMSI 2006-PR1 was not part of Plaintiff's analysis.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to dismiss the Complaint with prejudice.

Dated: New York, New York
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CERTIFICATE OF SERVICE BY MAIL

I, Jacqueline Williams, hereby certify under the penalty of perjury that on January 16th, 2013 I served a true and correct copy of the attached:

- **NOTICE OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT**
- **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT**
- **AFFIDAVIT OF STEPHEN AULD Q.C. IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**
- **DECLARATION OF DAVID J. WOLL IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**
- **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT**

Upon:

[SEE ATTACHED SERVICE LIST]

By depositing a true copy of the same in a properly addressed, postpaid wrapper in a regularly maintained official depository of the United States Post Office located in the City, County and State of New York.

Dated: New York, New York
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