

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CMFG LIFE INSURANCE COMPANY,
CUMIS INSURANCE SOCIETY, INC., and
MEMBERS LIFE INSURANCE COMPANY,

Plaintiffs,

v.

RBS SECURITIES, INC.,

Defendant.

OPINION & ORDER

12-cv-037-wmc

Currently before the court is an apparently unopposed¹ motion for clarification and, in the alternative, reconsideration by plaintiff CMFG Life Insurance Company and its subsidiaries (collectively, “CUNA Mutual”). (Dkt. #254.) CUNA Mutual seeks clarification of this court’s August 19, 2013 order, which, among other things: (1) dismissed claims based on misrepresentation of underwriting compliance for securities MMLT 2005-3, RAMC 2004-4 and RAMC 2005-4 (the “dismissed underwriting claims”), based on the failure to allege facts specific to those securities’ originators; (2) granted CUNA Mutual leave to file a Second Amended Complaint (“SAC”) with respect to new factual allegations supporting its claims of rescission based on its remaining misrepresentation claims; and (3) denied CUNA Mutual leave to amend to add a new claim for rescission based on mistake. (See August 19, 2013 Opinion and Order (“Order”) (dkt. #245).)

CUNA Mutual asks this court to clarify the Order in two respects. *First*, CUNA Mutual asks whether it may proceed on the portions of the SAC that purport to cure the

¹ The deadline for RBS Securities to file its Response to CUNA Mutual’s Motion for Clarification was September 6, 2013. Inexplicably, one week late, on September 13, 2013, RBS Securities filed a Brief in Opposition. The court has nevertheless read the brief, and it does not change the result.

deficiencies surrounding the dismissed underwriting claims. *Second*, CUNA Mutual asks whether the court intended to take away its ability to argue the legal theory of rescission based on mistake by denying it leave to amend its complaint in that regard. And, though CUNA Mutual optimistically states that “[t]he Court’s clarification will likely moot any potential requests for reconsideration on these two issues,” (Pls.’ Mot. Clarification 2 (dkt. #255)), it also asks, in the alternative, for reconsideration of these two issues.

With regard to CUNA Mutual’s first request, the court’s order may have been less than clear as to CUNA Mutual attempting to cure the deficiencies of its dismissed underwriting claims through the SAC. In its motion for clarification, CUNA Mutual points out that the SAC includes detailed, specific allegations against the originators of MMLT 2005-3, RAMC 2004-4 and RAMC 2005-4, which should be enough to allow it to proceed. The court agrees.² To the extent that CUNA Mutual seeks leave to cure the dismissed underwriting claims, it may proceed with those amendments.³

With regard to CUNA Mutual’s second request, the court confirms that it did in fact foreclose the possibility of proceeding on a claim of rescission due to mistake. (*See* Order 1 (“The court will . . . deny [the motion to dismiss] with respect to the rescission claim, while narrowing as a matter of law the scope of that claim.”).) CUNA Mutual’s motion for reconsideration of that portion of the Order will likewise be denied. The court premised its

² In so ruling, the court recognizes that its statement that “none of the new allegations correct the isolated deficiencies identified . . . in dismissing a portion of [the] complaint” was, therefore, erroneous.

³ The court does not opine at this time as to whether the amendments *actually* cure the dismissed underwriting claims. Rather, it recognizes that the inclusion of more specific facts, which address the deficiencies the court identified, mean that it would not be “futile” for CUNA Mutual to try to amend. These new facts also appear directly responsive to the ongoing discovery process.

decision to disallow the new claim on the fact that “[t]here are no good grounds to have waited so long to add this legal theory; and the delay of a year justifies denial of an untimely motion to amend.” Order 35. In its motion for reconsideration, CUNA Mutual still offers no justification for its delay, nor for its failure to include this claim in either the initial complaint, or at least as a proposed amendment in response to RBS’s original Motion to Dismiss, which was filed on March 30, 2012, more than a year prior. (Dkt. #32.) The court, therefore, has been offered no good cause to reconsider its denial of CUNA Mutual’s motion to amend in the face of so much delay. *See Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005) (noting that it is within a district court’s discretion to deny a long-delayed motion to amend absent good cause for the delay).

CUNA Mutual correctly points out that for pleading purposes, a “complaint need not identify a legal theory.” *Bartholet v. Reishauer AG (Zürich)*, 953 F.2d 1073, 1978 (7th Cir. 1992). Here, however, CUNA Mutual *did* choose to identify a specific legal theory in its First Amended Complaint -- rescission based on misrepresentation. To argue that “RBS should have recognized that the complaint seemed to invoke both theories,” (Pls.’ Mot. Clarification 10 (dkt. #255)), is particularly misguided. Having specifically identified the legal theory of rescission based on misrepresentation, RBS is not to blame for not knowing, much less preparing for, an alternative theory identified nowhere in the First Amended Complaint.⁴

Insofar as CUNA Mutual suggests that this court’s initial Order supports its argument that RBS should have known to prepare for mistake as a legal theory, the court

⁴ Indeed, the word “mistake” appears nowhere in the entirety of the First Amended Complaint.

disagrees. To say that CUNA Mutual's "alleged misrepresentation seems to fit neither into the 'fraud' category nor the 'mistake' category" (Order 7 n.4), is to say just that. What does *not* follow is to say that because CUNA Mutual's allegations neatly fit neither the legal theory specifically pled nor the one left unpled, RBS should have known to prepare for both.

ORDER

IT IS ORDERED that plaintiffs' motion for clarification (dkt. #254) is GRANTED as set forth above; and plaintiffs' motion for reconsideration of this court's order (dkt. #254) is GRANTED IN PART with respect to plaintiffs' claims of misrepresentation of underwriting compliance for securities MMLT 2005-3, RAMC 2004-4 and RAMC 2005-4 in its second amended complaint and DENIED in all other respects.

Entered this 19th day of September, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge