UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARSHALL FREIDUS, et al.,

Plaintiffs,

-against-

09 Civ. 1049 (LAK)

ING GROEP N.V., et al.,

Defendants.

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MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

On September 14, 2010, this Court granted in part and denied in part defendants' motion to dismiss the consolidated amended complaint ("CAC"). *Freidus v. ING Groep N.V.*, 736 F. Supp.2d 816 (S.D.N.Y. 2010). Plaintiffs now move, pursuant to Fed. R. Civ. P. 60(b), for reconsideration of that ruling with respect to the September 2007 and June 2008 offerings. They argue that reconsideration is warranted because *Litwin v. Blackstone Group, L.P.*, __ F.3d __, No. 08-cv-03601, 2011 WL 447050 (2d Cir. Feb. 10, 2011), changed the standard of materiality and therefore warrants a different result.

1. Rule 60(b) applies to applications for relief with respect to final judgments, orders or proceedings and thus has no application to the Court's prior ruling. That ruling, however, is subject to reconsideration under Rule 54 in appropriate circumstances, including an intervening change in controlling law. *E.g., In re Rezulin Prods. Liab. Litig.*, 224 F.R.D. 346, 349-50 (S.D.N.Y. 2004). As plaintiffs claim an intervening change in controlling law, the Court has reconsidered the previous ruling in light of *Litwin.*

2. The claim with respect to the September 2007 offering was "that ING had an

obligation to disclose the details of its Alt-A and subprime RMBS assets . . . in order to render its (1) reported financial metrics and (2) statements that ING 'considered its subprime [and] Alt-A . . . exposure to be of limited size and of relatively high quality' and that they had a 'limited impact' on the Company, not misleading." 736 F. Supp.2d at 830.

In dismissing that claim, the Court relied first upon its conclusions that (1) there were no allegations that any of the financial metrics were false at the time of the September 2007 offering, (2) there were no allegations that, at the time of that offering, ING "did not consider its Alt-A and subprime exposure to be of 'limited' size, relative to ING's total assets, clearly the asserted reference point, or that they were not 0.24 percent (subprime) and 2.0 percent (Alt-A) of ING's total assets," which is what the pertinent disclosure document claimed, and (3) there were no allegations that "ING's RMBS, as of September 2007, had had anything other than a 'limited impact' on the company in amounts specifically disclosed in the September 2007 Offering Materials." *Id.* at 830-31. This analysis, insofar as it related to the accuracy of the statements regarding ING's financial metrics and the impact on the company of its RMBS holdings through the date of the offering, would be unaffected, even if plaintiffs' reading of *Litwin* were correct.

As this Court's opinion indicates, the foregoing conclusions "left [only] . . . the allegation that ING's statement that it considered its assets to be of 'relatively high quality' was inaccurate or incomplete in September 2007 because it did not disclose the types of loans in the pools underlying ING's Alt-A and subprime RMBS or the places and years in which they were originated." *Id.* at 831. In dealing with that contention, the Court first observed that "[a]llegations of industry-wide or market-wide troubles alone ordinarily are insufficient to state a claim based on the securities or assets held by a defendant," citing among other cases the district court decision later reversed in *Litwin.* It noted that "none of the CAC's allegations concern ING's assets." *Id.* at 831-32. But it then

went on to dismiss plaintiffs' remaining contention principally on the basis that:

> "In many cases, [plaintiffs'] allegations post-date the statements in the offering materials alleged to be misleadingly incomplete. In most cases, they describe conditions related to the individual mortgage loans, not the securities structured around them. None describe ING's assets – the allegations concern the market generally, other securities, or the actions of other institutions.
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> "Perhaps most importantly, the only allegations that concern Alt-A and subprime RMBS – the categories of assets ING owned – before September 2007 discuss the performance of tranches that were lower-rated, and therefore riskier and more prone to loss, than those that ING held." *Id.* at 832.

As plaintiffs read it, *Litwin* stands for the propositions that a complaint need not "identify specific . . . investments made or assets held by [a defendant] that might have been at risk as a result of then-known trends in the . . . industry" and that the Blackstone Group, in the circumstances of that case, had been obliged "'to disclose material details of its real estate investments, and . . . the manner in which those . . . investments might be materially affected by the then-existing downward trend in housing prices.'" Pl. Mem. at 4-5 (quoting *Litwin,* 2011 WL 447050, at *11). But this is a very different case.

First, while this Court did discuss materiality, and that discussion perhaps may be thought to be in some modest tension with *Litwin,* the basis of the dismissal of plaintiffs' final contention rested on different grounds. Unlike the complaint in *Litwin,* the CAC relied not only on general industry-wide and market-wide conditions, but made specific allegations both about those conditions and their timing and about ING's situation. It relied heavily on matters that occurred *after* the September 2007 Offering Materials were disseminated and that therefore have no logical connection to the truth or falsity of the statements in those materials at the time they were made. Even more importantly, plaintiffs' allegations concerning the market generally related to the performance of tranches that were rated lower than the Alt-A and subprime RMBS that ING owned and therefore

were of little or no relevance in determining whether the additional disclosures that plaintiffs claim should have been made were necessary in order to make that which ING did disclose not misleading. In short, this Court's reliance on the district court's decision in *Litwin*, upon careful reflection, was not material to its dismissal of the claims relating to the September 2007 offering.

But there is a second and quite independent basis for adhering to the original result with respect to that offering. Here, unlike in *Litwin,* the sole basis of ING's alleged obligation to disclose was the assertion that the added disclosure was necessary to make that which was said not misleading.[1] Moreover, the precise statement that plaintiffs claim was misleading in the absence of the allegedly required additional disclosure was that ING "'considered its subprime [and] Alt-A . . . exposure to be of limited size and of relatively high quality.'" 736 F. Supp.2d at 830.

This statement was one of opinion or of the company's state of mind.[2] Such a statement can be false if, and only if, the company in fact did not so consider the exposure.[3] The CAC is devoid of any allegation that ING did not hold the view set forth in the offering materials at

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1 In *Litwin,* the argument was principally that there was a duty to disclose under Item 303 of Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii). *Litwin,* 2011 WL 447050, at *7.

2 The same analysis applies also to the "limited impact" statement which was simply a characterization based on the disclosed facts that ING's subprime exposure was 0.24 percent and its Alt-A exposure 2.0 percent of its total assets. 736 F. Supp.2d at 830-31.

3 *See, e.g., id.* at 836 (holding, in a ruling unchallenged by plaintiffs, that rating of credit agency was not actionable in absence of allegations that rating agency did not in fact hold the opinion stated); *Tsereteli v. Residential Asset Securitization Trust 2006-A8,* 692 F. Supp.2d 387, 394-95 (S.D.N.Y.2010) (holding that a rating is a "statement of opinion by each agency that it believed, based on the models it used and the factors it considered, that the credit quality of the mortgage pool underlying each Certificate was sufficient to support the assigned rating"); *In re Lehman Brothers Sec. & Erisa Litig.,* 684 F. Supp.2d 485, 494-95 (S.D.N.Y.2010) (holding that a rating is "a statement of opinion by each ratings agency that it believed, based on the methods and models it used, that the amount and form of credit enhancement built into each Certificate, along with the Certificate's other characteristics, was sufficient to support the rating assigned to it.").

the time those materials were published.

3. The claim with respect to the June 2008 offering, plaintiffs' half-hearted contention to the contrary (Pl. Mem. 9-10) notwithstanding, is unaffected by any plausible reading of *Litwin*.

Accordingly, plaintiffs' motion for reconsideration of the Court's previous order [DI 146] is treated as having been made under Rule 54, not Rule 60(b), and is granted. On reconsideration, the Court adheres to the same result it reached previously.

SO ORDERED.

Dated: March 29, 2011

Lewis A. Kaplan
United States District Judge