IKB Intl. S.A. in Liquidation v Goldman Sachs Group, Inc.
2015 NY Slip Op 31110(U)
June 25, 2015
Supreme Court, New York County
Docket Number: 653101/2012
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 3

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IKB INTERNATIONAL S.A. IN LIQUIDATION and IKB DEUTSCHE INDUSTRIEBANK AG,

Plaintiffs,

- against -

THE GOLDMAN SACHS GROUP, INC.; GOLDMAN SACHS REAL ESTATE FUNDING CORP.; GS MORTGAGE SECURITIES CORP.; GOLDMAN SACHS MORTGAGE COMPANY; GOLDMAN, SACHS & CO., and GOLDMAN SACHS INTERNATIONAL,

Defendants.

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Index No.: 653101/2012
Mot. Seq. No.: 001
Motion Date: 1/8/2015

BRANSTEN, J.:

In this action, plaintiffs IKB International S.A. in Liquidation ("IKB SA") and IKB Deutsche Industriebank AG, ("IKB AG," collectively "IKB") assert claims for common-law fraud, fraudulent concealment, aiding and abetting fraud, and negligent misrepresentation against defendants The Goldman Sachs Group, Inc. ("GS Group"), GS Mortgage Securities Corp. ("GS Mortgage Securities"), Goldman Sachs Real Estate Funding Corp. ("GS Real Estate Funding"), Goldman Sachs Mortgage Company ("GS Mortgage Co."), and Goldman, Sachs & Co. ("GS & Co.") (collectively "Goldman").[1] Goldman now seeks dismissal of the complaint, pursuant to CPLR 3211(a)(1), (a)(5), and

[1] The cause of action for aiding and abetting fraud is asserted against defendants Goldman, Sachs & Co., The Goldman Sachs Group, Inc. and Goldman Sachs Real Estate Funding Corp. The remaining causes of action are asserted against all defendants.

(a)(7). In support of their motion, defendants contend that IKB's claims are time-barred by the German statute of limitations and fail to assert any cause of action. Defendants also argue that IKB SA does not have standing to sue, since it assigned all its causes of action to IKB NA. For the following reasons, defendants' motion is granted in part and denied in part.

I. BACKGROUND

This action concerns approximately $73,203,000 in residential mortgage-backed securities ("RMBS") certificates, issued by defendants in eight securitizations.[2] In 2006, IKB SA purchased seven of those certificates directly from defendants, as well as one from a third party (the M4 tranche of GSAMP 06-HE1). On November 20, 2008, IKB SA sold seven of the certificates to IKB AG, and sold the certificate to the M5 tranche of ACCR 2005-4 to a third party.[3]

On December 4, 2008, IKB AG sold each of the certificates to a third party, Rio Debt Holdings Limited ("Rio"), and allege that IKB SA and IKB AG concurrently

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[2] Defendant Defendant GS Mortgage Securities was the depositor for six of the securitizations. Defendant Goldman Sachs Mortgage Company the sponsor of three of the securitizations, the parent company of defendant GS Mortgage Securities, and an affiliate of defendant GS & Co. through their common parent, defendant GS Group. Defendant GS & Co. was the sole or lead underwriter for each securitization, and is a wholly owned subsidiary of The Goldman Sachs Group and is its principal U.S. broker-dealer.

[3] Plaintiffs allege that they retained the litigation rights to ACCR 2005-4 (M5).

assigned all legal claims arising from the certificates to Rio. Subsequently, on May 9, 2012, Rio assigned all such claims back to IKB AG.

In their complaint, Plaintiffs allege that IKB SA was fraudulently induced to purchasing the RMBS by defendants' material false statements and omissions and active concealment of material information. IKB alleges that defendants misrepresented the following: the loans' compliance with the stated underwriting guidelines; the loan to value (LTV) ratios and the combined loan-to-value ratios (CLTV) of the mortgaged properties; the occupancy rates of the mortgaged properties; and, that the loans had been validly transferred to the issuing trusts. In addition, plaintiffs contend that defendants made misrepresentations to rating agencies that resulted in the agencies' granting of artificially high ratings to the RMBS. Plaintiffs assert that, in reliance on defendants' misrepresentations, they were damaged by paying far more for the RMBS than they were worth.

II. DISCUSSION

Defendants now seek to dismiss the complaint in its entirety on standing and statute of limitations grounds. Defendants also contend that the complaint fails to state a claim. These arguments will be addressed below.

A. *Standing*

As a preliminary matter, the Court declines to dismiss IKB SA from the action for lack of standing. While defendants are correct that the complaint is vague with regard to the right of IKB SA to assert claims as the seller of ACCR 2005-4 (M5), they have not provided any documentary evidence to indicate that IKB SA does not have standing to pursue claims. It is premature to determine if IKB SA is a proper party before conducting any discovery.

B. *Applicable Statute of Limitations*

"When a nonresident sues on a cause of action accruing outside New York, CPLR 202 [New York's Borrowing Statute] requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999). As explained by the Court of Appeals, "[t]his prevents nonresidents from shopping in New York for a favorable Statute of Limitations." *Id.*

Here, Defendants argue that plaintiffs' claims must be dismissed because they accrued in Germany and are untimely under the three-year German statute of limitations for fraud. *See* Affidavit of Uwe Schneider ¶¶ 7-8 (describing applicable German statutes of limitation). Plaintiffs oppose, arguing that the claims are timely because IKB SA is a

resident of Luxembourg, and thus, the claims accrued in Luxembourg.[4] As a result, plaintiffs contend that their claims are subject to New York's statute of limitations for fraud – the greater of six years after the claim accrued, or two years after the claim could have diligently been discovered – since this limitations period is shorter than the at least 10-year period under Luxembourg law. *See* CPLR 213(8) (New York statute of limitations for fraud); Affidavit of Guy Arendt in Support of Plaintiffs' Opposition ¶¶ 10-11 (describing applicable Luxembourgian statutes of limitation).

For the purposes of CPLR 202, "[a] cause of action for fraud accrues where the loss was sustained. Generally, the loss is sustained where the investors resided." *Loreley Fin. [Jersey] No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 A.D.3d 463, 465 (1st Dep't 2014) (internal citations and quotation marks omitted). As a resident of Luxembourg, IKB SA's claims accrued in Luxembourg under this general rule.

Defendants argue that the general rule does not apply to the instant action because IKB SA is a subsidiary of IKB AG, a German corporation, and the economic impact therefore was sustained at its "financial base" in Germany. In support of this argument, defendants note that IKB SA's financial statements were included in IKB AG's 2007/2008 and 2008/2009 annual reports, and that IKB AG identified itself as financially supporting IKB SA in a series of other documents.

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[4] Plaintiff IKB AG is a commercial bank incorporated in Germany, while Plaintiff IKB SA is a commercial bank incorporated in Luxembourg.

In two nearly identical actions commenced by IKB before this court, *IKB International S.A. in Liquidation v. Morgan Stanley*, 45 Misc.3d 1212[A] (Sup. Ct. N.Y. Cnty. Oct. 28, 2014) and *IKB International S.A. v. Credit Suisse Sec. (USA) LLC*, 2014 NY Slip Op. 31066 [U] (Sup. Ct. N.Y. Cnty. March 3, 2014), defendants unsuccessfully presented the same arguments offered by Goldman here. As in this action, the defendants in those two actions submitted only *Baena v. Woori Bank*, 2006 WL 2935752 (S.D.N.Y. Oct. 11, 2006) in support of the contention that the impact of the economic loss was felt by IKB in Germany. Consistent with Plaintiffs' position here, the *Baena* court recognized that a Belgian parent corporation's place of incorporation, which was also its principal place of business, was the location of the economic injury suffered and therefore where the claims at issue accrued for statute of limitations purposes. *Baena*, 2006 WL 2935752, at *6-7.

Here, the certificates at issue were purchased by IKB SA, a Luxembourg resident, and to the extent that claims are asserted by IKB AG, the German plaintiff, it is only because IKB AG received the claims by assignment. This assignment does not demonstrate that the "economic loss" was suffered in Germany. Morever, defendants have not proffered any conclusive documentary evidence to establish that the injury was incurred in Germany.

In the absence of documentary evidence, defendants have failed to demonstrate that the losses were suffered in Germany; therefore, the German statute of limitations is

inapplicable. The claims accrued in Luxembourg, rendering the New York statute of limitations applicable, which Defendants nowhere assert bars these claims.

B. *Sufficiency of the Claims*

Defendants next contend that plaintiffs' complaint must be dismissed for failure to state a claim. On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

1. The Fraud Claims

"To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable

reliance and resulting injury."[5] *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 135 (1st Dep't 2014). If any of the elements are not adequately stated, the fraud claims must be dismissed.

i. Reasonable Reliance

Defendants first contend that plaintiffs' pleading of justifiable reliance is lacking because: (1) plaintiffs failed to engage in the due diligence required of a sophisticated investor prior to purchasing securities and (2) there were multiple disclosures and disclaimers within the offering documents. These contentions are without merit.

As a preliminary matter, defendants' assertion that IKB failed "to allege that it conducted even a minimal pre-purchase investigation," *see* Defs.' Moving Br. at 13, is belied by the complaint. IKB alleges that it hired Blackrock and Standish Mellon as investment managers to analyze the RMBS. (Compl. ¶¶ 233- 238.)

Moreover, as a general rule, "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss." *ACA*

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[5] In their briefing, defendants conflate the elements of fraud with those for fraudulent concealment. *See* Defs.' Moving Br. at 7. However, the claims are not identical. "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements [for fraud], an allegation that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003). Accordingly, having simply briefed dismissal of the fraud claim, defendants have proffered no argument to dismiss the claims for fraudulent concealment.

Fin. Guar. Corp. v. Goldman, Sachs & Co., -- NY3d --, 2015 NY Slip Op 03876 (May 7, 2015).

In their complaint, plaintiffs allege that they did not have access to the loan files in order to conduct a review of the underlying mortgages. (Compl. ¶ 41). Defendants do not contradict this allegation, nor do they claim that they would have provided the loan files for review. Instead, defendants merely state that IKB "could have and should have inquired" about the loans. *See* Defs.' Moving Br. at 15.

Defendants cite to *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185 (1st Dep't 2012) for the proposition that "as a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations *if that plaintiff failed to make use of the means of verification that were available to it*." *Id.* at 194-95 (internal quotation marks and citation omitted) (emphasis added). However, *HSH Nordbank* is inapplicable here. In contrast to that case, in which the subject matter of the alleged misrepresentations was publicly available, here it is alleged that the loan files were within the knowledge of defendants and not discoverable by plaintiffs.

Thus, accepting the allegations of the complaint as true and giving plaintiffs the benefit of every favorable inference, the Court concludes that plaintiffs have "sufficiently alleged that [defendants] possessed peculiar knowledge of the facts underlying the fraud, and the circumstances present would preclude any investigation by [plaintiffs] conducted

with due diligence." *China Dev. Indus. Bank v. Morgan Stanley & Co. Inc.*, 86 A.D.3d 435, 436 (1st Dep't 2011).

Defendants' argument that the multitude of disclosures and disclaimers in the offering documents prevents IKB from alleging justifiable reliance is likewise unavailing. "The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge." *Basis Yield Alpha Fund (Master)*, 115 A.D.3d at 137 (1st Dep't 2014). In the *Basis Yield* case, the First Department determined that plaintiff's allegations regarding Goldman Sach's knowledge of the particular securities from non-public sources – including "its role as an underwriter and because of what the mortgage investigations conducted on its behalf (Clayton report) revealed," coupled with internal Goldman-authored documents expressing derogatory remarks about the CDOs – were "more than adequate to allege the peculiar knowledge exception to the disclaimer bar." *Id.* at 139. Though the securities involved in the *Basis Yield* were CDOs, the allegations there were nearly identical to the instant allegations. In line with *Basis Yield*, the complaint here alleges that defendants alone had knowledge from non-public sources, including but not limited to due diligence reports prepared by third-party vendors for Goldman, which vitiated the effect of the disclaimers. *See* Compl. ¶ 103.

In any event, Goldman's disclaimers were not sufficiently specific enough to invalidate a claim of reliance. The disclaimers here included statements that only the offering documents were to be relied on, that it was IKB's responsibility as a sophisticated investor to analyze the risks for itself, that the underwriting standards were less stringent than those used by Freddie Mac and Fannie Mae, that the home purchasers had impaired credit, and that the loans were originated with limited or no documentation. Such disclaimers do not address the particular fraud alleged here, particularly the allegation that Goldman knowingly presented investors with false information about the loans in the securitizations at issue. *See, e.g.,* Compl. ¶¶ 94-104; *Basis Yield*, 115 A.D.3d at 138 ("These disclaimers and disclosures, in our view, fall well short of tracking the particular misrepresentations and omissions alleged by plaintiff.").

Accordingly, defendants' attacks on plaintiffs' justifiable reliance pleading fall wide of the mark, and defendants' motion to dismiss on these grounds is denied.

ii. **Scienter**

Defendants next argue that plaintiffs' allegations fail to plead scienter with the particularity required by CPLR 3016(b).

"Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are

sufficient to permit a reasonable inference of the alleged conduct." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). "The language of CPLR 3016(b) merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice." *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 97 (1st Dep't 2003).

Defendants argue that plaintiffs make only generalized allegations concerning Goldman's due diligence and its close relationships with originators and ask the Court to assume that Goldman must have seen and concealed problems with the loans. According to Defendants, these are "conclusory and speculative hindsight allegations" that are insufficient under New York law. *See* Defs.' Moving Br. at 16. However, the First Department has held that substantially similar allegations to those at issue in this action were sufficiently particular to plead the requisite elements of fraud, including scienter. "While the complaint fails to specify dates as to many of the relevant events, and fails to mention the Citigroup employees who were involved in these activities that comprised the fraudulent scheme, under the circumstances here, where the facts were generally 'peculiarly within the knowledge of the party against whom the fraud is being asserted,' the misconduct complained of is set forth in sufficient detail to apprise Citigroup of the alleged wrongs." *Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Global,* 119 AD3d 136, 142-43 (1st Dep't 2014).

Plaintiffs' complaint clearly provides notice to defendants that, as a result of the due diligence performed by Clayton on defendants' behalf, defendants purportedly were aware of the nonconforming loans. (Compl. ¶ 9.) The complaint also clearly informs

defendants that due to their knowledge of the due diligence results from a multitude of RMBS issuances, they allegedly knew that the originators' loans did not comport with the representations of the offering documents.

Additionally, Commercial Division courts have repeatedly held that similar allegations of scienter in RMBS fraud actions, such as those here, are adequately pleaded. *See Stichting Pensioenfonds ABP v Credit Suisse Group AG*, 38 Misc 3d 1214[A], at *11 (Sup. Ct. N.Y. Cnty. Nov. 30, 2012); *Allstate Ins. Co. v Credit Suisse Sec. (USA) LLC*, 42 Misc.3d 1220(A), at *14 (Sup. Ct. N.Y. Cnty. Jan. 24, 2014); *HSH Nordbank AG v Barclays Bank PLC*, 42 Misc 3d 1231[A], *18-*20 (Sup. Ct. N.Y. Cnty. Mar. 3, 2014). The Court does not deviate from these holdings.

Accordingly, the Court denies defendants' motion to dismiss on these grounds.

iii. **Misrepresentation**

Defendants argue that plaintiffs have failed to allege an actionable misrepresentation. This contention likewise fails.

Plaintiffs have alleged that defendants misrepresented: (1) the underlying loans' compliance with the stated underwriting guidelines, (2) the LTV/CLTV ratios and owner-occupancy statistics, and (3) the transfer and assignment of the loan notes to the trusts. Time and time again, Commercial Division courts have held that alleged misrepresentations of compliance with the underwriting guidelines, the LTV/CLTV ratios

and owner-occupancy are actionable. *See Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG*, 38 Misc.3d 1214(A), at *10 (Sup. Ct. N.Y. Cnty. 2012) (rejecting arguments that complaint failed to assert misrepresentations where offering documents disclosed potential deviations from underwriting guidelines and risks related to LTV/CLTV ratios because such disclosures "do not adequately warn of the risk that standards will be ignored") (citing *In re IndyMac Mortg.-Backed Sec. Litig.*, 718 F. Supp. 2d 495, 499 (S.D.N.Y. 2010); *Allstate Ins. Co. v. Ace Sec. Corp.*, 2013 WL 1103159, at *12 (Sup. Ct. N.Y. Cnty. March 14, 2013) ("The court, however, rejects the notion that defendants are immunized from liability because the Offering Materials generally disclosed that the representations were based on information provided by the originators. ...A general warning that 'exceptions' may occur where borrower demonstrates certain compensating factors does not give notice of, as alleged here, a wholesale abandonment of underwriting standards.") (internal citations omitted); *Allstate Ins. Co. v. Credit Suisse Sec.*, 42 Misc.3d 1220(A), at *9 (Sup. Ct. N.Y. Cnty. 2014) ("This court holds, on this persuasive authority, that the cited disclosures in the offering materials do not, as a matter of law, bar Allstate's claim that the offering materials made actionable misrepresentations that the underlying mortgage loans were made in compliance with sound underwriting standards. Put another way, the allegations of the complaint regarding defendants' repeated deviations from underwriting standards are actionable, notwithstanding that the offering materials disclosed that exceptions to the underwriting standards might be made in issuing the loans."); *IKB Deutsche Industriebank v. Credit Suisse Sec.*, 2014 WL

859355, at *7 (Sup. Ct. N.Y. Cnty. 2014) ("[T]he court again rejects defendants' argument that the alleged misrepresentations based on LTVs or CLTVs are not actionable because defendants did not vouch for the appraisals or the appraisals themselves are inactionable statements of opinion. These misrepresentations are actionable, as plaintiffs allege facts that cast doubt on the falsity of the representations - here, based in part on plaintiffs' loan level analyses - and that defendants were aware, based on their due diligence, that the originators deliberatedly deflated the appraisals."); *HSH Nordbank AG v. Barclays Bank PLC*, 42 Misc 3d 1231(A), at *15 (Sup. Ct. N.Y. Cnty. 2014) (noting that complaint alleges misstatements of LTV and CLTV ratios, owner occupancy and compliance with underwriting guidelines and holding "that the allegations … adequately plead material misrepresentations that were made by defendants with knowledge of their falsity, and are therefore actionable. This conclusion is supported by the following additional considerations."). This case does not merit different treatment.

iv. **Loss Causation**

Defendants argue that plaintiffs fail to plead that defendants' alleged fraud was the cause of their losses. Instead, defendants attribute plaintiffs' losses to the financial crisis. This argument was explicitly rejected in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287 (1st Dep't 2011). "It cannot be said, on this pre-answer motion to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and

credit crisis[;]it is the job of the factfinder to determine which losses were proximately caused by misrepresentations and which were due to extrinsic forces." *Id.* at 296 (internal citation and punctuation omitted). This argument fails here as well.

v. Transfer and Assignment of Mortgage Notes

Defendants' argue that the alleged failure to transfer and assign the mortgage notes to the trusts is not actionable. They argue that the representations in the offering documents were a manifestation of a future intent to assign the mortgages, and that plaintiffs have not alleged damages. Defendants also argue that plaintiffs have not alleged particular facts to support their claim, as required by 3016 (b). These arguments fail.

Fraud is actionable "only if the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future. The misrepresentations must be misstatements of material fact or promises made with a present, but undisclosed intent not to perform them." *Eastman Kodak Co. v. Roopak Enterprises, Ltd.,* 202 A.D.2d 220, 222 (1st Dep't 1994) (internal citations omitted); *see also MBIA Ins. Corp.*, 87 A.D.3d at 293. Plaintiffs allege that defendants did precisely this. "The Offering Materials represented that the Trusts were to hold all the notes and mortgage loans as of the dates the Trusts closed and the Certificates were issued. Not only was this not true, but upon information and belief, at the time the Defendants

represented that the notes and mortgage loans were being transferred to the Trusts by or at the Securitizations' closings, they knew they would not do so. In fact, Defendants failed to effectuate such transfers in past or other securitizations, and this practice, motivated by Defendants' desire to secure even greater profits, was consistent and systemic." (Compl. ¶ 191.)

While defendants are correct that the allegations regarding the purported difficulty of hypothetical foreclosures is not an actionable injury, plaintiffs also allege that in response to market participants' awareness of the failure to transfer the loans, the value of the RMBS has declined. (Compl. ¶ 245.) This is an actionable injury.

Finally, the allegations regarding the notes are sufficiently particular. Plaintiffs' complaint includes nearly 20 pages of allegations regarding the mortgage notes, which include excerpts from offering documents, specific examples of notes that were not transferred and the results of investigations that sampled hundreds of mortgages.

2. The Aiding and Abetting Fraud Claim

Defendants argue that plaintiffs' cause of action for aiding and abetting fraud must be dismissed because plaintiffs have not alleged substantial assistance in furtherance of a fraud. In addition, defendants maintain that plaintiffs' allegations are too generalized. The Court disagrees.

"To state a claim for aiding and abetting fraud, a plaintiff must plead '(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud.'" *Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG*, 39 Misc.3d 1214(A), at *3 (Sup. Ct. N.Y. Cnty. 2012) (quoting *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009)). Although Defendants contend that the allegations are insufficient because they do not specifically spell out the role each party played in aiding and abetting, this is not required of the pleadings. "A complaint may be sustained even where the case for corporate defendants' knowledge and participation in the alleged fraud is a purely circumstantial one drawn from the inferences arising from their positions and responsibilities at the defendant companies." *HSH Nordbank AG v. Barclays Bank PLC*, 42 Misc.3d 1231(A) at *22 (Sup. Ct. N.Y. Cnty. 2014); *see also Pludeman v. Northern Leasing Sys.*, 10 N.Y.3d at 367-8; *Bernstein v. Kelso & Co., Inc.*, 231 A.D.2d 314, 323 (1st Dep't 1997). Accepting the allegations of the complaint as true and giving plaintiffs the benefit of all favorable inferences, the Court concludes that plaintiffs' complaint is sufficiently particular to plead aiding and abetting fraud.

3. The Negligent Misrepresentation Claim

Defendants next seek dismissal of the negligent misrepresentation claims on the grounds that no special relationship existed between plaintiffs and defendants when IKB SA purchased the RMBS. The Court agrees.

"A claim for negligent misrepresentation requires a showing of a special relationship of trust or confidence between the parties which creates a duty for one party to impart correct information to another. . . . Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties." *MBIA Ins. Corp.*, 97 A.D.3d at 296 (internal citation omitted). Plaintiffs' complaint alleges that because defendants had superior knowledge of the facts regarding the RMBS, and knew that plaintiffs would rely on their misrepresentations, a "special relationship" between the parties arose. However, allegations of "superior knowledge of the particulars of its own business practices is insufficient to sustain the cause of action [of negligent misrepresentation]." *Id.* at 297. "Plaintiff's alleged reliance on defendant's superior knowledge and expertise in connection with its foreign exchange trading account ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties." *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 447 (1st Dep't 2010).

Despite plaintiff's conclusory allegations of the existence of a special relationship, no such relationship existed between the parties. Instead, plaintiffs' allegations set forth

an arm's-length relationship between the parties. Accordingly, the claims for negligent misrepresentation fail as a matter of law.

III. CONCLUSION

Accordingly, it is,

ORDERED that defendants' motion to dismiss the fourth cause of action for negligent misrepresentation is granted in full; and it is further

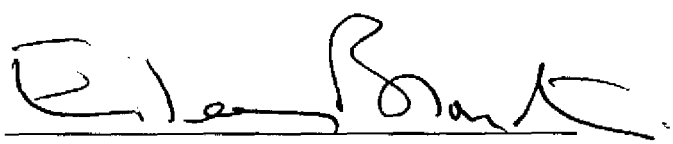
ORDERED that defendants' motion to dismiss the complaint is otherwise denied; and it is further

ORDERED that defendants shall serve an Answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on July 28, 2015 at 10:00 am.

Dated: New York, New York
June 25, 2015

ENTER



Hon. Eileen Bransten, J.S.C.