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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MBIA INSURANCE CORPORATION, a New
York Corporation

Plaintiff,

v.

INDYMAC ABS, INC. a Delaware corporation;
HOME EQUITY MORTGAGE LOAN ASSET-
BACKED TRUST, SERIES 2006-H4, a
Delaware statutory trust; HOME EQUITY
MORTGAGE LOAN ASSET-BACKED
TRUST, SERIES INDS 2007-1, a New York
common law trust; HOME EQUITY
MORTGAGE LOAN ASSET-BACKED
TRUST, SERIES INDS 2007-2, a New York
common law trust; CREDIT SUISSE
SECURITIES (USA), L.L.C., a Delaware
limited liability corporation; UBS
SECURITIES, LLC, a Delaware corporation;
JPMORGAN CHASE & CO., a Delaware
corporation; MICHAEL PERRY, an individual;
A. SCOTT KEYS, an individual; JILL
JACOBSON, an individual; KEVIN CALLAN,
an individual; and JOHN and JANE DOES 1-
100,

Defendants.

CASE NO. BC422358
[Assigned to the Hon. Carl. J. West]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' JOINT MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: July 30, 2010
Time: 1:30 p.m.
Dept.: 322

[Notice of Joint Motion and Joint Motion, Request
for Judicial Notice, and Appendix of Non-
California Authorities filed concurrently herewith;
[Proposed] Order Granting Joint Motion for
Judgment on the Pleadings lodged concurrently
herewith]

Complaint Filed: September 22, 2009

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1 sophisticated parties intended that the full economic risk of default was to be borne by MBIA, the
2 insurer, and, had MBIA intended to preserve securities fraud claims against third parties on behalf of
3 the Note Purchasers, it could have bargained for those rights. 2004 WL 1944452, *4, *6; *see also*
4 *Knight v. Alefosio* (1984) 158 Cal. App. 3d 716, 721-23 (dismissing contractual subrogation claims
5 where policy contained limited subrogation rights, not including the right to seek the relief sought).

6 *Second*, MBIA has no equitable subrogation rights to sue on behalf of the Note Purchasers
7 because equitable subrogation “cannot be invoked to override the contract of the parties. It is not
8 applicable where, as here, its enforcement would be inconsistent with the terms of the contract, or
9 where the contract, either expressly or by implication, forbids its application.” *Knight*, 158
10 Cal.App.3d at 724 (citation omitted). *See also MBIA Ins. Corp. v. Bank of Am.*, Case No. BC417572,
11 Slip Op. at 8 (May 17, 2010) (relying on *Knight* and dismissing without leave to amend MBIA’s
12 equitable subrogation claims that are substantially identical to its claims here) (Defendants’ Request
13 for Judicial Notice (“RJN”), Ex. 6).

14 *Third*, MBIA did not insure the Note Purchasers, and therefore cannot stand in their shoes.
15 Subrogation allows an insurer (under certain circumstances) to sue, *only on behalf of its insured*,
16 third-parties with whom the insurer has no direct relationship in order to recover sums that the insurer
17 paid to its insured to cover a loss caused by the third-party. But MBIA’s insureds in connection with
18 the securities at issue are IndyMac Bank and the Trusts, *not* the Note Purchasers. MBIA therefore
19 has no right to sue on their behalf.

20 *Fourth*, MBIA has no subrogation rights because the Note Purchasers have obtained every
21 payment they bargained for under the securities they purchased and therefore have suffered no loss.

22 Finally, even if MBIA had the subrogation rights it alleges (and it does not), the action is
23 unripe under the “made whole” doctrine.

24 For these reasons, discussed in detail below, this Court should grant the Defendants’ Joint
25 Motion for Judgment on the Pleadings and dismiss MBIA’s Complaint without leave to amend.

26 **FACTUAL AND PROCEDURAL BACKGROUND**

27 The following allegations are taken from the Complaint and the transaction and offering
28

1 documents giving rise to the claims at issue, many of which are cited in the Complaint.² MBIA is a
2 stock insurance corporation that guarantees financial obligations related to securities. (Cmpl. ¶ 13.)
3 In late 2006 and early 2007, MBIA issued a guarantee policy to the Trusts “unconditionally and
4 irrevocably” guaranteeing the financial obligations of three issuers (*i.e.*, the Trusts) of certain
5 residential mortgage-backed securities (the “Notes”). (Cmpl. ¶ 3-4, 47, 66, 67, 125.) The Notes are
6 secured by three pools (one for each Trust) of mortgages, each consisting of thousands of second-lien
7 home equity lines of credit (“HELOC”). (Cmpl. ¶¶ 4, 40-41, 125.) The Notes were sold by the
8 Underwriter Defendants through the offering documents. (Cmpl. ¶¶ 38, 64-65.)

9 The Trusts’ financial obligation is to pass through to the investors in the Notes – the Note
10 Purchasers – the principal and interest payments of the mortgagees whose HELOCs serve as
11 collateral for the Notes. (Cmpl. ¶ 44.) If the Trusts do not receive enough principal and interest
12 payments to pay the Note Purchasers, MBIA must, on behalf of its insured – *i.e.*, “on behalf of
13 IndyMac Bank” – pay to the Trustee of the Trusts proceeds that are equal to the principal and interest
14 payments due under the Notes. (Cmpl. ¶¶ 4, 67, 68.) MBIA issues its guarantee proceeds to the
15 Indenture Trustee of the Trusts and not directly to the Note Purchasers, (Cmpl. ¶ 125), and expressly
16 is not responsible for seeing that the proceeds are passed to the Note Purchasers (Prospectus
17 Supplement at p.S-42 (RJN Ex. 2)).

18 The three Trusts at issue in this case were created and funded by IndyMac Bank and former
19 defendant IndyMac ABS, Inc. (Cmpl. at ¶ 41.) The pooled HELOCs used to fund the Trusts largely
20 were originated by IndyMac Bank. (Cmpl. at ¶ 41.) During the nation-wide mortgage crisis, some
21 mortgagees failed to make timely payments, and the Trusts – MBIA’s insured – filed claims with
22 MBIA to cover the shortfalls. (Cmpl. ¶¶ 7-8.) MBIA alleges that since 2007 it has paid \$487 million
23 on its guarantees of the Trust obligations and is exposed to claims for another \$566 million. (Cmpl.

24
25 ² Each Trust has a set of closing documents and each set of Notes issued by each Trust has a set of
26 offering documents. MBIA focuses on one set of closing and offering documents in its
27 Complaint – for the Series 2006-H4 Trust – and avers that the other two sets of closing and
28 offering documents are “substantially similar in every material respect.” (Cmpl. ¶ 55.) For
purposes of this Motion, Defendants take that allegation as true. Attached as Exhibit A to this
Memorandum of Points and Authorities is a chart depicting the Transaction Overview for the
2006-H4 securitization. The Transaction Overview was included in the 2006-H4 Prospectus
Supplement at p.S-2 (RJN Ex. 2) and has been modified to add more detail.

1 ¶ 11.)

2 MBIA now brings this lawsuit alleging California Securities Law and common law violations
3 to recover as damages the proceeds it has paid, and will in the future pay, in guarantee of the Trusts'
4 obligations. (Cmpl. ¶¶ 4, 11, 203(b) & p.49 ¶ 7.) MBIA alleges that IndyMac Bank failed to comply
5 with its own internal underwriting standards when originating mortgage loans that ultimately were
6 included in residential mortgage-backed securities. (Cmpl. ¶ 6.) MBIA claims the defendants falsely
7 represented in the offering documents – collectively, the “Prospectus Supplement,” (Cmpl. ¶¶ 64-65)
8 – that the loans used to back the Notes were originated in compliance with IndyMac Bank’s internal
9 underwriting standards, when the defendants knew, or had reason to believe, those representations
10 were not true. (Cmpl. ¶¶ 5-6.) MBIA purports to sue not for itself, but as “subrogee” for the
11 unnamed – and, as far as the Complaint is concerned, *unknown* – Note Purchasers. (Cmpl. ¶¶ 11, 12.)

12 LEGAL ANALYSIS

13 I. Legal Standard

14 In general, “a motion for judgment on the pleadings by the defendant is equivalent to a
15 demurrer.” *Mack v. State Bar*, 92 Cal. App. 4th 957, 961 (2001). Granting Defendants’ Motion
16 without leave to amend is appropriate here because MBIA’s complaint fails to “state facts sufficient
17 to constitute a cause of action.” Cal. Code Civ. Proc. § 438(c)(1)(B)(ii); *see also Knight*, 158 Cal.
18 App. 3d at 721-726 (denying right to intervene because equitable and contractual subrogation claims
19 were barred as a matter of law). In evaluating the legal sufficiency of a complaint, the Court must
20 assume the plaintiff’s factual allegations are true, but it need not accept its “contentions, deductions,
21 or conclusions of fact or law.” *Mack*, 92 Cal. App. 4th at 960. A plaintiff may not rely on
22 conclusory allegations. *See Bains v. Moores*, 172 Cal. App. 4th 445, 477 (2009) (sustaining demurrer
23 to California Corporations Code violations on the grounds that allegations were conclusory). Instead,
24 a plaintiff must establish each element of its claims through sufficient factual allegations. *See*
25 *Goodman v. Kennedy*, 18 Cal. 3d 335, 339-40 (1976) (affirming grant of general demurrer where
26 complaint lacked factual allegations sufficient to constitute a claim under section 25401).

27 This Court is not limited to the complaint and its attachments when considering a motion for
28 judgment on the pleadings. Cal. Code Civ. Proc. § 438(d). The Court may judicially notice other

1 court documents, *see* Cal. Evid. Code § 452(d), facts, *see id.*, at § 452(h), (g), and it may consider
2 documents referenced in the complaint whether attached to the complaint or not. *See Ascherman v.*
3 *Gen. Reinsurance Corp.*, 183 Cal. App. 3d 307, 310-11 (1986).³ Moreover, when challenging the
4 pleadings, not every allegation in the complaint must be credited to the plaintiff. Allegations that are
5 inconsistent with other allegations in the complaint or documents attached to or referenced in the
6 complaint also need not be credited to the plaintiff. *See Del E. Webb Corp. v. Structural Materials*
7 *Co.*, 123 Cal. App. 3d 593, 604 (1981) (“[A] pleading valid on its face may nevertheless be subject to
8 demurrer when matters judicially noticed by the court render the complaint meritless.”); *Natomas*,
9 184 Cal. App. 3d at 1528 (dismissing state securities law claims, in part, because the prospectus
10 “plainly disclosed” the alleged omission).

11 Leave to amend should be granted only when a plaintiff has sufficiently demonstrated that
12 there is a reasonable possibility that it can cure the defect by amendment. *See Goodman*, 18 Cal. 3d
13 at 349. Furthermore, “[i]f there is no liability as a matter of law, leave to amend should not be
14 granted.” *Schonfeldt v. California*, 61 Cal. App. 4th 1462, 1465 (1998).

15 **II. MBIA Has No Subrogation Rights To The Claims Asserted In This Action.**

16 MBIA purports to bring this action solely as subrogee for unidentified Note Purchasers, and
17 not in its own right. (Cmpl. ¶¶ 11-12, 124-128.) Subrogation is “the substitution of another person in
18 place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim.”
19 *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A.*, 143 Cal. App. 4th 1098, 1105 (2006).
20 Subrogation rights arise either where equity demands it or by right of contract. *See Knight*, 158 Cal.
21 App. 3d at 723. MBIA claims it has the right to sue the Defendants as subrogee to the Note

22 ³ A plaintiff may not deliberately omit from its complaint references to documents upon which its
23 claims are based in order to avoid dismissal. *See Ins. Underwriters Clearing House v. Natomas*
24 *Co.*, 184 Cal. App. 3d 1520, 1528 (1986) (dismissing state securities law claims, in part, because
25 the prospectus “plainly disclosed” the alleged omission); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706
26 (9th Cir. 1998) (considering on motion to dismiss documents not explicitly incorporated in the
27 complaint in order to “[p]revent[] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately
28 omitting references to documents upon which their claims are based”); *In re Infonet Servs. Corp.*
Sec. Litig., 310 F. Supp. 2d 1106, 1116 n.10 (C.D. Cal. 2003) (analyst reports not specifically
referenced in plaintiff’s complaint properly considered on motion to dismiss where plaintiff had
extensively relied on documents “comparable in form and content” in its complaint); *Spiegel*,
2004 WL 1944452 at *4, n.3 (relying on transaction documents similar to those at issue here
related to securitizations similar to those at issue here to support dismissal of MBIA’s
representative claims nearly identical to its subrogation claims here).

1 Purchasers under both contractual (a.k.a., “conventional”) and equitable subrogation. (Cmpl. ¶ 126.)
2 MBIA is wrong on both fronts.⁴

3 **A. MBIA’s policy provides MBIA with only limited and narrow subrogation**
4 **rights, and those rights do not include (1) the right to bring a damages**
5 **action (2) on behalf of the Note Purchasers (3) against these Defendants.**

6 MBIA alleges it is contractually subrogated to the Note Purchasers’ rights under several
7 agreements, (Cmpl. ¶¶ 124-128), but none of those agreements give MBIA any rights to any Note
8 Purchasers’ purported private causes of actions for securities law and common law violations. In
9 both California and New York, contractual subrogation provisions are to be construed specifically
10 and narrowly as waiving all subrogation rights either not expressly provided or inconsistent with
11 what is provided. *See Knight*, 158 Cal. App. 3d at 723 (“Where the insurance contract is silent as to
12 subrogation rights it means that such a right was not bargained for and hence not acquired by the
13 insurance company.”); *J&B Schoenfeld, Fur Merchs., Inc. v. Albany Ins. Co.*, 109 A.D.2d 370, 373
14 (N.Y. App. Div. 1985) (“[W]here the right of an insurer to subrogation is expressly provided for in
15 the policy, its rights must be governed by the terms of the policy.”).⁵

16 In *Knight*, an insurer, Farmers Insurance Exchange, paid its insured “income continuation
17 benefits” as called for by the policy, and then sought to intervene in its insured’s lawsuit against the
18 responsible tortfeasor. 158 Cal. App. 3d at 719-20. Farmers asserted that it was subrogated to its
19 insured’s claim against the tortfeasor for loss of income. *Id.* The California Court of Appeal
20 disagreed. *Id.* at 723. Although the policy at issue provided Farmers with subrogation rights with
21 respect to *damages* (defined as compensation for bodily injury or property damage), it did not
22 provide Farmers with any subrogation rights for *income continuation benefits*. *Id.* at 722. The court
23 held that Farmers lacked the subrogation rights it sought because Farmers’ “policy [did] not contain
24 an express reservation of its right to subrogate with respect to” such benefits. *Id.* at 721.

25 ⁴ *See Century Indem. Co. v. London Underwriters* 12 Cal. App. 4th 1701, 1708 (1993) (“In most
26 instances this distinction [between equitable and contractual subrogation] has no significance for
27 the same facts which give rise to subrogation by operation of law are ordinarily the same facts
28 which entitle a person to claim the benefit of a contract or convention for subrogation.”).

⁵ MBIA brings all its claims under California law, but the contracts MBIA claims give rise to its
subrogation rights are governed by New York law. Regardless of which law applies, MBIA lacks
the subrogation rights it asserts.

1 Similarly, here MBIA has not bargained for an express reservation of rights to subrogate for
2 damages arising from securities law violations; rather, it has subrogation rights only to collect
3 payment and interest *from the Trust* and thereby has waived all other contractual subrogation rights.
4 The contractual language giving rise to MBIA's subrogation rights on behalf of the Note Purchasers,
5 which is quoted in MBIA's Complaint, is *specific* and *narrow*, both in the relief MBIA can seek –
6 *principal and interest payments* that are made into the Trust (as distinct from damages arising from a
7 lawsuit) – and from whom MBIA can seek those payments – *from the Trusts*. (Cmpl. ¶¶ 124-128.)

8 One court has already considered similar language in an MBIA policy guaranteeing the
9 principal and interest payments of an almost identically-structured asset-backed security, and rejected
10 MBIA's right to sue for securities law violations. In *Spiegel*, MBIA argued just as it does here that
11 the policy and related agreements “expressly [give it] the right ... to act on behalf of the Noteholders
12 and to pursue remedies available under the law.” *MBIA*, 2004 WL 1944452, at *4. The court called
13 MBIA's argument “meritless,” *id.* at *5, and dismissed MBIA's claims, reasoning:

14 While MBIA is granted many rights and protections in these sophisticated and highly
15 detailed commercial agreements, notably absent from them is any provision that gives
16 MBIA the right to bring a lawsuit on behalf of the Noteholders or to pursue legal
17 remedies that the law reserves solely to them. The absence of any such provision is
18 particularly noteworthy in the context of these documents, which list in excruciating
19 detail all of the rights and duties of the various parties, including the Insurer, the
20 Issuer, the Servicer, and the Indenture Trustee, who, as is typical in such transactions,
21 is granted broad-ranging powers to act on behalf of and for the benefit of the
22 Noteholders. . . . In this context, and given the traditional disfavor with which claims
of representative standing are regarded, *see, e.g., Warth v. Seldin*, 422 U.S. 490, 509
(1975) (plaintiffs cannot rest their claim to relief on the legal rights of others, citing the
“prudential standing rule that normally bars litigants from asserting the rights or
legal interest of others in order to obtain relief from injury to themselves”), MBIA
must point to some clear grant of authority if it is to survive defendant's motion to
dismiss. The provisions it cites cannot meet this standard.

23 *Id.* at * 4.

24 The contractual language that MBIA relies on in this case as the source for its alleged
25 subrogation rights are identical in substance, and nearly verbatim, to the language rejected by the
26 court in *Spiegel*. In *Spiegel*, the Note Guaranty Insurance Policy (which was included among the
27 various transaction documents submitted to the court by MBIA) provided:

28 The Insurer shall be subrogated to the rights of each Noteholder to receive payments
under the Series 2001-A Indenture Supplement to the extent of any payment by the

1 Insurer hereunder.

2 (*Spiegel* Note Guaranty Insurance Policy at 4 (RJN, Ex. 5).) In nearly verbatim language, the Note
3 Guarantee Insurance Policy here provides:

4 Subject to the terms of the Agreement [*i.e.*, the Indenture and the Sale and Servicing
5 Agreement], the Insurer shall be subrogated to the rights of each Owner to receive
6 payments under the Obligations [*i.e.*, the Trusts] to the extent of any payment by the
7 Insurer hereunder.

8 (Cmpl. ¶ 126.) In turn, the Indenture in this case similarly provides:

9 The Insurer shall, to the extent it makes any payment with respect to the Notes,
10 become subrogated to the rights of the recipient of such payments to the extent of such
11 payments. Subject to and conditioned upon any payment with respect to the Notes by
12 or on behalf of the Insurer, the Indenture Trustee shall assign to the Insurer all rights to
13 the payment of interest or principal with respect to the Notes which are then due for
14 payment to the extent of all payments made by the Insurer.

15 (Cmpl. ¶ 127.) And the subrogation provision in the Sale and Servicing Agreement states that
16 the Insurer will be fully subrogated to the rights of such Holders to receive such
17 principal and interest, as applicable, from the Trust.

18 (Cmpl. ¶ 128.) No other provision of the transaction documents identified by MBIA in its Complaint
19 affords it any greater subrogation rights than that just quoted. That is, nothing in the Policy and
20 related agreements provides MBIA with a right to bring this lawsuit as anyone's subrogee. Indeed,
21 the subrogation language at issue in this case is limited compared to subrogation clauses giving
22 blanket subrogation rights or rights to sue for damages. *See, e.g., Kardly v. State Farm Mut. Auto.*
23 *Ins. Co.*, 207 Cal. App. 3d 479, 488 (1989) ("Upon payment under this policy . . . the company shall
24 be subrogated to all *the insured's* rights of recovery therefor" (emphasis in original)).

25 Not only has MBIA, as it did in *Spiegel*, failed here to point to *any specific provision* in the
26 contracts at issue which confer on MBIA the rights of the Note Purchasers (if indeed they would have
27 any such rights) to sue the Defendants for alleged securities law or common law violations, but also
28 MBIA concedes in its Complaint that the only source of satisfaction for MBIA's rights as subrogee is
29 *actual payments of principal and interest from the Trust*, and not a damages action: "the Insurer shall
30 be paid such principal and interest *but only from the sources and in the manner provided herein and*
31 *in the Insurance [and Indemnity] Agreement* for the payment of such principal and interest." (Cmpl.
32 ¶ 128 (emphasis added).) Subrogation language in the Indenture that MBIA does *not* quote also

1 makes clear the limits of MBIA's subrogation rights:

2 Notes which have been paid with proceeds of the Policy shall continue to remain
3 Outstanding for purposes of the Indenture *until the Insurer has been paid as subrogee*
4 *under the Insurance and Indemnity Agreement or the Insurer has been reimbursed*
5 *pursuant to the Insurance and Indemnity Agreement, as evidenced by a written notice*
6 *from the Insurer delivered to the Indenture Trustee"*

7 (Indenture, § 1.01 (definition of "Outstanding") (emphasis added) (RJN Ex. 3).)

8 If there is any doubt or ambiguity as to whether an insurance company has successfully
9 bargained for the right to bring a damages action in subrogation, that doubt is to be resolved against
10 the insurance company, MBIA. *Knight*, 158 Cal.App.3d at 722-723 ("[I]t is basic California law that
11 where policy provisions are reasonably susceptible of different interpretations, ambiguities or doubt
12 as to the meaning of the policy provisions must be resolved against the insurer."). That is especially
13 the case here, because, at the time MBIA issued the Policy, District Judge Gerard E. Lynch (who has
14 since been elevated to the United States Court of Appeals for the Second Circuit) had already found
15 that MBIA could not sue as Note Purchasers representatives under a guarantee policy nearly identical
16 to the one at issue here. *Spiegel*, 2004 WL 1944452, at *4. MBIA was well aware of the decision in
17 *Spiegel* when it failed to bargain for any greater subrogation rights here than it had in *Spiegel*. In
18 light of this history, the following admonition in *Spiegel* is especially damaging to MBIA's attempts
19 to pursue rights it did not bargain for:

20 MBIA's claims ring hollow in the context of a sophisticated commercial insurer who
21 is in the business of providing "financial guaranty insurance to the issuers of asset-
22 backed securitizations," . . . and who elected to participate in this transaction and sign
23 the various agreements documenting it. MBIA is an insurer – it evaluates risk and
24 charges premiums accordingly. Occasionally, it may find itself in the position of
25 having to make disbursements on policies, precisely because of the occurrence of
26 events whose contemplation prompted people to seek insurance in the first place. . .
27 The failure to [secure "the right to bring securities laws claims on behalf of the
28 Noteholders"] does not give rise to an equitable or policy argument that overrides
29 MBIA's lack of standing to bring claims under the securities laws that belong to the
30 Noteholders.

31 *Id.*, at *6 (factual citations omitted). The court in *Spiegel* put on MBIA's shoulders the consequences
32 of its failure to bargain for the Note Purchasers' right to sue, and this Court should do likewise.
33 Judge Elias similarly found that "MBIA does not cite specific language establishing a right to bring

1 subrogation lawsuits.” *Bank of America*, Slip Op. at 7.⁶

2 The transaction documents provide MBIA only with limited subrogation rights (*i.e.*, payments
3 of principal and interest from the Trusts) to the exclusion of all others (*e.g.*, the right to sue for
4 securities and common law violations). That was the holding of the only on-point authority at the
5 time MBIA bargained for its subrogation rights. The Court should hold MBIA to the benefit of its
6 bargain.

7 **B. Equity does not provide MBIA with the subrogation rights it alleges.**

8 MBIA alleges it is entitled to sue on behalf of the Note Purchasers by “operational law.”
9 (Cmpl. ¶ 126.) Subrogation by “operation of law” is commonly known as “equitable subrogation.”
10 *Knight*, 158 Cal. App. 3d at 723. MBIA has no rights to equitable subrogation here.

11 “The doctrine of [equitable] subrogation cannot be invoked to override the contract of the
12 parties. It is not applicable where, as here, its enforcement would be inconsistent with the terms of
13 the contract, or where the contract, either expressly or by implication, forbids its application.” *Id.* at
14 724 (citation omitted); *see also Fed. Ins. Co. v. Arthur Andersen & Co.*, 552 N.E.2d 870, 872 (N.Y.
15 1990) (equitable subrogation does not exist where there is “language in the agreement . . . which
16 could be construed as barring plaintiff’s claim as equitable subrogee”). Because MBIA has bargained
17 for limited subrogation rights as described above in Part II.A, it has no right to sue the Defendants as
18 the Note Purchasers’ subrogee in equity. MBIA cannot “ask[] the court to allow in equity what
19 [MBIA] failed to reserve for itself under the insurance policy.” *Knight*, 158 Cal. App. 3d at 726; *see*
20 *also Spiegel*, 2004 WL 1944452, at *6 (“The failure to do these things does not give rise to an

21 ⁶ Judge Elias could not find, however, “that the contractual language is clear and unambiguous,”
22 and she therefore held that “determining the reach and meaning of the subrogation provisions
23 necessitates consideration of evidence.” *Id.* Respectfully, this holding cannot be reconciled with
24 the outcome in *Knight* where the court dismissed the insurer’s subrogation claims because no
25 contractual subrogation language provided for the right to bring a lawsuit in subrogation. *Knight*,
26 158 Cal. App. 3d at 722-723. Where the subrogation rights asserted are not explicitly provided
27 (as Judge Elias found they are not), the language necessarily clearly and unambiguously does *not*
28 provide such rights. In other words, if, as Judge Elias found, the contract is “ambiguous” as to
whether there is a contractual right of subrogation, *then necessarily there is no right such right*,
because the right needs to be clearly and unambiguously set forth in the contract. That is
especially so here, where the contract provides that MBIA “shall be paid such principal and
interest *but only from the sources and in the manner provided herein and in the Insurance [and
Indemnity] Agreement* for the payment of such principal and interest.” (Cmpl. ¶ 128 (emphasis
added).) Also contrary to *Knight*, Judge Elias did not construe the limited subrogation language
against MBIA, despite MBIA’s failure to bargain for greater subrogation rights after *Spiegel*.

1 equitable or policy argument that overrides MBIA's lack of standing to bring claims under the
2 securities laws that belong to the Noteholders.").

3 In *Bank of America*, where MBIA brought a similar action on a subrogation theory against
4 individual and institutional defendants based on their involvement in offering and underwriting
5 similarly-structured HELOCs, Judge Elias sustained the various defendants' demurrers on equitable
6 subrogation grounds:

7 The Court rejects MBIA's argument. The decision in *Knight, supra*, 158 Cal.App.3d
8 716 instructs that equitable subrogation is not available where the party asserting the
9 subrogation right negotiated specific, different subrogation rights in a contract and
10 failed to reserve the asserted subrogation right under the policy. To hold otherwise,
11 according to *Knight*, would permit the party to rewrite the contract to the detriment of
the other contracting party. *Knight* remains good law and operates against MBIA's
reliance on equitable subrogation given the parties' negotiation of specific contractual
subrogation provisions.

12 Slip Op. at 8 (footnotes omitted). Indeed, if MBIA's specific and narrow contractual subrogation
13 rights were supplemented by broader equitable subrogation, then the contractual provisions which
14 specifically delineate and limit MBIA's subrogation rights would be entirely superfluous. See
15 *Fireman's Fund Ins. Co. v. Superior Court*, 65 Cal. App. 4th 1205, 1215 (1997) (construction of
16 contract that renders provisions superfluous is "a result that is contrary to accepted rules of
17 interpretation"). MBIA cannot claim broad and unfettered rights to bring securities fraud and tort
18 claims under equitable subrogation where the contract has specific subrogation provisions that do not
19 provide for such remedies.

20 **C. MBIA has no subrogation rights because it has privity with the**
21 **Underwriter Defendants.**

22 Subrogation rights exist only where there is no contract between the insurer and the
23 defendant-in-subrogation concerning those parties' rights in relation to the claim asserted by
24 subrogation. See *Knight*, 158 Cal. App. 3d at 724 ("The usual application of equitable subrogation
25 has been as a device to achieve a just result by clothing a party with a right of recovery *where he*
26 *would otherwise be defeated by lack of privity.*" (emphasis added)). In the leading case on equitable
27 subrogation in California, the Supreme Court stated that "the doctrine of subrogation, which is
28 essentially a creature of equity, . . . is called into play *only when it is necessary* to bring about an
equitable adjustment between the parties." *Meyers v. Bank of Am. Nat'l Trust & Savings Ass'n*, 11

1 Cal. 2d 92, 99 (1938) (citation omitted; original emphasis removed; emphasis added); *see also*
2 *Kardly*, 207 Cal. App. 3d at 488 (“Subrogation is the right of an insurer to take the place of its
3 insured to pursue recovery *from legally responsible third parties* for losses paid to the insured by the
4 insurer.” (emphasis added)). In *Meyers*, the Supreme Court adopted subrogation as a principle in
5 California law (but declined to allow it in the specific facts of that case), after having only first found
6 that, without subrogation, the insurer would not have had any direct right of action at law against the
7 alleged tortfeasor. *Meyers*, 11 Cal. 2d at 96.

8 Here, MBIA has a direct contractual relationship with the Underwriter Defendants in
9 connection with the very securitizations at issue. MBIA entered into an Indemnification Agreement
10 with the Underwriter Defendants in connection with the 2006-H4 Trust, which “govern[s] the
11 liability of [MBIA and the Underwriter Defendants] with respect to the losses resulting from material
12 misstatements or omissions contained in the Prospectus Supplement.” (Underwriting Agreement at
13 p.2 (RJN Ex. 4).) In their Indemnification Agreement, the Underwriter Defendants bargained for
14 New York law and provided MBIA with very specific warranties concerning narrow representations
15 they made in the Prospectus Supplement, none of which relate to the subject matter of the
16 misrepresentations MBIA alleges here. (Indemnification Agreement at pp.2 & § 3 (RJN Ex. 1).)
17 Thus, MBIA is seeking through subrogation to avoid the limits of its direct contract with the
18 Underwriter Defendants. That MBIA cannot do. *See In re Nat’l Mortgage Equity Corp. Mortgage*
19 *Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1150 (1986) (rejecting assigned claims in a similar
20 mortgage pool securities case alleging violations of the same California Securities Laws, because
21 “[a]llowing the assignments in this case would permit the Bank to pursue theories of recovery it
22 could not pursue in an action for indemnity or contribution”).⁷

23
24
25 ⁷ MBIA is presently pursuing a direct action to enforce its contractual rights with IndyMac Bank,
26 and has been since before it brought this action. Indeed, just as MBIA did in *Spiegel*, 2004 WL
27 1944452, at *2, before bringing this suit, MBIA sued the loan originator for breach of contract,
28 fraud, and other causes of action concerning the quality of mortgage loans underlying the HELOC
securitizations which MBIA guaranteed, and seeks the same damages it is seeking here in
subrogation. *MBIA Ins. Corp. v. IndyMac Bank F.S.B.*, No. 09-1011 (D.D.C.). That suit arises
out of the Insurance and Indemnity Agreement, which MBIA entered into not only with IndyMac
Bank, but also with the (former) defendant Trusts and (former) defendant IndyMac ABS. *See*

[Footnote continued on next page]

1 **D. The Note Purchasers are not MBIA's insureds for subrogation purposes.**

2 MBIA has no right to sue in subrogation also because an insurer can act as subrogee only for
3 *its insured's* losses. *Truck Ins. Exch. v. County of Los Angeles*, 95 Cal. App. 4th 13, 21 (2002);
4 *Kardly*, 207 Cal. App. 3d at 488 (“Subrogation is the right of an insurer to take the place of *its*
5 *insured* to pursue recovery from legally responsible third parties for losses paid *to the insured* by the
6 insurer.” (emphases added)). Judge Elias held in *Bank of America*, concerning similarly-structured
7 guarantees, that MBIA's true “insured” is the Trusts – not the Note Purchasers. *Bank of America*,
8 Slip Op. at 3 fn.10, 5 fn.19, 9 fn.28. Indeed, MBIA concedes in the Complaint that it issued its
9 guarantee policy *to the Trusts* and agreed with IndyMac Bank and the Trusts to pay any proceeds *on*
10 *behalf of IndyMac Bank* to the Indenture Trustee for the benefit of the Note Purchasers. (Cmpl.
11 ¶¶ 47, 67-68, 124; *see also* IndyMac Bank Cmpl. ¶ 32 (“MBIA issued the Policies on behalf of
12 IndyMac”) (RJN Ex. 7).)⁸ Thus, in seeking to assert the rights of the Note Purchasers, MBIA is
13 not seeking to assert the rights of its insured. It is seeking, rather, to pursue the purported rights of
14 those whom MBIA's insureds – the Trusts – allegedly harmed, which subrogation does not permit.⁹

15 **E. The Note Purchasers have suffered no loss and therefore have no claims**
16 **for MBIA to assert “in subrogation”.**

17 The Note Purchasers have not suffered a cognizable “loss” which subrogation requires.
18 *Truck*, 95 Cal. App. 4th at 20-21. The guarantee policy issued by MBIA was one part of the larger
19 security investment – not a separate transaction the Note Purchasers acquired independently – that
20 enabled the Trust to make principal and interest payments to the Note Purchasers regardless of loan

21 _____
22 [Footnote continued from previous page]

23 *Bank of America*, Slip Op. at 8 (“Equitable subrogation also appears unavailable because MBIA
is pursuing direct claims . . . [as such] there appears to be an adequate legal recourse.”).

24 ⁸ While insurers routinely pay proceeds *for the benefit* of its insured and the non-insured alike (*e.g.*,
in an automobile accident in which the insured is at fault for damages to its own car and another's
25 car, the insurer will pay for the damage to both cars), an insurer pays proceeds “on behalf of”
only *its insured*. *See Intri-Plex Tech., Inc. v. The Crest Group, Inc.*, 499 F.3d 1048, 1053 (9th
Cir. 2007) (receipt of proceeds from insurer does not make the payee the “insured”; rather, the
insured is the entity the insurer acts “on behalf of”). Here, that is not the Note Purchasers.

26 ⁹ That MBIA should not be permitted to pursue the rights of the Note Purchasers in subrogation
27 makes sense because MBIA has no direct relationship with the Note Purchasers. MBIA not only
pays proceeds to someone other than the Note Purchasers (the Indenture Trustee), but also has no
28 obligation to see that the Note Purchasers ultimately receive any proceeds. (Prospectus
Supplement at p.S-42 (RJN Ex. 2).)

1 defaults. The Note Purchasers for the Trusts at issue, according to MBIA's own Complaint, have
2 received every dime they bargained for from their securities. (Cmpl. ¶ 8.) Having suffered no loss,
3 and having received every payment from the Trust that was owed to them, the Note Purchasers have
4 no cause of action against the Defendants that could be subrogated to MBIA. In *Spiegel*, the court
5 recognized that MBIA's insurance agreement was "part of the same transaction that issued the Note"
6 and noted that it was not "clear that the Noteholders, on whose behalf the action is purportedly
7 brought, have suffered any injury in light of the insurance provided by MBIA." 2004 WL 1944452,
8 at *1, *2 fn.2. Likewise, the Note Purchasers here have not suffered the tortious injury alleged by
9 MBIA. "[A]lthough a [guarantor] may acquire by subrogation a creditor's right of action against a
10 principal for fraud arising out of the latter's deceitful conduct in connection with the performance of
11 the main contract, if the *creditor* suffered no damage as a result of the principal's conduct, there is no
12 cause of action to which the [guarantor] can be subrogated *even if the [guarantor] was injured by the*
13 *fraud.*" 63 N.Y. Jur. 2d Guaranty and Suretyship § 422 (emphases added) (citing *Am. Sur. Co. v.*
14 *Tannhauser*, 37 N.Y.S.2d 450 (N.Y. Sup. Ct. 1942), *aff'd* 39 N.Y.S.2d 996 (N.Y. App. Div. 1943));
15 *State Farm*, 143 Cal. App. 4th at 1106 (subrogee acquires only the rights the subrogor has).

16 **III. MBIA's Subrogation Claims Are, In Any Event, Unripe.**

17 Subrogation is also not appropriate here because the "made-whole" doctrine prohibits an
18 insurer from exercising subrogation rights before the insurer has fully compensated the insured for its
19 loss. *21st Century Ins. Co. v. Superior Court*, 47 Cal. 4th 511, 519 (2009) ("The made-whole rule is
20 a common law principle that limits the insurer's reimbursement right in situations where the insured
21 has not recovered his or her entire debt."); *Sapiano v. Williamsburg Nat. Ins. Co.*, 28 Cal. App. 4th
22 533, 536 (1994) ("Until the creditor has been made whole for its loss, the subrogee may not enforce
23 its claim based on its rights of subrogation."). MBIA alleges the Note Purchasers have not been
24 made whole and that it is exposed to \$566 million or more in "future" claims, and seeks a declaration
25 that it is subrogee for "future payments," (Cmpl. ¶¶ 4, 11, 203(b) & p.49 ¶ 7.) As such, MBIA's
26 claims are unripe and may not proceed at this time. *Bank of America*, Slip Op. at 5-6 (sustaining
27 defendants' demurrers on the grounds that MBIA's purported subrogation claims were unripe under
28 the made-whole doctrine). MBIA cannot point to any law "permitting a subrogation action prior to

1 the full compensation of the insured.” *Id.* Instead, well-settled law establishes that the made-whole
2 doctrine bars MBIA’s claims as subrogee. *See Am. Int’l Specialty Lines Ins. Co. v. United States*, No.
3 04-1591, 2005 WL 680159, at *4 (N.D. Cal. Mar. 24, 2005) (dismissing subrogation action where the
4 plaintiff sought “to recover the amounts ‘that [p]laintiff has incurred and may, in the future, incur’”);
5 *Cal. Dep’t of Toxic Substance Control v. Chico*, 297 F. Supp. 2d 1227, 1236-37 (E.D. Cal. 2004)
6 (barring plaintiff’s suit to “recover the payments it has made to date as a kind of first ‘installment’ of
7 the potentially significant future expenses that it might incur”).

8 CONCLUSION

9 For the foregoing reasons, this Court should grant Defendants’ Motion for Judgment on the
10 Pleadings without leave to amend and dismiss MBIA’s Complaint with prejudice in its entirety,
11 including Count Six, whereby MBIA seeks declaratory relief that it is the Note Purchasers’ subrogee.

12 DATED: June 4, 2010

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13 By: Dean Kitchens
14 Dean Kitchens

15 Attorneys for Defendants CREDIT SUISSE
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18 DATED: June 4, 2010

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27 DATED: June 4, 2010

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1 **CERTIFICATE OF SERVICE**

2 I, Kim Niz, declare as follows:

3 I am employed in the County of Los Angeles, State of California; I am over the age of
4 eighteen years and am not a party to this action; my business address is 333 South Grand Avenue,
5 Los Angeles, California 90071-3197, in said County and State. On June 4, 2010, I served the
6 following document(s):

7 **DEFENDANTS' NOTICE OF JOINT MOTION AND JOINT MOTION FOR JUDGMENT
8 ON THE PLEADINGS**

9 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'
10 JOINT MOTION FOR JUDGMENT ON THE PLEADINGS**

11 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' JOINT MOTION
12 FOR JUDGMENT ON THE PLEADINGS**

13 **APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF DEFENDANTS'
14 JOINT MOTION FOR JUDGMENT ON THE PLEADINGS**

15 **[PROPOSED] ORDER GRANTING DEFENDANTS' JOINT MOTION FOR JUDGMENT
16 ON THE PLEADINGS AND DISMISSING PLAINTIFF'S COMPLAINT IN ITS
17 ENTIRETY WITHOUT LEAVE TO AMEND**

18 on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below
19 by the following means of service:

20 *See Attached Service List*

21 **BY LEXIS NEXIS FILE & SERVE:** I posted each such document directly on the LexisNexis
22 File & Serve website (<https://fileandserve.lexisnexis.com>) at approximately 2:00 p.m. local time.

23 **BY PDF FORMAT:** I caused each such document to be transmitted by PDF Format, to the
24 parties and e-mail addresses indicated above

25 **BY OVERNIGHT MAIL:** I placed a true copy in a sealed envelope addressed as indicated
26 above, on the above-mentioned date. I am familiar with the firm's practice of collection and
27 processing correspondence for delivery by overnight mail. Pursuant to that practice, envelopes
28 placed for collection at designated locations during designated hours are delivered to the
overnight mail service with a fully completed airbill, under which all delivery charges are paid
by Gibson, Dunn & Crutcher LLP, that same day in the ordinary course of business.

BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each
person[s] named at the address[es] shown and giving same to a messenger for personal delivery
before 5:00 p.m. on the above-mentioned date.

SERVICE BY FAX: From facsimile machine telephone number (213) 229 7520, on the above-
mentioned date, I served a full and complete copy of the above-referenced document[s] by
facsimile transmission to the person[s] at the number[s] indicated above and that the
transmission was reported as completed and without error.

1 **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the
2 above-mentioned date. I am familiar with the firm's practice of collection and processing
3 correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the
4 ordinary course of business. I am aware that on motion of party served, service is presumed
invalid if postal cancellation date or postage meter date is more than one day after date of deposit
for mailing in affidavit.

5 **(STATE)** I declare under penalty of perjury under the laws of the State of California
6 that the foregoing is true and correct.

7 **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

8 Executed on June 4, 2010.

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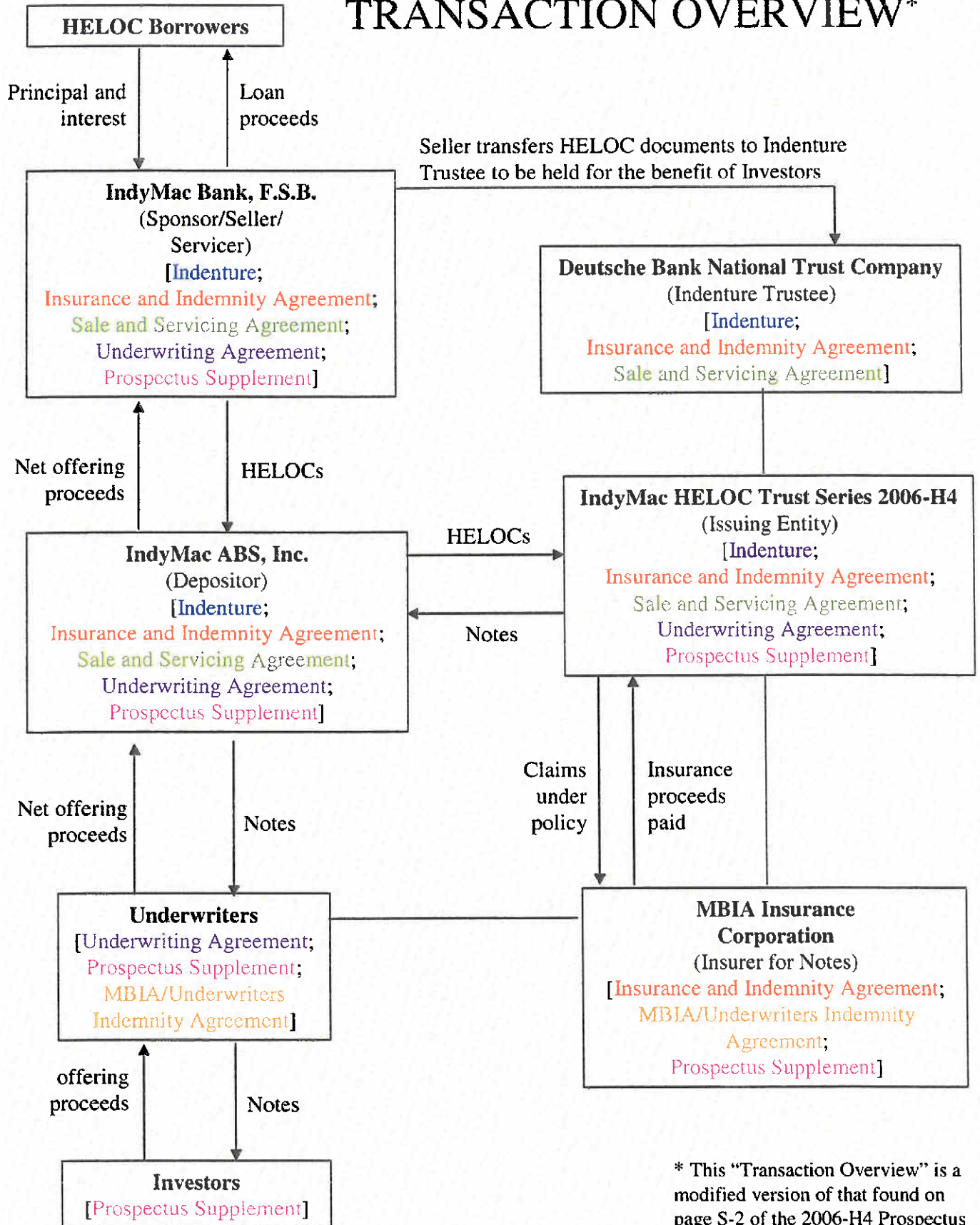
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TRANSACTION OVERVIEW*



* This "Transaction Overview" is a modified version of that found on page S-2 of the 2006-H4 Prospectus Supplement. (RJN, Ex. 2.)