UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEXIA SA/NV; DEXIA HOLDINGS, INC.; FSA ASSET MANAGEMENT LLC; DEXIA CRÉDIT LOCAL SA, *Plaintiffs*, v. BEAR STEARNS & CO. INC., THE BEAR STEARNS COMPANIES, INC., BEAR STEARNS ASSET BACKED SECURITIES I LLC, EMC MORTGAGE LLC (f/k/a EMC MORTGAGE CORPORATION), STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., J.P. MORGAN ACCEPTANCE CORPORATION I, J.P. MORGAN MORTGAGE ACQUISITION CORPORATION, J.P. MORGAN SECURITIES LLC (f/k/a JPMORGAN SECURITIES INC.), WAMU ASSET ACCEPTANCE CORP., WAMU CAPITAL CORP., WAMU MORTGAGE SECURITIES CORP., JPMORGAN CHASE & CO., and JPMORGAN CHASE BANK, N.A., *Defendants*.	ECF Case No. 12-cv-4761 (JSR)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

February 11, 2013

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TABLE OF AUTHORITIES

Statutes & Rules

EXPLANATION OF CITATION FORMS[1]

The following citation forms are used in this memorandum:

- "Defs. Br." for references to the January 21, 2013 Memorandum of Law in Support of Defendants' Motion for Summary Judgment.
- "Pls. Br." for references to the February 4, 2013 Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.
- "Ex. __" for references to the exhibits to the January 21, 2013 Declaration of J. Wesley Earnhardt In Support of Defendants' Motion for Summary Judgment ("Earnhardt Declaration") or the February 11, 2013 Declaration of Hector J. Valdes In Further Support of Defendants' Motion for Summary Judgment ("Valdes Declaration"). Defendants' exhibit numbers 1 through 114 are attached to the Earnhardt Declaration, while exhibit numbers 115 through 137 are attached to the Valdes Declaration. For consistency and brevity, citations to specific pages within those exhibits will refer to the last three digits of the Bates number, if applicable, for the page(s) in question.
- "Pls. Ex. __" for references to the exhibits to the February 4, 2013 Affidavit of John D. Hendrickson III ("Hendrickson Aff."); the Declaration of Jonathan M. Peterson in Opposition to Defendants' Motion for Summary Judgment ("Peterson Decl."); and the Declaration of Timothy A. Delange In Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("DeLange Decl."). Plaintiffs' exhibit numbers 1 through 51 are attached to the Hendrickson Aff. Plaintiffs' exhibits 52 through 58 are attached to the Peterson Decl. Plaintiffs' exhibits 59 through 242 are attached to the DeLange Decl.
- "Stmt. ¶ __" for references to Defendants' January 21, 2013 Local Rule 56.1 Statement.
- "Pls. 56.1 ¶ __" for references to Plaintiffs' February 4, 2013 Local Rule 56.1(b) Statement of Additional Material Facts as to Which There Are Genuine Issues to be Tried.
- "Compl. ¶ __" for references to the May 18, 2012 Amended Complaint in this matter.
- Residential mortgage-backed securities ("RMBS")
- The 65 RMBS certificates that are the subject of this litigation, as described in the Complaint (the "Certificates")
- The 51 RMBS offerings in which the Certificates were issued (the "Offerings")
- "Dexia v. DB I Order" for references to: Dexia SA/NV v. Deutsche Bank AG, No. 11-cv-5672 (JSR), Order (S.D.N.Y. Feb. 7, 2012).

[1] Unless otherwise noted, all defined terms used in this memorandum shall have the same meaning as in Defendants' January 21, 2013 Memorandum of Law in Support of Defendants' Motion for Summary Judgment.

- "Dexia v. DB II Order" for references to: Dexia SA/NV v. Deutsche Bank AG, No. 11-cv-5672 (JSR), Order (S.D.N.Y. Jan. 4, 2013).

- "Dexia v. DB Opposition to MTD" for references to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Defendants' Motion to Strike from Plaintiffs' Complaints Allegations Drawn from Pleadings and Settlements in Other Actions, Dexia SA/NV, et al. v. Deutsche Bank AG, et al., No. 11-cv-5672 (JSR) (S.D.N.Y. Nov. 4, 2011), ECF No. 30. (Ex. 135)

The Parties

- Dexia SA/NV ("Dexia")

- Dexia Holdings, Inc. ("DHI")

- Dexia Credit Local SA ("DCL") (together with Dexia and DHI, the "Dexia Entities")

- FSA Asset Management LLC ("FSAM")

- Bear Stearns & Co. Inc. (now known as J.P. Morgan Securities LLC) ("BSC"), the Bear Stearns Companies, Inc. (now known as The Bear Stearns Companies LLC), Bear Stearns Asset Backed Securities I LLC ("BSABS"), EMC Mortgage LLC (f/k/a EMC Mortgage Corporation) ("EMC") and Structured Asset Mortgage Investments II Inc. ("SAMI II") (collectively, the "Bear entities")

- J.P. Morgan Acceptance Corporation I ("JPM Acceptance"), J.P. Morgan Mortgage Acquisition Corporation ("JPM Acquisition"), J.P. Morgan Securities LLC (f/k/a JPMorgan Securities Inc.) ("JPMSI"), JPMorgan Chase & Co. ("JPMC"), and JPMorgan Chase Bank, N.A. ("JPMCBNA") (collectively, the "JPMorgan entities")

- WaMu Asset Acceptance Corp. ("WMAAC"), WaMu Capital Corp. ("WMCC") and WaMu Mortgage Securities Corp. ("WMMSC") (collectively, the "WaMu entities")

Deposition Transcripts

- Deposition of Jonathan Peterson, FSAM 30(b)(6) representative, dated November 8, 2012) ("FSAM 30(b)(6) Peterson Tr.") (Ex. 3)

- Deposition of Jake Hendrickson, FSAM 30(b)(6) representative, dated December 21, 2012 ("FSAM 30(b)(6) Hendrickson Tr.") (Ex. 116)

- Deposition of Frank Albus, dated January 4, 2013 ("Albus Tr.") (Ex. 117)

Expert Reports

- Expert Report for Plaintiffs of Joseph R. Mason, Ph.D., December 16, 2012 ("Mason Report") (Ex. 19)

- Expert Report for Plaintiffs of Ilya Kolchisnky, December 6, 2012 (“Kolchinsky Report”) (Ex. 18)

Plaintiffs repeatedly mischaracterize the summary judgment standard, suggesting that Defendants must do more than point to Plaintiffs' failure to adduce evidence in support of their claims. (Pls. Br. 13; see also id. at 14 n.11, 16, 17.) But that is precisely what the law permits: "When the burden of proof at trial would fall on the nonmoving party", summary judgment is ordinarily warranted if the movant "point[s] to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 204 (2d Cir. 2009) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). "In that event, the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." Id.

I. PLAINTIFFS LACK STANDING TO SUE ON 63 OF THE 65 SECURITIES.[2]

A. The Dexia Entities Lack Standing.

Plaintiffs offer no effective rebuttal to Defendants' showing that the Dexia Entities lack standing as a matter of law. As an initial matter, Plaintiffs repeatedly concede that the language of the Guaranteed Put Contract is unambiguous. (Pls. Br. 28, 31.) As a result, its meaning can be interpreted as a matter of law on summary judgment, and the extrinsic evidence Plaintiffs proffer is inadmissible. See R/S Assocs. v. N.Y. Job Dev. Auth., 98 N.Y.2d 29, 33 (2002).

The Guaranteed Put Contract did not transfer tort claims to the Dexia Entities. Plaintiffs do not even attempt to distinguish the extensive case law cited by Defendants establishing that the transfer of "all right, title and interest" in an asset—as opposed to all right, title and interest in a transaction—does not transfer tort claims related to that asset. (Defs. Br. 5-8.) Although Plaintiffs do cite Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank, 57 F.3d

[2] Plaintiffs' brief contains sections wholly irrelevant to Defendants' summary judgment motion. Although Defendants vigorously disagree with Plaintiffs' mischaracterization of the record in those sections, Defendants do not address them further herein. Defendants do address certain (but by no means all) inaccuracies in Plaintiffs' 56.1 Statement in their Response thereto.

146, 152 (2d Cir. 1995), they make no attempt to address Defendants' discussion of that case, instead simply mischaracterizing it as holding that "language assigning 'all right, title and interest' standing alone, unambiguously assign[s]" tort claims. (Pls. Br. 29.) In fact, the court in Banque Arabe stated the opposite. Regarding an assignment of "all of the [assignor's] rights, title and interest in (a) the Participation Agreement", the court held that "[s]tanding alone, as the district court considered it, this reference to the contract may be deemed insufficient under [Fox v. Hirschfeld, 157 A.D. 364 (1st Dep't 1913)] to transfer claims for rescission or fraud in the inducement." Banque Arabe, 57 F.3d at 152. Only after considering additional language that transferred "all of [the assignor's] rights and interest in the transaction" did the court deem the assignment sufficient to encompass tort claims. Id. (emphasis in original).

Plaintiffs also assert that "none of Defendants cases involve assignments between affiliates within the same corporate family". (Pls. Br. 30 n.28.) Plaintiffs are again wrong—In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 2012 U.S. Dist. LEXIS 87189 (C.D. Cal. June 15, 2012) involved a purported assignment between certain SPVs established by German bank, Sachsen, and another SPV, Sealink, established to hold Sachsen's RMBS assets. (Ex. 115.) On facts similar to those at issue here, the court specifically endorsed the possible outcome that Plaintiffs deem "untenable"—if the assignor SPVs did not validly assign tort claims, their receipt of par value for the RMBS at issue could defeat injury in fact and deprive them of standing to sue. In re Countrywide, 2012 U.S. Dist. LEXIS 87189 at *10.

Nor do the cases Plaintiffs cite help them. Both Pro Bono Invs., Inc. v. Gerry, 2008 WL 4755760, at *10 (S.D.N.Y. Oct. 29, 2008) and Int'l Design Concepts, LLC v. Saks, Inc., 486 F. Supp. 2d 229, 237 (S.D.N.Y. 2007) concern an unqualified assignment of "all assets" of a dissolving entity, which assets plainly included any causes of action held by that entity. Here, there was no attempt to transfer "all assets" of FSAM; instead, the assignment purported to convey only all right, title and interest in certain specified assets (i.e., the RMBS certificates).[3]

Plaintiffs' repeated reference to the "all right, title and interest" language misses the point. The case law establishes the relevant question is: all right, title and interest in what? Plaintiffs make no attempt to explain how the language at issue here—"all right, title and interest in the Put Settlement Assets"—could be tantamount to the assignment of all right, title and interest in the RMBS transactions, particularly when the case law specifically refutes that contention. Cal. Pub. Emps.' Ret. Sys. ("CalPERS") v. Shearman & Sterling, 95 N.Y.2d 427, 432, 435 (2000); Consol. Edison, Inc. v. Ne. Utils., 318 F. Supp. 2d 181, 188 (S.D.N.Y. 2004).

Plaintiffs' interpretation of the Guaranteed Put Contract would turn New York law on its head. The New York statute addressed in several of the cases in Defendants' opening brief, N.Y. U.C.C. § 8-302(a), provides that "a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer"—language substantively identical to the assignment language in the Guaranteed Put Contract. Id. If Plaintiffs were correct that language assigning "all right, title and interest in the [Certificates]" is sufficient to transfer tort claims, then, pursuant to the substantively identical language in N.Y. U.C.C. § 8-302(a), every sale of a security in New York automatically would transfer tort claims. If that were the case, the tort claims at issue here would not be owned by the Dexia Entities, but by the

[3] Plaintiffs' reliance on North Fork Bank v. Cohen & Krassner, 44 A.D.3d 375 (1st Dep't 2007) similarly is misplaced. The court there considered the parties' respective rights with respect to the "subject mortgage transaction" and appears to have concluded that the assignment language at issue there was more akin to the language deemed sufficient to transfer tort claims in Banque Arabe than the language deemed insufficient in CalPERS. Id. Thus, North Fork stands only for the unremarkable proposition that transfer of "all right, title and interest" in a transaction encompasses tort claims relating to that transaction. See Banque Arabe, 57 F.3d at 152.

unaffiliated third parties to whom DCL later sold the Certificates.[4] (Stmt. ¶ 78.)

Plaintiffs' assertion that "this Court has twice rejected the very standing argument that Defendants rehash for a third time here" is also wrong. (Pls. Br. 29-30.) The two prior occasions on which Plaintiffs contend the Court considered Dexia's standing were decisions rendered on motions to dismiss, when the Court was required to accept as true the allegation that FSAM had transferred all rights and remedies sought in this action to the Dexia Entities. See (Compl. ¶ 18); Dexia SA/NV v. Bear, Stearns & Co., et al., No. 12-cv-4761 (JSR), Order at 1-2 (S.D.N.Y. Sept. 27, 2012); Dexia v. DB I Order.[5] But at the summary judgment stage, the Court need not accept that allegation as true, and it in fact has been proven false.

Nor would Defendants' interpretation of the Guaranteed Put Contract "lead to absurd results". (Pls. Br. 30 n.28.) For one thing, the call option allowed DCL to pay FSAM either "100% of the Outstanding Principal Amount" or a presumably lower "Mark to Market Value". (Stmt. ¶ 73.) Had DCL elected to pay market value, FSAM would not have recovered its full purchase price and would have retained standing to pursue tort claims. That DCL elected a different course of action also permitted by the Guaranteed Put Contract does not render the contract "absurd". Indeed, given Dexia's focus on entering the Guaranteed Put Contract to facilitate the separate sale of FSA Inc. (Stmt. ¶¶ 25-31), it makes perfect sense that the contract did not provide for the transfer of tort claims that Dexia did not contemplate bringing (as

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[4] Thus, Plaintiffs' assertion that the policy concern of protecting Defendants from "civil double jeopardy" is not implicated here (Pls. Br. 30) is wrong, and the cases Plaintiffs cite in support are inapposite. See Rosenblum v. Dingfelder, 111 F.2d 406 (2d Cir. 1940); Barry v. Duffin, 195 N.E. 511 (Mass. 1935). Neither involved a situation where both the assignor and purported assignee were parties to the litigation, nor where, as here, the only entity that potentially had standing (FSAM) had already been fully compensated for any potential injury it might claim.

[5] In Dexia v. DB I, after noting that it "need not decide whether the Complaint adequately pled that the Dexia plaitiffs had standing", the Court then stated that "the Dexia case need not have been dismissed on standing grounds at this stage of the litigation". Id. at 2 (emphasis added).

evidenced by the Guaranteed Put Contract's failure to mention such claims at all). "[I]t is not a court's function to imply a term to save a [party] from the consequences of an agreement that it drafted". Jade Realty LLC v. Citigroup Commercial Mortg. Trust, 20 N.Y.3d 881, 883 (2012).

Plaintiffs' reliance on equitable subrogation is also misplaced. Plaintiffs state that "subrogation . . . include[s] every instance in which one party pays a debt for which another is primarily answerable . . . so long as the payment was made either under compulsion or for the protection of some interest of the party making the payment and in discharge of an existing liability." (Pls. Br. 33.) Here, however, DCL did not pay an existing "debt" owed by Defendants to FSAM; at the time of the relevant asset sale, FSAM had not even filed suit against Defendants, much less obtained a judgment. See Med. Malpractice Ins. Ass'n v. Med. Liab. Mut. Ins. Co., 86 A.D.2d 476, 481 (1st Dep't 1982) (insurer of hospital defendant in malpractice action was not equitable subrogee of plaintiffs with respect to non-party individual doctors' malpractice insurer because, "[s]ince the doctors were never legally obligated to pay damages, [their insurer] never incurred an obligation to indemnify them").[6] Moreover, in light of the option, described above (see supra 4-5), whereby DCL could elect to pay FSAM the market value rather than the full remaining principal value of the Certificates, any payment over and above that market value was not made "under compulsion" of the Guaranteed Put Contract. See Nat'l Union Fire Ins. Co. v. Ranger Ins. Co., 190 A.D.2d 395, 397 (4th Dep't 1993) ("[A] mere volunteer or intermeddler will not be substituted in the place of a person whose rights he seeks to acquire, simply because he has paid a debt or discharged an obligation, for which that person was responsible."); Travelers Ins. Co. v. Nory Constr. Co., 184 Misc. 2d 366, 373 (N.Y. Sup. Ct. 2000) ("[T]he overpayment by [the insurer], made in the absence of any legal liability or

[6] Though Plaintiffs claim that "New York courts routinely apply equitable subrogation to tort claims", they fail to cite a single case outside the specialized insurance context. (Pls. Br. 34.)

compulsion to do so . . . was purely a voluntary payment which cannot be recovered."). Nor is there any evidence that DCL's election to make the higher payment was necessary in order to protect some interest of DCL. Thus, there is no equitable subrogation.[7]

Plaintiffs also point to FSAM's purported "ratification" of the assignment under Federal Rule of Civil Procedure 17(a)(3). (Pls. Br. 30 n.29.) Rule 17(a)(3) applies only where the real party in interest is not a party and is given the opportunity to "ratify" the suit brought by another on its behalf. It does not apply here, where both the purported assignor and assignee are parties to the action, and where FSAM has no claim to assign. Fed. R. Civ. P. 17(a)(3); In re Countrywide, 2012 U.S. Dist. LEXIS 87189, at *10; In re UBS Auction Rate Sec. Litig., 2009 U.S. Dist. LEXIS 26385, at *19 (S.D.N.Y. Mar. 30, 2009); Aimis Art Corp. v. N. Trust Sec., Inc., 641 F. Supp. 2d 314, 320 (S.D.N.Y. 2009); see also Bd. of Managers Mason Fisk Condo. v. 72 Berry St., LLC, 801 F. Supp. 2d 30 (E.D.N.Y. 2011) (rejecting attempt to use Rule 17(a) to cure ineffective assignment of fraud claims).

Finally, even if "Delivery" under the Guaranteed Put Contract could have transferred tort claims (and, as explained above, it could not), no "Delivery" occurred. Plaintiffs simply call Defendants' argument "absurd" and insist that "Delivery took place". (Pls. Br. 31.) But saying it does not make it so. The Guaranteed Put Contract requires the party exercising the put or call option to provide the counterparty an Exercise Notice in an attached form. (Ex. 9 at 332-33, 342.) Following an Exercise Notice, FSAM (or its Collateral Agent) was required to "Deliver" the assets to Dexia or DCL (id. at 336, 342), which was defined as follows:

> [T]o deliver, novate, transfer, assign or sell, as appropriate, in the manner customary for the settlement of the applicable Put Settlement Assets (which shall include executing all

[7] Moreover, the contractual subrogation provision to which Plaintiffs point (Pls. Br. 34 n.33) relates only to the right to receive any interest shortfalls, principal shortfalls or writedowns recovered from the issuing trust. That provision has no bearing on the tort claims at issue.

> necessary documentation and taking any other necessary actions) in order to convey all right, title and interest in the Put Settlement Assets to Dexia or DCL . . . (Id. at 337.)

That plain language shows that "Delivery" is not effectuated via the Guaranteed Put Contract itself; it is a step contemplated to take place in the future, after issuance of an Exercise Notice. Nor could an Exercise Notice effectuate "Delivery"—if that were the case, the contractual requirement that "Delivery" take place on a specified date after issuance of the Exercise Notice would, in every instance, have been meaningless. (Defs. Br. 10.) Moreover, Plaintiffs' assertion that the Guaranteed Put Contract "did not require execution of any particular documentation to effect 'Delivery'" (Pls. Br. 31) misses Defendants' point, which is that, following an Exercise Notice, some documentation was required to effectuate "Delivery"[8], and the record reveals there was none.

B. FSAM Lacks Standing.

FSAM has no injury in fact with respect to 63 of the 65 Certificates at issue. Plaintiffs' arguments in response are without merit. First, Plaintiffs' assertion that "the receipt of distributions of principal and interest does not mean FSAM was not damaged" is a red herring. (Pls. Br. 31 & n.31.) Defendants do not contend that missed monthly payments are the only relevant measure of damages in an RMBS action; instead, the record demonstrates that FSAM recovered all potential losses it incurred—whether attributable to missed payments, declines in market value or anything else—because it recovered at least its full purchase price for 63 of the 65 Certificates. (Defs. Br. 12-14.)

Second, the fact that fraud damages are calculated as of the date of sale does not mean a plaintiff who has recovered its full purchase price nevertheless has standing to sue. Each of the cases Plaintiffs cite for that proposition is inapposite. (Pls. Br. 32.) And Plaintiffs do not even

[8] FSAM's 30(b)(6) witness agreed: "It doesn't define what necessary documentation is, but it requires documentation". (FSAM 30(b)(6) Peterson Tr. 201:20-202:5 (Ex. 3).)

address the cases cited by Defendants establishing that an investor who has been made whole lacks injury in fact (and standing). (Defs. Br. 11-12.)

Third, Plaintiffs' assertion that "full payment in connection with an assignment simply does not extinguish 'injury-in-fact'" (Pls. Br. 32) (emphasis added) has no bearing on Defendants' standing arguments. With respect to FSAM, the only relevant question is whether it has been made whole—and it has. Plaintiffs' assertion only potentially relates to whether a valid assignee of FSAM could demonstrate injury in fact but, for the reasons addressed above (supra 1-7), that is an irrelevant inquiry here because there has been no valid assignment.

II. PLAINTIFFS CANNOT ESTABLISH RELIANCE.

A. Plaintiffs Attempt Radically to Revamp Their Claims.

Every purported misstatement specifically identified in Plaintiffs' Complaint was located in a prospectus supplement or prospectus. (Defs. Br. 15-16.) It is now undisputed that Plaintiffs did not review those documents in connection with their decisions to purchase the Certificates. (Id. at 16-17.) Thus, every allegation in the Complaint of purported reliance on a specific misstatement is demonstrably (and undisputedly) false. See Fed. R. Civ. P. 11(b)(3).

The case Plaintiffs now want to take to trial—which focuses on quantitative data, not textual disclosures—bears almost no resemblance to the one pled. Faced with that reality, Plaintiffs casually state that if the new claims were not pled in the Complaint, they should be deemed to constitute a motion to amend. (Pls. Br. 14 n.12.) But the drastic difference between the Complaint and Plaintiffs' current case, coupled with the late date of the request to amend and Plaintiffs' implicit admission that the allegations that allowed them to survive a motion to dismiss were false, justify denying the motion to amend and granting summary judgment.[9] See

[9] One critical difference between the Complaint in this case and the complaint in Dexia v. DB (where this Court granted defendants' motion to dismiss) appears to have been Plaintiffs'

In re ICN/Viratek Sec. Litig., 1996 WL 164732, at *1-2 (S.D.N.Y. Apr. 9, 1996).

Even if the Court were to deem the Complaint amended, Plaintiffs still would be unable to plead actual reliance on any misstatement of Defendants. A plaintiff who requests that its summary judgment opposition be deemed an amendment to the complaint is no less required to comply with the specificity requirements of Fed. R. Civ. P. 9(b) than is a plaintiff who actually files an amended complaint. See Bay State Mill. Co. v. Terranova Bakers Supplies Corp., 871 F. Supp. 703, 707 (S.D.N.Y. 1995); Hawkins-El v. First Am. Funding, LLC, 2012 WL 4099048, at *9 (E.D.N.Y. Sept. 19, 2012). Plaintiffs do not satisfy Rule 9(b) here (let alone Rule 56). In particular, Plaintiffs do not identify the specific misstatements upon which they purportedly relied for any of the Offerings. Their attempt to do so is Plaintiffs' Exhibit 72, which they describe merely as "a chart identifying representations made to Dexia regarding the underlying collateral for each of the Certificates".[10] (Pls. 56.1 ¶ 12.) Plaintiffs make no attempt to identify which, if any, of those representations are false or misleading, or why, or which, if any, they even read or relied on, and that in itself is fatal to their claims. See Dexia v. DB II Order at 11.

At a minimum, in light of Rule 9(b)'s requirement to specify each statement alleged to be misleading, Plaintiffs' Exhibit 72 establishes the outer bounds of the potential misstatements purportedly at issue in this litigation. Importantly, Plaintiffs' Exhibit 72 consists almost exclusively of references to quantitative data, not textual disclosures. (See Appx. C.) In fact, whereas representations about compliance with underwriting guidelines were the focus of both

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inclusion in this case of hundreds of pages of purported misstatements in prospectuses and prospectus supplements attached to the Complaint (Ex. B – H), which they had failed to include in Dexia v. DB. It has now been shown that Plaintiffs failed to read any of that material.

[10] Rather than identifying actual representations made in the various materials cited, Pls. Exhibit 72 simply lists six undefined "representation types"—Ratings, Loan to Value, Debt to Income, Owner Occupancy, FICO, and Compliance with Underwriting Guidelines—and indicates the page in the offering materials where each representation purportedly can be found. (Pls. Ex. 72.)

Plaintiffs' motion to dismiss opposition brief and Complaint, on that issue Plaintiffs now say only that "[i]n many of the Offerings"—but not all—"the supplemental term sheets or preliminary prospectus supplements provided to FSAM before its investment decision also contained information about the originator's underwriting standards". (Pls. Br. 12.) Plaintiffs do not claim to have received, much less read, any other textual disclosures.

B. Plaintiffs Cannot Establish Actual Reliance.

Even after fundamentally changing their theory of the case, Plaintiffs still have failed to adduce any evidence that FSAM relied on any misstatement by Defendants. It is not Defendants' burden to demonstrate the absence of reliance; rather, reliance is an essential element of each of Plaintiffs' claims, and it is Plaintiffs' burden on summary judgment to point to admissible evidence showing they relied on a particular misstatement in deciding to purchase each of the Certificates at issue. In re Fifth Judicial Dist. Asbestos Litig., 784 N.Y.S.2d 829, 834 (Sup. Ct. 2004); (Defs. Br. 14 n.11.) Discovery relevant to summary judgment is now closed, and the sum total of the record evidence on reliance can be summarized succinctly:

1. Deposition testimony by FSAM Portfolio Manager and 30(b)(6) representative Jake Hendrickson, Chief Risk Officer Russell Brewer and Risk Manager Hongfei Zhang that FSAM did not review prospectus supplements or prospectuses in connection with its RMBS purchase decisions. (Defs. Br. 16-17.)

2. Deposition testimony by Mr. Hendrickson and his associate, Frank Albus, that FSAM typically reviewed the structural and quantitative data contained in term sheets, marketing materials and collateral data files ("CDI files"). (Defs. Br. 18; FSAM 30(b)(6) Hendrickson Tr. 22:24-25:9; 28:16-29:10 (Ex. 116); Albus Tr. 48:10-49:25; 52:24-66:12) (Ex. 117).)

3. Mr. Albus's subsequent testimony that he "would have gone through and looked at any available information that [he] could in order to make an informed investment recommendation and to facilitate the investment process." (Albus Tr. 123:16-124:20 (Ex. 117).) Mr. Albus conceded that, aside from the term sheets, marketing materials and CDI files about which he testified specifically, he had no recollection as to any particular information that might have been gathered or reviewed in connection with any specific RMBS investment or RMBS investments generally. (Id. 126:20-127:6 (Ex. 117).)

4. Mr. Hendrickson's carefully worded affidavit submitted with Plaintiffs' summary judgment

> opposition wherein he writes: "In the ordinary course of business, FSAM received and relied on the statements contained in the documents prepared by or provided by the Defendants in this action prior to the purchase of the Certificates." Mr. Hendrickson does not define "the statements" to which he refers or "the documents" that contain those statements. In the next paragraph he states: "In the ordinary course of business, FSAM maintained deal files containing offering materials for each of the Certificates in a central database. True and correct copies of those documents are attached hereto as the exhibits listed in Schedule A." Notably, Mr. Hendrickson does not state or suggest that the documents attached to his affidavit are "the documents" to which he referred in the preceding paragraph. (Hendrickson Aff.) Nor could he. The documents identified in Schedule A include prospectus supplements, and Mr. Hendrickson testified unequivocally that FSAM did not review or rely upon such documents in connection with its RMBS purchases. (Defs. Br. 16-17); see B.U.S.A. Corp. v. EcoGloves, Inc., 2009 WL 3076042, at *7 (S.D.N.Y. Sept. 28, 2009) (Rakoff, J.) ("A party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony.").

That record defeats actual reliance. First, Mr. Hendrickson's and Mr. Albus's catch-all references to "the documents prepared by or provided by the Defendants" and "any available information that I could find" are far too vague and non-specific to support a showing of reliance under New York law. "To state a fraud claim . . . plaintiff must set forth the representations that it relied upon to its detriment. Although plaintiff alleges that she relied and acted upon movants' representations, she [must also set forth] specific details as to who made these alleged representations, what was represented, [and] to whom the representations were made." Arias v. 601 W. 137th St., LLC, 2007 WL 2917250, at *4 (N.Y. Sup. Ct. Sept. 28, 2007); Jones v. Gelles, 140 A.D.2d 819, 821 (3d Dep't 1988) ("While Gelles avers that he relied on representations made by Weibrecht and plaintiff, he fails to state what those representations were."); Small v. Lorillard Tobacco, 252 A.D.2d 1, 15-16 (1st Dep't 1998) ("[T]he complaint presents no additional facts to support an inference that plaintiffs saw the [advertisement at issue] and relied on it. The fact that the named plaintiffs 'read news periodicals during the time period the alleged misrepresentations were made . . . falls far short of proving [they] actually relied upon them'").

Second, with respect to the only alleged textual misstatement at issue (i.e., general compliance with underwriting guidelines), there is not a shred of evidence in the record that anyone at FSAM read or relied upon any such representations. As the cases cited above establish, evidence that a plaintiff typically read a certain category of document is insufficient; FSAM must show that it "in fact read and relied on" the alleged misrepresentations at issue. Turtur v. Rothschild Registry, Int'l, Inc., 1993 U.S. Dist. LEXIS 11939, at *17 (S.D.N.Y. Aug. 26, 1993); Portnoy v. Am. Tobacco Co., 1997 WL 92040, at *2 (N.Y. Sup. Ct. Feb. 19, 1997) ("Plaintiff claims to have relied on defendants 'advertising,' 'literature,' 'brochures' or 'other materials.' However Plaintiffs do not substantiate either reliance or what specifically they relied on."). Indeed, despite repeated opportunities to do so—at numerous depositions of many of FSAM's investment personnel, in the Hendrickson affidavit submitted with Plaintiffs' brief and elsewhere—Plaintiffs have adduced no testimony or other evidence showing there was any reliance by FSAM on representations about compliance with underwriting guidelines.

To the contrary, Plaintiffs' Exhibit 72 reveals that for 18 of the 51 Offerings at issue, FSAM does not even purport to have received a representation about compliance with underwriting guidelines. (Appx. A.) For 13 additional deals, the representation about compliance with underwriting guidelines appeared only in prospectus supplements or prospectuses (id.), which Messrs. Hendrickson (as 30(b)(6) witness for FSAM), Brewer and Zhang testified FSAM never reviewed. (Defs. Br. 16-17.) Thus, for 31 of the 51 Offerings at issue, FSAM could not possibly have relied on any statement concerning compliance with underwriting guidelines. Given the demonstrated lack of reliance on such statements for 31 of the 51 deals at issue, and the utter lack of evidence of reliance for the other 20 deals, Plaintiffs have failed to carry their burden of adducing evidence of reliance on statements concerning compliance with underwriting guidelines, and any claims related to such statements must fail.

Third, with respect to the quantitative data provided in term sheets, marketing materials and CDI files, Plaintiffs have adduced no evidence whatsoever that any such data was misstated, much less that it was materially and knowingly misstated.[11] The facts of FHFA v. Deutsche Bank AG, 2012 WL 5471864 (S.D.N.Y. Nov. 12, 2012), are instructive on this point. There, the court dismissed fraud claims relating to LTV and owner-occupancy data on the basis that a mere disparity between the numbers resulting from FHFA's own analysis and those reported by defendants, without more, is insufficient to allege fraudulent intent. Id. at *2. Unlike in FHFA, and despite having reached the conclusion of discovery, Plaintiffs here do not purport to have undertaken any analysis at all to show that any portion of the data they cite is incorrect, let alone by how much and why, making their claims even weaker than the ones dismissed in FHFA.

Plaintiffs offer only the demonstrably false assertion that loan-level data necessarily "would not be reliable if the loans were not underwritten in accordance with the guidelines". (Pls. Br. 12; see also id. at 15 ("persistent underwriting violations rendering the data unreliable").) That makes no sense since one cannot draw the conclusion that loan data necessarily is incorrect based merely on the premise that the loan did not meet underwriting guidelines. For example, a hypothetical loan with a FICO score of 650 and a DTI ratio of 35% could both comply with one set of guidelines (that allow those FICO scores and DTI ratios) and not comply with a different set of guidelines (that do not allow those FICO scores and DTI ratios). The loan's compliance or non-compliance with guidelines is not determinative of the

[11] Plaintiffs cite five types of data: Ratings, Loan to Value, Debt to Income, Owner Occupancy and FICO. (Pls. Ex. 72.) Claims relating to ratings fail for additional reasons stated in Defendants' opening brief. (Defs. Br. 19 n.14.) Plaintiffs' statement that Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 2012 WL 3584278 (S.D.N.Y. Aug. 17, 2012) "does not apply under New York law" is false. Id. at *8 ("[U]nder New York law, although some of the statements . . . may be attributable to Morgan Stanley, the ratings are attributable only to the Rating Agencies . . . .").

accuracy of the disclosed data. Thus, Plaintiffs' attempt to rely on the contested issue of compliance with underwriting guidelines to cast aspersions on the quality of the loan-level data fails. Because there is no evidence that the quantitative data—the only information that Plaintiffs could have relied on—was wrong or misleading, summary judgment is warranted.

Realizing they cannot show actual reliance, Plaintiffs, as predicted, attempt to circumvent that requirement by arguing they relied on credit ratings that supposedly were the product of Defendants' purported fraud. (Pls. Br. 16-19.) None of Plaintiffs' arguments refutes Defendants' arguments as to why that theory fails. A few points merit emphasis here.

First, Plaintiffs have not proffered any evidence that any piece of information Defendants provided to the ratings agencies was false, let alone that the ratings would have changed absent the (non-existent) false information. Plaintiffs devote a great deal of space discussing diligence processes whereby the initial number of loans that received defective grades from third-party vendors was reduced during the course of the due diligence process. But there is no evidence that the ratings agencies relied upon those due diligence grades when rating the Certificates at issue. And, stripped of their sensationalism, Plaintiffs' allegations about "overrides" and "sanitized" due diligence reports boil down to this theory: the mere fact that an EV3 loan is cured necessarily establishes that it was cured improperly. That theory is untenable, and one need look no further than Plaintiffs' own former employee to establish that fact. George Stiehl, formerly of Dexia affiliate Financial Security Assurance, Inc. ("FSA, Inc."), and a witness in this case as well, testified in Assured Guaranty Municipal Corp. v. Flagstar Bank, 11 Civ. 2375 (JSR) about the due diligence procedures he employed at FSA, Inc. (a monoline insurer) in assessing whether to insure RMBS transactions. Based in part on that testimony, this Court wrote:

> "Over the course of their reviews, [diligence vendors] Clayton and Bohan engaged in iterative processes with Flagstar and Assured, in which they were able

> to seek additional documentation and address compensating factors within the loan files. . . . This "clearing" process affected the grades given to the loans in the samples, as the due diligence providers were able to clarify issues with Flagstar and obtain documentation that might not have been located in the HELOC loan file. . . . By this process, nearly all of the loans originally coded as Event Level 3 were cleared of material issues." Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 2013 WL 440114, at *8 (S.D.N.Y. Feb. 5, 2013).

Because there is nothing inherently wrongful about clearing an EV3 exception, Plaintiffs' claims premised on that practice, without more, are insufficient to carry their burden to show that Defendants provided false information to the ratings agencies.

Second, Plaintiffs' strategy of cherry picking internal and external communications to create the appearance of omissions cannot withstand scrutiny. Demonstrating that a particular piece of information is not contained in a communication to the ratings agencies does not establish that the information is not contained in any communication to the ratings agencies. That concern is not theoretical. As just one example, Plaintiffs cherry pick two documents to suggest JPMorgan withheld from information sent to Moody's that 1,276 loans in a pool were past due. (Pls. 56.1 ¶¶ 54-57.) That is demonstrably false—the report showing the 1,276 past due loans was, in fact, provided to Moody's. (Defs. Ex. 119 at Tab UMLS, Column AW.) Plaintiffs fail to show any omission to the ratings agencies, let alone an omission of information Defendants had a duty to provide, or that any such omission affected the ratings.

Third, Plaintiffs' purported expert, Mr. Kolchinsky, cannot establish their reliance. Other than insisting that Mr. Kolchinsky's unsupported conjecture creates an issue of fact, Plaintiffs do nothing to address the deficiencies with his opinions pointed out in Defendants' opening brief. Plaintiffs point to Appendix 4 to Mr. Kolchinsky's report as the purported basis of his conclusions; but none of the documents discussed in Appendix 4 concerns communications with ratings agencies. (Ex. 18.) Instead, Mr. Kolchinsky simply assumed the information the ratings agencies received, assumed that it was false, and assumed with no analysis his ultimate conclusion that the ratings might have been different had the ratings agencies received different information. See Vargas v. Transeau, 514 F. Supp. 2d 439, 445-446 (S.D.N.Y. 2007) (expert's "conclusory assertions . . . are insufficient to defeat a motion for summary judgment").

Finally, Plaintiffs' assertion that FSAM "would not have purchased the Certificates if they had not been rated AAA" (Pls. Br. 18) is not supported by the evidence in the record. In fact, FSAM was permitted to, and in fact did, purchase non-AAA rated securities during the relevant time period. (FSAM 30(b)(6) Hendrickson Tr. 33:4-34:7 (Ex. 116); Ex. 118 at 983-85.)

C. Plaintiffs Cannot Establish Justifiable Reliance.

"As a matter of law, a sophisticated plaintiff cannot establish . . . justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." HSH Nordbank AG v. UBS, 95 A.D.3d 185, 194 (N.Y. App. Div. 2012).

Plaintiffs' argument that this heightened standard does not apply here because they purportedly lacked access to loan files misses the point. Plaintiffs' inability to establish justifiable reliance is premised on their failure to read the prospectuses or prospectus supplements—which Plaintiffs easily could have obtained—not loan files. Moreover, in light of Plaintiffs' newfound focus on quantitative data disclosed to investors, reviewing the prospectus supplement takes on additional importance. The prospectus supplements often disclosed that loans would continue to be added or removed from the pool through the closing, meaning that the quantitative data could change by up to plus or minus 10%. (Appx. B.) In light of the disclosures in prospectus supplements, Plaintiffs cannot have justifiably relied on the preliminary numbers in term sheets and marketing materials, which is all they claim to have read. Good Hill Partners L.P. v. WM Asset Holdings Corp., 583 F. Supp. 2d 517, 520 (S.D.N.Y. 2008) (Rakoff, J.) (granting motion to dismiss where "reliance on the graphs and tables in the [term sheet] was expressly disclaimed by means of cautionary language including 'preliminary,' 'expected to change,' and 'based upon numerous assumptions'").

III. PLAINTIFFS HAVE ADDUCED NO EVIDENCE OF LOSS CAUSATION.

Summary judgment should be granted because Plaintiffs provide no evidence to establish that the purported fraud at issue in this litigation caused <u>any</u> portion of their alleged losses. <u>See</u> <u>Laub v. Faessel</u>, 745 N.Y.S.2d 534, 536 (1st Dep't 2002) ("[P]laintiff must show . . . that the misrepresentations directly caused the loss about which plaintiff complains").

Plaintiffs' purported expert, Dr. Mason, fails to conduct any analysis specific to Defendants or the alleged misstatements at issue. Dr. Mason makes no attempt to determine whether any decline in value was attributable to <u>disclosed risks</u> inherent in loosened underwriting guidelines versus any alleged undisclosed failure to adhere to those guidelines. (Ex. 19 ¶¶ 14-24.) He also states there is no methodology that would allow him to determine whether any loss in value was attributable to the conduct at issue, rather than from the financial crisis generally.[12] (<u>Id.</u> ¶ 24.) It is difficult to imagine how Dr. Mason's analysis would be any different were other defendants, misstatements or securities at stake. Thus, there is no evidence from which a jury reasonably could infer that even "<u>some</u> portion of plaintiffs' losses were caused by **<u>defendants' fraud</u>**." <u>Abu Dhabi</u>, 2012 WL 3584278, at *19 (emphasis added).[13]

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[12] Contrary to Plaintiffs' assertion (Pls. Br. 24), Dr. Mason's statement in this regard does not "refute" Defendants' assertion that Plaintiffs must disaggregate losses. It establishes only that Dr. Mason is unwilling or incapable of performing the analysis the law requires.

[13] Defendants have not waived any right to summary judgment on Plaintiffs' fraudulent inducement claim. Defendants explicitly stated that "[l]oss causation is a fundamental element of Plaintiffs' <u>claims</u>", meaning all of them. (Defs. Br. 23); <u>see also</u> <u>Emergent Capital Inv. Mgmt. LLC v. Stonepath Grp, Inc.</u>, 165 F. Supp. 2d 615, 627 n.2 (S.D.N.Y. 2001), <u>aff'd in part and vacated in part</u>, 343 F.3d 189, 197 (2d Cir. 2003) (rejecting argument that "New York law does not require proof of loss causation where only rescission is sought"); <u>JSMS Rural LP v. GMG Capital Partners III, LP</u>, 2006 WL 1867482, at *4 (S.D.N.Y. July 6, 2006). In any event, rescission is unavailable where, as here, there is an "adequate remedy at law". <u>New Paradigm Software Corp. v. New Era of Networks, Inc.</u>, 107 F. Supp. 2d 325, 329-30 (S.D.N.Y. 2000).

Nothing in Plaintiffs' opposition compels a different result. First, regardless of differences between federal securities law and New York common law in the way damages are calculated, both require Plaintiffs to demonstrate that the alleged "misrepresentations directly caused the loss about which plaintiff complains". Laub, 745 N.Y.S.2d at 536.[14] "Although the facts in Dura involved a fraud claim under the federal securities laws, its holding is also applicable to common law fraud claims because the element of causation is treated the same in both." Sciallo v. Tyco Int'l Ltd., 2012 WL 2861340, at *6 (S.D.N.Y. July 9, 2012). Plaintiffs' sole authority on this point is not to the contrary. See Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 183 (2d Cir. 2007) ("The concept of loss causation elucidated in Dura is closely related to the common law doctrine of proximate cause.").[15]

Second, Plaintiffs' assertion that the disaggregation requirement repeatedly has been rejected is not supported by the cases they themselves cite. Plaintiffs take certain language from Abu Dhabi, 2012 WL 3584278, at *19, out of context in an attempt to suggest that it is Defendants' burden in a common law fraud case to establish negative causation at the summary judgment stage. That is not correct. As the court in Abu Dhabi made clear, to survive summary judgment, "plaintiffs [must] provide evidence 'that would allow a factfinder to ascribe some rough proportion of the whole loss to [the defendant's alleged] misstatements'". Id. There, plaintiffs met that requirement by proffering "[i]n great detail . . . factual evidence . . . that their losses were a direct and foreseeable results of defendants' false or misleading ratings" and by submitting "an expert declaration demonstrating that some of [plaintiffs'] losses are attributable to defendants' conduct." Id. Plaintiffs have not made that showing here. Likewise, the court in

[14] One of the cases Plaintiffs cite for the New York law standard for damages and causation is a Section 10(b) case. Castellano v. Young & Rubicam, Inc., 257 F.3d 171 (2d Cir. 2001).
[15] Plaintiffs cite no authority for their assertion that RMBS, unlike stocks and bonds, are not expected to "fluctuate with a wide range of outside market influences". (Pls. Br. 23.)

In re Sadia, S.A. Sec. Litig., 269 F.R.D. 298, 317 (S.D.N.Y. 2010) simply determined, at class certification, that damages theoretically could be proven where the proposed expert prepared an event study and attempted to control for the financial crisis "by including domestic and foreign stock and bond indexes as variables", neither of which Dr. Mason even attempts to do here.[16]

Plaintiffs' attempt to distinguish Defendants' cases by suggesting they involved situations where "plaintiffs submitted no evidence of loss causation" (Pls. Br. 22 n.21) fails. In Sciallo, 2012 WL 2861340, contrary to Plaintiffs' assertion, the plaintiffs put forth a loss causation expert, but, like here, his methodology was so lacking as to warrant summary judgment. In Gordon Partners v. Blumenthal, 293 Fed. App'x 815, 818 (2d Cir. 2008), plaintiffs submitted evidence of transaction causation but, like here, "insisted that attempting to [show loss causation] was 'nonsense' and an 'academic exercise'". In Shanahan v. Vallat, 2008 WL 4525452, at *6-7 (S.D.N.Y. Oct. 3, 2008), the court held that Plaintiffs' failure to disaggregate its losses from that of the market was fatal: "Having failed in the paging market for reasons wholly unrelated to any misstatements that were made, Plaintiffs must advance more than mere speculation in order to overcome the showing that their loss was attributable to an intervening cause." Those cases are directly on point with respect to loss causation, making summary judgment appropriate.

IV. SUMMARY JUDGMENT SHOULD BE GRANTED ON THE SIXTEEN OFFERINGS IN WHICH DEFENDANTS ACTED ONLY AS UNDERWRITERS.

Plaintiffs' attempts to draw superficial analogies regarding Defendants' roles between the sixteen underwriter-only deals at issue and the remaining sponsored deals do not take account of the actual bases that appear to have motivated this Court's dismissal with prejudice in Dexia v. DB.[17] The Dexia v. DB II Order does not depend upon the specific practices employed by the

[16] Plaintiffs' other cases were decided at the motion to dismiss stage. (Pls. Br. 24 n.22.)

[17] In fact, this Court rejected nearly identical arguments by Plaintiffs in Dexia v. DB (Dexia v. DB Opp'n to MTD at 5 (Ex. 135).)

underwriter, but instead suggests that no set of facts could have stated a claim with respect to those offerings, based on (i) the rule that fraud liability only lies if a party "makes", "authorizes", or "causes" a false statement to be made; and (ii) the absence of a representation in the offering documents that the underwriter would re-underwrite the loans to ensure that they complied with its own and the originator's guidelines. Id. at 19-22. Both factors compel the same result here.

As in Dexia v. DB II, for the sixteen underwriter-only deals, neither the underwriter Defendants nor any of their affiliates had any involvement in the origination, sponsoring or depositing of the underlying loans. Thus, no matter how extensive its diligence procedure at the securitization stage, it cannot plausibly be said that the Defendant underwriter made, authorized or caused a false statement to be made about the process by which the loans were originated.

Likewise, in the Dexia v. DB II case, the sponsor, DBSP, "made specific representations that it had reviewed the loans to ensure that the loans conformed with DBSP's underwriting standards . . . ." Id. at 18. Here, none of the Offering Documents for the sixteen underwriter-only Offerings contained representations that the underwriter Defendants would conduct due diligence or quality control at all, much less that they would review loans for conformance with their own underwriting standards. Thus, whatever diligence the underwriter Defendant elected to perform was done pursuant to its own business objectives, not in connection with a representation to investors regarding the quality of the loans. Because a fraud claim is premised on the existence of a representation alleged to be false or misleading, the absence of such a representation is of critical significance, as this Court concluded in Dexia v. DB II.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion for summary judgment in its entirety.

New York, New York

February 11, 2013

CRAVATH, SWAINE & MOORE LLP,

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