Westlaw Journal
DERIVATIVES
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 20, ISSUE 20 / AUGUST 29, 2014

WHAT'S INSIDE

MORTGAGE-BACKED SECURITIES

8 Bank of America settles mortgage probes for $16.65 billion

9 BNY Mellon cost MBS investors over $1 billion, lawsuit says

Royal Park Invs. v. Bank of N.Y. Mellon (S.D.N.Y.)

COLLATERALIZED MORTGAGE OBLIGATIONS

10 CMO purchaser not liable for payment, 5th Circuit says

Collective Asset Partners v. VTraderPro (5th Cir.)

VIRTUAL CURRENCY

11 New York could become first state to enact virtual currency regulation

ECONOMIC SANCTIONS AGAINST RUSSIA

12 Dechert LLP attorneys examine expansion of economic sanctions against Russia

SECURITIES FRAUD

14 Fraud suit against bank remanded based on *Halliburton* ruling

Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp. (11th Cir.)

COMMENTARY

15 Is the SEC encouraging unethical whistleblowing by counsel

RATINGS AGENCIES

California defeats S&P's anti-SLAPP appeal in inflated-ratings suit

By Brett Goncher, Esq., Senior Content Writer, Westlaw Daily Briefing

A California appeals panel has rejected Standard & Poor's immediate appeal of a ruling preventing it from relying on an anti-SLAPP statute to avoid the state attorney general's lawsuit alleging that it misled investors with inflated credit ratings for mortgage-related securities.

People v. McGraw-Hill Cos. et al., No. A140922, 2014 WL 4058814 (Cal. Ct. App., 1st Dist. Aug. 8, 2014).

SLAPPs, or "strategic lawsuits against public participation," refer to purportedly meritless litigation that attempts to chill or punish a party's exercise of constitutional rights, including free speech rights.

CONTINUED ON PAGE 19

REUTERS/Brendan McDermid

COMMENTARY

New credit default swap terms to be implemented in September

Leigh Fraser, Isabel Dische and Molly Moore of Ropes & Gray discuss the impact of the International Swaps and Derivatives Association's new credit derivatives definitions.

SEE PAGE 3

COMMENTARY

Banking scandals: Might plaintiffs be better off suing in England?

Richard Pike of Constantine Cannon LLP considers whether it might be better to sue members of the banking industry in the world's other big banking center: London.

SEE PAGE 5

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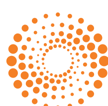

Westlaw Journal Derivatives

Published since September 1995

Publisher: Mary Ellen Fox

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Westlaw Journal Derivatives
(ISSN 2155-5842) is published biweekly by Thomson Reuters.

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877-595-0449
Fax: 800-220-1640
www.westlaw.com
Customer service: 800-328-4880

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TABLE OF CONTENTS

Ratings Agencies: ***People v. McGraw-Hill Cos.***
California defeats S&P's anti-SLAPP appeal in inflated-ratings suit (Cal. Ct. App.) 1

Commentary: By Leigh Fraser, Esq., Isabel Dische, Esq., and Molly Moore, Esq., Ropes & Gray
New credit default swap terms to be implemented in September 3

Commentary: By Richard Pike, Esq., Constantine Cannon LLP
Banking scandals: Might plaintiffs be better off suing in England? 5

Mortgage-Backed Securities
Bank of America settles mortgage probes for $16.65 billion 8

Mortgage-Backed Securities: ***Royal Park Invs. v. Bank of N.Y. Mellon***
BNY Mellon cost MBS investors over $1 billion, lawsuit says (S.D.N.Y.) 9

Collateralized Mortgage Obligations: ***Collective Asset Partners v. VTraderPro***
CMO purchaser not liable for payment, 5th Circuit says (5th Cir.) 10

Virtual Currency
New York could become first state to enact virtual currency regulation 11

Economic Sanctions Against Russia
Dechert LLP attorneys examine expansion of economic sanctions against Russia 12

Securities Fraud: ***Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.***
Fraud suit against bank remanded based on *Halliburton* ruling (11th Cir.) 14

Commentary: By Nick Morgan, Esq., and Haley Greenberg, DLA Piper
Is the SEC encouraging unethical whistleblowing by counsel? 15

News in Brief 18

Case and Document Index 19

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New credit default swap terms to be implemented in September

By Leigh Fraser, Esq., Isabel Dische, Esq., and Molly Moore, Esq.
Ropes & Gray

Earlier this year, the International Swaps and Derivatives Association published the 2014 credit derivatives definitions. Market participants who trade in credit default swap contracts should examine the 2014 definitions in advance of their anticipated September implementation date and determine whether they are comfortable with the new terms. If they are not, they may wish to amend provisions for their CDS trades.

Much like their predecessor, the 2003 ISDA credit derivative definitions, the 2014 definitions provide the basic legal framework for certain credit derivative transactions. They also offer standard provisions that parties may not otherwise specify in their trading agreements. As with other product-specific definitions, parties may elect to modify or supplement the standard terms set forth in the 2014 definitions.

The new definitions include several notable changes. For starters, they introduce a government bail-in credit event trigger for credit default swap contracts on financial reference entities, such as banks, in some non-U.S. jurisdictions. In addition, they modify the typical terms of sovereign CDS contracts in light of the Greek debt crisis. They allow a protection buyer to deliver upon settlement the assets into which the reference obligation has converted — even if the assets are not otherwise deliverable.

Furthermore, they create the concept of a standard reference obligation, meaning that most CDS contracts on a given reference entity will have the same reference obligation. This change increases the fungibility of such CDS contracts.

It is anticipated that market participants will begin using the 2014 definitions with the Sept. 22 credit default index swap roll date.

In August, ISDA introduced a draft protocol that will be open until Sept. 12. Using this protocol, parties can choose to apply the 2014 definitions to existing trades (other than certain existing sovereign CDS and CDS on certain non-US financial entities that are listed on ISDA's "Excluded Reference Entity List") via the protocol.

Leigh Fraser, (L) co-leader of **Ropes & Gray**'s hedge funds group in Boston, focuses her practice on issues related to hedge funds and derivatives. She advises a variety of financial institutions, including hedge funds, investment advisers, mutual funds and endowments, on derivatives and arrangements with brokers and custodians. She also has significant experience forming onshore and offshore private funds and advising these entities and their sponsors with respect to regulatory compliance and the structure of new investment products. **Isabel Dische**, (C) partner in the firm's New York office, focuses her practice on issues relating to hedge funds, private equity funds and derivatives. She has experience structuring and advising a range of hedge funds and other private funds and their sponsors. Dische regularly assists funds and their sponsors with legal and risk management questions, including Advisers Act compliance issues, and with fund restructurings. **Molly Moore** (R) practices as counsel in the corporate department at Ropes & Gray's Washington office. She advises a variety of financial institutions, including hedge funds, investment advisers, mutual funds and endowments, on derivatives and trading arrangements. Recently, she has advised clients regarding the anticipated impact of the derivatives provisions of the Dodd-Frank Act and related rulemakings. A version of this commentary was first published on the Harvard Law School Forum on the Corporate Governance and Financial Regulation blog.

Also, if both parties to an existing master confirmation agreement adhere to the protocol, that master confirmation agreement is amended to incorporate the 2014 definitions (including with respect to new trades) beginning Sept. 22.

KEY CHANGES IN THE 2014 DEFINITIONS

New CDS credit event triggered by government bail-in

The 2014 definitions add a new credit event — governmental intervention — for CDS transactions on financial reference entities in some non-U.S. jurisdictions.

Under the 2003 definitions, there was some uncertainty as to whether certain actions taken by a government in a bail-in — such as the expropriation and extinguishment of an entity's assets — would trigger a credit event (such as restructuring) and thus result in settlement of a CDS contract.

Much like their predecessor, the 2003 ISDA credit derivative definitions, the 2014 definitions provide the basic legal framework for certain credit derivative transactions.

Under the 2014 definitions, a governmental intervention credit event is triggered if, as a result of action taken or an announcement made by a governmental authority pursuant to a restructuring and resolution law or regulation, such as the EU Bank Recovery and Resolution Directive, certain binding changes are made to the relevant obligations of the reference entity, such as a reduction in the rate or amount of interest, principal or premium, postponement or deferral of payment dates, change in the ranking or priority of payments, expropriation, transfer or other event that mandatorily changes

the beneficial owner of the obligation, or a mandatory cancellation, conversion or exchange.

When such an event occurs, the CDS contract is settled based on the outstanding principal amount of the debt prior to the bail-in.

A governmental intervention credit event will not be triggered if the bail-in is of debt subordinated to the reference obligation. In other words, the bail-in of subordinated debt will not trigger a credit event with respect to CDS contracts on the senior debt.

Asset package delivery

With respect to transactions on sovereign reference entities and transactions on financial entities in non-U.S. jurisdictions, the 2014 definitions add the ability to settle a trade by delivering assets into which an obligation that was previously a deliverable obligation is converted in the event of a government intervention, with respect to financial entities, or a restructuring, with respect to financial entities or sovereigns.

Standard reference obligation

The 2014 definitions introduce the use of a standard reference obligation for frequently traded reference entities. As a result, there will no longer be a need to specify a reference obligation for these types of CDS contracts.

This change was made to increase the fungibility and liquidity of CDS contracts. ISDA announced that it will publish a list of standard reference obligations for each relevant reference entity and seniority level.

It is important to note that parties can generally opt out of a standard reference obligation by specifying a different non-standard reference obligation in the confirmation of a particular transaction.

Successor provisions

The 2014 definitions also made a number of changes to the provisions dealing with transfers of debt to successor reference entities.

For example, in determining the successor for CDS related to a financial reference entity,

> The 2014 definitions add a new credit event — governmental intervention — for CDS transactions on financial reference entities in some non-U.S. jurisdictions

the successor for CDS on senior debt and the successor for the CDS on subordinated debt will be analyzed separately. If the senior debt is transferred to one entity and the subordinated debt is transferred to a different entity, there may be different successors for the senior debt and the subordinated debt.

These changes are intended to address concerns raised by situations like the Greek debt crisis. Some of the assets issued by the Greek government in exchange for old bonds were not deliverable obligations.

With respect to sovereigns, only the assets into which a package observable bond of the applicable sovereign has been converted may be delivered. Package observable bonds are intended to be benchmark obligations of the relevant sovereign and will be published on ISDA's website.

This provision is limited to package observable bonds to ensure that only widely held bonds of a particular sovereign can be delivered, to reduce the risk that holders of a small issuance of a sovereign bond will agree to unfavorable terms in a restructuring because they have purchased CDS protection.

Additionally, the 2014 definitions introduce the concept of a universal successor. Under the 2003 definitions, a successor can be determined only if a notification is made to the ISDA credit derivatives determinations committee or the counterparty to the CDS contract within 90 days of a succession event. This provision can cause CDS buyers to lose protection if succession events go unnoticed.

This provision removes the 90-day "look back" period if one entity assumes all of the obligations, including at least one relevant obligation, of the reference entity, and the reference entity has either ceased to exist or is in the process of being dissolved.

For non-sovereign reference entities, the 2014 definitions remove the need for a succession event, such as a merger or transfer of assets or liabilities, distinct from the transfer of a sufficient threshold of debt obligations to determine a successor. Instead, the new definitions introduce a steps plan, which aggregates debt transfers pursuant to a pre-determined transfer plan over a period of time to determine whether a sufficient proportion of a reference entity's debt has been transferred so that a successor should be determined.

Qualifying guarantees

The 2014 definitions expand the scope of guarantees that will be obligations and deliverable obligations of a given reference entity. They provide that the inclusion of a release provision in connection with the transfer of a guarantee and all, or substantially all, of the assets and liabilities of a guarantor on the same, or substantially the same, terms will not cause the guarantee to fail to be a qualifying guarantee. Also, under the 2014 definitions, a guarantee can be a qualifying guarantee even if the obligations under the guarantee are limited by a cap.

The 2014 definitions further clarify that guarantees provided by a statute or regulation may be qualifying guarantees.

Other changes

In addition to the above changes, the 2014 definitions added provisions for determining the successor to a sovereign entity and made changes to the restructuring provisions.

The provisions added to the 2003 ISDA credit derivatives definitions by the 2009 "big bang" and "small bang" supplements, which provided for auction settlement for many CDS contracts, are also incorporated into the 2014 definitions. WJ

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Banking scandals: Might plaintiffs be better off suing in England?

By Richard Pike, Esq.
Constantine Cannon LLP

The various misdeeds, or alleged misdeeds, of the banks involved in the Libor scandal, foreign exchange contracts, credit default swaps and other contexts have naturally given rise to claims for compensation in the United States, typically alleging antitrust violations in order to seek treble damages and payment of attorney fees. There are, however, challenges with bringing such claims in the U.S.

CHALLENGES IN THE U.S.

Plaintiffs pursuing antitrust claims in the U.S. have to show antitrust injury.[1] This requirement has proved an obstacle for Libor plaintiffs, who have seen the majority of their claims, including all antitrust claims, summarily rejected at the early motion-to-dismiss stage of litigation.[2]

The position adopted by the court in *In re Libor-Based Financial Instruments Antitrust Litigation* was that setting Libor was never intended to be competitive, so collusion could not give rise to an antitrust injury.[3] The court also rejected the plaintiffs' argument that an impact in markets where the banks did compete would be sufficient to state a claim.

It has not yet been possible for the plaintiffs to appeal the dismissal because it was technically an interlocutory ruling, some of the claims having survived, and there is ordinarily a prohibition on appealing interlocutory rulings. The U.S. Supreme Court recently granted *certiorari* to allow argument on whether there should be an exception to allow an appeal in *Gelboim v. Bank of America Corp.*, No. 13-1174, *cert. granted* (U.S. June 30, 2014).

There are still likely to be other significant challenges for U.S. plaintiffs even if antitrust injury is not a problem.

For example, intervention by Congress and the courts has greatly restricted the extraterritorial reach of U.S. antitrust laws. This was illustrated most recently in the 7th U.S. Circuit Court of Appeal's decision in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14–8003, 746 F.3d 842 (7th Cir. July 1, 2014).

Plaintiffs pursuing antitrust claims in the U.S. have to show antitrust injury.

The plaintiff, Motorola, is a U.S.-based cellphone manufacturer seeking damages for a cartel that increased the cost of LCD screens incorporated in its phones sold in the U.S. The trial court granted the defendants partial summary judgment, finding that Motorola's foreign subsidiaries purchased the LCD screens, so the only impact in the U.S. was "indirect" — and insufficient to meet the requirements of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a.

The 7th Circuit recently granted a rehearing of Motorola's appeal but if the decision stands, it is likely to represent a significant restriction even for ostensibly U.S.-domiciled plaintiffs. There are, of course, many multinational organizations that conduct large parts of their core business through overseas subsidiaries. Indeed, it would hardly be surprising in the context of the banking scandals if U.S.-based businesses chose to transact with U.K. banks through local subsidiaries rather than directly with the head office.

Other issues for plaintiffs include the tightening of the pleading standard for antitrust claims in the wake of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as the ever-growing cost of e-discovery.

SITUATION IN ENGLAND

Antitrust damages claims are still a relatively new phenomenon in England and, indeed, in Europe more broadly. Claims only began to emerge within the last 10 to 15 years, but they are now becoming a much more common feature of the legal landscape.

Antitrust injury

EU law requires that plaintiffs[3] have an effective opportunity to recover losses suffered when there is a breach of European competition law (articles 101 and 102 TFEU). In England, a breach of EU competition law can give rise to a claim in tort for the breach of statutory duty.

It is held in other contexts that breach of statutory duty requires the plaintiff to show that the duty was owed to him and that it was in respect of the kind of loss he suffered — an argument seemingly similar in effect to the U.S. requirement of antitrust injury. The requirement was misapplied, however, by the England Court of Appeal in the case of *Crehan v. Inntrepreneur Pub Co.*,[4] barring the plaintiff's right to sue for a remedy because the wrong kind of loss was inconsistent with a decision of the European Court of Justice earlier in the same case[5] that required the availability of a remedy.

The House of Lords later reversed the Court of Appeal's decision without discussing the merits of the antitrust injury issue.[6] The result is that there remains scope for debate,

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but the better view would seem to be that if someone in plaintiff Bernard Crehan's position can ever sue — and that was the fundamental requirement of the European Court of Justice decision in Crehan's case — then it should never be necessary to show that the specific injury was one that antitrust law was intended to prevent.

The objective of the relevant antitrust law in Crehan's case was clearly not the protection of the people in Crehan's position.

It is consequently unlikely that the U.S. Libor decision would be replicated in England. In any event, however, where antitrust fines are imposed in Europe there is no scope at all to contest liability in a subsequent damages action — the finding of liability is irrefutably binding unless the fine is overturned on appeal.

This will already be the case for yen Libor, where the European Commission has made an infringement finding, and other commission investigations into the banking scandals remain ongoing.

Jurisdiction and applicable law

One advantage of bringing actions in England is the flexibility with which the jurisdiction of English courts may be established.

Under the provisions of the Brussels Regulation,[7] a plaintiff may sue in England for all losses caused by the cartel anywhere in Europe, even if the cartel did not affect the English market. As long as at least one relevant cartelist corporate entity is domiciled in England, the action may proceed in England.[8]

Needless to say, there would be no difficulty in establishing jurisdiction to claim all European losses in the case of the banking scandals given the number of U.K. banks involved.

A plaintiff can probably also sue in England for losses caused by the cartel outside of Europe.

Further, where the claim relates to events after Jan. 11, 2009, as will generally be the case with the banking scandals, there is an option for antitrust plaintiffs to choose that English law alone be applied for all the European claims regardless of what laws might otherwise apply as a matter of private international law.[9]

This may considerably simplify matters where the defendants might otherwise seek to fragment the litigation by claiming the applicability of numerous different national laws.

Discovery/disclosure

There is far less opportunity for discovery, known in England as "disclosure," than there is in U.S. litigation. There is, for example, almost no scope for the taking of depositions and very little scope for obtaining disclosure from third parties.

The test for document disclosure is also more restricted — not all "relevant" documents, but only those that more directly support or adversely affect the case of any party.

In some cases this may be a significant disadvantage compared with litigating in the U.S. Where, however, there is already an infringement finding, disclosure is likely to be less important and the restrictions can be seen as an advantage in that they reduce the cost of litigation and allow it to be completed quickly.

> Antitrust damages claims are still a relatively new phenomenon in England and, indeed, in Europe more broadly.

This may be a particularly relevant consideration when litigating with well-resourced defendants such as banks, which may be inclined to use disclosure as a way of fighting a war of attrition designed to wear down plaintiffs.

Other European jurisdictions typically provide even less disclosure — nothing at all or just very specifically identified documents. This tends to reduce the cost even further but may be considered just too limited by plaintiffs used to litigation in the U.S.

Collective actions

Long common in the U.S. and Canada, class actions have been much rarer in Europe. In recent years there have been some moves to increase the availability of collective redress mechanisms but, so far, they have all been of the opt-in variety, requiring plaintiffs affirmatively to join a group.

Opt-in mechanisms are fine for plaintiffs with relatively large claims, but plaintiffs with smaller claims typically will not bother joining a group. Apart from costing those plaintiffs the compensation to which they would be entitled, their non-involvement also reduces the overall amount at stake and thus some of the leverage otherwise available in settlement negotiations.

It may consequently be considered an advantage, at least over other European jurisdictions if not over the U.S., that legislation is about to be passed in England to introduce U.S.-style opt-out actions for antitrust claims. The Consumer Rights Bill has already passed through the House of Commons and is expected to complete its passage in the House of Lords and receive royal assent before the end of 2014.

Specialist tribunal

Unusually, England offers a choice of two different venues for antitrust damages claims: the regular courts or a specialist body, the Competition Appeals Tribunal. Until now, the CAT has only been permitted to handle damages actions that occur after infringement decisions and has suffered from various procedural disadvantages.

This, however, is about to change. The same new legislation that is to introduce opt-out class actions will also cure many of the deficiencies of the CAT and make it available for all types of antitrust actions. This is significant because the CAT has a number of potential advantages over the regular courts.

First, as one would expect from the name, it has specialist antitrust expertise. It already handles all appeals of antitrust infringement decisions and appeals from specialist economic regulators. Cases are heard by a panel of three members, typically including one High Court judge but also one economist.

Second, it has modern facilities and procedures. CAT members are supported by legally qualified referendaires (similar to law clerks), all orders and judgments are posted online, and submissions are often made in writing over email.

A docketing system is applied so that all decisions in the case involve at least the same legally qualified panel chairman. The CAT sits year round, and hearings are often easily arranged at short notice.

Compensation available

There are both advantages and disadvantages as regards the value of the compensation that may be obtained.

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There are no treble damages in England, and punitive damages are both exceptionally rare and nominal in amount. Further, there is no equivalent to the *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), decision in England. *Illinois Brick* held that only direct purchasers can recover damages for price-fixing conduct by suppliers.

Without an *Illinois Brick* equivalent, indirect purchasers can sue for damages but the compensation received by direct purchasers may be reduced to the extent that the defendant shows the loss was passed on to others.

> One advantage of bringing actions in England is the flexibility with which the jurisdiction of English courts may be established.

There are also no juries in antitrust cases so there is no possibility of a "runaway jury" award.

On the other hand, though, prejudgment interest is available and can be very significant. The European Union Court of Justice also recently mandated the availability of "umbrella damages."[10] The court established that victims of cartels must be permitted in principle to claim compensation from cartelists for the inflated prices of non-cartelist suppliers whose prices would not have been otherwise inflated but for the activities of the cartel.

Successful plaintiffs are also entitled to payment by the defendants for their costs of the action. As a quid pro quo, plaintiffs have to pay defendants their costs if the case or part of it fails, but this tends to be less of an issue where there is a prior infringement finding and plaintiffs can also insure against it.

Alternative causes of action

Insofar as issues in the U.S. are specific to antitrust claims, there are sometimes opportunities to pursue alternative claims. This can be seen in the Libor cases where some Commodity Exchange Act and breach-of-contract claims have survived.

Sometimes, though, there are problems with these actions as well because of short limitations periods or the lack of a direct contractual relationship with the banks. In any event, there are no treble damages in England.

There are also alternative causes of action in England. It is notable that there have been some Libor cases in England brought on a theory of fraudulent misrepresentation,[11] at least one of which has settled on seemingly favorable terms.

Alternative causes of action may be preferred to antitrust claims in England because they offer similar limitations periods and sometimes additional remedies, such as the setting aside of unprofitable transactions, or more favorable measures of damages.

CONCLUSION

Despite the issues in the banking cases in the U.S., and in the wider field of antitrust claims, plaintiffs will still undoubtedly prefer to bring claims in the U.S. because the rewards are likely to be greater. Where claims are barred, though, or are difficult, England offers a potentially attractive alternative forum. WJ

NOTES

[1] *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977); Atl. Richfield v. U.S.A. Petrol., 495 U.S. 328 (1990).

[2] *In re Libor-Based Fin. Instruments Antitrust Litig.,* No. 11-MD-2262, 935 F. Supp. 2d 666 (S.D.N.Y. Mar. 29, 2013).

[3] *Id*.

[4] *Crehan v. Inntrepreneur Pub Co.* (2004) EWCA Civ 637, para. 158.

[5] Case C-453/99, *Courage Ltd. v. Crehan* [2001] ECR I-6297, [2001] 5 CMLR 1058.

[6] *Crehan v. Inntrepreneur Pub Co.* (2006) UKHL 38.

[7] Council Regulation (EC) No 44/2001 of December 2000.

[8] Articles 2 and 6(1), Brussels Regulation. *See* also *Cooper Tire & Rubber Company Europe Ltd. v. Dow Deutschland Inc.* [2010] EWCA Civ 864.

[9] As a result of Council Regulation (EC) No 864/2007 of July 11, 2007, Article 6(3)(b). The regulation only takes effect in relation to causes of action accruing after Jan. 11, 2009: Article 32.

[10] *Kone AG v. ÖBB-Infrastruktur AG* (Case C-557/12).

[11] *E.g., Graisley Properties v. Barclays Bank plc; Deutsche Bank AG v. Unitech Global Ltd.; Deutsche Bank AG v. Unitech Ltd.* (2013) EWCA Civ 1372.

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Bank of America settles mortgage probes for $16.65 billion

(Reuters) – Bank of America Corp. reached a record $16.65 billion settlement with the U.S. government to settle charges that it and companies it bought misled investors into buying troubled mortgage-backed securities, helping the bank close a major chapter tied to the financial crisis.

The settlement announced Aug. 21 by the U.S. Department of Justice calls for the second-largest U.S. bank by assets to pay $9.65 billion in cash to resolve more than a dozen federal and state investigations, and provide $7 billion in help to struggling homeowners and communities.

It is expected to resolve the vast majority of the Charlotte, N.C.-based bank's remaining liabilities tied to its purchases of Countrywide Financial Corp., once the nation's largest mortgage lender, in July 2008 and Merrill Lynch & Co., six months later.

"I want to be very clear: The size and the scope of this multibillion-dollar agreement goes far beyond the 'cost of doing business,'" U.S. Attorney General Eric Holder said in announcing the settlement.

Bank of America expects the accord to reduce third-quarter earnings by about $5.3 billion before taxes, or about 43 cents per share after taxes.

Chief Executive Brian Moynihan has spent more than four years trying to shed Bank of America of liabilities from the purchases of Countrywide and Merrill, which were made by his predecessor, Kenneth Lewis. In a statement, Moynihan said the accord is in shareholders' best interests.

"Regulators wanted a pound of flesh, and they got it," said Joel Conn, president of Lakeshore Capital, an investment firm in Birmingham, Ala. He said the accord, while larger than he expected, represents a "major cloud that has been lifted" from the bank.

The settlement's outlines had surfaced earlier in August, and the formal announcement may increase the chance that many of the bank's mortgage problems are behind it.

REUTERS/Bobby Yip/Files

U.S. Attorney General Eric Holder (L) said Bank of America's $16.65 billion settlement "goes far beyond the 'cost of doing business.'" BofA Chief Executive Brian Moynihan (R) said the accord is in shareholders' best interests.

BEARING THE BURDENS

The settlement eclipses the respective $13 billion and $7 billion accords that JPMorgan Chase & Co. and Citigroup Inc. recently reached to resolve similar claims.

It means Bank of America will have paid well over $65 billion to resolve mortgage issues with consumers, investors and government agencies.

Some shareholders still felt as if they were bearing the costs of the mistakes of long-departed officials at Bank of America, Countrywide and Merrill.

"It's a slight disappointment to me that they settled the issue for this much money," said Joe Terril, president of Terril & Co. in St Louis, which invests $760 million and owns Bank of America shares.

The government is still examining crisis-era mortgage abuses. While Bank of America's settlement is expected to be the largest, charges could still be brought against Credit Suisse Group AG, Royal Bank of Scotland Plc and others, people familiar with the probes have said.

About $5 billion of the cash portion of the settlement is paid as a penalty to the U.S. Treasury. Other portions will go toward compensating investors, including state pension funds. Just under $1 billion will be split among six states, including California, New York and Illinois.

MOZILO

Under the out-of-court settlement, Bank of America acknowledged that Merrill Lynch told investors in subprime mortgage bonds in 2006 and 2007 that the loans generally complied with underwriting guidelines, though reviews suggested as many as 50 percent did not.

A statement of facts cites one email in which a Merrill employee wrote: "(h)ow much time do you want me to spend looking at these (loans) if (the co-head of Merrill Lynch's RMBS business) is going to keep them regardless of issues?"

Bank of America also acknowledged that Countrywide did not generally tell investors the extent to which it made exceptions to its own internal guidelines.

The settlement also covered some post-crisis conduct, including Bank of America's admission that from 2009 to 2012 it submitted loans for government insurance under the Federal Housing Administration that did not qualify.

No individuals were charged.

But the U.S. attorney's office in Los Angeles is preparing a civil fraud case against former Countrywide Chief Executive Angelo Mozilo, who previously reached a $67.5 million settlement with the U.S. Securities and Exchange Commission, according to a person familiar with the matter.

The settlement does not cover the $1.27 billion fraud penalty imposed in July by a federal judge over a fraudulent Countrywide mortgage scheme known as "High Speed Swim Lane," or "Hustle," which Bank of America is appealing. *United States ex rel. O'Donnell v. Countrywide Home Loans et al.*, No. 12-01422, 2014 WL 3734122 (S.D.N.Y. July 30, 2014). WJ

(Reporting by Aruna Viswanatha in Washington and Jonathan Stempel and Peter Rudegeair in New York; editing by Karey Van Hall, Susan Heavey and Jonathan Oatis)

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BNY Mellon cost MBS investors over $1 billion, lawsuit says

By Peter H. Hamner, Esq., Senior Legal Writer, Westlaw Journal

The Bank of New York Mellon's failure to sue issuers of mortgage-backed securities for their inclusion of faulty loans in the financial products cost investors more than $1 billion, a federal class action claims.

Royal Park Investments SA/NV v. Bank of New York Mellon, No. 14-CV-6502, complaint filed (S.D.N.Y. Aug. 14, 2014).

REUTERS/Sebastien Pirlet

The suit, filed Aug. 14 in the U.S. District Court for the Southern District of New York, accuses BNY Mellon, as trustee for the securities, of breaching contracts with investors of mortgage-backed securities by favoring the securities' issuers.

Royal Park Investments, a financial management firm created by the Belgian government, Dutch insurance company Ageas and French bank BNP Paribas, filed the suit alleging the breaches violated the Trust Indenture Act of 1939, 15 U.S.C. § 77.

Kevin Heine, a spokesman for **Bank of New York Mellon**, said the company will "vigorously" defend against the lawsuit. "The allegations are without merit and misconstrue the limited role of the trustee in these deals," he said.

> Bank of New York Mellon was the "pet" or "pocket" trustee for the securities' issuers, putting their interest over the investors' to ensure future business, the suit says.

Royal Park brought the complaint on behalf of itself and other investors in mortgage-backed securities for which BNY Mellon acted as the trustee. A mortgage-backed security is a financial instrument, tied to mortgage loans, that distributes payments drawn from the underlying loans to investors.

According to the suit, the issuers agreed to fill the securities with mortgage loans that met certain guidelines and loan qualities.

As trustee for the securities, BNY Mellon had a duty to ensure that the securities' issuers kept those promises, and it agreed to sue on behalf of investors if the issuers broke the promises, the suit says.

After a large portion of the underlying loans defaulted in 2008, the bank failed to protect investor interests by suing the issuers to cure the breaching loans, constituting a violation of the Trust Indenture Act and a breach of duty, the suit says.

The bank prioritized its business relationships with the securities issuers over its duties as trustee, according to the suit. It was the "pet" or "pocket" trustee for the securities' issuers, putting their interest over the investors' to ensure future business, the suit says.

"BNY Mellon's failures to act … caused plaintiff, the class and the covered trusts to suffer over $1 billion in damages, caused failures and shortages in the payment of principal and interest to plaintiff and the class, and caused steep declines in the value of plaintiff's and the class's RMBS," the complaint says.

Royal Park is seeking unspecified damages, class certification, litigation costs and attorney fees. WJ

Attorneys:
Plaintiff: Samuel H. Rudman, Robbins Geller Rudman & Dowd, Melville, N.Y.; Arthur C. Leahy and Steven W. Pepich, Robbins Geller Rudman & Dowd, San Diego

Related Court Document:
Complaint: 2014 WL 3965567

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CMO purchaser not liable for payment, 5th Circuit says

The purchaser of a collateralized mortgage obligation did not breach its contract with its seller when it refused to pay for the CMO after the financial product was not transferred to the right bank account, the 5th U.S. Circuit Court of Appeals has ruled.

Collective Asset Partners LLC v. VTraderPro LLC et al., No. 13-20619, 2014 WL 3974580 (5th Cir. Aug. 15, 2014).

Interpreting the contract language between purchaser VTraderPro and seller Collective Asset Partners, the appeals panel said VTraderPro was not obligated to pay for the CMO because it did not make it to the designated bank account in San Marino.

A CMO is a financial instrument backed by pools of mortgage loans and other debt securities.

According to the 5th Circuit's opinion, VTraderPro offered Collective Asset $400,000 for a CMO that Collective owned.

VTraderPro allegedly told Collective Asset that it would pay the purchase price when the CMO was transferred to the investor's bank in San Marino.

Collective Asset hired a broker to handle the transaction but the broker failed to fill out the required paperwork completely and as a result, the instrument only got as far as a designated clearinghouse before being returned to Collective Asset, the opinion says.

VTraderPro refused to buy the CMO after it was not transferred to the San Marino bank account and Collective Asset was forced to sell the financial product at a loss, according to the opinion.

Collective Asset sued VTraderPro in the U.S. District for the Southern District of Texas for breach of contract, claiming that the transfer of the CMO to the clearinghouse triggered VTraderPro's obligation to pay.

U.S. District Judge Lee H. Rosenthal disagreed, saying the contract required Collective Asset to transfer the security to the San Marino bank account, which would trigger VTraderPro's duty to pay. The CMO never arrived in the account, and VTraderPro was not required to pay, the judge held.

On appeal, Collective Asset argued that Judge Rosenthal wrongly determined that the contract required the CMO to reach the San Marino account.

The 5th Circuit rejected the argument, affirming the lower court's decision.

"[T]he only reasonable interpretation is that … [VTraderPro] was not required to pay until the CMO was transferred to the San Marino bank account," the panel said. WJ

Attorneys:

Appellant: Paul B. Kerlin, Vorys, Sater, Seymour & Pease, Houston

Appellee: Charles Sturm, Howard L. Steele Jr. and Kevin Kennedy, Steele Sturm PLLC, Houston

Related Court Document:
Opinion: 2014 WL 3974580

The contract between VTraderPro and Collective Asset

This letter will serve as an agreement between Vtrader PRO, LLC (VPRO) and Collective Asset Partners for the purchase of JPMCC 2007—LDP11 Cusip # US46631BAH87 with a face value of U.S. $500,000,000. The purchase price is $400,000 and this amount is to be paid to you within 10 business days from the date of transfer of the CMO's [t]o:

CITIBANK NY

DTC 908

Account 089154 CSC73464

Further Credit to:

Collective Asset Partners, LLC

Beneficiary Deposit Account NR. 840

BSI SPA San Marino

—*Collective Asset Partners LLC v. VTraderPro LLC et al.,* No. 13-20619, 2014 WL 3974580 (5th Cir. Aug. 15, 2014).

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New York could become first state to enact virtual currency regulation

By Cory Hester, Attorney Editor, Westlaw Capital Markets Daily Briefing

New regulatory oversight could be on the horizon in New York, which has become the first state to propose regulations that will govern the use of virtual currency.

The Securities and Exchange Commission, in addition to several online retailers, have continuously highlighted risks related to a lack of regulatory oversight over the use of virtual currency this year, specifically bitcoin.

In June, the SEC released an investor alert highlighting the potential risks of investments involving bitcoin and other forms of virtual currency. The SEC noted that, unlike traditional currencies, "bitcoin operates without central authority or banks and is not backed by any government." With no central authority to regulate its use, companies that utilize bitcoin currency are exposed to increased risk of fraud.

With no central authority to regulate its use, companies that utilize bitcoin currency are exposed to increased risk of fraud.

REUTERS/Jim Urquhart

New York's Department of Financial Services has responded to these concerns, proposing rules in July to regulate the use of virtual currency.

COMPREHENSIVE FRAMEWORK

The new rules provide a comprehensive framework to regulate bitcoin exchanges and companies that secure, store or maintain custody or control of the virtual currency on behalf of customers. The framework calls for covered exchanges or for companies to apply for a license, known as a BitLicense.

The framework also introduces rules related to minimum capital requirements for covered exchanges and companies, as well as rules on consumer protection, the prevention of money laundering and cybersecurity. It should be noted that merchants that merely accept bitcoin for payment like Overstock.com, would not need to apply for a license.

The new rules also govern custody and protection of customer assets, material changes to the business or a change in control at the company, books and recordkeeping requirements, business continuity and disaster recovery mandates, and the regulation of advertising and marketing activity.

BITCOIN SUPPORTERS UNEASY ABOUT REGULATION

Bitcoin supporters have expressed concern about whether the new rules will help legitimize the virtual currency or simply thwart innovation and threaten the flexibility that bitcoin was meant to promote.

On Aug. 5 the Bitcoin Foundation, a nonprofit advocacy group, sent a letter to Benjamin M. Lawsky, New York state's superintendent of financial services, asking for an additional 45 days to six months to provide feedback on the proposed regulations.

The Bitcoin Foundation's letter came shortly after a separate group of virtual-currency supporters sent a letter signed by roughly 400 bitcoin enthusiasts requesting a similar extension of the comment period.

Among the concerns by bitcoin supporters, they allege that the regulations do not address specific risks inherent to virtual currency. The Bitcoin Foundation subsequently announced Aug. 6 that the New York Department of Financial Services "quickly promised" to provide the foundation more information about the BitLicense framework.

It is too early to tell if New York's proposed virtual currency regulations will ultimately become law, however, covered companies will likely begin to update their risk factor disclosures in light of the potential for increased oversight. WJ

Dechert LLP attorneys examine expansion of economic sanctions against Russia

By Phyllis Lipka Skupien, Esq., Managing Editor, Westlaw Journal

A global roundtable discussion group of Dechert LLP attorneys convened July 31 to analyze the expected and still-unknown consequences of the latest round of economic sanctions imposed against Russia by the United States and the European Union.

Led by Laura Brank, managing partner of the firm's Moscow office, the speakers examined the significant escalation of the sanctions and their impact on the financial, energy and defense sectors.

"The current sanctions are being imposed on some of the largest and most important banks in Russia, and the impact of this round is likely to be much greater," Brank said.

The webcast colloquium was joined by Jeremy Zucker, partner and co-chair of Dechert's international trade and government regulation practice in Washington; Tom Bogle, partner in the financial services investment practice in Washington; and John Forrest, director of the international trade and governmental regulation practice in London.

"If banks continue to get hit, it will make it difficult for them to get capital and will drive up the cost of financing in Russia," said Laura Brank, managing partner of Dechert LLP's Moscow office.

REUTERS/Shamil Zhumatov

The banking, energy and defense sectors of the Russian economy, which includes production of AK-47 Kalashnikov assault rifles, are targets of the latest round of sanctions against Russia stemming from its takeover of Crimea earlier this year, attorneys at Dechert LLP said at a roundtable discussion. Here, a pro-Russian protester carrying a Kalashnikov rifle speaks at the entrance of the seized office of the SBU state security service in Luhansk, in eastern Ukraine on April 11.

Zucker explained that the current events trace back to responses in March to Russia's takeover of Crimea after the fall of the Russian-backed government in Ukraine.

At that time, President Barack Obama issued three executive orders adding certain individuals and companies to the Specially Designated Nationals and Blocked Persons list, known as the SDN list, maintained by the U.S. Treasury Department's Office of Foreign Assets Control, and he authorized the imposition of "sectoral" sanctions (although sectoral sanctions were not imposed until July). Additional sanctions were issued in April.

The sanctions are designed to influence Russia's actions by freezing the assets of individuals and companies close to President Vladimir Putin and restricting business transactions essential to its economy.

The latest round of sanctions issued by the United States on July 16 and July 29 are against additional individuals and companies and target the defense sector, including the manufacturer of AK-47 Kalashnikov assault rifles, and the banking and energy sectors.

This new round of sanctions added certain prominent financial and energy companies to the Sectoral Sanctions Identification, or SSI, list, which is a new category for U.S. sanctions.

On July 29 and in concert with anticipated actions by the EU, the U.S. added more banks to the SSI list and restricted the transfer of technology related to the exploration and production of offshore oil.

Banks sanctioned include the Russian Agricultural Bank and the Bank of Moscow, while Russian energy giant OAO Rosneft has been a target in the energy sector.

"The new sanctions are tailored and specific," Zucker said, "and the new sanctions also impose restrictions on access to U.S. capital markets to secure medium- to long-term financing."

U.S. citizens are prohibited from financing any equity or debt with maturity over 90 days on behalf of those entities on the SSI list.

"The new sanctions impose restrictions on access to U.S. capital markets to secure medium- to long-term financing," Jeremy Zucker of Dechert LLP said.

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"We'll need to see which Russian banks are specifically targeted. However, our expectation is that the measures will only apply to new issues," said John Forrest, director of Dechert LLP's international trade and governmental regulation practice in London.

These restrictions cover bonds, loans, letters of credit, commercial paper and stocks, among other financial instruments.

The panelists explained that companies and their subsidiaries need to consider their connections to Russia. If a foreign subsidiary looks to a U.S. corporation for governance or U.S. persons participate in the decision-making process, the restrictions may apply.

"The sanctions are designed to impose pain on the Russian side of any transaction," Zucker said. "However, U.S. financial institutions and U.S. companies involved with the Russian energy sector also may feel the pinch."

But sanctions are not meant to be as extensive as those previously imposed on Iran and do not have extraterritorial reach, the panelists said. Realistically, the panelists noted, the United States and the European Union are too integrated with Russia, and in particular the EU is too dependent on Russian gas.

The panelists explained that the restrictions apply to those entities that hold at least a 50 percent interest in any company on the SSI list. Therefore, companies will need to do more due diligence about any prospective joint venture partner.

Forrest, of the London practice, said the EU is ratcheting up the sanctions and awaiting details of the new regulatory framework. He said he expects another broad set of measures to be issued widening the scope of existing constraints, such as asset-freezing provisions and the removal of trade preferences and restrictions on the export of high technology.

He said the measures would include a ban on energy-related technology destined for deepwater oil exploration and production, Arctic oil exploration or production, and shale oil projects in Russia.

"But the devil will be in the details of the new EU regulations," Forrest said. "The prohibition will cover both the purchase and sale of new bonds, equity or similar financial instruments with a maturity of more than 90 days issued by state-owned Russian banks.

"We'll need to see which Russian banks are specifically targeted," he noted. "However, our expectation is that the measures will only apply to new issues."

IMPACT ON U.S. FINANCIAL SERVICE INDUSTRY

The prohibitions on the issuance of new debt or equity are broad enough to cover consulting and advising, Zucker said.

The panelists noted the sanctions will be a compliance challenge for U.S. asset managers, who will need to wait for further clarification from the U.S. Treasury on how this will affect the secondary stock market. At this point, the panelists said they do not expect that esoteric financial instruments such as derivatives will be affected.

But the scope of the measures will cover EU consultants wherever located, Forrest said. They can be at risk if they try to help companies circumvent the sanctions to secure debt or equity.

In the United States, civil penalties for individuals can be $250,000, or twice the value of the transaction, whichever is greater, while penalties for corporations can be higher. Penalties for willful criminal violations could be as high as $1 million per transaction and include imprisonment, Zucker explained.

Penalties in the European Union could include prison time and the confiscation of goods, as well as fines up to five times the value of the transaction, the panelists added. Dechert expects to issue a client alert with more details once they are available.

RUSSIAN REACTION

Brank discussed the overall Russian reaction to the sanctions.

"Russia's reaction has been restrained, and President Putin has not acted to impose similar sanctions on Western countries," Brank said. "Russia's foreign minister has said that the sanctions will not achieve their goals."

The sanctions are expected to cause Russia to focus on developing its domestic industries, and its central bank may prop up those banks being hit, she noted.

Capital leaving Russia during the first six months of the year is estimated to be $74.4 billion, she added.

"If banks continue to get hit, it will make it difficult for them to get capital and will drive up the cost of financing in Russia," Brank said.

In conclusion, the panelists noted that the United States is trying to get more Asian countries on board with the sanctions. "Although they were reluctant before, there appear to be more receptiveness after the shooting down of Malaysia Flight 17 by pro-Russian separatists in Ukraine," Brank said. WJ

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Fraud suit against bank remanded based on *Halliburton* ruling

A federal appeals court has vacated and remanded a class certification ruling in a securities fraud suit against Southern banking giant Regions Financial Corp., finding it should be reconsidered in light of the U.S. Supreme Court's recent decision in *Halliburton v. Erica P. John Fund*.

Local 703, I.B. of T. Grocery & Food Employees Welfare Fund et al. v. Regions Financial Corp. et al., No. 12-14168, 2014 WL 3844070 (11th Cir. Aug. 6, 2014).

The lower court's decision to certify the class was well-reasoned, but the court needed also to consider the defendant's evidence that its alleged misstatements had no impact on the stock price, the 11th U.S. Circuit Court of Appeals said.

Such evidence is permitted in the wake of the ruling in *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398 (2014), the appeals court said.

Regions was sued by shareholders who asserted it made misrepresentations about its real estate investments during the 2008 economic recession.

The bank announced $5.6 billion in losses Jan. 20, 2009. According to the 11th Circuit's opinion, Regions stock dropped to $4.60 per share when it had traded at $23 per share the previous year.

In their suit, the shareholders assert that Regions senior executives knew about its unstable asset portfolio but repeatedly underreported losses, misrepresented its financial health and inflated its stock price in violation of the anti-fraud provisions of federal securities laws.

Subsequently, the U.S. District Court for the Northern District of Alabama certified a class of investors who bought stock from Feb. 27, 2008, through Jan. 20, 2009, finding the plaintiffs had met all the requirements for class certification under Federal Rule of Civil Procedure 23.

Regions appealed that decision to the 11th Circuit, arguing that the class should not have been certified because the plaintiffs did not prove that common questions about reliance on the alleged misrepresentations predominated over individual ones — a requirement for securities suits.

> Citing *Halliburton*, the panel said the defendants were allowed to introduce price-impact evidence both to undermine the plaintiffs' case for market efficiency and to rebut the *Basic* presumption.

Citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the District Court said *Basic* allows shareholders to assert the market price of stock accurately reflects all publicly available information.

But Regions argued that the District Court had not established a comprehensive analytical framework for determining whether the market for a particular stock is efficient.

The 11th Circuit rejected that argument. "It is up to the District Court to consider the nature of the market on a case-by-case basis to decide whether the totality of the circumstances supports a finding of market efficiency," the panel said.

But Circuit Judge Beverly B. Martin, writing for the appeals panel, said the *Basic* inquiry does not end once the presumption of class-wide reliance has been invoked.

Citing *Halliburton*, the panel said the defendants were allowed to introduce price-impact evidence both to undermine the plaintiffs' case for market efficiency and to rebut the *Basic* presumption.

The appeals court noted Regions had presented evidence that its stock price did not change after the alleged misrepresentations were made. But the District Court, based on the state of the law before *Halliburton*, did not fully consider this evidence, the appeals court wrote.

Halliburton "by no means holds that in every case in which such evidence is presented, the presumption will always be defeated," the appeals court added.

Nevertheless, the panel vacated the class certification ruling and remanded the case so the evidence could be reconsidered.

The 11th Circuit also said the class period itself should also be reviewed as the defendants argued it should only be through Jan. 19, 2009 — the last trading day before the announcement of its losses. WJ

Related Court Document:
Opinion: 2014 WL 3844070

See Document Section B (P. 26) for the opinion.

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Is the SEC encouraging unethical whistleblowing by counsel?

By Nick Morgan, Esq., and Haley Greenberg
DLA Piper

A complaint filed in June in a Chicago federal court revealed the identities of three people who allegedly claim a portion of the largest ever bounty awarded by the Securities and Exchange Commission under the Dodd-Frank whistleblower program.[1] A dispute between two of the three purported whistleblowers over the $14 million bounty announced last October resulted in litigation, shedding unusual light on an issue otherwise shielded from public view.

Because the SEC makes an effort to keep whistleblower identities private, the revelation of the name of the recipient of the $14 million award was newsworthy.[2] Perhaps equally revealing is the fact that one of the three purported whistleblowers is an attorney and member of the New York state bar.

The attorney's conduct in this whistleblower matter did not involve the breach of client confidences, and no one has suggested that he acted unethically. With the SEC awarding bounties as large as $14 million, however, it is only a matter of time before an attorney tests state bar ethics boundaries by making a whistleblower claim based on disclosure of confidential client information.

Whether the client, the state bar or the public ever finds out that an attorney has blown the whistle on a client is another matter entirely, given the anonymous nature of the SEC's bounty award process. There is also the possibility that multiple whistleblowers could privately agree to split a bounty (as the attorney in the $14 million award appears to have done).

The SEC has long wrestled with the issue of how it will treat attorneys in possession of information about potential securities law violations. When tasked with promulgating rules to implement the Sarbanes-Oxley Act in 2003, the SEC initially proposed a rule that would have required such counsel to "noisily withdraw" and notify the SEC under certain circumstances.[3]

> It is only a matter of time before an attorney tests state bar ethical boundaries by making a whistleblower claim based on disclosure of confidential client information.

Under withering criticism from state bar associations and others, the SEC dropped the "noisy withdrawal" provision in exchange for less controversial internal reporting requirements. More recently, in a speech late last year, SEC chair Mary Jo White touted the enforcement benefits of the whistleblower program. At the same time, she emphasized that the agency "will not be looking to charge a gatekeeper that did her job by asking the hard questions, demanding answers, looking for red flags and raising her hand."[4]

Nick Morgan (L) is a partner at **DLA Piper**, where he is the West Coast chair of the firm's securities enforcement practice in Los Angeles. He practices complex securities litigation in state and federal courts with special emphasis in representing issuers, officers and directors, investment funds, analysts, and brokers in connection with Securities and Exchange Commission and Financial Industry Regulatory Authority investigations, litigation and arbitration. **Haley Greenberg** (R) is a summer associate at DLA Piper.

Sarbanes-Oxley protects whistleblowers by prohibiting adverse employment actions against employees of public companies who disclose fraudulent activity. In 2010, Congress expanded the protection Sarbanes-Oxley provided by enacting Dodd-Frank.[5] Dodd-Frank protects from retaliation any individual, regardless of whether he or she is an employee of a public company, who provides "original" information to the SEC about potential securities violations.

In addition to providing protection from retaliation, Dodd-Frank contains a number of provisions providing whistleblowers with financial rewards, including, potentially, attorney whistleblowers who disclose confidential information to the SEC.

The whistleblower rules adopted in 2011 to implement provisions of Dodd-Frank do not explicitly exclude attorneys from eligibility under the bounty provisions. The rules do, however, limit attorneys' ability to use information they acquire while acting within the scope of their employment.

The SEC will not consider information obtained in the following ways:

- Through a communication that was subject to the attorney-client privilege.
- In connection with the legal representation of a client on whose behalf the whistleblower or the whistleblower's employer or firm is providing services (and the whistleblower seeks to use the information to make a submission for his own benefit).
- If the whistleblower is an officer or partner of an entity and learned the information in connection with the entity's process for identifying, reporting and addressing possible violations of law.

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The SEC will, however, consider such information from an attorney whistleblower if that information could be disclosed under a specific Sarbanes-Oxley rule, Part 205.3(d)(2).[6] Part 205 applies to attorneys appearing and practicing before the commission in the context of providing legal services for an issuer.

The provisions of Part 205.3(d)(2), however, conflict with many state ethics laws and thus beg the question, Which laws prevail in the case of a conflict? Part 205.6 attempts to resolve the conflicts between federal whistleblower law and state ethics rules with a so-called preemption clause. That clause provides that an attorney who complies in good faith with Part 205 shall not be subject to inconsistent standards imposed by any state or other U.S. jurisdiction where the attorney is admitted or practices.[7]

> In addition to providing protection from retaliation, Dodd-Frank contains a number of provisions providing whistleblowers with financial rewards.

Under that provision, an attorney appearing or practicing before the SEC may reveal to the agency, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary to do the following:

- Prevent the issuer from committing a material violation likely to cause substantial injury to the financial interest or property of the issuer or investors.
- Prevent the issuer, in an SEC investigation or administrative proceeding, from committing perjury, suborning perjury or committing any act likely to perpetrate a fraud upon the SEC.
- Rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Although Part 205.3(d)(2) is limited to attorneys appearing and practicing before the SEC in the context of providing legal services to an issuer, "appearing and practicing" and "issuer" are broadly defined. "Appearing and practicing" includes, for example, merely advising on a U.S. securities law issue regarding a document that the attorney has notice will be incorporated into a document to be filed with or submitted to the SEC. "Issuer" includes any person controlled by an issuer, where an attorney provides legal services to such a person on behalf of or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

Nonetheless, committees in Washington state and California have challenged the preemption clause, leaving lawyers questioning whether Part 205 truly provides a safe haven for attorney whistleblowers.[8] In 2003 the Washington State Bar Association issued a proposed interim formal ethics opinion disagreeing with the notion that Part 205 can preempt state ethics rules.

Then, in 2004, the California State Bar's corporations committee published an in-depth law review article also questioning the SEC's authority to preempt state ethics laws.

The Dodd-Frank bounty provisions further exacerbated the conflict between federal securities whistleblower law and state attorney ethics requirements by giving attorneys financial incentives to breach attorney-client confidentiality.

In October 2013 the New York County Lawyers' Association's committee on professional ethics responded to the development by releasing a formal opinion.[9] It concluded that New York lawyers, presumptively, may not ethically serve as whistleblowers for a bounty against their clients under Dodd-Frank, because doing so generally gives rise to a conflict between lawyers' interests and those of their clients.

Furthermore, no court has yet found that SEC regulations preempt state ethics rules governing lawyers' communications with their clients. In cases in which conflicts of state and SEC law have appeared, federal courts have been receptive to arguments based on lawyers' ethical obligations under state law and have balanced the state and federal interests.

Lawyer whistleblowers on issues other than federal securities law violations have faced investigation (if not disciplinary action) by state bars. These cases, however, have not yet presented the perfect storm posed by the disconnect between Part 205 and state ethics rules.

While the Dodd-Frank bounty provisions increase the incentives for attorneys to act as whistleblowers at their clients' expense, it is unclear whether those incentives outweigh the risks and burdens associated with taking such actions. Aside from the ethical issues, whistleblowers more often than not go uncompensated and incur significant burdens for their trouble, decreasing whatever temptation some attorneys may feel. WJ

NOTES

1 *Tung v. Sears,* No. 14-CV-4699, *complaint filed* (N.D. Ill. June 23, 2014).

2 Peter Elkind & Marty Jones, *Whistleblower unmasked as partners battle over $14.7 million award,* Fortune, July 23, 2014, *available at* http://fortune.com/2014/07/23/whistleblower-unmasked/.

3 SEC Release No. 33-8186, Proposed Rule: Implementation 225 of Standards of Professional Conduct for Attorneys (Jan. 29, 2003).

4 Mary Jo White, Chair, Sec. & Exch. Comm'n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539872100.

5 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).

6 17 C.F.R. § 205.

7 17 C.F.R. § 205.6.

8 Lawrence A. West, Eric R. Swibel & Jenny Allen, *Will Award-Seeking Whistleblower Lawyers Be Caught Between Conflicting SEC and State Ethics Rules?,* 1596 Latham & Watkins Client Alert (Oct. 21, 2013).

9 N.Y. County Lawyers' Ass'n, Comm. on Prof'l Ethics, Formal Opinion 746, Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Wall Street Reform Act of 2010 (Oct. 7, 2013), *available at* http://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf.

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NEWS IN BRIEF

GOLD MANIPULATION SUITS CENTRALIZED IN MANHATTAN FEDERAL COURT

Eighteen lawsuits accusing several banks of manipulating the prices of gold futures and options contracts will be heard together in the U.S. District Court for the Southern District of New York. The U.S. Judicial Panel on Multidistrict Litigation held that the suits share common allegations and will be efficiently adjudicated in the District Court. The suits say Bank of Nova Scotia, Scotia Capital (USA), Inc., ScotiaMocatta, Barclays Bank PLC, Barclays Capital Inc., Deutsche Bank AG, Deutsche Bank Securities Inc., HSBC Holdings PLC, HSBC Bank PLC, HSBC Securities (USA) Inc., HSBC USA Inc., Société Générale S.A. and SG Americas Securities LLC artificially raised the prices of gold futures and options. Both plaintiffs and defendants supported centralizing the actions, the JPML's order said. Despite U.S. District Judge Valerie E. Caproni being a recent assignee to the bench, the panel said "her impressive résumé" makes her "more than capable" of overseeing the suits.

In re Commodity Exchange Inc., Gold Futures and Options Trading, MDL No. 2548, 2014 WL 4050049 (J.P.M.L. Aug. 13, 2014).

Related Court Document:
Transfer order: 2014 WL 4050049

$100 MILLION MBS FRAUD SUIT TO CONTINUE AGAINST MORGAN STANLEY

Morgan Stanley Mortgage Capital must face a lawsuit alleging that it included faulty loans in mortgage-backed securities to investors' detriment and failed to buy back the loans as required by a contract, a New York state court judge has ruled. Justice Eileen Bransten of the New York County Supreme Court declined to dismiss the suit, saying the plaintiff, a Morgan Stanley trust, presented enough evidence that it notified MSMC of the faulty loans. The trust claimed that MSMC made representations and warranties in their contract, promising that the loans underlying the securities met certain underwriting guidelines. The loans failed, and the trust asked MSMC to buy back defective loans, but it refused. The trust filed suit, and Justice Bransten denied MSMC's motion to dismiss. She also held that rescissory damages are not available to the trust.

Morgan Stanley Mortgage Loan Trust 2006-4SL et al. v. Morgan Stanley Mortgage Capital Inc., No. 650579/2012, 2014 WL 3924616 (N.Y. Sup. Ct., N.Y. County Aug. 8, 2014).

Related Court Document:
Opinion: 2014 WL 3924616

CDO SUIT REVIVED BY TENNESSEE APPEALS COURT

A lawsuit against several banks and credit ratings agencies has been brought back to life by the Tennessee Court of Appeals, which found the plaintiff adequately alleged that the defendants committed fraud by selling falsely rated collateralized debt obligations. The appeals court reversed a lower court's dismissal of the suit and remanded the case. The complaint filed by First Community Bank sufficiently alleged that the ratings agencies and banks knew the CDOs, securities backed by pools of bonds and loans, were doomed to fail, the panel held. First Community said it purchased CDOs based on the defendants' alleged misrepresentations, causing it to lose about $100 million. In reversing the trial court, the appeals court said it was too early in the litigation to toss the complaint.

First Community Bank v. First Tennessee Bank et al., No. E2012–01422, 2014 WL 4102365 (Tenn. Ct. App. Aug. 20, 2014).

Related Court Document:
Opinion: 2014 WL 4102365

See Document Section C (P. 33) for the opinion.

Ratings suit

CONTINUED FROM PAGE 1

A special motion to strike, also called an anti-SLAPP motion, allows a defendant to seek early dismissal of a lawsuit that qualifies as a SLAPP under California law, Cal. Civ. Proc. Code § 425.16.

In rejecting the ratings agency's appeal, the California 1st District Court of Appeal ruled it lacked jurisdiction to review a lower court's order confirming that California Attorney General Kamala Harris' enforcement action was exempt from the law.

The three-judge panel unanimously found that Harris was also exempt from the statute's provision for immediate appeals of anti-SLAPP motion rulings.

'RACE TO THE BOTTOM'

In a 2013 complaint filed on behalf of the state in the San Francisco County Superior Court, Harris accused S&P and parent McGraw-Hill Cos. of various violations of California law, including the California False Claims Act, Cal. Gov't Code § 12651.

The suit says S&P assigned undeserved high grades to mortgage-related securities, costing public pension funds hundreds of millions of dollars.

According to the complaint, an investigation found evidence that S&P secretly lowered its rating standards in a "race to the bottom" with other credit rating firms.

The complaint says S&P was "explicitly concerned" with matching rating methods, regardless of ratings quality, in its attempt to win business from securities issuers that were pushing to package shaky mortgage loans for sale to institutional investors.

S&P allegedly helped trigger the financial crisis by downgrading the securities en masse in 2007, causing the state's pension funds to lose hundreds of millions of dollars.

According to the suit, S&P touted its triple-A rating as meaning a security should, on average, be able to withstand the economic conditions of the Great Depression. However, between 2005 and 2007, as loan defaults escalated, the company downgraded to junk status more than 80 percent of mortgage-backed securities it had rated triple-A, the suit says.

The pension funds relied on S&P ratings being accurate, especially its triple-A ratings, because, like the vast majority of institutional investors, investment rules limit their ability to buy securities not carrying that grade, the attorney general says.

The suit says S&P assigned undeserved high grades to mortgage-related securities, costing public pension funds hundreds of millions of dollars.

NO IMMEDIATE APPEAL

S&P filed a special motion to strike the CFCA claims arguing that the alleged misconduct was "protected activity" under the anti-SLAPP statute because the suit originated from the communication of their ratings.

In denying the special motion, the trial court ruled that Section 425.16(d) exempted "any enforcement action brought in the name of the people of the State of California by the Attorney General" from the entire anti-SLAPP procedure.

After S&P filed a notice of appeal, Harris moved to dismiss it arguing that the suit was exempt from the entire law, including subsection (i), which allows immediate appeals of rulings on anti-SLAPP motions.

The panel dismissed the appeal.

It explained that authorizing an immediate appeal would undermine the attorney general's exemption by subjecting enforcement actions "to a specific type of juridical scrutiny that the exemption expressly prohibits."

The panel rejected S&P's argument that because the subsection allowing immediate appeals does not mention the enforcement action exemption, it must not include it.

Calling S&P's interpretation "over-broad," the panel said it was unnecessary for the legislature to carve out a specific exception in that part of the law.

The panel also noted that public prosecutor enforcement actions by definition are not SLAPP cases because they are not motivated by a "retaliatory attempt to gain a personal advantage over a defendant who has challenged his or her economic ambition."

"To the contrary, the legislative history shows that the subdivision (d) exemption was enacted in order to preclude defendants from using the anti-SLAPP statute to impair the ability of state and local agencies to enforce consumer protection laws," the panel said.

"Subjecting public prosecutors to the direct appeal process authorized by subdivision (i) would undermine legislative intent, because it would impede the public prosecutor's efforts to protect the health and safety of the citizenry, delaying the enforcement action while the defendant pursues an appeal," it said. WJ

Related Court Document:
Opinion: 2014 WL 4058814

See Document Section A (P. 21) for the opinion.

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CASE AND DOCUMENT INDEX

Collective Asset Partners LLC v. VTraderPro LLC et al., No. 13–20619, 2014 WL 3974580 (5th Cir. Aug. 15, 2014) 10

First Community Bank v. First Tennessee Bank et al., No. E2012–01422, 2014 WL 4102365 (Tenn. Ct. App. Aug. 20, 2014) 18
Document Section C 33

In re Commodity Exchange Inc., Gold Futures and Options Trading, MDL No. 2548, 2014 WL 4050049 (J.P.M.L. Aug. 13, 2014) 18

Local 703, I.B. of T. Grocery & Food Employees Welfare Fund et al. v. Regions Financial Corp. et al., No. 12-14168, 2014 WL 3844070 (11th Cir. Aug. 6, 2014) 14
Document Section B 21

Morgan Stanley Mortgage Loan Trust 2006-4SL et al. v. Morgan Stanley Mortgage Capital Inc., No. 650579/2012, 2014 WL 3924616 (N.Y. Sup. Ct., N.Y. County Aug. 8, 2014) 15

People v. McGraw-Hill Cos. et al., No. A140922, 2014 WL 4058814 (Cal. Ct. App., 1st Dist. Aug. 8, 2014) 1
Document Section A 21

Royal Park Investments SA/NV v. Bank of New York Mellon, No. 14-CV-6502, *complaint filed* (S.D.N.Y. Aug. 14, 2014) 9

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PEOPLE

2014 WL 4058814
Only the Westlaw citation is currently available.
Court of Appeal,
First District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,
v.
The MCGRAW–HILL COMPANIES, INC. et al., Defendants and Appellants.

A140922 | Filed August 18, 2014

Trial Court: Superior Court of the City and County of San Francisco. Trial Judge: Honorable Curtis E.A. Karnow. (San Francisco City & County Super. Ct. No. CGC–13–528491)

Attorneys and Law Firms

Attorneys for Defendants and Appellants: Morrison & Foerster, San Francisco, Melvin R. Goldman, Ryan G. Hassanein, Nicholas Napolitan; Cahill Gordon & Reindel, Floyd Abrams, Adam Zurofsky, Jason M. Hall, Peter J. Linken

Attorneys for Plaintiff and Respondent: Kamala D. Harris, Attorney General, Martin Goyette, Senior Assistant Attorney General, Fredrick W. Acker, Deputy Attorney General

Opinion

Richman, J.

***1** The People, by and through the Attorney General, brought this action against McGraw–Hill Companies, Inc. and Standard & Poor's Financial Services LLC (defendants) for statutory violations arising out of defendants' alleged business practice of inflating their credit ratings of various structured finance securities. The complaint alleged four causes of action, including two for violations of the California False Claims Act (CFCA). Defendants filed a special motion to strike the CFCA causes of action pursuant to section 425.16, subdivision (b) of the Code of Civil Procedure, the anti-SLAPP statute.[1] The superior court denied the motion on the ground that the People's enforcement action was exempt from the special motion to strike procedure pursuant to section 425.16, subdivision (d), which provides that "This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Defendants filed a notice of appeal.

The People filed a motion to dismiss the appeal, challenging this court's jurisdiction to review the trial court's order, relying on the express language of subdivision (d). Defendants opposed the motion, contending that this appeal is authorized by the express language of subdivision (i), which provides that "[a]n order granting or denying a special motion to strike shall be appealable under Section 904.1." The motion was thoroughly briefed, and we held oral argument, which was vigorous indeed. We now rule, concluding that the order is not appealable, and we therefore grant the motion to dismiss the appeal.[2]

BACKGROUND

Section 425.16

"In 1992, the Legislature enacted section 425.16, the anti-SLAPP statute, to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]" (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315, 86 Cal.Rptr.3d 288, 196 P.3d 1094; see

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also *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192, 25 Cal.Rptr.3d 298, 106 P.3d 958 (*Varian*) [section 425.16 enacted in order "to prevent and deter" SLAPP suits " 'brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' "].)

"Section 425.16 authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. It establishes a procedure by which the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citations.]" (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1546–1547, 110 Cal.Rptr.3d 129.)

***2** This special motion to strike procedure implements subdivision (b) of the statute which states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

When section 425.16 was originally proposed, the Attorney General expressed concern that it "might impair the ability of state and local agencies to enforce certain consumer protection laws." (*City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 307–308, 3 Cal.Rptr.3d 473 (*City of Long Beach*).) Thereafter, the Governor vetoed versions of the bill that failed to address this concern. (See *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 447, 104 Cal. Rptr.2d 618 (*Health Labs*).) Eventually, a provision was added to the proposed statute which recognized a prosecutorial exemption for enforcement actions to protect the consumer and/or the public. With the addition of this express exemption, the anti-SLAPP statute was enacted in 1992. (*Ibid*.) This exemption is set forth in subdivision (d), which states that section 425.16 "shall not apply to any enforcement action" brought by a public prosecutor.

"As originally enacted in 1992, section 425.16 contained no provision for an immediate appeal of orders made pursuant to that section. [Citation.] Orders made pursuant to section 425.16 could be reviewed only as an appeal after judgment [citations] or by petition for an extraordinary writ.... [¶] In 1999 the Legislature added former section 425.16, subdivision (j) ..., providing an appeal may be taken directly from an order granting or denying a special motion to strike under section 425.16." (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 144–145, 51 Cal.Rptr.3d 403 (*Doe*).) "The Legislature found it necessary to enact [former] subdivision (j) because, without the ability to appeal, a SLAPP 'defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated.' [Citation.]" (*Varian, supra,* 35 Cal.4th at p. 194, 25 Cal.Rptr.3d 298, 106 P.3d 958.) This direct appeal provision is now set forth in subdivision (i), which states that orders granting or denying a special motion to strike "shall be appealable under Section 904.1." And it is subdivision (i) on which defendants base their appeal.[3]

The Parties' Contentions

The People contend that this appeal must be dismissed because the express language of subdivision (d) exempts this action from the direct appeal procedure set forth in subdivision (i). According to the People, the phrase "this section shall not apply" in subdivision (d) means what it says: that all of section 425.16, including subdivision (i), does not apply to a prosecutor's enforcement action. The People also contend that the Legislature never intended for subdivision (d) findings to be subject to immediate appellate review.

***3** Defendants contend the trial court's subdivision (d) order is made appealable by subdivision (i). They argue that there is nothing unclear or ambiguous about subdivision (i)'s statutory language which explicitly authorizes their appeal from the order denying their special motion to strike. Defendants also argue that the history of the anti-SLAPP statute reflects a legislative intent to create a right to immediately appeal any order granting or denying a special motion to strike.

DISCUSSION

Although each party invokes a different provision of the anti-SLAPP statute, their respective interpretations are mutually exclusive. To resolve this conflict, we apply settled rules of statutory construction.

" 'When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent.' [Citations.] The Supreme Court has emphasized that the words in a statute selected by the Legislature must be given a 'commonsense' meaning when it noted: ' "Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense

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meaning. [Citations.]" [Citation.]' [Citation.] Further, our Supreme Court has noted, ' " 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)….' " ' [Citations.]" (*Goldstein v. Ralphs Grocery Co*. (2004) 122 Cal.App.4th 229, 233, 19 Cal.Rptr.3d 292.)

Because this case requires us to interpret language from two subdivisions of the anti-SLAPP statute, we are particularly guided by the rule requiring us to "consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063, 103 Cal.Rptr.2d 751, 16 P.3d 166.)

Applying these rules leads to several conclusions.

First, subdivision (b) is the linchpin of the anti-SLAPP statute: it authorizes the motion to strike procedure established by the Legislature in order to protect acts in furtherance of the constitutional rights to free speech and petition.

Second, subdivision (d) completely exempts public enforcement actions from the subdivision (b) motion to strike procedure. Thus, for example, a subdivision (d) order does not require any judicial assessment of the nature of the defendant's conduct or substantive evaluation of the merits of the plaintiff's lawsuit. Rather, as stated by our colleagues in Division Five, the "anti-SLAPP remedy is unavailable" to a defendant in an action brought by a public prosecutor. (*Health Labs, supra,* 87 Cal.App.4th at p. 448, 104 Cal. Rptr.2d 618.)

Third, the direct appeal right created by subdivision (i) unequivocally applies to an order granting or denying a special motion to strike pursuant to the procedures promulgated to implement subdivision (b).

Finally, the direct appeal provision in subdivision (i) cannot be stretched to apply to a trial court determination that an action is exempt from the anti-SLAPP statute under subdivision (d). Subdivision (i) authorizes a direct appeal from a ruling on the merits of a subdivision (b) special motion to strike. A subdivision (d) order is not a ruling on the merits of a special motion to strike, but rather a determination that the entire anti-SLAPP procedure does not apply to the case.

***4** Defendants contend that the broad language of subdivision (i) manifests the Legislature's "unambiguous intent that an immediate appeal should be available from any order granting or denying a motion to dismiss under section 425.16." However, interpreting subdivision (i) as authorizing an immediate appeal from a subdivision (d) finding would undermine the very function of the subdivision (d) exemption, subjecting the public prosecutor's action to a specific type of judicial scrutiny that the exemption expressly prohibits. Moreover, defendants' over-broad construction of subdivision (i) not only fails to account for the language in subdivision (d), it would render that exemption meaningless, something a reasonable Legislature would not have intended.

Defendants argue that the timing of the adoption of the two subdivisions reflects a legislative intent to authorize an immediate appeal from a subdivision (d) order. As noted above, subdivision (d) was part of the original anti-SLAPP statute enacted by the Legislature in 1992. Subdivision (i), on the other hand, was added by a 1999 amendment. So, defendants reason, if the Legislature had intended to except public enforcement actions from the broad right to an immediate appeal created by subdivision (i), "it would have said so." This argument, however, ignores what the plain language of subdivision (d) actually says: the anti-SLAPP statute does not apply to prosecutor enforcement actions. In light of this preexisting exemption, it was not necessary for the Legislature to expressly carve out another exemption for public prosecutor actions in the text of subdivision (i).[4]

Defendants also contend that published authority compels the conclusion that subdivision (d) orders are immediately appealable under subdivision (i), citing three cases: *Health Labs, supra,* 87 Cal.App.4th 442, 104 Cal.Rptr.2d 618; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 37 Cal.Rptr.3d 632; and *People ex re Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 9 Cal. Rptr.3d 844. The essence of defendants' argument is that in these cases the courts considered the merits of appeals from subdivision (d) orders.

As best we can determine—and, from comments by defendants' counsel at oral argument, as best he can determine—no party in any of these three cases questioned the appellate court's jurisdiction. Certainly, the opinions do not address the question whether a subdivision (d) order is appealable under subdivision (i). They thus do not avail defendants: " 'It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.' [Citation.]" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680, 36 Cal.Rptr.3d 495, 123 P.3d 931; see also *Ginns v.*

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Savage (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered"]; *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1278, 135 Cal.Rptr.2d 654, 70 P.3d 1067 [quoting *Ginns*].)

Citing *Olson v. Cory* (1983) 35 Cal.3d 390, 398, 197 Cal.Rptr. 843, 673 P.2d 720 (*Olson*), defendants contend that an appellate court "necessarily" affirms its jurisdiction by hearing an appeal "[b]ecause courts are required to consider jurisdictional issues without regard to whether they are raised by the parties." Defendants' reliance on *Olson* is misplaced. In that case, one party filed a brief suggesting that the appeal had been taken from an nonappealable order, but all of the material parties urged the court to review the ruling on the merits. Rejecting that proposal, the *Olson* court stated that "since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion." (*Id*. at p. 398, 197 Cal.Rptr. 843, 673 P.2d 720.) *Olson* is relevant here because, as happened there, doubt about the appealability of the order in question has been brought to the court's attention. *Olson* does not, however, support defendants' very different contention: that appellate courts must search for jurisdictional problems never raised by the parties.

***5** Furthermore, defendants overlook *Doe, supra,* 145 Cal.App.4th 139, 51 Cal.Rptr.3d 403, a case holding that the denial of a motion for attorney fees pursuant to subdivision (c) of section 425.16 is not immediately appealable under subdivision (i). There, the defendant argued that the order was appealable because other appellate courts had entertained interlocutory appeals from subdivision (c) orders. (*Id*. at p. 150, 51 Cal.Rptr.3d 403.) Rejecting the argument, the court concluded, among other things, that a judicial opinion addressing the merits of an appeal which "does not suggest either that the parties raised the jurisdictional issue or that the court considered it" is not authority for the proposition that the order is actually appealable. (*Ibid*.)

As noted at the outset of our analysis, both parties claim support for their respective theories in the legislative history of the anti-SLAPP statute. We question the need to resort to arguments about what the Legislature may have intended. (See *Goldstein, supra,* 122 Cal.App.4th at p. 233, 19 Cal.Rptr.3d 292 [if statutory language is clear, no need to resort the legislative history].) Section 425.16 is not ambiguous when its subdivisions are considered together rather than at odds with each other.

But were it relevant to this discussion, the legislative history of section 425.16 reinforces our conclusion that decisions against defendants under subdivision (d) are not immediately appealable. "The legislative history of section 425.16 plainly implies" that its purpose was to prevent the harm caused by SLAPP plaintiffs, litigants who "do not care so much about winning their lawsuits as they care about delaying and distracting the defendant from his or her objective, which is generally economically adverse to those of the SLAPP plaintiff. SLAPP plaintiffs achieve their goal if their suits deplete the defendant's resources and energy. [Citations.]" (*Health Labs, supra,* 87 Cal.App.4th at p. 450, 104 Cal.Rptr.2d 618; see also *City of Long Beach, supra,* 111 Cal.App.4th at pp. 308–309, 3 Cal. Rptr.3d 473.)

But by their very definition public prosecutor enforcement actions are not SLAPP cases. "[A] public prosecutor's enforcement action is not motivated by a retaliatory attempt to gain a personal advantage over a defendant who has challenged his or her economic ambition. The prosecutor's motive derives from the constitutional mandate to assure that the laws of the state are uniformly enforced and to prosecute any violation of these laws, so that order is preserved and the public interest protected. [Citations.] Nothing in the legislative history of section 425.16 implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcements actions." (*Health Labs, supra,* 87 Cal.App.4th at p. 450, 104 Cal.Rptr.2d 618.)

To the contrary, the legislative history shows that the subdivision (d) exemption was enacted in order to preclude defendants from using the anti-SLAPP statute to impair the ability of state and local agencies to enforce consumer protection laws. (*Health Labs, supra,* 87 Cal.App.4th at pp. 446–447, 104 Cal.Rptr.2d 618; *City of Long Beach, supra,* 111 Cal.App.4th at pp. 307–308, 3 Cal.Rptr.3d 473.) Subjecting public prosecutors to the direct appeal process authorized by subdivision (i) would undermine legislative intent, because it would impede the public prosecutor's efforts to protect the health and safety of the citizenry, delaying the enforcement action while the defendant pursues an appeal of the subdivision (d) determination.

Defendants contend that the legislative history leading to subdivision (i) reflects an intent that every ruling on a special motion to strike would be subject to immediate appellate review. Specifically, they rely on evidence that proponents of the immediate appeal provision expressed concern that without the ability to directly appeal a section 425.16 order, a defendant in an actual SLAPP suit might have to incur the cost of a lawsuit before having his or her right to free speech vindicated. (*See Brar, supra,* 115 Cal.App.4th at p. 1317–1318, 9 Cal.Rptr.3d 844; *Doe, supra,* 145 Cal.App.4th at p. 147, 51 Cal.Rptr.3d 403.)

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***6** As we recognized in a case that did not involve the subdivision (d) exemption, the right to appeal can be important to the extent it protects defendants from the consequences of an erroneous denial of a meritorious anti-SLAPP motion. (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 1000, 119 Cal.Rptr.3d 835.) That said, we went on in *Grewal,* in a section entitled "A Losing Defendant's Right to Appeal Is the Aspect of the Anti–SLAPP Statute Most Subject to Abuse" (*id*. at p. 1000–1003, 119 Cal.Rptr.3d 835), to discuss Supreme Court and Court of Appeal opinions reflecting on the possibility for abuse, including quoting this observation by the Supreme Court in *Varian, supra,* 35 Cal.4th at p. 195, 25 Cal.Rptr.3d 298, 106 P.3d 958: "In light of our holding today, some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial. As the Court of Appeal observed and plaintiffs contend, such a result may encourage defendants to 'misuse the [anti-SLAPP] motions to delay meritorious litigation or for other purely strategic purposes.' " These concerns are a fortiori applicable here—an enforcement action by a public prosecutor.

Health Labs, supra, 87 Cal.App.4th 442, 104 Cal.Rptr.2d 618, one of the cases relied on by defendants, concludes with this terse summation, one pointedly applicable here: "We conclude that the classification created by subdivision (d)'s exemption of public prosecutors' enforcement actions from anti-SLAPP motions bears directly on furthering the state's legitimate interest of allowing prosecutors—who did not create the SLAPP problem—to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction." (*Id.* at p. 451, 104 Cal.Rptr.2d 618.)

DISPOSITION

The appeal is dismissed.

We concur:

Kline, P.J.

Brick, J.[*]

Footnotes

1 All statutory references are to the Code of Civil Procedure. And, to facilitate a clear analysis, we refer to the relevant provisions of section 425.16 by their subdivision designation.

2 In light of our disposition of this motion, we deny defendants' request for judicial notice which was filed in support of the merits of their appeal.

3 Actually, defendants also cite to section 904.1, subdivision (a)(13), which states that an appeal may be taken from "an order granting or denying a special motion to strike under Section 425.16." That subdivision was added to section 904.1 in 1999, to accommodate the newly added section 425.16, subdivision (j), now subdivision (i). (Stats.1999, ch. 960 (A.B. 1675).) It thus adds nothing to defendants' position.

4 This also disposes of defendants' reliance on exemptions to the anti-SLAPP statute contained in section 425.17, which was added in 2003. (See generally *Goldstein, supra,* 122 Cal.App.4th at p. 232, 19 Cal.Rptr.3d 292.) Defendants argue that section 425.17, subdivision (e) shows that the Legislature knew how to create an exemption from the right of immediate appeal under subdivision (i) (and section 904.1, subd. (a)(13)), but did not do so for public prosecution actions. However, nothing more was needed for public prosecutor actions because of the clear language of subdivision (d) and its legislative history.

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

End of Document

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REGIONS

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United States Court of Appeals,
Eleventh Circuit.
LOCAL 703, I.B. OF T. GROCERY & FOOD EMPLOYEES WELFARE FUND, individually and on behalf of all others similarly situated,
Employees' Retirement System of the Virgin Islands, Lead Plaintiff, et al., Plaintiffs–Appellees,
Plaintiffs' Liaison Counsel, Plaintiff,
v.
REGIONS FINANCIAL CORPORATION, C. Dowd Ritter, et al., Defendants–Appellants.

No. 12–14168.
Aug. 6, 2014.

Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 2:10–cv–02847–IPJ.

Before PRYOR and MARTIN, Circuit Judges, and HONEYWELL,[FN*] District Judge.

FN* Honorable Charlene Edwards Honeywell, United States District Judge for the Middle District of Florida, sitting by designation.

MARTIN, Circuit Judge:

***1** Regions Financial Corporation and the individual defendants (collectively, "Regions") appeal from the District Court's decision to certify a class action based on alleged misrepresentations about Regions's financial health before and during the recent economic recession. Regions argues that the District Court should not have certified the class, and that the class period is not justified. After careful review, and with the benefit of oral argument, we affirm the District Court's wellreasoned order in nearly all respects. But we vacate and remand for further proceedings in light of *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II),* ––– U.S. ––––, 134 S.Ct. 2398 (2014), to allow consideration of Regions's evidence of price impact and for the District Court to review the duration of the class period.

I. BACKGROUND

According to the plaintiffs' amended complaint, Regions made a series of misrepresentations beginning in 2008, in statements to analysts as well as required financial disclosures, about the value of its assets and its financial stability. More specifically, the plaintiffs allege that Regions—which was heavily invested in the real estate market—manipulated the way unhealthy assets were carried on its books to avoid disclosing significant losses that would compromise the company's value. Plaintiffs also allege that senior executives, with full knowledge of Regions's impaired and unstable asset portfolio, repeatedly underreported losses and represented that the company was in good financial health. Plaintiffs say that the failure to accurately represent the company's financial situation resulted in artificially high stock prices for Regions, and allowed it to avoid the precipitous decline of its stock price that would have resulted during the recession, absent the misleading disclosures. On January 20, 2009 Regions made a substantial corrective disclosure, reporting $5.6 billion in losses. That same day, Regions stock traded at $4.60 per share, compared to $23 per share on the first day of the proposed class period.

The plaintiffs moved to certify a class comprised of all investors who purchased Regions stock from February 27, 2008, when Regions filed its first allegedly misleading financial disclosure, through January 19, 2009, the last trading day before the corrective disclosure. The District Court found that the proposed class satisfied all the prerequisites for certification under Federal Rule of Civil Procedure 23(a): the class is sufficiently numerous, there are questions of law or fact common to the class, the named representatives have claims and are subject to defenses typical of the class, and the representatives will fairly and adequately protect the class interests. The District Court allowed the class to proceed under Rule 23(b)(3), finding that common questions of law or fact would predominate over individual questions. Based on these findings, the Court certified the class for the period from February 27, 2008 to January 20, 2009.

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***2** Regions argues here that the District Court should not have certified the class because (1) the plaintiffs did not prove that common questions about reliance, a required element in securities actions, would predominate over individual ones; (2) the District Court should have conducted an evidentiary hearing on the expert evidence supporting the conclusion that common questions predominate; (3) Regions offered sufficient evidence to rebut the finding of class-wide reliance; (4) the named representatives are not typical; and (5) the period over which the class is certified is not justified.[FN1]

FN1. Regions also argued, for the first time in supplementary briefing, that class certification is inappropriate because, in its view, the plaintiffs did not demonstrate that damages are susceptible to class-wide proof. Regions believes such proof is required by *Comcast Corp. v. Behrend,* ––– U.S. ––––, 133 S.Ct. 1426 (2013). It is not appropriate for us to pass on that issue now because Regions did not challenge the class certification on this basis in the District Court. *Access Now, Inc. v. Sw. Airlines Co.,* 385 F.3d 1324, 1330–35 (11th Cir.2004) (noting that this Court will hear an argument raised for the first time on appeal in limited circumstances, which do not apply in this case); *see also United States v. Levy,* 416 F.3d 1273, 1275–76, 1280 (11th Cir.2005) (per curiam) (describing this Court's general rule that arguments not raised in the opening brief are waived).

II. STANDARD OF REVIEW

We review a District Court's decision about whether to certify a class for an abuse of discretion. *E.g., Babineau v. Fed. Express Corp.,* 576 F.3d 1183, 1189 (11th Cir.2009). We will only find an abuse of discretion if the District Court applies the wrong legal standard, follows improper procedures in making its determination, bases its decision on clearly erroneous findings of fact, or applies the law in an unreasonable or incorrect manner. *Klay v. Humana, Inc.,* 382 F.3d 1241, 1251 (11th Cir.2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131 (2008).

III. CLASS–WIDE RELIANCE

A. The *Basic* Presumption

To certify a class under Rule 23(b)(3), the District Court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton* I), –––U.S. ––––, 131 S.Ct. 2179, 2184 (2011). The elements of a private securities fraud claim are (1) material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation and the purchase or sale of a company's stock; (4) reliance on the misrepresentation; (5) economic loss; and (6) loss causation. Id. "Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *Id.* This case is no exception.

"The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.,* purchasing common stock—based on that specific misrepresentation." *Id.* at 2185. However, the Supreme Court has recognized that requiring such direct proof of reliance in every case "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Basic Inc. v. Levinson,* 485 U.S. 224, 245, 108 S.Ct. 978, 990 (1988). And because it would be difficult for individual investors to prove reliance, the requirement of individualized proof would have the practical effect of preventing plaintiffs from bringing class actions in securities cases. Id. at 242, 108 S.Ct. at 989; *see also Halliburton I,* 131 S.Ct. at 2185.

***3** The Supreme Court established what we now call the *Basic* presumption to alleviate these concerns. *Halliburton I,* 131 S.Ct. at 2185. Under the *Basic* presumption, plaintiffs may benefit from a rebuttable presumption of class-wide reliance "based on what is known as the fraud-on-the-market theory." *Id.* (quotation marks omitted). "According to that theory, the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* (quotation marks omitted). The theory thus allows us to presume "that an investor relies on public misstatements whenever he buys or sells stock at the price set by the market." Id. (quotation marks omitted).

But the mere purchase of stocks at a price set by the market does not permit plaintiffs to take advantage of *Basic's* rebuttable presumption of reliance. It is well settled that "plaintiffs must prove certain things in order to invoke" that presumption. *Id.* "It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known ..., that the stock traded in an efficient market, and that the relevant transaction took place between the time the misrepresentations were made and the time the truth was revealed." *Id.* (quotation marks omitted).

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The District Court found that these plaintiffs justified invocation of the *Basic* presumption. Regions argues that this finding was erroneous because the evidence was insufficient to conclude that its stock traded on an efficient market. To that end, Regions makes three arguments: (1) that the District Court should have, but failed to, apply the analytical framework for analyzing market efficiency set forth in *Cammer v. Bloom,* 711 F.Supp. 1264 (D.N.J.1989); FN2 (2) that at the very least, the District Court should have required the plaintiffs to offer evidence that the misrepresentations caused an immediate change in the stock price; FN3 and (3) that these analytical shortcomings contributed to the erroneous application of a *per se* rule that the market for every stock listed on a national exchange trades on an efficient market. None of these arguments compel a result different from that reached by the District Court. The trial judge properly applied the established law of our Circuit to analyze the efficiency of the market for Regions stock.

FN2. The *Cammer* factors are: (1) high average trading volume during the class period; (2) a significant number of analysts following the stock; (3) numerous market makers who react quickly to, and trade based upon, new information about the company; (4) entitlement to file a Securities and Exchange Commission (SEC) Form S–3, which has minimum stock and trading requirements; and (5) empirical facts showing a cause and effect relationship between unexpected corporate events and an immediate response in the stock price. 711 F.Supp. at 1286–87.

FN3. In light of the intervening case *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,* ––– U.S. ––––, 133 S.Ct. 1184 (2013), Regions has wisely retreated from its initial position that certification was inappropriate because the plaintiffs did not show that the misrepresentations were material.

B. Analyzing Market Efficiency

Regions complains that this Court has not established a comprehensive analytical framework for determining whether the market for a particular stock is efficient. Regions is right that we have not adopted any sort of mandatory analytical framework. But we do not see this as a problem. By not setting forth a mandatory framework, we have given District Courts the flexibility to make the fact-intensive inquiry on a case-by-case basis. Beyond that, the flexible approach will allow District Courts in the future to consider new factors yet unknown to this Court that market theorists might consider to indicate market efficiency.

***4** At the same time, our more flexible approach of leaving the analysis in the capable hands of District Courts by no means implies that we have given no guidance. Quite the contrary, we identified some major, general characteristics of an efficient market in *FindWhat Investor Group v. FindWhat.com,* 658 F.3d 1282, 1310 (11th Cir.2011). There, we said that the market for a stock is generally efficient when "millions of shares change hands daily and a critical mass of" investors and/or analysts who "study the available information and influence the stock price through trades and recommendations." FN4 *Id.* (alteration and quotation marks omitted). So, quite contrary to Regions's position on appeal that we have yet to specify factors relevant to the market efficiency inquiry, we have indeed defined some features of an efficient market: high-volume trading activity facilitated by people who analyze information about the stock or who make trades based upon that information. These are factors District Courts therefore know to look for when analyzing the markets for securities of established companies like Regions. However, even these general signs of an efficient market may not be required for a finding of an efficient market in every case. Stocks that trade on a smaller scale, or that are not widely followed, might trade on an efficient market. It is up to the District Courts to consider the nature of the market on a case-by-case basis to decide whether the totality of the circumstances supports a finding of market efficiency.

FN4. *FindWhat* makes reference to "market makers" instead of active investors. 658 F.3d at 1310. "A 'market maker' is one who helps establish a market for securities by reporting bid-and-asked quotations." *Sec. & Exch. Comm'n v. Diversified Corporate Consulting Grp.,* 378 F.3d 1219, 1222 n.7 (11th Cir.2004) (alteration and quotation marks omitted). Unlike the NASDAQ, the national exchange FindWhat's stock traded on, *FindWhat,* 658 F.3d at 1293 n.5, it appears the NYSE does not use market makers in the same way, according to the record in our case. In our view, informed investors closely watching the value of their investments generally serve as a good proxy for market makers for those trading platforms that do not or did not rely on them to facilitate trades in the way alluded to in *FindWhat.*

We reject Regions's suggestion that we adopt the *Cammer* factors as the mandatory analytical framework for market efficiency inquiries. Of course, we recognize that a number of our sister Circuits have approved the use of those factors when appropriate. *See In re DVI, Inc. Sec. Litig.,* 639 F.3d 623, 634 n.16 (3d Cir.2011) (noting that seven of the twelve Circuit Courts have done so). And we certainly do not suggest that a District Court would be wrong to rely on the *Cammer* factors to guide its analysis. Indeed, some of those factors might prove particularly useful when a District Court considers a stock for which the more traditional indicia of efficiency set out in *FindWhat* are not present.

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But we do not think it wise to require District Courts to analyze market efficiency in terms of the *Cammer* factors in every case. Apparently, neither do many of our sister Circuits that have applied those factors in their own cases. *See In re PolyMedica Corp. Sec. Litig.,* 432 F.3d 1, 18 (1st Cir.2005) ("While we agree ... that the [*Cammer*] factors considered by the district court were relevant to the issue of market efficiency, these factors are not exhaustive."); *In re DVI,* 639 F.3d at 634 n.16 ("We have noted the *Cammer* factors may be instructive depending on the circumstances."); *Gariety v. Grant Thornton, LLP,* 368 F.3d 356, 368 (4th Cir.2004) (citing *Cammer* for the proposition that, "to determine whether a security trades on an efficient market, a court should consider factors such as, among others, whether the security is actively traded, the volume of trades, and the extent to which it is followed by market professionals"); *Unger v. Amedisys Inc.,* 401 F.3d 316, 323 (5th Cir.2005) ("[T]his list [of eight factors, including the five *Cammer* factors,] does not represent an exhaustive list, and in some cases one of the above factors may be unnecessary...."). As the law stands, District Courts have a good idea of what they should be looking for in determining market efficiency, as well as the flexibility to do that analysis in the most sensible way given the circumstances. We see no reason to upset the balance.

***5** Neither are we persuaded by Regions's argument that a finding of market efficiency always requires proof that the alleged misrepresentations had an immediate effect on the stock price. Although many Circuit Courts have described cause-and-effect as the most important of the *Cammer* factors, *see, e.g., Teamsters Local 445 Freight Div. Pension, Fund v. Bombardier Inc.,* 546 F.3d 196, 207 (2d Cir.2008), Regions does not point us to any court that has adopted the unwavering evidentiary requirement it urges upon us. Nor could it. Even the *Cammer* court itself did not establish such a strict evidentiary burden at the class certification stage. 711 F.Supp. at 1287 (noting that proof of the cause-and-effect factor "would be helpful" to the efficiency analysis). This case presents a perfect example of why an inflexible requirement would run contrary to the market principles that motivated the decision in *Basic.*

The plaintiffs have alleged here that Regions made a number of confirmatory misrepresentations during the class period. Confirmatory misrepresentations "confirm" existing information about a stock, rather than release new and different information that might bring about a negative change in the stock's price.[FN5] In other words, Regions's disclosures were designed to prevent a more precipitous decline in the stock's price, not bring about any change to it. When a company releases expected information, truthful or otherwise, the efficient market hypothesis underlying *Basic* predicts that the disclosure will cause no significant change in the price. *See FindWhat,* 658 F.3d at 1310 ("A corollary of the efficient market hypothesis is that disclosure of confirmatory information—or information already known by the market—will not cause a change in the stock price. This is so because the market has already digested that information and incorporated it into the price."); *see also Cammer,* 711 F.Supp. at 1287 (noting that the cause-and-effect factor looks to the relationship "between *unexpected* corporate events or financial releases and an immediate response in the stock price" (emphasis added)). Requiring plaintiffs to present evidence that the alleged misrepresentations immediately moved the market price in these circumstances would thus place an evidentiary burden upon them which is, at best, elusive.

FN5. Regions argues that the District Court erroneously applied the legal standard from *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 92 S.Ct. 1456 (1972), which governs reliance in cases alleging material omissions rather than affirmative misrepresentations. The District Court wisely accepted the plaintiffs' argument that a confirmatory misrepresentation is like an omission, because it is an affirmative representation that omits negative information. Thus, like we do here, the District Court noted that this type of misrepresentation would likely yield price stability rather than volatility, just as we would expect with a traditional omission. All the District Court did in this case was recognize the similarity between two different but closely related factual scenarios and draw on precedent from both areas to render its decision. The District Court's decision to do so evidences good, reasoned judging, not an abuse of discretion.

Neither would it make sense to impose an unwavering requirement for plaintiffs to identify unexpected disclosures during or around the class period that had an immediate price impact. In any given case there may be no unexpected disclosures during the period at all, because the company is withholding that information. To require plaintiffs to prove a set number of unexpected disclosures resulting in an immediate price impact would rob District Courts of the flexibility they need to conduct holistic, fact-sensitive inquiries into the efficiency of the market for the particular stock before it. The plaintiffs in this case did identify one unexpected disclosure around the class period—a corrective disclosure on January 20, 2009, which had an immediate negative impact on the stock price. On this record, the District Court did not abuse its discretion when it refused to require the plaintiffs to identify more instances of unexpected disclosures and a resulting price impact before finding the initial burden under *Basic* satisfied.[FN6]

FN6. We are aware that the Fifth Circuit has criticized a District Court for accepting the cause-and-effect factor as proven based on only three instances of unexpected disclosures resulting in a price impact. *Unger,* 401 F.3d at 324–25. But the Fifth Circuit did not purport to adopt a minimum requirement, and instead cautioned District Courts that the *Cammer* factors are no more than an "analytical tool" that must be applied in ways sensitive to the particulars of the case before it. See id. at 325. Beyond that, the misrepresentations alleged in *Unger* were not the sort of confirmatory misrepresentations we have here. Instead, they were affirmative misrepresentations of profits above what the market would otherwise expect. *See id.* at 319–20.

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***6** Finally, we turn to Regions's accusation that the District Court applied an improper, *per se* rule that stocks trading on a national exchange always trade on efficient markets. Another member of our Court has recognized that securities trading on national exchanges like the NYSE "are often presumed to be traded on an efficient market," *see Thompson v. RelationServe Media, Inc.,* 610 F.3d 628, 693–94 (11th Cir.1010) (Tjoflat, J., concurring in part and dissenting in part), precisely because the exchanges are generally populated by stocks that are closely watched by analysts and that trade at a high volume. *See In re DVI,* 639 F.3d at 634 ("[T]he listing of a security on a major exchange such as the NYSE or the NASDAQ weighs in favor of a finding of market efficiency."). Nevertheless, we share Regions's resistance to a *per se* rule of market efficiency for all stocks that trade on a national exchange, without regard for the particular characteristics of that stock. *See Bell v. Ascendant Solutions, Inc.,* 422 F.3d 307, 313–14 (5th Cir.2005) ("[S]ome companies listed on national stock exchanges are relatively unknown and trade there only because they met the eligibility requirements. While the particular market for stock trades might be relevant, it is not dispositive of whether the current price reflects all available information, which, of course, is the hallmark of an efficient capital market." (quotation marks and citations omitted)). Thus, although trading on a national exchange may be relevant to the inquiry, District Courts should remain focused on the market for the particular stock before them, as *FindWhat* suggests.

At the same time, we do not share Regions's view that the District Court applied a *per se* rule in this case, notwithstanding the language in the order that might suggest otherwise. The District Court did recognize that not all securities trading on the NYSE necessarily trade on an efficient market, noting only that the market could be presumed efficient for "virtually" all securities traded there. And the District Court said it applied *FindWhat* to the particular circumstances of the market for Regions stock, not any sort of *per se* rule. As the District Court's opinion notes, "millions of shares of [Regions] stock are traded on the New York Stock Exchange daily," a high trading volume that strongly suggests an efficient market. *See FindWhat,* 658 F.3d at 1310. Unfortunately, the District Court's order does not point to the other factors in the record that lend even more credibility to its market efficiency finding. For example, 29 financial analysts covered Regions stock over the class period. Regions was eligible to file an SEC Form S–3, one of the *Cammer* factors. *Cammer,* 711 F.Supp. at 1286. And the number of institutional investors holding Regions stock during the class period ranged from 329 to 425. *Cf. In re Xcelera.com Sec. Litig.,* 430 F.3d 503, 512, 515 (1st Cir.2005) (indicating that the presence of institutional investors can contribute to a market efficiency finding).

***7** Surely these are the types of facts the District Court had in mind when it said it was "[a]pplying *FindWhat* to the facts here ." Certainly these facts undermine Regions's claim that the District Court applied a strict *per se* rule of market efficiency for all stocks trading on national exchanges. In any event, even if the District Court did engage in an improper presumption without considering the specific trading characteristics of Regions stock, the evidence before the District Court supports a finding of market efficiency in light of *FindWhat. See Hubbard v. BankAtlantic Bancorp, Inc.,* 688 F.3d 713, 716 (11th Cir.2012) ("Despite the District Court's error, we may affirm for any reason supported by the record."). We therefore affirm the District Court's determination that the plaintiffs justified application of the *Basic* presumption.[FN7]

FN7. Regions also complains that the District Court violated *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786 (1993), by relying on expert testimony despite Regions's motion to strike and request for a hearing. The District Court only relied on the challenged expert testimony in deciding materiality issues. Given Regions's concession that *Amgen* precludes consideration of materiality at the class certification stage, the *Daubert* argument is moot in this respect. And because the District Court did not rely on the challenged expert evidence to resolve any other issue, there was no need to engage the *Daubert* analysis before resolving the class certification motion. *See Am. Honda Motor Co. v. Allen,* 600 F.3d 813, 815–16 (7th Cir.2010) (per curiam) ("We hold that when an expert's report or testimony is critical to class certification, ... the district court must perform a full *Daubert* analysis before certifying the class...."). Neither have we considered the challenged expert evidence in resolving Regions's appeal.

IV. REBUTTING THE PRESUMPTION

The *Basic* inquiry does not end once the presumption of class-wide reliance has been invoked. As the Supreme Court recently held, defendants may introduce price impact evidence both to undermine the plaintiff's case for market efficiency and to rebut the *Basic* presumption once it has been established. *Halliburton II,* 134 S.Ct. at 2414–16. Regions presented evidence that its stock price did not change in the wake of any of the alleged misrepresentations. The District Court, relying on the state of the law before *Halliburton II,* did not fully consider this evidence. The plaintiffs apparently agree, urging us to "remand for fuller consideration by the district court of all the price-impact evidence submitted below."

In keeping with the suggestion of both parties that the analysis of Regions's case rebutting the *Basic* presumption should be reconsidered in light of *Halliburton II,* we remand to the District Court to undertake that review. But we are mindful, and the District

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Court is no doubt aware, that its work on remand will be limited in scope. The Supreme Court only said that defendants "*may* seek to defeat the *Basic* presumption" with evidence that the misrepresentations did not impact the price. Id. at 2417 (emphasis added). *Halliburton II* by no means holds that in every case in which such evidence is presented, the presumption will always be defeated. Indeed, this Court has recognized the distinct role that confirmatory information may have in this analysis. *See FindWhat,* 658 F.3d at 1310 ("A corollary of the efficient market hypothesis is that disclosure of confirmatory information—or information already known by the market—will not cause a change in the stock price. This is so because the market has already digested that information and incorporated it into the price."). But in any event, because the District Court is in the best position to review all the facts and conduct the inquiry now required in the wake of *Halliburton II,* we vacate and remand this case for that purpose.

V. TYPICALITY OF THE REPRESENTATIVES

***8** Regions next argues that the lead plaintiffs, District No. 9, I.A. of M. & A.W. Pension Trust (District 9) and Employees' Retirement System of the Virgin Islands (Virgin Islands), are not proper class representatives because their claims are not typical, as Federal Rule of Procedure 23(a) requires. Regions argues that District 9 is not typical because (1) it benefitted from the alleged misrepresentations by selling some of its Regions stock at inflated prices during the class period; and (2) it purchased many shares of Regions stock following the corrective disclosure. The Virgin Islands also is not typical, in Regions's view, because (1) it retained its Regions holdings long after the corrective disclosure; and (2) it purchased its shares late in the class period. Regions also argues that both are atypical because they ceded investment authority to outside managers.

"The typicality requirement may be satisfied despite substantial factual differences ... when there is a strong similarity of legal theories." *Williams v. Mohawk Indus., Inc.,* 568 F.3d 1350, 1357 (11th Cir.2009) (quotation marks omitted). After careful consideration of Regions's arguments, we find that the District Court did not abuse its discretion by finding that both lead plaintiffs meet the typicality requirement.

That District 9 benefitted to some extent from the alleged fraud by selling some of its shares during the class period makes no difference here. There is no evidence that District 9 may be subject to an *in pari delicto* defense because it is equally at fault for the misrepresentations. See *Pinter v. Dahl,* 486 U.S. 622, 633, 108 S.Ct. 2063, 2071 (1988). And while some District Courts have found that an investor who suffers no net losses thanks to sales during the class period is subject to an atypical standing defense, *see, e.g., In re Comdisco Sec. Litig.,* 150 F.Supp.2d 943, 945–46 (N.D.Ill.2001), those cases are inapposite here. District 9 did suffer net losses from its purchases of Regions stock, despite some sales during the class period. The evidence shows that District 9 spent about $933,000 on the 64,500 Regions shares it acquired over the class period, compared to its sale of 25,900 shares over the same period for about $256,000. Regions has not pointed us to any evidence suggesting that District 9's gains during the period might arguably offset its losses under any generally accepted accounting method. Its argument that District 9's sales render it atypical is thus misguided.

Neither are we persuaded by Regions's argument that District 9's postdisclosure purchases render it atypical. We agree with our colleagues from the Fifth Circuit that "[r]eliance on the integrity of the market prior to disclosure of alleged fraud (i.e. during the class period) is unlikely to be defeated by postdisclosure reliance on the integrity of the market." *Feder v. Elec. Data Sys. Corp.,* 429 F.3d 125, 138 (5th Cir.2005). This is particularly true where, as here, the post-period purchases are made "after the stock price has been 'corrected' by the market's assimilation of the new information." *Id.* Regions's briefing does not identify any unique circumstances in this case that should have persuaded the District Court to deviate from this general rule. We therefore adhere to it.

***9** That the Virgin Islands purchased its shares late in the class period presents no reason to consider the District Court's finding of typicality to be an abuse of discretion. *FindWhat,* 658 F.3d at 1315 ("Every investor who purchases at an inflated price—whether at the beginning, middle, or end of the inflationary period—is at risk of losing the inflationary component of his investment when the truth underlying the misrepresentation comes to light."). Neither does the Virgin Islands's retention of its shares long after the corrective disclosure. There is merit to Regions's argument that "the longer the time between the purchase and sale, ... the more likely that other factors [besides the misrepresentations] caused the loss." *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 343, 125 S.Ct. 1627, 1632 (2005). Nevertheless, the District Court's determination on this record that the Virgin Islands would not likely be subject to an atypical defense for that reason does not amount to an abuse of discretion.[FN8]

FN8. Of course, if the circumstances have changed since the District Court's June 2012 certification order such that the representatives are no longer typical or adequate, the District Court may revisit its initial certification decision. *See Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 2372 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.").

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Finally, neither representative's use of investment advisers warrants reversal. Certainly, a large institutional investor is likely to rely on investment advisers to make investment decisions on its behalf. And yet both Congress and the courts have recognized that these sorts of investors are generally preferred as class representatives in securities litigation. *See, e.g.,* 15 U.S.C. § 77z1(a)(3)(B)(iii)(I) (directing courts to "adopt a presumption that the most adequate [lead] plaintiff in any private [securities] action arising under this subchapter is the person or group of persons that ... in the determination of the court, has the largest financial interest in the relief sought by the class"); *In re DVI,* 639 F.3d at 641 ("[S]ophisticated institutional investors ... are preferred as class representatives."); *see also id.* at 640 n.25 (acknowledging, while addressing a different topic, that institutional investors are likely to use outside advisors). Even sophisticated investment advisers (like those involved in this case) rely on the integrity of the market. This is true even if they do not incorporate particular informational disclosures into their investment strategies. *Blackie v. Barrack,* 524 F.2d 891, 907 (9th Cir.1975) ("A purchaser on the stock exchanges may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price whether he is aware of it or not, the price he pays reflects material misrepresentations.").

Given all these facts, we cannot conclude that the District Court's typicality finding constituted an abuse of its discretion.

VI. CLASS PERIOD

***10** Finally, Regions complains about the duration of the class period. It argues that the class period cannot begin with the filing of the Form 10–K reflecting Regions's financial data for fiscal year 2007 because the plaintiffs do not allege any wrongdoing in 2007.[FN9] This argument misunderstands the plaintiffs' allegations. These plaintiffs have alleged that the Form 10–K filed on February 27, 2008 was misrepresentative because it was the first financial disclosure in which Regions should have reported losses based on the 2007 decline of the real estate market. Contrary to Regions's position in this appeal, this theory of liability in no way requires the plaintiffs to allege or prove that any fraud took place in 2007. All of Regions's conduct in 2007 may be perfectly innocent, but if it misrepresented the value of its 2007 assets in 2008, then it would have violated the Securities Exchange Act, and the class period can begin at that time on that basis.

FN9. Regions's broader argument that there is no evidence of wrongdoing during the class period is entirely without merit. The complaint alleges that Regions fraudulently overvalued its asset portfolio by manipulating loan classifications "throughout 2008, and at least through the first quarter of 2009."

However, Regions's argument about the end date for the period is well taken. The plaintiffs requested the class to include all persons or entities who purchased or otherwise acquired Regions securities "between February 27, 2008 and January 19, 2009." The District Court's certification order, however, included all those who purchased or acquired securities "between February 27, 2008, and January 20, 2009." Based on the record here, individuals who purchased their shares on January 20, 2009 should likely be excluded from the class. This is because Regions's corrective disclosure on January 20 was made before the market opened for trading. We therefore vacate and remand for the District Court to clarify the end date of the class period.

VII. CONCLUSION

The District Court's holdings regarding the application of the *Basic* presumption, the typicality of the class representatives, and the start date for the class period are due to be affirmed. But we vacate and remand for the District Court to reconsider, in light of *Halliburton II,* whether Regions rebutted the *Basic* presumption and to clarify the end date of the class period.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

C.A.11 (Ala.),2014.
Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Financial Corp.
--- F.3d ----, 2014 WL 3844070 (C.A.11 (Ala.))

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

FIRST COMMUNITY BANK, N.A.
v.
FIRST TENNESSEE BANK, N.A., et. al.

No. E2012–01422–COA–R3–CV. | Opinion on Remand—July 10, 2014 Session. | Aug. 20, 2014.

Appeal from the Circuit Court for Knox County, No. 347511; Wheeler A. Rosenbalm, Judge.

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JOHN W. McCLARTY, J., delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, J., and D. KELLY THOMAS, JR., SP.J.,[1] joined.

OPINION

JOHN W. McCLARTY, J.

***1** Plaintiff brought this action against Defendants for fraud, constructive fraud, negligent misrepresentation, civil conspiracy, unjust enrichment, and violation of the Tennessee Securities Act, codified at Tennessee Code Annotated section 48–1–101, et seq. The claims arose out of the purchase of asset-backed securities that were later deemed unmarketable, causing a significant financial loss to Plaintiff. Defendants filed motions to dismiss pursuant to Rule 12.02(6), arguing that the claims were untimely, that Plaintiff failed to plead its claims with particularity, and that the losses were caused by general market conditions. Nonresident Defendants also objected to the court's personal jurisdiction. The trial court dismissed the complaint. Plaintiff appealed the dismissal to this court, and we affirmed the dismissal against Nonresident Defendants for lack of personal jurisdiction but reversed the dismissal for failure to state a claim as to the remaining defendants. In so holding, this court found that consideration of matters outside the pleadings

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pertaining to the running of the statute of limitations converted the motions to dismiss into one for summary judgment, thereby requiring remand of the entire case for further discovery. The remaining defendants filed an application for permission to appeal. The Tennessee Supreme Court granted the application and remanded the case for "consideration of the trial court's alternative basis of dismissal of [the] complaint, i.e., the failure to state a cause of action or state a claim for which relief can be granted (other than on the basis of the running of the applicable statutes of limitations or repose)." Upon remand, we reverse the decision of the trial court.

I. BACKGROUND

First Community Bank ("Plaintiff")[2] is a banking and financial services company that is incorporated in Virginia. Plaintiff has more than 50 financial centers located in various states, including Virginia, West Virginia, North Carolina, and Tennessee. In 2003, Plaintiff began investing in asset-backed securities, namely collateralized debt obligations ("CDOs") and residential mortgage-backed securities ("RMBSs"). CDOs are an amalgam of different forms of debt that are pooled together, regrouped into classes ("tranches"), assigned a rating, and marketed to investors. Ideally, investors who purchase a tranche in a CDO receive a steady influx of payments and eventually recoup the investment in addition to a profit.

In 2000, FTN Financial Securities Corporation ("FTN"), a wholly owned subsidiary of First Tennessee Bank, N.A. ("FTB"), along with Keefe, Bruyette & Woods, Inc. ("KBW") developed pooled trust preferred CDOs, entitled Preferred Term Securities ("PreTSLs"). PreTSLs were comprised of portfolios of debt issued by banks, insurance companies, and real estate investment subsidiaries. FTN and KBW formed entities ("PreTSL Entities") to serve as the issuer or co-issuer of the asset-backed securities. From 2003 to 2007, Plaintiff purchased notes in varying tranches in seven of the PreTSLs formed by FTN and KBW.

***2** In June 2007, Plaintiff purchased notes in the A–3L tranche of a CDO, entitled Soloso 2007–1 ("Soloso"). The next day, Plaintiff purchased additional notes from the same tranche. Bear Stearns & Company, Inc. ("Bear Stearns") and SunTrust Robinson Humphrey, Inc. ("SunTrust") structured Soloso and created special purpose entities, Soloso CDO 2007–1, Ltd. and Soloso CDO 2007–1, Inc. ("Soloso Entities"), to serve as issuer and co-issuer of Soloso. One month later, Plaintiff purchased notes in the D tranche of a CDO, entitled Trapeza CDO XIII ("Trapeza"). J.P. Morgan Securities, LLC ("JP Morgan"),[3] along with Morgan Keegan & Company, Inc. ("Morgan Keegan") structured Trapeza and created special purpose entities, Trapeza CDO XIII, Ltd. and Trapeza CDO XIII, Inc. ("Trapeza Entities"), to serve as issuer and co-issuer of Trapeza. Trapeza Capital Management, LLC ("TCM") served as a collateral manager and assisted in the selection and management of the securities.

Unlike CDOs, RMBSs are securities "backed by a pool of residential mortgage loans" and grouped into tranches. The recoupment of the purchase price and any profit are dependent upon the viability of each underlying mortgage's rates of return and default. On December 22, 2006, Plaintiff purchased notes in the A–9 tranche of Residential Asset Securitization Trust 2006–A9CB ("RAST"), which was backed by 2,016 mortgages. The mortgages were acquired by IndyMac Bank, F.S.B. ("Indy")[4] and marketed by Indy and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").

Each sale, whether for a CDO tranche or the RMBS tranche, was conditioned upon the receipt of a minimum rating by one of three rating organizations, Moody's Investor Services, Inc. ("Moody's"); Fitch, Inc. doing business as Fitch Ratings ("Fitch"); and The McGraw–Hill Companies, Inc. ("McGraw–Hill") doing business as Standard & Poor's Ratings Services ("S & P").[5] The products were rated as follows:

Product	Purchase Price	Moody's	Fitch	S & P
PreTSL X	$10,000,000	A2	A	No rating
PreTSL XII	$10,000,000	A2	A	No rating
PreTSL XII	$10,417,695.61	A2	A	No rating
PreTSL XIV	$9,335,790	A2	A	No rating
PreTSL XVI	$4,119,326.67	A2	A	No rating
PreTSL XXIII	$8,180,712.21	A3	A	No rating
PreTSL XXII	$12,785,606.03	A3	A-	No rating
PreTSL XXVI	$7,000,000	A3	A-	No rating
Trapeza	$20,000,000	No rating	A-	No rating
Soloso	$18,400,000	A2	A-	No rating
RAST	$25,000,000	Aaa	No rating	

Each product received the required minimum rating. Specifically, the ratings from Moody's, Fitch, and S & P (collectively "Rating Agencies") represented that each security was "uppermedium grade" and "subject to low credit risk" according to Moody's, of "high credit quality" and "low default risk" with a "strong" capacity for repayment according to Fitch, and of "[e]xtremely strong capacity to meet financial commitments" according to S & P.

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***3** In order to finance the transactions, Plaintiff borrowed from other sources by aligning the repayment terms with the anticipated income of principal and interest from its newlypurchased investments. In August 2008, Moody's downgraded the rating for a number of Plaintiff's investments. "Beginning in the fourth quarter of 2008, some" of the investments "began to fail certain coverage tests" and began to "pay in kind, crippling their fair market value." Plaintiff eventually sold its CDOs. The following table represents Moody's revised ratings and sale price, if applicable:

Product	Purchase Price	Sale Price	Revised Rating
PreTSL X	$10,000,000	$1,106,000	Ca
PreTSL XII (both products)	$20,417,695.61	$3,262,000	Ca
PreTSL XIV	$9,335,790	$1,314,900	Ca
PreTSL XVI	$4,119,326.67	$3,000.41	Ca
PreTSL XXII	$12,785,606.03	$238,750	Ca
PreTSL XXIII	$8,180,712.21	$990,000	C
PreTSL XXVI	$7,000,000	$2,499	C
Trapeza	$20,000,000	$2,500	Not rated by Moody's
Soloso	$18,400,000	$2,500.56	C
RAST	$25,000,000		A2

Plaintiff retained its investment in RAST, despite a significant downgrade in its rating and breaches in various "coverage tests." In total, Plaintiff lost approximately $100,000,000 as a result of the downgrade in the overall value of its CDOs. In order to recover from the massive loss, Plaintiff cut shareholder dividends, froze salaries, and scaled back plans for expansion and growth to the detriment of its shareholders, employees, and customers.
On September 15, 2011, Plaintiff filed a 207–page complaint, alleging fraud and negligent misrepresentation against the Rating Agencies; the PreTSL Entities, the Soloso Entities, and the Trapeza Entities (collectively "Issuing Entities"); and FTN, KBW, Morgan Keegan, TCM, SunTrust, Bank of America Corporation ("BOA") as successor in interest to Merrill Lynch,[6] and JP Morgan, individually and as successor in interest to Bear Stearns[7] (collectively "Placement Agents").[8] Plaintiff brought claims for violation of the Tennessee Securities Act ("TSA") and unjust enrichment against Placement Agents and Issuing Entities.

In general, Plaintiff alleged that Placement Agents and Issuing Entities worked with Rating Agencies in producing products that appeared marketable and that Rating Agencies were retained and compensated based upon the rating it provided. Plaintiff claimed that Placement Agents and Issuing Entities then knowingly provided a misleading rating to secure the sale of the products.

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In support of its claim for fraud, Plaintiff claimed that Placement Agents, Issuing Entities, and Rating Agencies (collectively "Defendants") "made materially false and misleading representations and omissions" relative to the products, the underwriting and rating process, the adequacy of the credit support and enhancement available, conflicts of interest with Rating Agencies, and whether Rating Agencies had "sufficiently reliable facts and sufficiently reliable models on which to assign" ratings. Plaintiff also specifically alleged that those involved in the PreTSL and Soloso transactions made materially false and misleading representations concerning the subscription of the products. Plaintiff asserted that Defendants "made the representations and omissions either knowing of their falsity or with recklessness as to whether the representations were false," that its reliance upon the representations and omissions was reasonable and justifiable, and that it suffered damages as a result of the "fraudulent conduct, misrepresentations, and omissions."

***4** In support of its claim for negligent misrepresentation, Plaintiff alleged that Placement Agents and Issuing Entities "supplied materially false, faulty and misleading information" in an attempt to guide Plaintiff in its business transactions, that Defendants "failed to exercise reasonable care in obtaining and communicating the information" concerning the quality of the notes, that it was foreseeable, reasonable, and justifiable that Plaintiff would rely on the information, and that Plaintiff suffered damages as a result of its reliance. Plaintiff further alleged that Rating Agencies also "supplied materially false, faulty and misleading" information and credit ratings, that Rating Agencies "held special expertise" and "had a duty to conduct a reasonable investigation of the truthfulness of its representations regarding" the ratings, that it was foreseeable, reasonable, and justifiable that Plaintiff would rely on the information, and that Plaintiff suffered damages as a result of its reliance.

In support of its TSA claim against Placement Agents and Issuing Entities, Plaintiff alleged that Placement Agents and Issuing Entities

> (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices and a course of business that operated as a fraud or deceit[.]

Plaintiff asserted that it suffered damages as a result of the "false and fraudulent conduct, misrepresentations, and omissions."

In support of its claim for unjust enrichment, Plaintiff alleged that it conferred a benefit upon Placement Agents and Issuing Entities for the purchase of the products and that they appreciated and accepted the benefit "under such circumstances that it would be inequitable and unjust" to allow retention of "the benefit without payment of value."

SunTrust and BOA filed motions to sever. Defendants sought dismissal, alleging that Plaintiff had failed to state a claim upon which relief could be granted because the claims were time-barred, because Plaintiff failed to plead its fraud-based claims with particularity, because Plaintiff failed to identify a material misstatement upon which it reasonably relied, because the securities were not purchased in Tennessee, and because the losses were caused by general market conditions. Placement Agents claimed they had not sold the securities or issued the offering materials. BOA argued that Plaintiff had not pled any facts concerning successor liability. Rating Agencies asserted that Plaintiff's claims were preempted by the Credit Rating Agency Reform Act of 2006 ("the CRARA") and that the ratings were protected by the First Amendment to the United States Constitution.

Issuing Entities, Rating Agencies, and TCM ("Nonresident Defendants") asked the court to dismiss Plaintiff's complaint for lack of personal jurisdiction, alleging that Plaintiff was a Virginia corporation and that Plaintiff's cause of action did not arise from and was not related to any activities that occurred in Tennessee. Nonresident Defendants attached affidavits in support of each motion.

***5** On February 16, 2012, Plaintiff filed a motion for leave to take limited discovery on the issue of personal jurisdiction and sought to hold oral arguments in abeyance. Plaintiff filed an amended complaint, along with interrogatories, requests for production of documents, and notices of deposition. Defendants objected to the discovery requests and filed renewed motions to dismiss. Nonresident Defendants either filed motions to quash or requested a protective order to prevent discovery. The rest of the defendants objected to any discovery that did not pertain to jurisdictional issues and sought timely oral argument on their respective motions to dismiss.

Plaintiff's amended complaint, which spanned 260 pages, added claims of civil conspiracy and constructive fraud against Defendants and a claim of unjust enrichment against Rating Agencies for the payment received for rating each product. Plaintiff alleged that Defendants were guilty of civil conspiracy because they "omitted numerous material facts in connection with the issuance, rating, marketing and sale" of each product "for the purpose of defrauding" Plaintiff and others. Plaintiff relied upon the "material

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misrepresentations and omissions made by" those "acting in concert and in furtherance of the conspiracy" for each product. Plaintiff asserted that Defendants were guilty of constructive fraud because they "owed a legal and/or equitable duty" to Plaintiff "to provide accurate and complete information orally and in written communications" but that each defendant "made the false representations and omissions knowing they were not accurate or complete." Relative to the unjust enrichment claim, Plaintiff alleged that it conferred "an indirect benefit in the amount of the fees paid to [ ] Rating Agencies out of [Plaintiff's] purchase price proceeds" and that Rating Agencies appreciated and accepted the benefit under "circumstances that it would be inequitable and unjust for it to retain the benefit without payment."

Plaintiff also added general allegations and facts in its amended complaint. Plaintiff claimed that FTN and KBW repurchased investments from investors and then sold them in order to create the appearance of short-term profits and secondary market liquidity. Plaintiff relied upon KBW's representations of secondary market liquidity in making its purchases.

In the renewed motions to dismiss, Defendants asserted that Plaintiff failed to state any claims upon which relief could be granted. Defendants responded to the new claims of civil conspiracy by asserting that Plaintiff failed to plead sufficient facts constituting tortious conduct or a relationship that would support a conspiracy claim. Defendants responded to the new claim of constructive fraud by asserting that Plaintiff failed to plead sufficient facts demonstrating that they owed Plaintiff a legal or equitable duty, that they misrepresented or concealed material facts, or that Plaintiff relied upon any alleged misrepresentations or omissions. Nonresident Defendants also renewed their objections to personal jurisdiction and objected to Plaintiff's new claim of conspiracy jurisdiction.

***6** Plaintiff filed briefs in opposition to the motions to dismiss, asserting that dismissal was inappropriate at this stage of the proceedings. Plaintiff attached affidavits in support of the opposition to the motions to dismiss for lack of personal jurisdiction. Following a hearing on the various motions before the trial court, the court stated,

> [P]laintiff has furnished some affidavits in response to the [motions to dismiss for lack of jurisdiction], but the [c]ourt is constrained to conclude that [ ] Plaintiff has not established such a prima facie case that it should be permitted at this point to inquire by discovery further about the personal jurisdiction defense, and so this [c]ourt most respectfully denies that implicit request which is in [P]laintiff's motion for a status conference and sustains those motions filed by defendants for either protective orders or to quash that issue.

The court ultimately held that it did not have personal jurisdiction over Nonresident Defendants. Applying Tennessee law, the court found that Plaintiff's claims were timebarred. In finding that the claims were time-barred, the trial court stated,

> [In 2006, Congress] passed comprehensive legislation [concerning rating agencies]; in 2007[,] there was considerable public notoriety about the role of rating agencies and whether or not they were laboring under conflicts of interest and engaged in other wrongdoing; [ ] the rating agencies in this case [re-rated or issued downgrades for Plaintiff's securities]; [in 2007,] the Wall Street Journal wrote at length about the very problems that are the basis of [this] lawsuit; and [in July 2008, Congress] released a report ... that called attention to all of these problems. And I just really cannot see how anybody that was in charge of investments at a banking institution could have not been aware of all of these problems by at least July of 2008.

The trial court ruled that Plaintiff filed suit "more than two years and indeed more than three years after [Plaintiff] knew or should have known these problems" and that "the pleadings in this case reveal[ed] that the common-law actions and the statutory action are barred by the two-year and three-year statute of limitations." The court also held that any statutory law claims relating to the 2003 PreTSL transactions were barred by TSA's five-year statute of repose. In the event of further appellate review, the court found that Plaintiff failed to plead its fraud claims with particularity and that Plaintiff failed to state a claim for negligent misrepresentation, constructive fraud, violations of the TSA, and unjust enrichment. The court further found that the non-fraud claims against Rating Agencies were preempted by the CRARA. The court declined to rule on the issue of loss causation.

Plaintiff appealed to this court. We affirmed the dismissal of the complaint against Nonresident Defendants but reversed the dismissal of the complaint against the remaining defendants, holding that consideration of matters outside the pleadings pertaining to the running of the statute of limitations converted the motions to dismiss into one for summary judgment, thereby requiring remand of the entire case for further discovery. Plaintiff filed an application for permission to appeal the dismissal for lack of personal jurisdiction, while the remaining defendants filed an application for permission to appeal the reversal of the dismissal. Morgan Keegan filed a separate application for permission to appeal. The Tennessee Supreme Court denied the application filed by Plaintiff

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but granted the applications filed by the remaining defendants and Morgan Keegan and remanded the case for "consideration of the trial court's alternative basis of dismissal of [the] complaint, i.e., the failure to state a cause of action or state a claim for which relief can be granted (other than on the basis of the running of the applicable statutes of limitations or repose)."

II. ISSUE

***7** Having been directed to consider a limited issue upon remand, we will simply restate the issue as phrased by the Tennessee Supreme Court:

> Whether the trial court erred in dismissing the complaint for "failure to state a cause of action or state a claim for which relief can be granted (other than on the basis of the running of the applicable statutes of limitations or repose)."[9]

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof." *Trau–Med of America, Inc. v. Allstate Ins. Co.,* 71 S.W.3d 691, 696 (Tenn.2002). In determining whether the trial court erred in granting the motion to dismiss, we "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* The complaint "should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of [the] claim that would warrant relief." *Id.* The trial court's grant of the motion to dismiss is subject to a de novo review with no presumption of correctness because we are reviewing the trial court's legal conclusion. *Blackburn v. Blackburn,* 270 S.W.3d 42, 47 (Tenn.2008); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993).

IV. DISCUSSION

The remaining defendants argue that dismissal was appropriate pursuant to Rule 12.02(6). They assert that Plaintiff failed to state its claims with particularity and merely resorted to a group pleading tactic without identifying a misrepresentation made by each defendant. They further assert that the facts as alleged were not capable of warranting relief.

Rule 8.01 of the Tennessee Rules of Civil Procedure provides,

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Tenn. R. Civ. P. 9.02. "A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact." *Kincaid v. SouthTrust Bank,* 221 S.W.3d 32, 41 (Tenn.Ct.App.2006). Nevertheless, "[e]ach averment of a pleading shall be simple, concise and direct." Tenn. R. Civ. P. 8.05(1). In keeping with that directive, "Tennessee follows a liberal notice pleading standard." *Webb v. Nashville Area Habitat for Humanity, Inc.,* 346 S.W.3d 422, 426 (Tenn.2011).

"Our state's notice pleading regime is firmly established and longstanding; this Court recognized well before the Tennessee Rules of Civil Procedure were adopted that '[t]he object and purpose of any pleading is to give notice of the nature of the wrongs and injuries complained of with reasonable certainty, and notice of the defenses that will be interposed, and to acquaint the court with the real issues to be tried.' " *Id.* (quoting *Hammett v. Vogue, Inc.,* 179 Tenn. 284, 165 S.W.2d 577, 579 (Tenn.1942)). "To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations." *Id.* at 427. "Moreover, courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Id.* (quoting *Riggs v. Burson,* 941 S.W.2d 44, 47–48 (Tenn.1997)). "When a complaint fails to comply with Rule 8 [or 9.02], it is subject to dismissal by grant of a motion to dismiss for failure to state a claim upon which relief can be granted, as provided by Tennessee Rule of Civil Procedure 12.02(6)." *Webb,* 346 S.W.3d at 425–26.

***8** Plaintiff raised claims of fraud, constructive fraud, negligent misrepresentation, civil conspiracy, unjust enrichment, and violations of the Tennessee Securities Act ("TSA"). We will address the sufficiency of each claim, in turn. We will also address BOA's claim that Plaintiff failed to adequately plead successor liability.

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Sufficiency of each claim

Fraud

Under Tennessee law, in order to prevail on a claim based on fraud, a plaintiff must show the following: (1) an intentional misrepresentation with regard to a material fact; (2) knowledge of the representation's falsity (i.e., it was made "knowingly" or "without belief in its truth," or "recklessly" without regard to its truth or falsity); (3) the plaintiff reasonably relied on the misrepresentation and suffered damage; and (4) the misrepresentation relates to an existing or past fact, or, if the claim is based on promissory fraud, the misrepresentation "must embody a promise of future action without the present intention to carry out the promise ." *Shahrdar v. Global Housing, Inc.,* 983 S.W.2d 230, 237 (Tenn.Ct.App.1998) (citing *Stacks v. Saunders,* 812 S.W.2d 587, 592 (Tenn.Ct.App.1990)).

While Plaintiff states its claims of fraud against each defendant individually, the allegations are undoubtedly similar and in some cases, a verbatim recitation of the claim against the preceding defendant. In pertinent part, Plaintiff alleged that each defendant made materially false and misleading representations regarding:

> the risk associated with the [product], the thoroughness of the underwriting and rating process, the adequacy of credit support/enhancement, whether the Rating Agencies had sufficiently reliable facts and sufficiently reliable models on which to assign their ratings, inadequate historical assumptions, conflicts of interest involving the Rating Agencies, and the soundness of investment in [the product] generally.

Plaintiff additionally alleged that FTN, FTB, KBW, and JP Morgan also made materially false and misleading representations regarding:

> an alleged "oversubscription" of the [product] among institutional investors[.]

Plaintiff continued that each defendant "intentionally made the false representations and concealed material facts" either orally and/or in written communications, namely the materials prepared and distributed with each product. Plaintiff also alleged that

> [Each defendant] made the false representations and concealments in concert with the other Defendants either knowing of their falsity or with recklessness as to whether the representations were false.
>
> With respect to the credit ratings, upon information and belief, [each defendant] and the Rating Agencies worked together to structure the tranches and assign them credit ratings.
>
> [Each defendant] obtained the ratings for the [product] from the Rating Agencies and then provided the knowingly misleading investment grade credit ratings to First Community.
>
> ***9** The ratings constituted a representation of fact that [each defendant] and the Rating Agencies had sufficiently reliable facts to provide those ratings.
>
> To the extent that [each defendant] may claim the ratings are opinions, the ratings were nonetheless fraudulent because [each defendant] did not genuinely and reasonably believe them and they were without basis in fact.
>
> [Each defendant] had the motive and opportunity to commit fraud, as pled with particularity above.
>
> [Each defendant] made the aforesaid materially misleading statements and omissions, with regard to both the credit ratings and the soundness of the products, with the intent that First Community rely on the statements and for the purpose of inducing First Community to buy [the product].
>
> First Community reasonably and justifiably relied on [the] materially misleading statements and omissions, made both verbally and in the offering documents and ratings, because they went to the core of First Community's investment decision regarding the [product].

The complaint goes on to allege that Plaintiff suffered damages as a result of the "fraudulent conduct, misrepresentations, and omissions" by the remaining defendants.

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Citing *Strategic Capital Resources, Inc. v. Dylan Tire Industries, LLC,* 102 S.W.3d 603, 611 (Tenn.Ct.App.2002), the remaining defendants claim that Plaintiff was required to identify "each alleged misrepresentation and [tie] it to a particular defendant, at a particular place, and at a particular time." In affirming the trial court's dismissal of the complaint for failure to plead fraud claims with particularity, the court in *Strategic* stated,

> The chancellor dismissed the fraud claim because of the failure to comply with the requirements of Rule 9.02, Tenn. R. Civ. P., that "the circumstances constituting fraud or mistake shall be stated with particularity." There is a companion rule set forth in Rule 8 .06 that all pleadings shall be construed so as to do substantial justice. *See Ezell v. Graves,* 807 S.W.2d 700 (Tenn.Ct.App.1990); *cf. Sullivant v. Americana Homes, Inc.,* 605 S.W.2d 246 (Tenn.Ct.App.1980). In *City State Bank v. Dean Witter Reynolds,* 948 S.W.2d 729 (Tenn.Ct.App.1996), the court found the complaint sufficient where it "specifically identifies the time and place of each alleged false representation, and identifies the manner in which each representation was deemed to have been fraudulent." 948 S.W.2d at 738.
>
> We think that the complaint does fail the particularity test. An inspection of the complaint shows that the allegations are only general and that no particular defendant is identified as the one making the false and misleading statements. *At a minimum the actors should be identified and the substance of each statement should be pled.* We think the fraud claims were properly dismissed.

102 S.W.3d at 611 (emphasis added). While the court referenced a decision in which the complaint was upheld because it identified the time and place of each representation, the court stopped short of issuing any new particularity requirements and merely held that the plaintiff failed to identify the actors and the substance of each statement as required. This standard is in keeping with the particularity requirement and cases construing the requirement. The Committee Comments to Tenn. R. Civ. P. 9.02 explain that:

> ***10** The [particularity] requirement ... is not intended to require lengthy recital of detail. Rather, the Rule means only that general allegations of fraud and mistake are insufficient; the pleader is required to particularize but by the 'short and plain' statement required by Rule 8.01.

This court has previously held that "[t]he particularity requirement means that any averments sounding in fraud (and the circumstances constituting that fraud) must relat[e] to or designat[e] one thing singled out among many." *Diggs v. Lasalle Nat'l Bank Ass'n,* 387 S.W.3d 559, 564 (Tenn.Ct.App.2012) (internal quotation and citation omitted). "[P]articularity in pleadings requires singularity—of or pertaining to a single or specific person, thing, group, class, occasion, etc., rather than to others or all." *Id.* (citing *PNC Multifamily Capital Inst. Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.,* 387 S.W.3d 525 (Tenn.Ct.App.2012)).

Here, the complaint contains a general accounting of each purchase and the role each defendant played in securing the purchases over the course of several years. The transactions at issue and the alleged misrepresentations were remarkably similar in nature. The similarity of each claim was not surprising given the companies involved and the economic climate at the time of the transactions. A review of the complaint reveals that Plaintiff identified the actors and the substance of each admittedly similar statement. With these considerations in mind, we hold that the complaint was sufficient to survive a motion to dismiss for failure to state its fraud-based claims with particularity pursuant to Rule 9.02. Likewise, a review of the remainder of the complaint reveals that the complaint was sufficient to survive a motion to dismiss for failure to state the remaining claims with particularity pursuant to Rule 8.01 and the corresponding notice pleading standard.

Citing *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services,* LLC, 700 F.3d 829, 842 (6th Cir.2012), the remaining defendants further assert that the facts, as alleged, were not capable of warranting relief because the alleged misstatements were opinions, not actionable misrepresentations. They are correct in asserting that the misrepresentation must relate to an existing or past fact and cannot be a mere statement of opinion, commonly referred to as "puffing" in order to make a sale. *See Harrison v. Avalon Props., LLC,* 246 S.W.3d 587, 601 (Tenn.Ct.App.2007) (citing *Ladd v. Honda Motor Co., Ltd.,* 939 S.W.2d 83, 97 (Tenn.Ct.App.1996)). However, such was not the case here when Plaintiff alleged that the remaining defendants worked with Rating Agencies to structure the tranches and that each defendant "did not genuinely and reasonably believe" the ratings, which were "without basis in fact." "In such a case, the misrepresentation is not the opinion, but is the speaker's assertion that he or she believes the opinion, which is a question of existing or pre-existing fact." *Ohio Police,* 700 F.3d at 842. Plaintiff alleged as much in the complaint. Accordingly, we conclude that the claim was sufficient to survive a motion to dismiss on this ground.

***11** Citing *Green v. Green,* 293 S.W.3d 493 (Tenn.2009), the remaining defendants assert that Plaintiff's claims of fraud must fail because the alleged misstatements and omissions were not material given the total mix of information available to Plaintiff, a sophisticated investor. In determining whether a particular representation or omission is material, Tennessee courts use an objective

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test. *Green,* 293 S.W.3d at 511. The test, which was accepted by our Supreme Court, provides

> A misstatement of omitted fact is material if there is a substantial likelihood that a reasonable purchaser or seller would consider it important in deciding whether or not to purchase or sell. It does not require proof of a substantial likelihood that disclosure of the misstatement or omitted fact would have caused the reasonable investor not to purchase or sell the security. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the misstatement or omitted fact would have assumed actual significance in the deliberations of the reasonable investor. Put another way, there must be a substantial likelihood that the disclosure of the misstatement or omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

Id. at 512. (citations omitted). In light of the fact-specific nature of a materiality finding, the United States Supreme Court expressed "wariness about applying bright-line rules" in such cases, causing courts to treat questions of materiality as factual issues best left to the jury. *Id.* at 516–17. In this case, at this stage of the proceedings, presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff will be unable to prove the materiality of the statements as alleged. *Trau–Med,* 71 S.W.3d at 696. Accordingly, we conclude that the claim was sufficient to survive a motion to dismiss on this ground.

The remaining defendants assert that Plaintiff could not establish justifiable reliance given the disclaimers contained in the offering materials for each transaction. Morgan Keegan specifically asserts that its offering circular provided a disclosure of the very issues Plaintiff claims were hidden in the transaction process. Plaintiff responds by claiming that "whether a disclaimer matched a particular risk and negated reliance thereupon is a question of fact for the fact finder, not something to be determined on a motion to dismiss." The disclaimers and disclosures at issue were not included in a contract signed by Plaintiff evidencing an intent to hold the remaining defendants harmless for any statements that conflicted with the information contained in the offering materials. We agree that the information provided by the remaining defendants likely differed from that contained in the offering materials that spanned in excess of 100 pages. However, presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief." *Id.* Accordingly, we conclude that the claim was sufficient to survive a motion to dismiss on this ground.

***12** Lastly, the remaining defendants, KBW and FTN specifically, assert that Plaintiff failed to sufficiently establish that its damages were a result of the alleged fraud instead of a simple decline in the market. KBW notes that Plaintiff enjoyed a substantial income stream from its investment for several years until the market unexpectedly declined. In the complaint, Plaintiff alleged that its losses were not caused by a simple market decline but that when the truth regarding the soundness of the investments and the inaccuracy of the rating process was revealed, Rating Agencies were forced to revise the inflated ratings, which, in turn, caused the decline in the market and Plaintiff's corresponding losses. Accordingly, Plaintiff alleged a causal connection between the challenged conduct and its injuries. Presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief." *Id.* With all of the above considerations in mind and without passing judgment on whether Plaintiff will be successful with these claims, we hold that the claims, as alleged, were sufficient to survive a motion to dismiss and that the trial court erred in dismissing these claims against the remaining defendants.

Constructive fraud

"Constructive fraud is essentially fraud without the element of intent." *Kincaid,* 221 S.W.3d at 39. Indeed,

> Constructive fraud is a breach of a legal or equitable duty which is deemed fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Cornwell v. Hodge,* C.A. No. 44, 1986 WL 5890, at *3 (Tenn.Ct.App. May 23, 1986) (citing *Bank of Blount Cnty. v. Dunn,* 10 Tenn.App. 95 (1929)). Constructive frauds are acts, statements or omissions which operate as virtual frauds on individuals. *Cornwell,* 1986 WL 5890, at *3 (citing *Maxwell v. Land Developers, Inc.,* 485 S.W.2d 869 (Tenn.Ct.App.1972)). They concern a breach of a legal or equitable duty, with or without fraudulent intent, and entail as an attribute of fraud, conduct which reasonably can be expected to influence the conduct of others. *Cornwell,* 1986 WL 5890, at *3 (citing *Parks v. Alexander,* 608 S.W.2d 881 (Tenn.Ct.App.1980)).

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Id.

While Plaintiff states its claims of constructive fraud against each defendant individually, the allegations are undoubtedly similar and in some cases, a verbatim recitation of the claim against the preceding defendant. In pertinent part, Plaintiff repeated its allegations of fraud with an added element, namely that each defendant "owed a legal and/or equitable duty to First Community to provide accurate and complete information [either orally and/or in written communications], including the [materials] prepared for the [applicable] product and distributed to First Community." Throughout the complaint, Plaintiff also alleged that it "placed trust in JP Morgan and Morgan Keegan based upon [their] reputations"; that it "believed it could rely upon representations made by FTN to a much greater extent than in a normal arm's length deal" because of its longstanding relationship that spanned decades; and that each of the remaining defendants had participated in the creation of the products at issue.

***13** The remaining defendants assert that this claim must fail because they did not owe Plaintiff, a sophisticated investor, a legal or equitable duty. A legal duty of disclosure arises

(1) where there is a previous confidential relation between the parties;

(2) where it appears one or each of the parties expressly reposes a trust or confidence in the other;

(3) or where the contract or transaction itself is intrinsically fiduciary and calls for good faith, as in the case of insurance contracts.

Dozier v. Hawthorne Dev. Co., 37 Tenn.App. 279, 262 S.W.2d 705, 711 (Tenn.Ct.App.1953); *see also Justice v. Anderson Cnty.,* 955 S.W.2d 613, 616–17 (Tenn.Ct.App.1997) (listing the situations in which a legal duty to disclose may arise). While Plaintiff may have enjoyed a longstanding relationship with several of the remaining defendants, the record is clear that the transactions at issue were arm's length deals that were not intrinsically fiduciary in nature and that the parties did not enjoy a fiduciary relationship. Plaintiff concedes as much but asserts that it expressly reposed trust and confidence in the remaining defendants given their reputations and superior skill, knowledge, training, and expertise. Presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief." *Trau–Med,* 71 S.W.3d at 696. Without passing judgment on whether Plaintiff will be successful with these claims, we hold that the claims, as alleged, were sufficient to survive a motion to dismiss. Accordingly, we hold that the trial court erred in dismissing these claims against the remaining defendants.

Negligent misrepresentation

Persons asserting a negligent misrepresentation claim must establish:

> One, who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977); *Robinson v. Omer,* 952 S.W.2d 423, 427 (Tenn.1997).

While Plaintiff states its claims of negligent misrepresentation against each defendant individually, the allegations are undoubtedly similar and in some cases, a verbatim recitation of the claim against the preceding defendant. In pertinent part, Plaintiff alleged that each defendant, while acting

> in the course of its business, profession and employment, and in transactions in which it has a pecuniary interest .... supplied materially false, faulty and misleading information to First Community intended to guide First Community in its business transactions related to the purchase of the [product], and specifically to induce First Community to purchase the [product].

***14** Plaintiff further alleged, in pertinent part, that each defendant "failed to exercise reasonable care in obtaining and communicating the information to First Community concerning the credit quality of the [product], among other things." Plaintiff reaffirmed its earlier allegation that it had reasonably and justifiably relied upon the information provided by each defendant in the offering materials and that it suffered damages as a result of the "materially false, faulty and misleading representations and omissions." Plaintiff claimed that the misrepresentations, as previously alleged, related to the

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> the risk associated with the [product], the thoroughness of the underwriting and rating processes, the adequacy of credit support/enhancement, whether the Rating Agencies had sufficiently reliable facts and sufficiently reliable models on which to assign their ratings, inadequate historical assumptions, conflicts of interest involving the Rating Agencies, and the soundness of investment in [the product] generally.

Plaintiff additionally alleged that FTN, FTB, KBW, and JP Morgan also made materially false and misleading representations regarding:

> an alleged "oversubscription" of the [product] among institutional investors[.]

The remaining defendants assert that this claim must fail because they did not owe Plaintiff, a sophisticated investor, a duty to exercise reasonable care in communicating the information relied upon by Plaintiff to purchase the products. Having already concluded that the facts, as alleged, *may* give rise to a legal and/or equitable duty to disclose relative to Plaintiff's constructive fraud claims, we conclude that the same holds true with regard to Plaintiff's negligent misrepresentation claims and the corresponding duty to exercise reasonable care in offering information intended to guide a plaintiff in his or her business transactions. Without passing judgment on whether Plaintiff will be successful with these claims, we hold that the claims, as alleged, were sufficient to survive a motion to dismiss. Accordingly, we hold that the trial court erred in dismissing these claims against the remaining defendants.

Civil conspiracy

"An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau–Med,* 71 S.W.3d at 703. "A claim for civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy." *Watson's Carpet & Floor Coverings, Inc. v. McCormick,* 247 S.W.3d 169, 180 (Tenn.Ct.App.2007). Conspiracy, standing alone, is not actionable where the underlying tort is not actionable. *Id.* at 179–80.

While Plaintiff states its claims of civil conspiracy against the specific group of defendants involved in the sale of the applicable product, the allegations are undoubtedly similar and in some cases, a verbatim recitation of the claim against the preceding group of defendants. Specifically, Plaintiff alleged that FTN and KBW, along with others that were dismissed on jurisdictional grounds, marketed the PreTSLs in an unlawful manner; that JP Morgan and Morgan Keegan, along with others that were dismissed on jurisdictional grounds, marketed Trapeza in an unlawful manner; that Bear Stearns and SunTrust, along with others that were dismissed on jurisdictional grounds, marketed Soloso in an unlawful manner; and that Merrill Lynch, along with others that were dismissed on jurisdictional grounds, marketed RAST in an unlawful manner. In pertinent part, Plaintiff alleged that each group "agreed to act in concert to *fraudulently market* the [product]." (Emphasis added). In furtherance of that plan, the specified group

> ***15** omitted numerous material facts in connection with the issuance, rating, marketing and sale of the [product], which if disclosed to First Community and others in the market would have made the [product] unable to be sold to a large number of qualified institutional buyers, such as First Community.

Plaintiff alleged that it foreseeably relied upon the misrepresentations and material omissions because it "would not and could not have purchased [the product] if [the product] had not been represented to be investment grade, and as possessing secondary market liquidity." Plaintiff claimed that each group made the "false representations and omissions either knowing of their falsity or with recklessness as to whether the representations were false" and that it suffered damages as a result of the "fraudulent conduct, misrepresentations, and omissions."

Having concluded that Plaintiff's claim of fraud may proceed, we likewise conclude that the facts, as alleged, may support a claim for civil conspiracy to commit fraud given the nature in which the products were structured, marketed, and sold with the involvement of several companies. Accordingly, we hold that the trial court erred in dismissing these claims against the remaining defendants.

Unjust enrichment

"The doctrine of unjust enrichment is founded upon the principle that someone who receives a 'benefit desired by him, under circumstances rendering it inequitable to retain it without making compensation, must do so.' " *CPB Mgmt., Inc. v. Everly,* 939 S.W.2d 78, 80 (Tenn.Ct.App.1996) (quoting *Lawler v. Zapletal,* 679 S.W.2d 950, 955 (Tenn.Ct.App.1984)). The elements of an unjust enrichment claim are:

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(1) a benefit conferred upon [the defendant] by [the plaintiff];

(2) appreciation by [the defendant] of such benefit; and

(3) acceptance of such benefit under circumstances that it would be inequitable for [the defendant] to retain the benefit without payment of the value thereof.

Bennett v. Visa U.S.A. Inc., 198 S.W.3d 747, 755 (Tenn.Ct.App.2006) (internal quotations and citations omitted).

While Plaintiff states its claims of unjust enrichment against each defendant individually, the allegations are undoubtedly similar and in some cases, a verbatim recitation of the claim against the preceding defendant. In pertinent part, Plaintiff alleged that it conferred a financial benefit upon each defendant when it invested in each product, that each defendant appreciated such benefit, and that each defendant accepted such benefit "under such circumstances that it would be inequitable and unjust for it to retain the benefit without payment of value thereof" when it "sustained massive losses" on its applicable investments in each product. Plaintiff alleged that it submitted at least $71,839,130.52 in payments to FTN and KBW, that it submitted at least $30,000,000 in payments to JP Morgan, that it submitted at least $20,000,000 in payments to Morgan Keegan, that it submitted at least $8,400,000 in payments to SunTrust, and that it submitted at least $25,421,093.75 in payments to Merrill Lynch.

***16** The remaining defendants assert that the trial court did not err in dismissing the claims of unjust enrichment. Morgan Keegan individually asserts that the trial court did not err in dismissing the unjust enrichment claim against it because Plaintiff never conferred a direct benefit upon it in the form of payments. Morgan Keegan asserts that even if it received a small benefit from Plaintiff's purchase of Trapeza, Plaintiff must first exhaust its remedies against those that received a direct benefit from the purchase and the eventual resale of the product, namely JP Morgan, the seller, or FTN, the buyer. Plaintiff responds that the trial court erred in dismissing its alternative claim for relief at this stage of the proceeding when the unjust enrichment claims were adequately pled. We agree with Plaintiff. While it may be difficult to establish the exact monetary benefit conferred upon each defendant given the number of companies involved in each transaction and the relative roles played by each company, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief." *Trau–Med,* 71 S.W.3d at 696. Without passing judgment on whether Plaintiff will be successful with these unjust enrichment claims, we hold that the claims, as alleged, were sufficient to survive a motion to dismiss. Accordingly, we hold that the trial court erred in dismissing these claims against the remaining defendants.

Tennessee Securities Act

The TSA provides, in pertinent part, that

(a) It is unlawful for any person, *in connection* with the offer, sale or purchase of any security in this state, *directly or indirectly,* to:

(1) Employ any device, scheme, or artifice to defraud;

(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Tenn.Code Ann. § 48–1–121(a) (emphasis added).

While Plaintiff specifically asserts that each defendant violated the TSA, the allegations are undoubtedly similar and in some cases, a verbatim recitation of the claim against the preceding defendant. In pertinent part, Plaintiff alleged that each defendant made materially false and misleading representations and omissions regarding:

> the risk associated with the [product], the thoroughness of the underwriting and rating processes, the adequacy of credit support/enhancement, whether the Rating Agencies had sufficiently reliable facts and sufficiently reliable models on which to assign their ratings, inadequate historical assumptions, conflicts of interest involving the Rating Agencies, and the soundness of investment in [the product] generally.

Plaintiff additionally alleged that FTN, FTB, KBW, JP Morgan, and Morgan Keegan also made materially false and misleading representations regarding:

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> ***17** an alleged "oversubscription" of the [product] among institutional investors[.]

Plaintiff continued that each defendant "intentionally made the false representations and omissions" either orally and/or in written communications, namely the materials prepared and distributed with each product. Plaintiff also alleged that

> [Each defendant] made the false representations and omissions either knowing of their falsity or with recklessness as to whether the representations were false.
>
> Upon information and belief, with respect to the credit ratings, [each defendant] and the Rating Agencies worked together to structure the tranches and assign them credit ratings.
>
> [Each defendant] obtained the ratings for the [product] from the Rating Agencies and then provided the misleading investment grade credit ratings to First Community.
>
> The ratings constituted a representation of fact that [each defendant] had provided sufficiently reliable facts to provide those ratings.
>
> To the extent that [each defendant] may claim the ratings are opinions, the ratings were nonetheless fraudulent because [each defendant] did not genuinely and reasonably believe them and they were without actual basis in fact.
>
> [Each defendant] had the motive and opportunity to commit fraud, as pled with particularity above.

The complaint goes on to allege that Plaintiff suffered damages as a result of the "false and fraudulent conduct, misrepresentations, and omissions" and that it was "entitled to recover from [each defendant] the difference between the price at which [it] purchased the securities and the market value at the time of sale, interest at the legal rate and reasonable attorneys' fees" pursuant to Tennessee Code Annotated section 48–2–122.

Remaining defendants assert that the trial court did not err in dismissing the TSA claims for the same reasons that the common law tort claims were properly dismissed for failure to state a claim, namely Plaintiff failed to plead an actionable misrepresentation, Plaintiff failed to allege that the remaining defendants acted willfully, and Plaintiff failed to establish that the alleged misrepresentations and omissions were material. Having already concluded that the trial court erred in dismissing the common law tort claims at this stage of the proceedings, we hold that these arguments are without merit.

KBW and Morgan Keegan assert that the TSA claim must fail because they never made any representations as a seller of the product. While KBW and Morgan Keegan may not have officially served as the seller of the product, they were intricately involved in the creation of the product and the issuing entities. The statute allows for recovery from those who are "directly or indirectly" involved with the sale. Tenn.Code Ann. § 48–1–121(a). Presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief" from KBW and Morgan Keegan given their involvement with the transactions at issue. *Trau–Med,* 71 S.W.3d at 696.

***18** JP Morgan, SunTrust, and Morgan Keegan further assert that any TSA claim related to the Trapeza and Soloso transactions must fail because Plaintiff did not allege that

> any activity related to [its] purchases of the Trapeza and Soloso notes ... occurred in Tennessee, that any selling or marketing activities occurred in Tennessee, that [Plaintiff] sent funds to Tennessee or even that any documents related to the purchase of the notes were executed in Tennessee.

According to the complaint, Plaintiff alleged that Soloso was marketed by Anna White from Memphis, Tennessee and that SunTrust, a Tennessee corporation, was intricately involved in the marketing and sale of Soloso. Relative to the Trapeza transactions, Plaintiff also alleged that the misrepresentations and omissions were made in connection with the sale of a security in Tennessee and that Morgan Keegan, a Tennessee corporation, was intricately involved in the marketing and sale of Trapeza. Presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief." *Trau–Med,* 71 S.W.3d at 696. Without passing judgment on whether Plaintiff will be successful with these claims, we hold that the claims, as alleged, were sufficient to survive a motion to dismiss. Accordingly, we hold that the trial court erred in dismissing these claims against the remaining defendants.

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Successor liability

BOA individually alleged that Plaintiff failed to state a claim upon which relief could be granted because Plaintiff treated it as if it were the same entity as Merrill Lynch without pleading facts to support the application of successor liability. In the complaint, Plaintiff alleged that BOA purchased Merrill Lynch "in a de facto merger" and that BOA adopted the marketing name of Bank of America Merrill Lynch. Plaintiff continued,

> The "Bank of America Merrill Lynch" website identifies "Bank of America Merrill Lynch" as the "marketing name" for certain Bank of America business, and indicates that certain services are performed by "investment banking affiliates of Bank of America Corporation," including Merrill Lynch.

In Tennessee, a successor may be liable for the debts of its predecessor when there is an

> express or implied undertaking of the liabilities in the form of (1) an express or implied assumption of such debts; (2) the transaction amounting to a consolidation or merger of the seller and purchaser; (3) the purchaser being a mere continuation of the seller[;] or (4) a fraudulent transaction.

Gas Plus of Anderson Cnty., Inc. v. Arowood, No. 03A01–9311–CH–00406, 1994 WL 465797, at *3 (Tenn.Ct.App. Aug.30, 1994) (citations omitted); *see also Hopewell Baptist Church v. Se. Window Mfg. Co., LLC,* No. E2000–02699–COA–R3–CV, 2001 WL 708850, at *4 (Tenn.Ct.App. June 25, 2001) (applying the traditional rule of successor liability discussed in Arowood). Presuming all factual allegations to be true and giving Plaintiff the benefit of all reasonable inferences as we are constrained to do, it does not yet appear that Plaintiff "can prove no set of facts in support of [the] claim that would warrant relief." *Trau–Med,* 71 S.W.3d at 696. With all of the above considerations in mind and without passing judgment on whether Plaintiff will be successful on the issue of successor liability, we hold that the complaint was sufficient to survive a motion to dismiss on this ground.

V. CONCLUSION

***19** The judgment of the trial court is reversed as to the court's ruling that Plaintiff failed to state a claim against First Tennessee Bank, N.A. doing business as FTN Capital Markets; FTN Financial Securities Corporation; Keefe, Bruyette & Woods, Inc.; SunTrust Robinson Humphrey, Inc. formally known as SunTrust Capital Markets, Inc.; Morgan Keegan & Company, Inc.; J.P. Morgan Securities, LLC, individually and as successor in interest to Bear Stearns & Company, Inc.; and Bank of America Corporation as successor in interest to Merrill Lynch, Pierce, Fenner & Smith, Inc.

The case is remanded for further proceedings consistent with this opinion. Costs of the appeal are taxed equally to the appellees, First Tennessee Bank, N.A. doing business as FTN Capital Markets; FTN Financial Securities Corporation; Keefe, Bruyette & Woods, Inc.; SunTrust Robinson Humphrey, Inc. formally known as SunTrust Capital Markets, Inc.; Morgan Keegan & Company, Inc.; J.P. Morgan Securities, LLC, individually and as successor in interest to Bear Stearns & Company, Inc.; and Bank of America Corporation as successor in interest to Merrill Lynch, Pierce, Fenner & Smith, Inc.

Footnotes

1

Judge on the Court of Criminal Appeals sitting by special designation.

2

Plaintiff is a wholly owned subsidiary of First Community Bancshares, Inc.

3

Formally known as J.P. Morgan Securities, Inc.

4

OneWest Bank, F.S.B. as successor in interest to Indy has since been removed as a party.

5

S & P was not registered as a nationally recognized statistical rating organization until September 2007.

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Product	Purchase Price	Moody's	Fitch	S & P
PreTSL X	$10,000,000	A2	A	No rating
PreTSL XII	$10,000,000	A2	A	No rating
PreTSL XII	$10,417,695.61	A2	A	No rating
PreTSL XIV	$9,335,790	A2	A	No rating
PreTSL XVI	$4,119,326.67	A2	A	No rating
PreTSL XXIII	$8,180,712.21	A3	A	No rating
PreTSL XXII	$12,785,606.03	A3	A-	No rating
PreTSL XXVI	$7,000,000	A3	A-	No rating
Trapeza	$20,000,000	No rating	A-	No rating
Soloso	$18,400,000	A2	A-	No rating
RAST	$25,000,000	Aaa	No rating	AAA

[6] BOA purchased Merrill Lynch in 2008.

[7] JP Morgan purchased Bear Stearns in 2008.

[8] Originally, Plaintiff filed claims against S & P for each transaction. All but one of the claims were eventually dismissed in recognition of the fact that S & P only rated RAST.

[9] Plaintiff's argument that this court need only reaffirm its prior ruling with slightly more specificity is without merit given our Supreme Court's instruction to address this limited issue upon remand.

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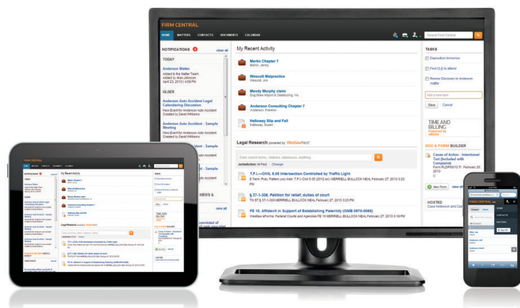

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