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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X **PART 6**

FIRST CENTRAL SAVINGS BANK,

INDEX NO.: 14233/11

Plaintiff,

-against-

MOTION DATE: 02/03/12
SEQUENCE NO. 01, 02, 03, 04, 05

MERIDIAN RESIDENTIAL CAPITAL d/b/a TRUMP FINANCIAL, DAVID BRECHER, MERIDIAN MORTGAGES SERVICES, INC., DBS SERVICING SOLUTIONS, INC., DAVID S. FRANKEL, P.C., LAW OFFICES OF SAM SHORE, JEFFREY E. MEHL, ESQ.,

Defendants,

----------X

Upon the foregoing papers:

Motion pursuant to CPLR §3211[a][1],[5],[7] by the defendant Jeffrey E. Mehl, Esq., for an order dismissing the complaint insofar as interposed as against him is granted.

Motion pursuant to CPLR §3211[a][1],[5],[7] by the defendants Meridian Residential Capital, d/b/a, Trump Financial, Meridian Mortgage Services, Inc., David Brecher, Meridian Mortgage Services, Inc., and DBS Servicing Solutions, Inc., for an order dismissing the complaint insofar as interposed as against them is granted in part and denied in part as directed below.

Motion pursuant to CPLR §3211 by the defendant David S. Frankel, P.C., for an order dismissing the complaint insofar as interposed as against him is granted.

Order to show cause pursuant to CPLR §3012[d] by the plaintiff First Central Savings Bank for an order compelling the defendants to accept late service of the complaint, and/or alternatively, for an order deeming service upon the defendants to be timely, *nunc pro tunc,* pursuant to CPLR §205[a] is denied.

Motion pursuant to CPLR §3211[a][1],[5],[7] and CPLR §3016[b] by the defendant Law Offices of Sam Shore, for an order dismissing the complaint insofar as interposed as against him is granted.

In March of 2003, the plaintiff First Central Savings Bank ["First Central"] entered into a "Loan Origination and Marketing Agreement" [the "Origination Agreement"] with defendants Meridian Mortgage Services, Inc. ["Meridian"], and its principal, David Brecher (Cmplt., ¶¶ 3, 18-20). Pursuant to the agreement, Meridian agreed to originate and service residential loans for First Central (Cmplt., ¶¶ 20-21). Specifically, First Central contends that Meridian agreed to make credit judgments and perform underwriting analyses of the information obtained from each prospective borrower, which included review of completed loan applications, credit reports, property appraisals and other necessary verifications and documents (Cmplt., ¶¶ 23-26; Agreement, ¶ 3.1[a]). In exchange, Meridian collected certain fees and was also entitled to retain a stated percentage of the loans which they later sold on the secondary, residential loan market (Cmplt., ¶¶ 29-31).

During the loan origination and closing process, certain attorneys were retained by First Central, as contemplated by the Origination Agreement; namely, and among others, codefendants

David S. Frankel, P.C., Jeffrey E. Mehl, Esq., and the Law Offices of Sam Shore. The Origination Agreement, Article 3, refers to the role of counsel, providing, *inter alia*, that "[t]he legal counsel selected by the Bank shall be responsible for ensuring that all closing documents are properly signed by the Borrower, the Bank or the appropriate third party, as applicable and contain authentic signatures" (¶ 3.10). The Origination Agreement and other, separately executed "individual loan purchase agreements," both contained so-called "buy-back" requirements – an obligation also personally guaranteed under the Origination Agreement by codefendant Brecher (Cmplt., ¶¶ 21-23; 32-33). In sum, the "buy-back" provision required Meridian to purchase from First Central, those loans which remained unsold in the "secondary loan market" for a period over 90 days, post-closing (Cmplt., ¶¶ 21-23; 32-33; 67-70, 73; Agreement, ¶ 4.1[c]). The complaint also avers that the individual loan purchase agreements required Meridian to ensure that no fraudulent information had been submitted to First Central with respect to any of the loans (Cmplt., ¶ 34).

Thereafter, Meridian originated some 225 First Central loans (Cmplt., ¶¶ 39-40). First Central, claims, however, that certain loans were purportedly made upon false, fraudulent and/or incomplete borrower loan information submitted by Meridian, including overstated borrower incomes and inaccurate, third-party property appraisals (Cmplt., ¶¶ 47-48; 115-116, 121). Further, First Central contends that the "attorney-defendants" previously referenced above represented First Central at certain closings, but allegedly breached duties of care to First Central and/or committed malpractice, negligence and fraud. The attorneys purportedly did so by, *inter alia*, closing loans which contained terms different from those supposedly agreed to by First Central (Cmplt., ¶¶ 48-50). First Cental claims that the attorneys (and Meridian) "intentionally" permitted adjustable rate loans to close without so-called interest rate "floor" provisions, which would have prevented rates from dipping below stated minimum percentages. These loan documents allegedly differed from corresponding, borrower commitment letters apparently drafted by First Central, which did include the rate floor provisions (Cmplt., ¶¶ 3, 50-51; 64-65; 115-116, 121).

First Central asserts that as a consequence of Meridian's underwriting misconduct and alleged fraud, it made loans to customers who could not repay them, as reflected by the "large number of Meridian Loans which defaulted, many within a very short time after" the closings were concluded (Cmplt., ¶¶ 28-29, 42-43). First Central further alleges that Meridian concealed

its misconduct by itself making payments on certain loans – which conduct allegedly prevented First Central from discovering, in a timely manner, that the actual borrowers had, in fact, defaulted (Cmplt., ¶¶ 56-57; 61-62).

Lastly, First Central contends that Meridian failed to repurchase or buy-back certain loans, thereby violating both the Origination Agreement and the individual loan agreements (Cmplt., ¶¶ 33-34; 49; 72-78). In fact, First Central claims that from the inception, Meridian never intended to buy back any of the loans – although there is no allegation that First Central ever contemporaneously objected to Meridian's untimely failure to reacquire the loans immediately after the respective 90-day buy-back periods expired (Cmplt., ¶¶ 106-107).

Based upon these factual averments and others, First Central commenced the within action against, *inter alia*, both the Meridian defendants and the attorney-defendants. The verified complaint contains ten causes of action, including claims sounding in breach of contract, specific performance, fraud, attorney malpractice/breach of fiduciary duty, negligent misrepresentation and unjust enrichment/conversion.

Significantly, the subject, state court action is not the first proceeding arising out of the alleged loan misconduct identified by First Central. In August of 2009, First Central commenced a virtually identical, Federal lawsuit as against all the same defendants (and several others) in the Eastern District of New York (*First Central Savings Bank v. Meridian Residential Capital, et., al.*, ___ F. Supp. 2d.___, 2011 WL 838910 [E.D.N.Y. 2011]). Although First Central's Federal action contained two RICO claims (*e.g.*, 18 U.S.C. §§ 1961[1],[4], [5]; 1962[c],[d]) (Fed. Cmplt., ¶¶ 121-137), it included essentially the same State law claims interposed in this action.

However, by decision dated March 3, 2011, the District Court [Irizarry, J.], dismissed the Federal action "without prejudice" pursuant to F.R.C.P. 12[b][6] – albeit with leave to replead. While the Court did not reach the pendent State law claims in its March 3 order, it did consider and dismiss the RICO claims, holding in sum that First Central had not properly alleged damages or shown that its alleged injuries were proximately caused by the alleged misconduct relied on. More specifically, the District Court reasoned, in part, that: (1) a compensable RICO injury had not occurred with respect to those loans which had not yet been foreclosed upon; and (2) that as to the few loans which had been foreclosed upon, allegations of compensable injury were still lacking, since First Central relied on post-litigation appraisals to establish injury – which appraisals which were unreliable as to value, since they were performed after the recent real

estate market collapse. Lastly, the Court ruled that the requisite, "but for" RICO causality with respect to the "rate floor" claims had not been demonstrated, since First Central had not alleged that the rates at issue had actually reset or dipped below the rate "floor" figures relied upon (*First Central Savings Bank v. Meridian Residential Capital, et., al., supra*, 2011 WL 838910 at 7-8; 9-10)(*First Central Savings Bank v. Meridian Residential Capital, et., al., supra*, 2011 WL 838910 at 4-6 *see also, First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 [2nd Cir. 1994]).

After dismissing First Central's RICO claims, the Court noted that "only Plaintiff's state law claims remain," but declined to consider those claims, noting that "where federal claims are dismissed at an early stage, courts decline supplemental jurisdiction and dismiss pendant state law claims without prejudice" (*First Central Savings Bank v. Meridian Residential Capital, et., al., supra*, 2011 WL 838910 at 11). In light of these conclusions, the District Court dismissed the complaint "without prejudice" and at the same time, granted First Central leave to served an amended complaint, to be filed no later than April 4, 2011

In the interim, the District Court resolved a second motion made by the Merdian for sanctions pursuant to F. R.C.P. 11[b][3]. That motion, which the Court granted in part and denied in part, was predicated on assertions that First Central had included allegations in its Federal complaint for which there was no proper, evidentiary support (*see, First Central Savings Bank v. Meridian Residential Capital, et., al.*, ___ F. Supp. 2d.___, 2011 WL 838910, at 2-3 [March 30, 2011 E.D.N.Y.]). Although the District Court concluded that First Central's factual claims, for the most part, did not warrant the imposition of sanctions, the Court nevertheless admonished First Central for including in its complaint, certain unsupported averments, *i.e.*, that: (1) the alleged "concealment" of the borrower defaults continued into 2008; and (2) that Meridian had fraudulently permitted loans to close despite the existence of encumbrances affecting loan collateral (*First Central Savings Bank v. Meridian Residential Capital, et., al., supra*, 2011 WL 838910, at 2-3, 6). Notably, the same averment with respect the 2008 concealment claim has been reincorporated – at least generally – into First Central's current complaint (Cmplt., ¶¶ 15, 56).

Finally, the District Court warned First Central with respect to the framing of any amended complaint, stating that "the court fully expects Plaintiff to consider carefully the arguments discussed in this Order and to provide a more thoughtful amended complaint if it chooses to file one." The Court added that "[p]laintiff is well advised to consider carefully

whether it has valid claims when deciding whether to file an amended complaint, and exercise care in crafting its pleadings in order to avoid any of the ambiguities that gave rise to this motion [for sanctions]"(*First Central Savings Bank v. Meridian Residential Capital, et., al., supra*, 2011 WL 838910, at 6).

Ultimately, First Central elected not to serve an amended complaint and in response, the District Court issued an order dismissing the complaint in its entirety, "with prejudice" on April 7, 2011 (Hardwood Aff., Exh., "D")(Cmplt., ¶ 16). First Central then noticed an appeal with the Second Circuit, which it later withdrew. It later settled with several of the federal, "adjuster" defendants (not named here) and commenced (filed) this action on October 5, 2011 – later serving the defendants on or shortly after October 13, 2011 (Cervini [Dec. 21] Aff., ¶ 11).

Both the Meridian and the attorney-defendants now move to dismiss the plaintiff's verified complaint pursuant to CPLR §3211[a][1], [5], [7]. The defendants have argued, *inter alia*, that the complaint is dismissible on res judicata and/or collateral estoppel grounds based on the Federal dismissals; that various claims are time-barred since the plaintiff concededly did not serve its complaint within the six-month recommencement period conferred by CPLR §205; and that, in any event, the causes of action as pleaded fail to state viable claims.

First Central has opposed the motions and moved by order to show cause for relief compelling the defendants to accept its complaint as timely and/or deeming its service of process timely, *nunc pro tunc*, pursuant to CPLR §205[a]. Notably, and with respect to the CPLR §205 claim, First Central does not dispute that it served its state law complaint on the defendants after CPLR §205's six-month tolling period had already expired on October 5, 2011, nor is it disputed that CPLR §205 [a] requires, *inter alia*, that "*service* upon [a] defendant * * * [must be] effected within such six-month period" (*Quinones v Neighborhood Youth & Family Servs., Inc.*, 71 AD3d 1106, 1107)(Cmplt.,¶¶ 15-16)[emphasis added].

The defendants' respective motions to dismiss are granted the extent indicated below. First Central's order to show cause is denied.

Preliminarily, the Court does not agree that the action is subject to the bar of res judicata. Although res judicata principles apply to decisions rendered by Federal Courts (*see*, *Lamb v. Governor for New York State*, 90 AD3d 716; *Toscano v 4B's Realty VIII Southampton Brick & Tile, LLC*, 84 AD3d 780, 781), "[t]he rule in New York is that a dismissal of a pendent State action by a Federal court is presumed to be not on the merits absent a clear indication to the

contrary" (*Browning Ave. Realty Corp. v Rubin,* 207 AD2d 263, 265-266 *see, City of New York v Caristo Constr. Corp.,*62 NY2d 819, 821 [1984]; *McLearn v Cowen & Co.,* 60 NY2d 686, 688 [1983]; *Dietrich v E.I. du Pont de Nemours & Co.,* 38 AD3d 1335; *Stylianou v Incorporated Vil. of Old Field,* 23 AD3d 454; *Van Hof v Town of Warwick,* 249 AD2d 382; *Capital Tel. Co. v New York Tel. Co.,* 146 AD2d 312, 316; *Travelers Indem. Co. v Sarkisian,* 139 AD2d 27, 29 *cf., Tomasello v Choice Care Long Is.*, 229 AD2d 527, 528). Indeed, even "the language 'with prejudice' is narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach" (*Van Hof v Town of Warwick, supra,* 249 AD2d 382 *see also, Pawling Lake Prop. Owners Assn., Inc. v Greiner,* 72 AD3d 665, 667).

Here, while the District's Court's March 30, 2011 order dismissed the action in its entirety, "with prejudice," the record confirms that the Court did not consider First Central's pendent, State law claim on the merits. Rather, as evidenced by the underlying, March 3, 2011 order – and the language contained therein – the District Court limited its analysis to the Federal, RICO claims interposed and declined to exercise jurisdiction over First Central's pendent state law claims (*First Central Savings Bank v. Meridian Residential Capital, et., al., supra,* 2011 WL 838910, at 11]). Since it is clear that "[t]he Federal Court made no determination as to the merits of the plaintiff's pendent State law * * * causes of action and presumably never exercised jurisdiction thereover," those claims are not subject to the bar of res judicata (*Van Hof v Town of Warwick, supra,* 249 AD2d 382; *Whitfield v. JWP/Forest Elec. Corp.*, 223 AD2d 423; *Browning Ave. Realty Corp. v Rubin, supra*). The claims are also not barred as matter of law pursuant to the doctrine of collateral estoppel, inasmuch as the damage and proximate cause concepts relied upon by the District Court were predicated upon federal, RICO pleading criteria, not determinative here (*cf., Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 432-433; *Burrowes v Combs*, 25 AD3d 370, 371).

Turning to the movants' alternative dismissal theories, and in particular, their statute of limitations claims, the Court finds that the movants have *prima facie* established that First Central did not timely serve the defendants within six months of the final dismissal order issued by the District Court on April 7, 2011, *i.e.,* prior to October 5, 2011 (Cmplt., ¶ 17)(*Quinones v Neighborhood Youth & Family Servs., Inc., supra,* 71 AD3d 1106, 1107; *Pi Ju Tang v St. Francis Hosp.*, 37 AD3d 690, 691; *Burns v Pace Univ.*, 25 AD3d 334, 335).

While First Central may have filed or commenced the action prior to the termination of

the six-month period – albeit only days before, on October 5, 2011 – it did not effectuate service until after the six month period had already expired (*cf., Gazes v Bennett*, 70 AD3d 579). It also did not make its current motion until over two months after that period had terminated – and then only after certain defendants first moved to dismiss (*cf., Bahadur v New York State Dept. of Correctional Servs.*, 88 AD3d 629). Accordingly, those claims whose applicable limitations periods expired prior to First Central's commencement of the subject action on October 5, 2011, are time-barred (*Pyne v 20 E. 35 Owners Corp.*, 267 AD2d 168, 169 *see, DeVerna v. Inc. Village of Lynbrook,* 85 AD3d 847; *Henriquez v Inserra Supermarkets, Inc.*, 68 AD3d 927, 928).

The Court notes in this respect that the various attorney-defendants (Frankel, Shore and Mehl), have shown that the closings in they were involved, including those most recently identified in First Central's opposition papers, all occurred more than three years before the institution of the subject action in October of 2011 (CPLR §214[6]; *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 812). Nor in this pre-answer context, did the attorney-defendants waive the right to interpose the subject, limitations defenses (CPLR §3211[e]; *Hickey v. Hutton*, 182 AD2d 801, 802 *see generally, Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327 [2011]; *Matter of Augenblick v Town of Cortlandt*, 66 NY2d 775 [1985]). Additionally, attorney Mehl has demonstrated that First Central did not serve "Jeffery E. Mehl" individually – the party actually named in the complaint, but rather, served the distinct entity, "Jeffery E. Mehl, P.C.," by delivering process to the secretary of state under to BCL § 306 (Mehl Main Brief at 8-9). The complaint is therefore alternatively dismissable as against Mehl individually on the ground that personal service was never properly effectuated on him (*see, Somer & Wand v Rotondi*, 219 AD2d 340, 343-344).

However, those branches of Meridian's motion which are to dismiss the plaintiff's remaining non-time-barred, contract claims (first through third causes of action), including the Brecher guarantee (third) cause of action, should be denied. The Court disagrees that these claims are dismissable as a matter of law on the theory that the Origination Agreement is merely an agreement to agree and/or that the requisite detail is absent to the extent that the contract claims are fatally deficient at this pre-answer juncture of the action (Meridian Brief at 12-13). The particulars relating those loans which are still timely can be further amplified during the course of pre-trial discovery. With respect to the related specific performance (fourth) cause of action (arising out of the "buy back" requirement), Meridian's laches defense does not mandate

dismissal at this point, *i.e.*, Meridian's claim that First Central slept on its rights and made no specific performance claims until after the real estate market collapsed years later, in 2008 (Meridian, Main Brief at 11; Cmplt.,¶ 47). Upon the inconclusive factual record developed to date, this largely fact-intensive claim cannot be resolved as a matter of law at this early stage in the litigation (*Trahan v Galea*, 48 AD3d 791, 792).

With respect to the fifth and sixth, fraud-based claims, a plaintiff must allege "a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*High Tides, LLC v. DeMichele*, 88 AD3d 954, 957 *see, Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). Moreover, "CPLR §3016[b] requires that the circumstances of the fraud must be "stated in detail," including "specific dates and [other] items" (*Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691, 692 *see, Scott v. Fields,* 92 AD3d 666). Conclusory assertions and/or "[s]weeping references to acts by all or some of the defendants" will not suffice (*Quinones v. Schaap*, 91 AD3d, 739, 740-741; *Orchid Const. Corp. v. Gottbetter,* 89 AD3d 708, 710; *Henry v. City of New York*, ___F.Supp.2d.___, 2007 WL 1062519 at 5 [E.D.N.Y. 2007]; *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 AD2d 736; *Shimiaie v. Shadan*, ___ Misc.3d____, 2011 WL 5295209 [Supreme Court, Nassau County 2011]).

Preliminarily, those fraud claims which rely on Meridian's alleged failure to buy-back stated loans, are duplicative of the first and second breach of contract causes of action, which arise out of the same, operative facts (Cmplt., ¶¶ 66-88). It is settled that "a cause of action alleging breach of contract may not be converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations" (*Refreshment Management Services, Corp. v. Complete Office Supply Warehouse Corp.*, 89 AD3d 913, 914 *see, New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 389 [1987]). Similarly, the fraud claims alleging that the attorney-defendants "intentionally" omitted the rate floor provisions are duplicative of attorney malpractice (seventh) cause of action (Cmplt., ¶¶115-116; 121-122)(*Daniels v Turco*, 84 AD3d 858, 859).

In any event, the verified complaint (as to the "rate floor" fraud issue) merely lumps the Meridian and attorney-defendants together and then, in bare-boned fashion, avers that the

defendants (as an undifferentiated group), "intentionally" and thereby fraudulently, closed loans without the rate floors (*Daly v Kochanowicz*, 67 AD3d 78, 90; *Shimiaie v. Shadan*, *supra*). The complaint, however, is vague in describing the manner in which the purported rate floor fraud was supposedly perpetrated. Among other things, it: (1) never clearly links a particular attorney-defendant to a given closing or identifies the dates when the offending closings occurred; (2) does not allege that the attorneys drafted or prepared the improper documents or define precisely what closing duties the attorneys had agreed to undertake as part of their retainer; (3) omits facts detailing precisely how – or even if – the attorney-defendants (or the Meridian defendants) were ever apprised by First Central that the rate floors were required components of the loan agreements; and (4) does not attribute to specific defendants, any particularly described, false statements relating to the closings or rate floors (*Quinones v Schaap, supra*, 91 AD3d 739, 741). Rather, the complaint's rate floor fraud theory appears to founded in large part, on presumption that because the documents relied on by First Central contained the rate floors – and certain customer loan documents did not – both Meridian and the attorney defendants must therefore have "intentionally" omitted the floor provisions, with the requisite scienter and thereby committed fraud (Cmplt., ¶¶ 115, 121). However, absent further explanatory or contextual background, attaching the term "intentional" to a series of otherwise inconclusive averments, does not establish a present intent to deceive or otherwise spell out a properly detailed cause of action sounding in fraud (*High Tides, LLC v. DeMichele, supra*, 88 AD3d 954, 958-959; CPLR §3016[b]).

It also bears noting that the Origination Agreement itself refers to the duties to be assumed at the closings by retained counsel, and at least insofar as therein described, depicts those duties in a decidedly narrow fashion, *i.e.*, it provides that "[t]he legal counsel selected by the Bank shall be responsible for ensuring that all closing documents are properly signed by the Borrower, the Bank or the appropriate third party, as applicable and contain authentic signatures" (Origination Agreement, ¶ 3.10)(*see, Turner v. Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849, 850). While the attorney-defendants were not formal parties to the Origination Agreement, First Cental plainly was. Lastly, First Central has not alleged facts establishing, *inter alia*, that "but for" the attorney-defendants' purported negligence, it would not have incurred damages (*M & R Ginsburg, LLC v. Segal, Goldman, Mazzotta & Siegel, P.C.*, 90 AD3d 1208, 1209; *Humbert v Allen*, 89 AD3d 804, 806 *see, Leder v Spiegel*, 9 NY3d 836, 837 [2007]). Contrary to First

Central's contentions, the complaint does not specifically allege that the rates ever reset below the floor figure which allegedly should have been in the customer loan documents (Pltff's Brief at 4, 10, 15; Cmplt., ¶¶ 54, 65, 118, 123, 133). It is settled that a "failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent" (*Snolis v Clare*, 81 AD3d 923, 925).

Those branches of the motions which are to dismiss the negligent misrepresentation and fiduciary duty (eighth and ninth) causes of action are also granted. Firstly, to the extent that the Meridian-based, fiduciary duty claims accrued more than three years prior to the October 5, 2011 commencement date, they are time-barred. In any event, to succeed on a cause of action to recover damages for breach of fiduciary duty "'a plaintiff 'must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct'" (*Guarino v. North Country Mortg. Banking Corp.*, 79 AD3d 805, 807; *Robert I. Gluck, M.D., LLC v. Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1167 *see, EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Northeast Gen. Corp. v. Wellington Adv.*, 82 NY2d 158, 162 [1993]). "A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR §3016" (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 684), and a plaintiff must also "do more than make allegations of unscrupulous acts" (*Robert I. Gluck, M.D., LLC v. Kenneth M. Kamler, M.D., LLC, supra*). Similarly, with respect to negligent misrepresentation, a plaintiff must allege: (1) the existence of special or privity-like relationship imposing duty on defendant to impart correct information to plaintiff; (2) that information was incorrect or withheld; and (3) reasonable reliance on information or omission (*High Tides, LLC v. DeMichele, supra*, 88 AD3d at 957-958). "Liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *High Tides, LLC v. DeMichele, supra*). "A special relationship does not arise out of an ordinary arm's length business transaction between two parties" (*US Express Leasing, Inc. v. Elite Tech. [NY], Inc.*, 87 AD3d 494, 497).

At bar, the complaint contains only circular averments as to Meridian with respect to the requisite, special relationship of trust (Cmplt., ¶¶ 135-138)(*High Tides, LLC v. DeMichele, supra*,

88 AD3d at 960 *see*, *Baer v Complete Off. Supply Warehouse Corp.*, 89 AD3d 877, 878; *Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp., supra,* 89 AD3d 913, 914; *US Express Leasing, Inc. v. Elite Tech. [NY], Inc., supra*, 87 AD3d 494, 497). The parties' contracts also belie the inference that there arose anything other than a conventional business arrangement between two sophisticated, commercial entities – Meridian and First Central (*Northeast Gen. Corp. v. Wellington Adv., supra*, 82 NY2d 158, 162; *Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 663). As to the negligent misrepresentation claim, while the complaint avers, in conclusory terms, that the defendants – as an undifferentiated group – made "repeated factual misrepresentations" (Cmplt., ¶ 128), it does not particularly describe any specific or affirmative misstatements made by these defendants (*High Tides, LLC v. DeMichele, supra*). The record further establishes that the negligent misrepresentation claim is also dismissable as duplicative of the legal malpractice claim (*Conklin v. Owen,* 72 AD3d 1006, 1007; *Sitar v. Sitar*, 50 AD3d 667, 670).

The tenth cause of action, styled as a combined unjust enrichment and conversion claim, is also dismissed since: (1) as to Meridian, an unjust enrichment is not viable because there is a contractual agreement governing the involved subject matter (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 23 [2005]); and (2) First Central has not meaningfully opposed dismissal of its conversion claim. In addition, the conversion claim is miscast since it does not properly allege that First Central had "ownership, possession, or control of the proceeds" involved (*Orchid Const. Corp. v. Gottbetter*, *supra,* 89 AD3d at 710; *Quinones v. Schaap*, *supra*, 91 AD3d at 741; *Castaldi v 39 Winfield Assoc.*, 30 AD3d 458, 459). Lastly, the unjust enrichment claim is also duplicative of the legal malpractice claim (*Town of Wallkill v Rosenstein*, 40 AD3d 972, 974).

The Court has considered First Central's remaining contentions and concludes that they are insufficient to defeat the movants' respective motions to the extent granted above.

Accordingly, it is,

ORDERED that the motions pursuant to CPLR §3211[a][1],[5],[7], CPLR §3016, by the attorney-defendants Jeffrey E. Mehl, Esq., David S. Frankel, P.C., and the Law Offices of Sam

Shore, for an order dismissing the complaint insofar as interposed as against them, are granted, and the plaintiff's action, together with all cross-claims, are hereby dismissed against said defendants, and it is further,

ORDERED that the motion pursuant to CPLR §3211[a][1],[5],[7] by the defendants Meridian Residential Capital, d/b/a, Trump Financial, Meridian Mortgage Services, Inc., David Brecher, Meridian Mortgage Services, Inc., and DBS Servicing Solutions, Inc., for an order dismissing the complaint insofar as interposed as against them, is granted with respect to plaintiff's fifth through tenth causes of action, but denied with respect to the stated portions of the first through fourth causes of action, which shall survive in accordance herewith, and it is further,

ORDERED that the order to show cause by the plaintiff First Central Savings Bank, is hereby denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 27, 2012

Anthony L. Parga, J.S.C.

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