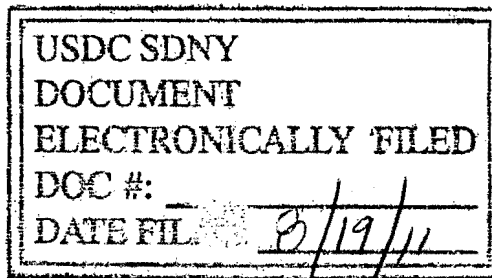


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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In re DEUTSCHE BANK AG :
SECURITIES LITIGATION :
-----X

09 Civ. 1714 (DAB)

This Document Relates To: :
: :
ALL ACTIONS :
: :
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MEMORANDUM & ORDER

DEBORAH A. BATTS, United States District Judge.

On August 11, 2009, this Court issued an Order consolidating six putative class action cases filed between February and May 2009 against Deutsche Bank AG ("Deutsche Bank" or the "Company") and other related entities and individuals. On November 23, 2009, this Court appointed Co-Lead Plaintiffs and Co-Lead Counsel and directed the filing of a Consolidated Complaint. The Consolidated Amended Complaint (the "CAC") in this case alleges violations of Sections 11, 12(a)(2), and 15 of the Securities Act by certain Deutsche Bank¹ and Individual Defendants²,

¹The Deutsche Bank Defendants are: Deutsche Bank AG, Deutsche Bank Capital Funding Trust VIII, Deutsche Bank Capital Funding LLC VIII, Deutsche Bank Capital Funding Trust IX, Deutsche Bank Capital Funding LLC IX, Deutsche Bank Capital Funding Trust X, Deutsche Bank Capital Funding LLC X, Deutsche Bank Contingent Capital Trust II, Deutsche Bank Contingent Capital LLC II, Deutsche Bank Contingent Capital Trust III, Deutsche Bank Contingent Capital LLC III, Deutsche Bank Contingent Capital Trust V, Deutsche Bank Contingent Capital LLC V and Deutsche Bank Securities Inc.

²The Individual Defendants are: Josef Ackerman, Hugo Banziger, Detlef Bindert, Jonathan Blake, Anthony Di Iorio, Martin Edelmann, Tessen von Heydebreck, Hermann-Josef Lamberti,

Underwriters³, and auditor KPMG International, relating to a Form F-3 Registration Statement and Prospectus filed with the Securities and Exchange Commission ("SEC") on October 10, 2006 (the "Registration Statement"), and various prospectus supplements to that Registration Statement. (CAC ¶¶ 1-2.) Now before the Court are Motions to Dismiss filed by the Deutsche Bank Defendants, certain Individual Defendants, and the Underwriter Defendants. Also before this Court is Plaintiffs' Motion to Strike certain documents filed in support of the Deutsche Bank and Individual Defendants' Motion to Dismiss. For the reasons stated herein, the Motions to Dismiss are GRANTED in part and DENIED in part, and the Motion to Strike is GRANTED.

I. BACKGROUND

The following facts from the CAC are assumed to be true for purposes of this Motion to Dismiss.

On or about October 10, 2006, Deutsche Bank AG filed a Form F-3 Registration Statement and Prospectus with the SEC utilizing

Rainer Rauleder, Peter Sturzinger and Marco Zimmermann.

³The Underwriter Defendants are Deutsche Bank Securities Inc. ("Deutsche Bank Securities"), UBS Securities LLC ("UBS"), Citigroup Global Markets Inc. ("Citigroup"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Wachovia Capital Markets, LLC ("Wachovia"), Morgan Stanley & Co. ("Morgan Stanley"), and Banc of America Securities LLC ("Banc of America").

a "shelf" registration process which allowed the Company to sell, from time to time, any combination of securities described in the Prospectus. (CAC ¶ 2.) Between October 2006 and May 2008, the Company conducted six offerings of preferred securities, and filed a Prospectus Supplement to the Registration Statement each time. (Id.)

The offerings raised over \$6.2 billion of Tier I capital via the sale of 248 million shares of the preferred securities at a price of \$25.00 per share as follows: (1) an October 13, 2006 offering of 6.375% Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust VIII (the "October 2006 Offering"); (2) a May 16, 2007 offering of 6.55% Trust Preferred Securities of Deutsche Bank Contingent Capital Trust II (the "May 2007 Offering"); (3) a July 16, 2007 offering of 6.625% Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust IX (the "July 2007 Offering"); (4) a November 6, 2007 offering of 7.35% Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust X (the "November 2007 Offering"); (5) a February 14, 2008 offering of 7.60% Trust Preferred Securities of Deutsche Bank Contingent Capital Trust III (the "February 2008 Offering"); and (6) a May 5, 2008 offering of 8.05% Trust Preferred Securities of Deutsche Bank Contingent Capital Trust V (the "May 2008 Offering"). (CAC ¶ 2.)

Between 2005 and 2007, Deutsche Bank significantly increased its involvement in structuring, trading and investing in residential mortgage-backed securities ("RMBSs") and collateralized debt obligations ("CDOs") backed by U.S. residential subprime and nonprime mortgages. (CAC ¶ 4.) Subprime and nonprime RMBSs are backed by residential mortgages extended to borrowers who do not qualify for standard loans, and are more risky than RMBSs backed by conforming loans. (CAC ¶ 5.) Default rates began to rise dramatically through 2006 and accelerated in 2007, leading to a decline in the value of the securities backed by subprime and nonprime mortgages. (CAC ¶ 6.)

On January 14, 2009, Deutsche Bank was forced to announce that it anticipated a loss after taxes of €4.8 billion for the fiscal 2008 fourth quarter, driven by negative revenues of €4.8 billion in its sales and trading businesses. (CAC ¶ 10.) On February 5, 2009, the Company announced a net loss of €3.9 billion for fiscal year 2008. (Id.) The deterioration of the Company's mortgage-related assets contributed to the 2008 losses. (Id.) For the full fiscal year, the Company recorded €5.3 billion in write-downs on debt securities and other mortgage-related products, including leveraged loans and loan commitments, RMBSs/CDOs, monoline insurers, and commercial real estate. (Id.)

Each of the Securities purchased in the offerings at issue

was purchased at \$25.00 per share. (CAC ¶ 11.) By February 24, 2009, the date that the initial lawsuit in this litigation was commenced, the value of the 6.375% Securities was \$8.10 per share, the 6.55% Securities was \$8.35 per share, the 6.625% Securities was \$7.98 per share, the 7.35% Securities was \$8.35 per share, the 7.60% Securities was \$8.99 per share, and the 8.05% Securities was \$11.20 per share. (CAC ¶ 11.)

II. DISCUSSION

A. Legal Standard for a Motion to Dismiss

For a complaint to survive dismissal under Rule 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility," the Supreme Court has explained,

"when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-57). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels

and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotation marks omitted). "In keeping with these principles," the Supreme Court has stated,

"a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Iqbal, 129 S.Ct. at 1950.

In ruling on a 12(b)(6) motion, a court may consider the complaint as well as "any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference." Zdenek Marek v. Old Navy (Apparel) Inc., 348 F.Supp.2d 275, 279 (S.D.N.Y. 2004) (citing Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001) (internal quotations omitted)).

B. Section 11 Claims

To state a claim under Section 11 of the Securities Act, a plaintiff must allege that: (1) it purchased a registered security; (2) the defendant participated in the offering in a manner giving rise to liability under Section 11; and (3) the

registration statement "contained an untrue statement of a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). A claim under Section 11 may be asserted against every person who signed the registration statement, the directors of the issuer and the underwriter of the securities, among others. Id.

A court finds a violation of Section 11 when "material facts have been omitted or presented in such a way as to obscure or distort their significance." In re Flag Telecom Holdings, Ltd. Sec. Litig., 618 F.Supp.2d 311, 320-21 (S.D.N.Y. 2009). "The test for determining whether the prospectus contained a material misstatement or omission is whether the defendants' representations in the prospectus, taken together and in context, would have misled a reasonable investor." Id. Moreover, "[i]n the area of pure omissions, disclosure of the information must be required." Litwin v. The Blackstone Group L.P., 634 F.3d 706, 722 (2d Cir. 2011) ("Here, plaintiffs adequately plead that Item 303 of Regulation S-K requires Blackstone to disclose the omitted information, but without that regulatory requirement Blackstone would be under no obligation to disclose even material information."); see also Resnik v. Swartz, 303 F.3d 147, 154 (2d Cir. 2002) ("Disclosure of an item of information is not required . . . simply because it may be relevant or of interest to a

reasonable investor. For an omission to be actionable, the securities laws must impose a duty to disclose the omitted information."); In re Morgan Stanley Tech. Fund Sec. Litig., 643 F.Supp.2d 366, 375 (S.D.N.Y. 2009) ("[I]t is well established that there is no liability in the absence of a duty to disclose, even if the information would have been material.")

A duty to disclose may be imposed by statute or regulation, or may arise when information is needed to make another statement not misleading. Morgan Stanley, 643 F.Supp.2d at 375.

(1) The October 2006 Offering

The October Registration Statement and October 13, 2006 Prospectus Supplement incorporated by reference Deutsche Bank's Form 20-F for the year ending December 31, 2005 (the "2005 20-F"), which stated that the Company utilized "a detailed risk assessment of every credit exposure." (CAC, ¶ 63.) The 2005 20-F also included a statement from the Company's auditor KPMG that the Company's consolidated financial statements "present fairly, in all material respects, the financial position of [the Company] . . . in conformity with U.S. generally accepted accounting principles." (CAC, ¶ 66.)

Plaintiffs allege that these statements were materially false and misleading when made because: (a) the Company failed to

disclose that it had significant exposure to the high-risk subprime and nonprime residential mortgage market through RMBS and CDO-related assets; (b) the Company failed to disclose its true exposure to RMBS/CDO securities and other mortgage-related assets; and (c) the Company failed to disclose a material concentration of risk arising from subprime/nonprime-backed CDOs in its 2005 20-F as required by GAAP. (CAC, ¶ 67-68.)

Plaintiffs first allege that the Company failed to disclose a material concentration of risk arising from subprime/nonprime-backed CDOs and non-prime mortgage-related assets. (CAC, ¶ 68.) Plaintiffs claim that Paragraph 15A of FASB Statement of Financial Accounting Standards ("SFAS") No. 107, Disclosures about Fair Value of Financial Instruments, required the Company to disclose "all significant concentrations of credit risk from all financial instruments, whether from an individual counterparty or groups of counterparties." (Id.) According to Plaintiffs, Deutsche Bank's exposure to the subprime and nonprime market was a concentration of credit risk that should have been disclosed under SFAS No. 107 and, accordingly, that the failure to disclose means that the Company's financial statements did not comply with GAAP. Similarly, the CAC alleges that the Company's exposure to subprime and nonprime mortgage-backed assets at the time of the October 2006 Offering constituted a "significant

factor[] that ma[de] the offering speculative or risky," such that disclosure was required pursuant to Item 503 of Regulation S-K, 17 C.F.R. §229.503. (See CAC ¶ 73.)

Plaintiffs' allegation that Deutsche Bank's subprime and nonprime exposure represented a group concentration of credit risk, (see CAC, ¶ 69), is a legal conclusion, rather than a factual one. See Employees' Retirement System of the Gov't of the Virgin Islands v. J.P. Morgan Chase & Co., ___ F.Supp.2d ___, 2011 WL 1796426 (S.D.N.Y. May 10, 2011) ("A bare assertion that appraisals were not made in accordance with USPAP is 'a legal conclusion not entitled to the assumption of truth unless supported by appropriate factual allegations.'") (quoting Tsereteli v. Residential Asset Securitization Trust 2006-A8, 692 F.Supp.2d 387, 393 (S.D.N.Y. 2010)). Plaintiffs, however, allege no facts contemporaneous to the October 2006 Offering that would support the conclusion that the Company's subprime/nonprime holdings represented a group concentration of credit risk at the time of that offering, nor do Plaintiffs allege any contemporaneous facts about Deutsche Bank's subprime/nonprime holdings that would support the conclusion that they constituted a significant factor that made the offering speculative or risky.

The CAC alleges that the Company's mortgage-backed assets amounted to "as much as €20 billion," (CAC, ¶ 75), but also that

the Company acquired billions of dollars in exposure to subprime and nonprime mortgage-backed assets "[b]etween 2005 and 2007." The CAC is devoid of factual allegations as to the Company's exposure to subprime and nonprime mortgage-backed assets as of the date of the October 2006 Offering.

Likewise, the CAC does not allege adequately that disclosure of the Company's specific subprime/nonprime exposure was required to make another statement not misleading. The CAC alleges that "[b]y failing to allege any information about the level and structure of its subprime/nonprime asset holdings . . . the Offering Materials prevented investors from determining the effect that the subprime and nonprime mortgage crisis was having on the Company prior to the Offering(s), i.e., its exposure to the subprime crisis." (CAC ¶ 74.) The CAC continues, "Accordingly, investors were unable to consider the impact on [Deutsche Bank] of the adverse events in the subprime and nonprime markets because [D]efendants effectively represented that the Company had no exposure." (Id.)

The CAC, however, ignores the Company's 2005 20-F, which is incorporated into the October 2006 Offering. In that document, the Company states, "We aim to expand our presence in the U.S. market by growth in key businesses, such as equity derivatives and mortgage-backed securities." (Bateup Decl., Ex. A, at 17.)

The Company, therefore, disclosed its intention to expand its activities in mortgage-backed securities. Furthermore, the 2005 20-F disclosed that "[i]n recent years, we have increased our exposure to the financial markets as we have emphasized growth in our investment banking activities, including trading activities. Accordingly, we believe that we are more at risk from adverse developments in the financial markets than we were when we derived a larger percentage of our revenues from traditional lending activities." (Id., at 7.)

The Company disclosed that it intended to increase its activities in mortgage-backed securities, and disclosed that its increased trading activities could lead to losses. The CAC alleges no facts contemporaneous to the 2006 Offering that would have required the Company to disclose its specific exposure to subprime/nonprime mortgage-backed securities, in order to make the Company's general statements about exposure to the mortgage-backed securities market not misleading. Accordingly, the CAC fails to state a claim as to the October 2006 Offering.

(2) The 2007 Offerings

a. Timeliness

Defendants first argue that Plaintiffs lack standing to assert claims related to the May 2007 Offering. Plumbers' Union is the only named Plaintiff alleged to have acquired securities

"pursuant or traceable to" to the May 2007 Offering. (CAC ¶ 19.) Plumbers' Union, however, first asserted its claims in the CAC, which was filed on January 25, 2010, more than one year after January 14, 2009, when Plaintiffs were on notice of their claims. (See CAC ¶ 172.)

Of the six actions originally filed in this case, only Gerson v. Deutsche Bank AG, 09 Civ. 3884, mentioned the 6.55% Trust Securities issued in the May 2007 Offering. As evident from the Certification filed with the Complaint in that case, however, the named Plaintiff in the Gerson case did not purchase the 6.55% Securities. Accordingly, the Plaintiff in the Gerson suit lacked standing to sue for violations relating to the May 2007 Offering. See In re Am. Int'l Group Inc. Sec. Litig., 265 F.R.D. 157, 165 (S.D.N.Y. 2010).

Plaintiffs contend that they are entitled to the benefit of the rule set forth in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), which held that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." American Pipe, 414 U.S. 554. In that case, intervening plaintiffs' claims that would have otherwise been untimely were allowed to proceed following a court's determination that a class action could not

be sustained. Id. The Supreme Court noted that requiring purported class members to anticipate successfully a court's determination of the viability of a class action would result in unnecessary and duplicative motions. Id.

Courts in this District have held in following the American Pipe rule in cases resembling this one, that the statute of limitations may be tolled by the filing of a class action complaint purporting to include a certain security, even if it is later determined that the named plaintiff lacked standing to sue for violations relating to that security. See In re IndyMac Mortgage-Backed Sec. Litig., ___ F.Supp.2d ___, No. 09 Civ. 4583 (LAK), 2011 WL 2508254, at *5 (S.D.N.Y. June 21, 2011) (finding that an earlier-filed complaint tolled the statute of limitations even where plaintiffs lacked standing and noting that a contrary decision would undermine the efficiency of class actions); In re Flag Telecom Holdings, Ltd. Sec. Litig., 352 F.Supp.2d 429, 455-56 (S.D.N.Y. 2005) (same), abrogated on other grounds, 574 F.3d 29 (2d Cir. 2009); In re Initial Public Offering Sec. Litig., No. 21 MC 92 (SAS), 2004 WL 3015304, at *5 (S.D.N.Y. Dec. 27, 2004) (tolling statute of limitations where absent class members would not have been aware that original plaintiff lacked standing to assert claims on their behalf).

Defendants argue that those cases are distinguishable

because it was evident from the face of the Certification filed in the Gerson action that the Plaintiff in that action never purchased the securities at issue and therefore lacked standing. (UW Defs.' Mem. L. at 12, n.6) This Court does not find this difference persuasive. After all, in the Am. Int'l Group decision, which was issued after the Gerson Complaint was filed, this Court noted that "[t]here is conflicting case law in the Second Circuit on whether a court may certify a class of purchasers of a security or fund that was not also purchased by the Lead Plaintiffs." 265 F.R.D. at 165. Therefore, at the time the Gerson Complaint was filed, it may not have been evident to silent class members that the Gerson Complaint was defective. Accordingly, this Court finds that the statute of limitations was tolled by the filing of the Gerson Complaint, and claims relating to the May 2007 Offering are timely.

b. Misstatements and Omissions

The Company filed Prospectus Supplements in connection with the May 2007 Offering, the July 2007 Offering, and the November 2007 Offering. (CAC ¶¶ 76, 79, 82.) The Company's 2006 20-F was incorporated into the three 2007 Offerings. (CAC ¶ 85.)

With respect to the Company's credit risks, the 2006 20-F stated, inter alia, "[a] primary element of the credit approval process is a detailed risk assessment of every credit exposure

associated with a counterparty." (CAC ¶ 85.) With respect to the Company's market risks, the 2006 20-F stated, "We use a combination of risk sensitivities, value-at-risk, stress testing and economic capital metrics to manage market risks and establish limits." (CAC ¶ 86.) Regarding proprietary trading, the 2006 20-F stated, "[w]ithin Corporate Banking & Securities, we conduct proprietary trading, or trading on our own account, in addition to providing products and services to customers. Most trading activity is undertaken in the normal course of facilitating client business." (CAC ¶ 87.) The Company continued, "[w]hile we have taken selective trading opportunities and risks throughout the year, our value-at-risk for the trading units remained within a band between €58.3 million and €82.0 million." (Id.) The 2006 20-F also included a statement from KPMG that the consolidated financial statements were presented in conformity with U.S. GAAP. (CAC ¶ 88.)

The November 2007 Offering also incorporated by reference a Form 6-K filed on November 1, 2007, which stated that the Company had taken charges of €1.6 billion "on trading activities in relative value trading in both debt and equity, CDO correlation trading and residential mortgage-backed securities. (CAC ¶ 89.) The Form 6-K noted that "[p]erformance suffered primarily from the rapid loss of liquidity in credit markets from August

onwards. . . . ,” which “negatively impacted credit trading positions in relative value trading, CDO correlation trading and residential mortgage-backed securities.” (Id.)

The CAC claims that these statements were false and misleading because (a) the Company failed to disclose its more than €20 billion exposure to the high-risk subprime and nonprime residential mortgage markets; (b) the disclosures about market risk and credit risk misrepresented the Company’s true exposure to RMBS/CDO securities; and (c) the 2006 20-F did not comply with GAAP. (CAC ¶ 90.)

The CAC first alleges that the Company’s exposure to the subprime and nonprime residential mortgage markets represented a concentration of credit risk that gave rise to a reporting obligation under GAAP and, therefore, a duty to disclose. (CAC ¶ 90.) The CAC alleges that in 2007 the Company had €3.46 billion of gross exposure to CDOs backed primarily by subprime/nonprime mortgages. (CAC ¶ 97.) The CAC also alleged that the Company had €9 billion in net counterparty exposure to monoline insurers, and that the exposure was tied to the monoline insurers’ ability to absorb the losses on the billions of dollars of subprime/nonprime assets they insured. (CAC ¶¶ 99-100.) The Company had an additional €9.7 billion of RMBS backed primarily by subprime and nonprime mortgages. (CAC ¶ 102.) Furthermore,

the CAC alleges that indicators of market conditions prior to the 2007 Offerings, such as the number of properties in foreclosure, and the default and delinquency rates for subprime loans, demonstrated that the Company's subprime/nonprime loans represented a concentration of credit risk. (CAC ¶ 105.)

Next, the CAC alleges that in violation of SFAS No. 107, the Company valued its subprime and mortgage-backed assets based on subjective internal estimates that were clearly inconsistent with current market conditions.⁴ (CAC ¶ 94). The CAC alleges that the ABX Index for RMBS tranches rated BBB and BBB- had suffered serious declines by February and March 2007, with some tranches dropping as much as 60%. (CAC ¶ 110.) The TABX Index, which tracked the value of BBB and BBB- tranches of the ABX indices, but also took into account varying levels of subordination, also plunged between February 2007 and September 2007. (CAC ¶¶ 107, 112.) Nonetheless, the Company did not write down the value of its RMBS/CDO holdings until October 2007, when it took a €1.6 billion charge related to "CDO correlation trading and residential mortgage-backed securities." (CAC ¶ 113-114.)

Defendants contend they had no duty to "disaggregate" or quantify the particular types or quality of the Company's

⁴Although the CAC alleges that the Company also violated SFAS No. 157, the CAC itself concedes that SFAS No. 157 did not take effect until January 1, 2008. (CAC ¶ 91.)

mortgage-related holdings. This Court cannot say that no such duty existed as a matter of law. See Litwin, 634 F.3d at 721 (finding plausible plaintiffs' claims that defendant had a duty to disclose particular facts regarding residential real estate holdings, given market trends affecting that specific sector). The CAC alleges specific facts about the Company's subprime holdings and trends in the subprime market that put those holdings at risk. See In re Citigroup Inc. Sec. Litig., 753 F.Supp.2d 206, 235 (S.D.N.Y. 2010) (finding that plaintiffs adequately pled that defendant's subprime holdings constituted a "concentration of credit risk" that was concealed in violation of GAAP where plaintiff's alleged deterioration in the subprime market specifically affecting those holdings). Defendants make no attempt to argue that the CAC fails to allege adequately the materiality of the omitted information. Accordingly, this Court finds that the CAC adequately pleads that the Offering Materials for the 2007 Offerings were materially misleading.

(3) The February 2008 Offering

The Company filed a Registration Statement and Prospectus Supplement with the SEC on or about February 14, 2008. (CAC ¶ 121.) The February 2008 Prospectus Supplement incorporated by reference the 2006 20-F. (CAC ¶ 123.) The February 2008 Prospectus Supplement also incorporated by reference a Form 6-K

filed by the Company on February 7, 2008. (CAC ¶ 125.) The Form 6-K stated that "we took no further losses on our remaining CDO exposures in the current quarter after taking into account related gains on hedge positions." (Id.) It continued, "[i]n the fourth quarter, we again demonstrated the quality of our risk management. We had no net write-downs related to sub-prime, CDO or RMBS exposures." (Id.) The CAC alleges that these statements were false because the Company failed to account properly for its CDO and RMBS securities at the end of 2007. (CAC ¶ 126.)

The February 2008 6-K also noted the Company's "robust earnings for the fourth quarter, which concludes one of our best years ever and a year of solid performance in challenging times." (CAC ¶ 127.) The CAC alleges that this statement was false and misleading because the Company would not have had "robust earnings" if it had accounted properly for its RMBS/CDO-related exposure. (CAC ¶ 128.) The CAC also alleges that Defendants failed to disclose that the Company engaged in high-risk proprietary trading. (CAC ¶ 129.)

Regarding the Company's proprietary trading, the CAC has failed to allege a misstatement or omission. The CAC asserts that the Company's claims as to the quality of its risk management were misleading, as evidenced by the losses the Company incurred in its proprietary trading activities. The

Company, however, specifically warned investors that proprietary trading losses were possible. In its 2006 20-F, the Company stated that “[i]n recent years we have increased our exposure to the financial markets as we have emphasized growth in our investment banking activities, including trading activities. Accordingly, we believe that we are more at risk from adverse developments in the financial markets than we were when we derived a larger percentage of our revenues from traditional lending activities.” (Bateup Decl. Ex. B, 2006 20-F at 9.) The Company also disclosed that “our risk management techniques and strategies may not be fully effective in mitigating our risk exposure in all economic market environments or against all types of risk, including risks that we fail to identify or anticipate.” (Bateup Decl. Ex. B, 2006 20-F at 12.)

The allegations regarding risk management in the CAC are significantly different from the allegations in Iowa Public Employees’ Retirement Sys. v. MF Global Ltd., 620 F.3d 137 (2d Cir. 2010). In that case, the Second Circuit found that cautionary statements about possible inadequacies in MF Global’s risk management procedures did not necessarily absolve MF Global of liability under Section 11 when the complaint alleged that MF Global allowed a broker to take positions vastly in excess of MF Global’s trading limits, and that MF Global’s internal risk

controls did not apply to brokers trading for their own accounts. Iowa Public, 620 F.3d at 139. The CAC here makes the far more general allegation that the Company's risk management procedures proved to be inadequate to insulate the Company from proprietary trading risk. The CAC alleges no facts that are inconsistent with the Company's disclosure that it was increasing its proprietary trading activities and, correspondingly, that it was exposed to increased risk from proprietary trading.

Regarding the Company's alleged failure to account properly for its mortgage-related holdings and disclose risks related to those holdings, however, the Court finds that the CAC has adequately pled a misstatement or omission, for the same reasons noted in the discussion of the 2007 Offerings, supra.

(4) The May 2008 Offering

On or about May 5, 2008, the Company filed a Prospectus Supplement with the SEC, which incorporated by reference the Annual Report on Form 20-F of Deutsche Bank AG for the year ended December 31, 2007 filed on March 26, 2008 (the "2007 20-F").

(CAC ¶¶ 153-155.) The Prospectus Supplement also incorporated by reference a Form 6-K filed by the Company on April 29, 2008.

(CAC ¶ 170.)

The CAC's allegations regarding the inadequacies in the Company's risk management procedures with respect to proprietary

trading fail for the same reasons discussed with respect to the February 2008 Offering, supra. The CAC alleges no facts supporting an allegation that the risk management procedures were not applied as the Company stated. An allegation that in hindsight those procedures were not sufficient to prevent losses is insufficient to state a claim.

The CAC makes two additional allegations with respect to the May 2008 Offering: (1) that the Company's reported Value-at-Risk ("VaR") metrics were false and failed to reflect the actual risk associated with the Company's equities trading; and (2) the Company failed to disclose its exposure to monoline insurers.

Regarding VaR, the 2007 20-F stated that "'Value-at-risk' is the primary metric we use in the management of our trading market risks." (CAC ¶ 159.) The 2007 20-F stated that the Company's equities trading VaR ranged between \$43.5 million and \$90.5 million in 2007. (CAC ¶ 162.) Although the Company stated that "trading market risk outside of these units is immaterial," the Company reported equities trading losses for 2008 of \$630 million, which is almost 700% above the "maximum exposure" of \$90.5 million. (CAC ¶ 162.) These factual allegations of trading vastly in excess of stated VaR limits are sufficient to state a claim. See In re Lehman Bros. Sec. and ERISA Litig., ___ F.Supp.2d ___, No. 09 MC 2017 (LAK), 2011 WL 3211364, at *17

(S.D.N.Y. July 27, 2011) ("The factual allegations of routine breaches of VaR limits . . . are sufficient to permit a reasonable trier of fact to conclude that the statements in the Offering Materials were materially misleading, particularly in light of the suggestion in Lehman's 2007 10-K that breaches of VaR limits were infrequent.")

The CAC's allegations regarding the Company's exposures to monoline insurers, however, fail to state a claim. Although the CAC points to the Company's disclosure of only about €2.3 billion in counterparty exposure to monoline insurers, the April 29, 2008 Form 6-K clearly stated that the notional value of the Company's exposure to monoline insurers was approximately €8.9 billion. (Bateup Decl. Ex. I, April 28, 2008 6-K, at 11.) The Company's true exposure to monoline insurers was disclosed adequately. Accordingly, the CAC's allegation that the Company's financial statements were not prepared in conformity with IFRS regarding exposure to monoline insurers also fails.

C. Section 12(a)(2) Claims

Plaintiffs assert claims under § 12(a)(2) of the Securities Act, 15 U.S.C. § 771, against the Company, the Trust and LLC Defendants, and the Underwriter Defendants.

Liability under Section 12(a)(2) arises when a person offers or sells a security by means of a prospectus or oral

communication that includes a material misrepresentation or omission. 15 U.S.C. § 771(a)(2). "A plaintiff has standing to bring a Section 12 claim only against a 'statutory seller' from which it 'purchased' a security. In re Lehman Bros. Sec. and ERISA Litig., 2011 WL 3211364, at *35.) "A 'statutory seller' is one who, in a public offering, either transferred title to the purchaser or successfully solicited the transfer for financial gain." Id.

The Deutsche Bank Defendants argue that they cannot be considered "statutory sellers" because the CAC fails to allege privity between the Deutsche Bank Defendants and Plaintiffs, or that the Deutsche Bank Defendants participated actively in the sales of the securities to Plaintiffs. (DB Defs.' Mem. L. at 45.) Although privity between Plaintiffs and the Deutsche Bank Defendants is not required, see In re Scottish Re Group Sec. Litig., 524 F.Supp.2d 370, 399 (S.D.N.Y. 2007), the CAC must allege (1) that the Company solicited sales of its securities; and (2) that the Company was motivated by financial gain. See Id. at 400. Here, the allegations in the CAC that Deutsche Bank conducted offerings of the securities and raised over \$6.2 billion in Tier 1 capital from the sale of the securities (See CAC ¶ 2), is sufficient to bring Deutsche Bank within the "statutory seller" definition. See Scottish Re, 524 F.Supp.2d at

400 (finding allegations sufficient when they alleged that the company conducted a public offering and benefitted from the sale of those securities).

The Underwriter Defendants claim that Plaintiffs lack standing under Section 12(a)(2) because the CAC fails to allege facts sufficient to demonstrate that the securities were purchased in the public offerings at issue, as opposed to in the secondary market. See Gustafson v. Alloyd Co., 513 U.S. 561, 578 (1995); In re Alcatel Sec. Litig., 382 F.Supp.2d 513, 530 n.8 (S.D.N.Y. 2005). The Underwriter Defendants are correct that allegations such as those in the CAC that securities were purchased "pursuant or traceable to" the Registration Statement and Prospectuses (CAC ¶¶ 16-19) are insufficient to establish standing for purposes of Section 12(a)(2). See In re Lehman Bros. Sec. and ERISA Litig., 2011 WL 3211364, at *35 (noting that "[a] complaint that alleges that the plaintiff purchased its securities 'pursuant and/or traceable to' the Offering Documents is not sufficient" to confer standing under Section 12(a)(2)). The Section 12(a)(2) claims must therefore be dismissed.

D. Section 15 Claims

Plaintiffs assert claims under Section 15 of the Securities Act against Deutsche Bank, the Individual Defendants, and KPMG

International.⁵

Section 15 creates liability for “[e]very person who, by or through stock ownership, agency, or otherwise, controls any person liable under Sections 77k . . . of this title . . .” 15 U.S.C. § 77o. A “control person” subject to liability under Section 15 must have “the power, directly or indirectly, ‘to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.’” In re Deutsche Telekom AG Sec. Litig., No. 00 Civ. 9475 (SHS) 2002 WL 244597, at *6 (S.D.N.Y. Feb. 20, 2002) (quoting 17 C.F.R. § 230.405).

As an initial matter, Section 15 claims must be dismissed where a plaintiff fails to plead a primary violation under Section 11 or Section 12. See, e.g., Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 358 (2d Cir. 2010); In re Am. Int’l Group, Inc. Sec. Litig., 265 F.R.D. 157, 167 (S.D.N.Y. 2010). The Section 15 claims relating to the October 2006 Offering are therefore dismissed.

Defendants contend that the remaining Section 15 claims must be dismissed because the CAC fails to allege any “culpable participation” by the purported “control person” Defendants. (DB Defs.’ Mem. L. at 47.) As the Second Circuit recently noted, the

⁵KPMG International has not appeared in this action.

issue of whether a plaintiff must demonstrate "culpable participation" by the alleged controlling person "has divided district courts in this Circuit." In re Lehman Bros. Mortgage-Backed Sec. Litig., ___ F.3d ___, 2011 WL 1778726, at *15 (2d Cir. May 11, 2011).

This Court agrees with those courts that have declined to impose a requirement that a plaintiff allege "culpable participation" to state a violation under Section 15. See, e.g., In re Refco, Inc. Sec. Litig., 503 F.Supp.2d 611, 660-661 & n.43 (S.D.N.Y. 2007) (finding that the "culpable participation" requirement applied only to claims under Section 20(a)); In re CINAR Corp. Sec. Litig., 186 F.Supp.2d 279, 309-10 (E.D.N.Y. 2002) (finding that there is no "culpable participation" requirement under Section 15 because Section 11, unlike Section 10(b), contains no intent element). It would be incongruous to require allegations regarding "state of mind," as Defendants suggest is required, when the Section 11 claims on which the Section 15 claims are premised contain no "state of mind" element. The Motions to Dismiss the remaining Section 15 claims must be denied.

E. Leave to Replead

When a complaint has been dismissed, permission to amend it

"shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, a court may dismiss without leave to amend when amendment would be "futile," or would not survive a motion to dismiss. Gatt Communications, Inc. v. PMC Associates, 10 Civ. 8, 2011 WL 1044898 at *7 (S.D.N.Y. Mar. 10, 2011) (citing Oneida Indian Nation of NY v. City of Sherrill, 337 F.3d 139, 168 (2d Cir. 2003)).

Because Plaintiffs cannot allege any facts contemporaneous to the October 2006 Offering that would have required particularized disclosure of Deutsche Bank's exposure the subprime and nonprime real estate markets, the claims relating to the October 2006 Offering are dismissed without leave to replead.

F. Motion to Strike

Plaintiffs move to strike Exhibits E, H, L, M, N, O, P, Q, and R to the Bateup Declaration as documents not referenced in the CAC, not matters of public record, and not subject to judicial notice. Defendants did not respond to the Motion to Strike, and this Court did not rely on documents outside of the CAC or that were not referenced therein in deciding the Motions to Dismiss. Accordingly, the Motion to Strike is GRANTED.

III. CONCLUSION

The Motions to Dismiss are GRANTED WITH PREJUDICE with respect to Plaintiffs' Section 11, Section 12(a)(2) and Section 15 claims relating to the October 2006 Offering;

The Motions to Dismiss are GRANTED WITHOUT PREJUDICE with respect to Plaintiffs' remaining claims under Section 12(a)(2);

The Motions to Dismiss are DENIED in all other respects;

Plaintiff's Motion to Strike is GRANTED;

Plaintiff shall file a Second Consolidated Amended Complaint within 30 days of the date of this Order; and

Defendants shall answer within 60 days of the date of this Order.

SO ORDERED.

Dated: New York, New York

August 19, 2011

Deborah A. Batts
DEBORAH A. BATTIS
United States District Judge