

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

TENNESSEE CONSOLIDATED
RETIREMENT SYSTEM

Plaintiff,

v.

J.P. MORGAN SECURITIES LLC (f/k/a J.P.
Morgan Securities Inc., and as successor-in-
interest to Bear, Stearns & Co., Inc.),
CITIGROUP GLOBAL MARKETS INC.,
CREDIT SUISSE SECURITIES (USA) LLC
(f/k/a Credit Suisse First Boston LLC),
GOLDMAN, SACHS & CO.,
HSBC SECURITIES (USA) INC.,
MERRILL LYNCH, PIERCE, FENNER &
SMITH INC. (and as successor-in-interest to Banc
of America Securities LLC),
MORGAN STANLEY & CO. LLC (f/k/a Morgan
Stanley & Co. Inc.), and
UBS SECURITIES LLC,

Defendants.

N.F.
No. 13-1729-II

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ORDER

This matter came before the Court for hearing on April 6, 2016, on (i) the defendants' joint motion to dismiss the Amended Complaint of the Tennessee Consolidated Retirement System ("TCRS") on the grounds that the Amended Complaint is time barred by the applicable statutes of limitations and/or repose, and that even if TCRS's claims were timely, the Amended Complaint fails to state a claim upon which relief can be granted and/or allege the necessary elements of each claim with the specificity required by the Tennessee Rules of Civil Procedure; and (ii) the separate motions to dismiss the Amended Complaint filed by defendants HSBC Securities (USA) Inc. ("HSBC"), Credit Suisse Securities (USA) LLC ("Credit Suisse"), and UBS Securities LLC ("UBS"). The Court heard argument from P. Jason Collins on behalf of

TCRS, Bruce Birenboim on behalf of each of the defendants, Jaime Sneider on behalf of HSBC, Britt K. Latham on behalf of Credit Suisse, Trent J. Benishek on behalf of UBS, and James A. Delanis on behalf of Goldman, Sachs & Co. For the reasons below, the Court denies each of these motions in full.

I. Background

In this case, the Amended Complaint alleges that TCRS lost \$164 million because of defendants' misrepresentations as to the nature, quality, character, and risks of residential mortgage backed securities ("RMBS") that they underwrote. TCRS alleges that the RMBS offering documents contained as many as three categories of misrepresentations: (i) the percentage of mortgaged homes subject to second liens; (ii) the percentage of mortgaged homes that were owner-occupied; and (iii) the percentage of mortgaged homes with loan-to-value ratios below certain thresholds. With respect to each RMBS, TCRS alleges the percentage by which defendants misrepresented each category.

TCRS identifies each of the defendants by name and, and for each defendant, alleges that it knew there was a failure to meet applicable underwriting standards. TCRS claims that defendants worked with third-party vendors to conduct due diligence on mortgage loans prior to securitization, but disregarded warnings in the vendor reports and waived loans that were not in compliance with underwriting guidelines into loan pools that were purchased or securitized. TCRS also alleges that defendants did not properly disclose the information gleaned from due diligence—both its own and that of third party vendors—and induced reliance by stating that the prospective purchaser should rely only on the information contained in the documents provided by the defendants or that bore defendants' names. TCRS additionally alleges that some of the defendants provided warehouse lines of credit to originators, the repayment of which provided

the defendants with extra incentive to ignore underwriting failures. TCRS then alleges that the defendants provided their bad data to potential investors and credit rating agencies and/or pressured the credit rating agencies to give AAA ratings to the RMBS that were to be sold. TCRS further alleges that based on the defendants' misrepresentations—and the AAA ratings resulting from these misrepresentations—TCRS claims to have purchased the RMBS listed in the Amended Complaint, and suffered damages as a result.

This action was originally filed under seal by a relator, Integra REC LLC, under the Tennessee False Claims Act. The Office of the Tennessee Attorney General was given an opportunity to determine if there was good cause to go forward with this action, and asked that the seal be extended several times so that the Attorney General staff could review the pleadings, research damages, and meet with the new Attorney General to seek his decision on whether to intervene. On November 3, 2014, an agreed order was entered allowing for the relator's counsel to assume direct representation of TCRS, while the relator would provide expert services. The state and the plaintiff agreed to amend the pleadings or to take other appropriate actions to dismiss the Qui Tam claim based on the False Claims Act and proceed on claims based upon violations of the Tennessee Securities Act, Consumer Protection Act, and common law. TCRS filed its Complaint in Intervention on February 6, 2015, followed by an Amended Complaint on June 22, 2015, asserting claims for common law fraud, constructive fraud, negligent misrepresentation, and violations of the Tennessee Securities Act.

II. Standard of Review

Under Tennessee Rule of Civil Procedure 12.02, a motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint, not the plaintiff's proof. Courts must take all factual allegations as true and give the plaintiff the benefit

of all reasonable inferences. These motions are not favored and are rarely granted in light of the liberal pleading standards in the Tennessee Rules of Civil Procedure.

A plaintiff's claim should be dismissed for failure to state a claim only if it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief or when the complaint is totally lacking in clarity and specificity. A complaint should not be dismissed, no matter how poorly drafted, if it states a cause of action.

III. Discussion

A. Statute of Limitations

With the exception of one security, the RMBS at issue were purchased in 2006 and 2007. The Amended Complaint was filed on February 6, 2015. As a result, defendants contend that dismissal of the Amended Complaint is required because the three-year statute of limitations for common law fraud and negligent misrepresentation bars those claims. Further, defendants argue that, irrespective of knowledge, claims under the Tennessee Securities Act are barred by that statute's two-year statute of limitations and a five-year statute of repose. These arguments fail under the common-law and statutory doctrine of *nullum tempus* and Tennessee's version of the discovery rule.

1. *Nullum Tempus*

The common-law doctrine of *nullum tempus occurrit regi* literally means no time runs against the king. Tennessee codified the doctrine at Tenn. Code Ann. § 28-1-113, which states, "[t]he provisions of this title do not apply to actions brought by the state of Tennessee, unless otherwise expressly provided." The doctrine does not apply to a private or corporate matter, but only to claims brought by the state of Tennessee or its political arms or subdivisions to enforce a demand arising out of or dependent upon the exercise of its governmental functions in which all

of the people of the state are interested. The Tennessee Supreme Court has stated that the “doctrine is not to be lightly regarded,” and that “statutes of limitations are looked upon with disfavor in actions brought by the state, and will not be enforced in the absence of clear and explicit statutory authority to do so.” *Hamilton Cnty. Bd. of Educ. v. Asbestospray Corp.*, 909 S.W.2d 783, 785 (Tenn. 1995).

Defendants argue that TCRS overstates its royal pedigree and that it is not part of the state. Defendants also argue that TCRS’s claims arise from a private or corporate matter, and not from the exercise of a governmental function. Accordingly, defendants claim that TCRS cannot avail itself of *nullum tempus*, and its claims are untimely. This Court respectfully disagrees.

Although the Tennessee courts have not had an occasion to specifically address whether TCRS is a state agency for the purposes of *nullum tempus*, plaintiff has pointed the Court to other cases in which TCRS was found to be a governmental agency for the purpose of determining the validity or applicability of its rules and orders. *See Crawford v. Tenn. Consol. Ret. Sys.*, 732 S.W.2d 293, 296 (Tenn. Ct. App. 1987). Similarly, in *Hair v. Tennessee Consolidated Retirement System*, the court found TCRS to be a state agency for the purpose of immunity under the Eleventh Amendment of the United States Constitution. 790 F. Supp. 1358, 1360 (M.D. Tenn. 1992). Plaintiff also points to out-of-state authority. In *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, the Kansas Supreme Court found that the Kansas Public Employees Retirement System (“KPERS”) was a state agency and thus applied Kansas’ similar *nullum tempus* statute. 941 P.2d 1321, 1348 (Kan. 1997). TCRS is a state-administered pension fund. It was created by the state, it is funded by the state, and the Tennessee General Assembly is statutorily required to make annual appropriations to meet TCRS’s liabilities. TCRS is mandated by the General Assembly to invest its funds in common

and preferred stocks, fixed income securities and foreign investments. This Court agrees with the reasoning of these cases and finds that TCRS is an arm of the state for purposes of applying the *nullum tempus* doctrine.

With respect to the defendants' allegation that TCRS's investment activities are primarily proprietary and only for the benefit of TCRS beneficiaries, TCRS responds that even though private parties regularly invest their own assets, when a state agency does so to secure the retirement of its civil servants, it is exercising a fundamental government function. This Court agrees. It is not the individual beneficiaries who created this pension; instead, it was the state of Tennessee. TCRS is operated by the state, and its investment of state funds includes the exercise of a fundamental state function. Moreover, since the state is required to appropriate sufficient funds to meet TCRS's accrued liability for state employees each year, every tax paying Tennessee citizen has a vested interest in the avid pursuit of funds lost at the hands of fraudsters. For these reasons, the doctrine of *nullum tempus* as codified at Tenn. Code Ann. § 28-1-113 applies to TCRS's common-law claims.

It is also suggested that the Tennessee Securities Act statutes of limitations and repose bar TCRS's Tennessee Securities Act claims. TCRS responds that the common law doctrine of *nullum tempus* applies. Defendants claim that the language in Tenn. Code Ann. § 28-1-113 limits *nullum tempus* to those statutes of limitations set forth in Title 28. While section 28-1-113 is the statutory codification of the doctrine of *nullum tempus*, the statute did not vitiate or eliminate the application of the doctrine at common law. Courts have "consistently held that, when the state of Tennessee, acting through its various departments, files a claim in its governmental capacity, statutes of limitation do not bar the state's claim absent an express legislative directive to the contrary." *In re Estate of Daugherty*, 166 S.W.3d 185, 191 (Tenn. Ct. App. 2004). There is no

language in the Tennessee Securities Act that expressly applies the relevant statute of limitations to the state. Under similar circumstances, a Tennessee court has applied *nullum tempus* to statutes of limitations outside of Title 28, and TCRS argues that this should also be the Court's position with regard to the Tennessee Securities Act under Title 48. *See, e.g., Knox Cnty. ex rel. Schumpert v. Perceptics Corp.*, 03A01-9803-CH-00089, 1998 WL 668721, at *3-5 (Tenn. Ct. App. Sept. 30, 1998) (applying common-law *nullum tempus* to a statute of limitations in Title 47).

Again, the Court finds that the reasoning set forth in TCRS's memorandum is persuasive and that the common law doctrine of *nullum tempus* allows the filing of the Tennessee Securities Act violations to survive the defendants' challenge on the basis of both the statute of limitations and the statute of repose.

At oral argument, defendant Goldman, Sachs & Co. emphasized the public policy in favor of statutes of limitation and the presumption against creating new exceptions to the statute of limitations. The Court concurs, but this Court has not created any new exception. Actions brought by the State and its agencies are treated differently than actions by any other entity. In addition to the doctrine of *nullum tempus*, there are at least two other reasons why fraud claims alleged by the State, if articulated sufficiently, are not dismissed: (1) one cannot bankrupt on fraud and (2) the law does not favor fraud or those who engage in fraudulent conduct. Defendants suggest that the TCRS is allowed to set the time limit for whenever it wants to file. The General Assembly allows the State, if it ever discerns how and who defrauded the State, to file suit and pursue whoever defrauded the State. The Court does not think this is a surprise. People who engage in fraud should always expect someone is going to discover their fraud no matter how hidden or difficult to discover. The fraud is always going to be there. As to

individuals, the General Assembly did establish statutes of limitation and statutes of repose. So, the individual citizen does not have the same legal standing as the State of Tennessee.

2. Discovery Rule

There is some validity to the defendants' argument that the state should have known that they were losing money early on, but it is equally important to assess whether TCRS knew the identity of the actor that perpetrated the fraud. And it took a considerable period of time for many institutions and investors to determine where the liability lay.

TCRS's representation, which must be given a favorable view by the Court, is that it did not discover its alleged claims until the relator did its statistical analysis and used the data in such a fashion that they were able to discern the defendants' alleged misrepresentations, the significance of the misrepresentations, and what entity was responsible for the misrepresentations.

Thus, the Court finds that the defendants' motion to dismiss TCRS's claims as untimely is not well taken and is denied both under the doctrine of *nullum tempus* and, alternatively, under Tennessee's discovery rule.

B. Fraud

To state a claim for fraud, TCRS must plead: (i) that the defendants made a representation of an existing or past fact; (ii) the representation was false when it was made; (iii) that the misrepresentation involved a material fact; (iv) the misrepresentation was made recklessly with knowledge that it was false or without belief that it was true; (v) that TCRS reasonably relied on the misrepresentations and (vi) that TCRS suffered damages. *See, e.g., Davis v. McGuigan*, 325 S.W.3d 149, 154 (Tenn. 2010). Tennessee law requires that the circumstances constituting fraud or mistake be stated with particularity. Malice, intent,

knowledge, or other condition of mind of a person may be averred generally. *See* Tenn. R. Civ. P. 9.02.

The defendants contend that TCRS failed to plead actionable misrepresentations; that it failed to adequately plead materiality; that it failed to adequately plead actual or reasonable reliance; and that it failed to adequately plead scienter, especially as to secondary market purchases. The defendants also move to dismiss the claims of constructive fraud, negligent misrepresentation, and any claims under the Tennessee Securities Act. The Court disagrees on all counts.

1. Actionable Misrepresentations

Defendants submit that their alleged misrepresentations of owner-occupancy rates came from the borrowers, and were not something that the defendants represented. Defendants direct the Court's attention to Appendix A of their brief in which it is represented that it was the mortgagees who stated whether they lived in their houses, and that unless the issuer or the underwriter had reason to believe the information provided by the mortgagees was unreliable, there was no actionable claim.

TCRS argues that it is not alleging that the defendants passed along owner-occupancy rates that turned out to be false. It is alleging that the defendants passed along owner-occupancy rates that the defendants knew were false, and which were clearly misrepresentations actionable under Tennessee law. The Court concurs. As an example of the specificity included in the Amended Complaint, Paragraph 44 states "81.45 percent of mortgages in the pool were listed as owner-occupied mortgages" on Page I-8 of the RALI 2007-QS1 prospectus supplement. That specificity, regarding what each alleged misrepresentation was and where it occurred, is repeated throughout the Amended Complaint.

Defendants also argue that loan-to-value ratios are based on appraisals, and appraisals are opinions that are not actionable. But the Tennessee Supreme Court has categorically held that appraisals containing “representations as to market price or market value are not mere statements of opinion, but are representations of fact, which, if false, will support an action for fraud or deceit.” *See Davis v. McGuigan*, 325 S.W.3d 149, 155 (Tenn. 2010) (internal citation and quotation marks omitted). The Restatement (Second) of Torts explains that the form of an opinion is determinative of whether it is an actionable misrepresentation, giving this example: “I believe that there are ten acres here” is a different statement than “the area of this land is ten acres.” The one conveys an expression of some doubt, while the other leaves no room for it.

TCRS has taken the position that it is not one appraisal made by the defendants or several appraisals made by the defendants that are fraudulent. As underwriters, the defendants were obligated to verify all material assertions in the offering documents. It is for that reason that potential investors rely upon any documents provided to them by underwriters, *i.e.*, so that the potential investors can rely that there has been verification of the underlying material assertions. Underwriters are thus liable if they go forward using material assertions that they were not able to verify. *See Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, No. 11 civ. 6201, 2015 WL 394072, at *3 (S.D.N.Y. Jan. 29, 2015).

Therefore, it is the defendants’ alleged misrepresentations of the composition of the collateral underlying the residential mortgage-backed securities that make them actionable. The defendants were not simply passing along the findings of an appraiser regarding the value of individual loans backed by the securities, but for each securitization, the defendants provided what purported to be group-level information about the loan-to-value ratio for the underlying group as a whole. The identified misrepresentations are set forth in a form that is as specific as

the plaintiff could make it, setting forth tables that listed the number of mortgage loans by range of original loan-to-value ratios. The Court concurs with cases cited by TCRS finding that such misrepresentations are actionable. *See, e.g., Allstate Ins. Co. v. Credit Suisse Sec. (USA) LLC*, No. 650547/2011, 2014 WL 432458, at *10 (N.Y. Sup. Ct. Jan. 24, 2014).

Defendants point to certain disclaimers in the offering documents to assert that the alleged misrepresentations are not actionable. However, the disclaimers that were provided in some of these documents are not sufficient to be effective in the presence of fraud, although this issue was not really discussed and will be revisited. *See First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925, 928 (Tenn. 1991) (Tennessee law “gives no effect to disclaimers in the presence of fraud.”) (internal citation and quotation marks omitted).

2. Materiality

Defendants also argue that, if in fact there were misrepresentations, such misrepresentations were not material given the breadth and extent of disclosures and statements that were in the offering documents. Therefore, according to defendants, the fact that there might be a small percentage difference between what was represented and the reality was not sufficient to create a basis for fraud because the difference was not material. The plaintiff contends that Tennessee does not require proof of a substantial likelihood that disclosure of a misstatement or omitted fact would have caused a reasonable investor not to purchase or sell the security.

In the complaint, TCRS alleges that it would not have purchased the securities identified in the complaint if it had known the truth regarding the subject matter of the defendants' misrepresentations. TCRS further alleges that the defendants' misrepresentations were critical to the defendants' ability to secure AAA ratings for the securities at issue. Presumably, all of the securities that have been identified in the complaint were AAA-rated at the time they were

purchased based on that statement. Without these ratings, TCRS asserts that it would not have invested in the securities, and at the very least a AAA rating from an independent credit rating agency is not so obviously unimportant as to warrant dismissal. The Court concurs. However, the evaluation of the total mix of information available to the plaintiff and other investors is not appropriate for the Court to decide at this juncture. Nor would it be appropriate to determine whether the defendants' misrepresentations were immaterial based upon the amount of information the defendants did not misrepresent.

The determination of materiality requires a delicate assessment of the inferences that a reasonable investor would draw from a given set of facts, and the significance of those inferences to him typically is a determination for the trier of fact. Materiality hinges on whether disclosure of the misstatement would have been significant to an investor's deliberation, not whether it would have changed the investor's ultimate decision to invest. *See Green v. Green*, 293 S.W.3d 493, 512–13 (Tenn. 2009).

3. Reliance

TCRS alleges in its Amended Complaint that its analysts or portfolio managers “would carefully review” the offering documents containing the alleged misrepresentations. The Court disagrees with the defendants that this allegation is insufficient to plead reliance. TCRS's use of the word “would” does not lend more power to the defendants' argument. It is sufficient for TCRS to say its employees would review the offering documents and attempt to assess the underlying collateral as best they could. Moreover, TCRS alleges that it “reviewed the Offering Documents containing Defendants' misrepresentations . . . and detrimentally relied on such misrepresentations.” These allegations are sufficient under Tennessee pleading rules.

The defendants also argue that TCRS did not rely on the offering documents because it purchased some of the securities before the prospectuses or the offering documents had been issued. TCRS responds that, on a trade date, a purchaser and a defendant make certain commitments to one another regarding the purchase of a certificate. Where the trade date precedes the offering date, a trader or analyst reviews the proposed investment based on preliminary or draft materials sent to the seller, including collateral stratifications, a preliminary prospectus, a free-writing prospectus, or a term sheet (typically called the preliminary offering documents). After the trade date, the purchaser transfers payment to the defendant and the defendant transfers title to the certificate to the purchaser on the settlement date. Before the settlement date, prospectus supplements incorporating the information in the preliminary offering documents are sent to the investor.

Defendants state that 15 of the 27 certificates purportedly acquired by TCRS were not bought by TCRS in an original offering. In these instances, TCRS bought the securities, but they had been traded previously and TCRS purchased them in the aftermarket, more than three months from the date of issuance or the initial offering. According to defendants, any representations made in the prospectuses for those offerings were, at best, relevant at the time the offerings were made, and that the facts underlying those statements could change over time. Defendants suggest that to assume investors relied on old information is basically incredible, and that market information is far more powerful to alert purchasers to what is important with regards to the bond or the security after issuance.

TCRS responds that defendants' representations identified in the Amended Complaint were not updated over time and represented the only source of information regarding the key metrics specified—information that it asserts to be highly material to buyers on the secondary

market. TCRS further alleges that the defendants specified their intent to establish a secondary market for the RMBS, and thus knew that purchasers on the secondary market would rely upon the defendants' representations.

These factual disputes are outside of the complaint, and not appropriate to evaluate on a motion to dismiss. Accordingly, the Court finds that TCRS has adequately pleaded reliance.

4. *Scienter*

The Court concurs with TCRS that *scienter* can be averred in general terms and need not meet the heightened standard required in the federal courts. TCRS has adequately pleaded *scienter*.

C. Constructive Fraud

Constructive fraud is essentially fraud without the element of intent. The defendants have argued that TCRS's constructive fraud claim fails because defendants had no legal or equitable duty to disclose the misrepresentations. In response, TCRS states that the defendants had an equitable duty that arises where it appears that one or each of the parties expressly reposes a trust or confidence in the other.

In *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, the Tennessee Court of Appeals concluded that the plaintiff adequately pleaded a legal duty because the plaintiff reposed a trust in the defendant security dealer's reputation and superior skill, knowledge, training, and expertise. E2012-01422-COA-R3CV, 2014 WL 4102365, at *13 (Tenn. Ct. App. Aug. 20, 2014), *appeal granted* (Jan. 15, 2015), *aff'd in part, vacated in part*, No. E2012-01422-SCR-11CV, 2015 WL 9025241 (Tenn. Dec. 14, 2015). TCRS alleged in the Amended Complaint that it placed its trust and confidence in the defendants' reputation, superior skill, knowledge, training, and expertise in connection with the RMBS and similar financial products.

Accordingly, the Court finds that TCRS has adequately pleaded a claim for constructive fraud.

D. Negligent Misrepresentation and Tennessee Securities Act Claims

With regard to the dismissal of TCRS's claims for negligent misrepresentation and fraud under the Tennessee Securities Act, defendants do not make any arguments other than those asserted against TCRS's claims for common-law fraud and constructive fraud. Thus, for the same reasons stated above, the Court finds that TCRS has adequately pleaded claims for negligent misrepresentation and fraud under the Tennessee Securities Act.

E. Argument Concerning MASTR 2003-11

UBS asserts that TCRS's claims based on the MASTR 2003-11 certificates, which were issued in 2003 and purchased by TCRS in 2010, are particularly suited for dismissal for failure to plead the reliance and materiality elements. UBS argues that TCRS should have known about, and relied upon, the certificate's actual performance, rather than the original offering documents, when making its purchase decision. TCRS argues that it was encouraged by UBS to rely only on the information provided by UBS in the offering documents, which were the only source of the information contained therein.

In the sale of RMBS, the information available at offering is the information that is tested when the mortgages are put into the pool, and it is based upon the facts that exist at that time. Facts will change. The economy changes. Life changes. But for that picture in time, that is when any fraud occurred. And it does not change. The date of the offering is the date that one uses to determine if the information was accurate, and investors will go back and look at that. Securities go up, securities go down, and people evaluate them, but they do rely upon the quality, condition and state of the security at the time that it was initially issued. And so far as the claim

is pleaded, the plaintiff had the right to rely upon any of those representations that were made at the time that it was offered. As has been alleged by TCRS, the offering documents are the only source of certain data that is made available to investors, the defendants never updated or changed the representations in those documents, and TCRS had the right to rely upon the representations that were made at the time that the security was offered.

The Court finds that TCRS has adequately pleaded its reliance on and the materiality of misstatements in the offering documents for the MASTR 2003-11 certificates. Whether TCRS actually and reasonably relied on the defendants' misrepresentations is a question of fact that cannot be resolved on a motion to dismiss.

F. Supplemental Motion of HSBC

First, HSBC moves to dismiss because it was not named in the original relator complaint. HSBC states that the original complaint in intervention does not relate back to the date of the original relator complaint for purposes of statutes of limitations. This court has found that the doctrine of *nullum tempus* applies to all claims against HSBC and rejects this argument as moot.

Second, HSBC repeats the claim made in the joint motion that TCRS has failed to adequately plead *scienter*. TCRS argues that the Amended Complaint contains 50 pages of statements with regard to defendants' intent and *scienter*. As discussed above, the Court concurs with TCRS that *scienter* can be averred in general terms and need not meet the heightened standard required in the federal courts.

Third, HSBC argues that it served only as an underwriter for the relevant securities listed in the Amended Complaint, yet the conduct ascribed to HSBC in the Amended Complaint was conduct it allegedly took as issuer of other securities that were not the subject of the Amended Complaint.

In the Amended Complaint, TCRS alleged that HSBC, as underwriter, made specific misrepresentations, and played a critical role in the fraudulent structuring, offering and sale of the securities. TCRA argues that based on HSBC's own due diligence and the due diligence of third parties, HSBC knew the representations were false. Given that the Court must consider the factual allegations in the Amended Complaint to be true on a motion to dismiss, the contention that the statements are not true or significant is not an appropriate rejoinder. For the foregoing reasons, HSBC's motion is denied.

G. Supplemental Motion of Credit Suisse

Like HSBC, Credit Suisse stated that (1) it was undisputed that Credit Suisse had been sued as an underwriter, (2) there are defined roles for the issuer and the underwriter, (3) Credit Suisse was a third-party underwriter and (4) the plaintiffs had bought securities from another investment bank in the secondary market after the initial offering. Credit Suisse moved to dismiss the Amended Complaint because it neither issued nor directly sold to TCRS the one certificate upon which it was sued, and did not create the investment product. Credit Suisse also argued that TCRS failed to plead relevant facts to support the elements of fraud, constructive fraud, negligent misrepresentation and its Tennessee Securities Act claims.

TCRS argues that it properly alleged that Credit Suisse made specific misrepresentations to pension-fund investors, including TCRS, to induce them into purchasing investment products which Credit Suisse knew failed to meet applicable standards, specifically, that the loan-to-value ratios reported in the Offering Documents were materially misstated. TCRS also alleged that based on its own due diligence and due diligence of third parties, Credit Suisse knew such representations were false. A reading of TCRS's allegations reflects that it articulated the specific elements of fraud: TCRS asserted that Credit Suisse knowingly did not disclose that a

substantial portion of the packaged mortgages failed to meet underwriting standards and were unqualified for securitization, that Credit Suisse waived those disqualified loans into the pool of mortgages comprising the security and passed the unforeseen risks onto TCRS who reasonably relied upon Credit Suisse's misrepresentations. For purposes of ruling on a motion to dismiss, the Court presumes TCRS's allegations to be true and Credit Suisse's motion to dismiss is denied.

Likewise, Credit Suisse's argument with regard to loan-to-value ratio misrepresentations based on appraisals also fails for the reasons previously stated.

IV. Conclusion

For the reasons stated above, the defendants' motions to dismiss fail. All of the allegations and causes of action survive except for those voluntarily withdrawn through the stipulated dismissals of Paragraphs 35 through 38 and Paragraphs 123 through 126 of the Amended Complaint. Defendants shall have 45 days from the entry of this Order to answer or otherwise respond to the Amended Complaint.

IT IS SO ORDERED.



CHANCELLOR CAROL L. MCCOY

Certificate of Service

The undersigned deputy clerk certifies that on 5-25, 2016, the foregoing was served via U.S. Mail, postage pre-paid, to the parties listed on the attached pages.



DEPUTY CLERK

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