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**LOS ANGELES
SUPERIOR COURT**

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

MBIA INSURANCE CORPORATION, a New
York Corporation,

Plaintiff,

v.

INDYMAC ABS, INC., a Delaware
corporation; et al.,

Defendants.

LASC Case No: BC422358

**COURT'S RULING AND ORDER RE:
JOINT DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

Hearing Date: July 30, 2010

I.

BACKGROUND

Plaintiff MBIA Insurance Corporation ("MBIA") is a stock insurance corporation that guarantees financial obligations related to securities. MBIA filed suit against numerous entities and persons, alleging that in 2006 and 2007, it issued a guarantee policy "unconditionally and irrevocably" guaranteeing the financial obligations of three issuers (the Trusts) of certain residential-mortgage backed securities (the "Notes"). The Notes are secured by three pools of mortgages (one for each Trust), each consisting of thousands of second-lien home equity lines of

1 credit (“HELOCs”). The Notes were sold by the Underwriter Defendants through the Offering
2 Documents.

3 The Trusts’ financial obligation is to pass through to the investors in the Notes (the “Note
4 Purchasers” or “Note Holders”) the principal and interest payments of the mortgagees whose
5 HELOCs serve as collateral for the Notes. If the trusts do not receive enough principal and
6 interest payments to pay the Note Purchasers, MBIA must pay to the Trustee of the Trusts
7 proceeds that are equal to the principal and interest payments due under the Notes. Defendants
8 claim that MBIA issues its guarantee proceeds to the Indenture Trustee of the Trusts and not
9 directly to the Note Purchasers, and is not responsible for seeing that the proceeds are passed to
10 the Note Purchasers.

11 The three trusts at issue were created and funded by IndyMac Bank and former
12 Defendant IndyMac ABS, Inc. The pooled HELOCs used to fund the trusts largely were
13 originated by IndyMac Bank. During the mortgage crisis, some mortgagees failed to make
14 timely payments, and the Trusts filed claims with MBIA to cover shortfalls. MBIA alleges that
15 since 2007, it has paid \$487 million on its guarantee of the Trust obligations and is exposed to
16 claims for another \$566 million.

17 MBIA sued the Defendants, alleging they violated California Securities law and
18 committed various common law torts, to recover the proceeds MBIA has paid.¹ MBIA alleges
19 IndyMac Bank failed to comply with its own internal underwriting standards when originating
20 mortgage loans that ultimately were included in residential mortgage-backed securities. Plaintiff
21 MBIA further alleges that Defendants prepared materially false offering documents (collectively,
22 the “Prospectus Supplement”) that the Note Purchasers relied upon, and they caused MBIA to
23 have to make good on hundreds of millions of dollars in missed payments.

24
25 ¹ The Complaint alleges causes of action for state securities violations; common law claims for fraud and negligent
misrepresentation; and a claim for declaratory relief. Complaint, ¶¶122-130.

1 The Defendants² have moved for an order granting judgment on the pleadings as to all
2 claims alleged in the Complaint, claiming that MBIA is attempting to “stand in the shoes” of
3 unidentified entities who are not MBIA’s insureds, who have suffered no loss, and with whom
4 MBIA has no contractual relationship.

5 For the reasons discussed *infra*, the motion for judgment on the pleadings is denied.

6
7 **II.**

8 **DEFENDANTS’ REQUEST FOR JUDICIAL NOTICE**

9 Defendants request judicial notice of the following exhibits in support of the motion:

10 1. Indemnification Agreement entered into by MBIA, as Insurer, and Lehman
11 Brothers, Inc., Bear, Stearns & Co., Inc., Credit Suisse Securities (USA) LLC,
and IndyMac Securities Corporation, as Underwriters, dated December 20, 2006;

12 2. Prospectus Supplement for the IndyMac Home Equity Mortgage Loan Asset-
13 Backed Trust, Series 2006-H4, dated December 20, 2006;

14 3. Indenture between IndyMac Home Equity Mortgage Loan Asset-Backed Trust,
15 Series 2006-H4, Issuer, and Deutsche Bank National Trust Company, Indenture
Trustee, dated as of December 21, 2006;

16 4. Underwriting Agreement entered into by IndyMac ABS, Inc., Depositor,
17 IndyMac Bank, F.S.B., Sponsor/Seller, and Lehman Brothers Inc., Bear, Stearns
& Co., Inc., Credit Suisse Securities (USA) LLC, and IndyMac Securities
18 Corporation, Underwriters, dated December 12, 2006;

19 5. Financial Guarantee Insurance Policy, filed with the Declaration of Neil S.
20 Binder in Support of Plaintiff’s Opposition to Defendant Spiegel holdings, Inc.’s
21 Motion to Dismiss in *MBIA Ins. Corp. v. Spiegel Holdings, Inc.*, et al., No. 03-
10097 (GEL) (Southern District of New York, declaration filed April 19, 2004);
and

22 6. Order re: Demurrers and Motion to Strike in *MBIA Ins. Corp. v. Bank of Am.*
23 *Corp.*, LASC Case No. BC417572, filed May 17, 2010.

24
25 ² The Defendants moving for judgment on the pleadings are Credit Suisse Securities (USA) LLC; JP Morgan Chase & Co.; UBS Securities, LLC; A. Scott Keys; Michael Perry; Jill Jacobson; and Kevin Callahan.

1 The request is granted as to each item pursuant to Evidence Code §452(d). The
2 documents referenced in Exhibits 1-4 have all been attached to documents filed with the Court,
3 and are subject to judicial notice under this section. The Court does not judicially notice the
4 truth of the matters stated in these exhibits.

5 The request is granted as to Exhibits 5 and 6 under §452(d) (again, as records of the
6 Court). In doing so, MBIA's objections to the Court judicially noticing these exhibits is
7 overruled. However, the Court notes that these exhibits are not binding in any way on the
8 Court's determination with respect to assessing the motion for judgment on the pleadings in the
9 instant litigation.

10
11 **III.**

12 **PLAINTIFF MBIA'S REQUEST FOR JUDICIAL NOTICE**

13 MBIA requests judicial notice of the following:

14 A. Excerpts from the Sale and Servicing Agreement for the Home Equity
15 Mortgage Loan Asset-Backed Trust, Series 2006-H4;

16 B. Excerpts from the Pooling and Servicing Agreement for the Home Equity
17 Mortgage Loan Asset-Backed Trust, Series INDS 2007-1;

18 C. Excerpts from the Pooling and Servicing Agreement for the Home Equity
19 Mortgage Loan Asset-Backed Trust, Series INDS 2007-2;

20 D. Excerpts from the Indenture for the Home Equity Mortgage Loan Asset-
21 Backed Trust, Series 2006-H4;

22 E. A copy of the Note Guaranty Insurance Policy for the Home Equity Mortgage
23 Loan Asset-Backed Trust, Series 2006-H4;

24 F. Excerpts from the Prospectus Supplement for the Home Equity Mortgage Loan
25 Asset-Backed Trust, Series 2006-H4;

26 G. Excerpts from the Insurance and Indemnity Agreement for the Home Equity
Mortgage Loan Asset-Backed Trust, Series 2006-H4;

27 H. Excerpts from the Indemnification Agreement for the Home Equity Mortgage
Loan Asset-Backed Trust, Series 2006-H4; and

1
2 I. A copy of the Memorandum of Law in Support of the Underwriter Defendants'
3 Motion to Dismiss Plaintiffs' Complaint in *MBIA v. IndyMac ABS, Inc., et al*, No.
4 CV-09-07737 SJO (PJWx), filed November 30, 2009.

5 The request is granted as to each item pursuant to Evidence Code §452(d). Exhibits A-H
6 are attached, and incorporated by reference, to the Complaint in this litigation. They are
7 therefore subject to judicial notice under this section. Again, the Court does not judicially notice
8 the truth of the matters stated within these exhibits.

9 The request is granted as to Exhibit I as a record of the Court as well. The Court limits
10 its order granting judicial notice of this exhibit to the fact that the document appears in the
11 Court's file.

12 IV.

13 MOTION FOR JUDGMENT ON THE PLEADINGS

14 1. Legal standards on motions for judgment on the pleadings

15 A motion for judgment on the pleadings involves the same type of procedures that apply
16 to a general demurrer. *Richardson-Tunnell v. School Ins. Program for Employees* (2007) 157
17 Cal.App. 4th 1056, 1061; *Burnett v. Chimney Sweep* (2004) 123 Cal. App. 4th 1057, 1064. In
18 considering a motion for judgment on the pleadings, courts consider whether the factual
19 allegations, assumed true, are sufficient to constitute a cause of action. *Fire Ins. Exchange v.*
20 *Sup. Ct.* (2004) 116 Cal. App. 4th 446, 452-453.

21 "The grounds for a motion for judgment on the pleadings must appear on the face of the
22 complaint or from a matter of which the court may take judicial notice." *Richardson-Tunnell v.*
23 *School Ins. Program for Employees* (2007) 157 Cal.App. 4th 1056, 1061. *Accord Bufile v. Dollar*
24 *Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1202; *Saltarelli & Steponovich v. Douglas*
25 (1995) 40 Cal.App.4th 1, 5; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2009)
¶7:292. Finally, a motion for judgment on the pleadings does not lie as to only part of a cause of

1 action. *Fire Ins. Exch. v. Sup. Ct., supra*, 116 Cal.App.4th at 452; Weil & Brown, Cal. Practice
2 Guide: Civ. Pro. Before Trial (The Rutter Group 2009) ¶7:295.

3 **2. Discussion**

4 MBIA alleges that it is subrogated to the claims of the Note Purchasers, both from a
5 contractual standpoint and from an equitable standpoint. Defendants claim that, as a matter of
6 law, and when considering the documents attached to the Complaint, Plaintiff MBIA cannot
7 allege any subrogated claims. The Court addresses the viability, at the pleading stage, of
8 Plaintiff MBIA's contractual and equitable subrogation claims. The Court will then discuss the
9 remaining issues addressed by the parties in the motion and the opposition.

10 **a. Subrogation**

11 There are two types of subrogation at issue in the motion and in the Complaint –
12 contractual (“conventional”) subrogation and equitable subrogation.

13 **(1) Contractual subrogation**

14 *Knight v. Alefosio* (1984) 158 Cal.App.3d 716 is the primary case upon which the
15 Defendants rely. In *Knight*, the respondent insured filed an action against respondent tortfeasor
16 based on injuries resulting from an automobile accident. Appellant insurer paid income
17 continuation benefits to respondent insured, and sought leave to intervene in the action claiming
18 a right of subrogation. The trial court denied appellant leave to intervene. The court affirmed,
19 finding that appellant had no right to intervention under CCP §387(a). The Court determined that
20 the appellant insurer had no contractual right of subrogation on the claim for loss of income
21 under the policy, as appellant only reserved the subrogation right for damages, which were a
22 different provision than benefits. Appellant also had no equitable right of subrogation because it
23 would be inconsistent with the terms of the contract and would conflict with the reasonable
24 expectation of respondent insured. Appellant had no interest in the action of respondent insured
25 under CCP§ 387(b), where its goal was reimbursement.

1 The *Knight* court noted that “[w]here the insurance contract is silent as to subrogation
2 rights it means that such a right was not bargained for and hence not acquired by the insurance
3 company.” *Knight*, 158 Cal.App.3d at 723. New York law is in accord with this broad principle.
4 In *J&B Schoenfeld, Fur Merchs., Inc. v Albany Ins. Co.* (N.Y. App. Div. 1985) 109 A.D. 2d 370,
5 373, the Appellate Division noted that “where the right of an insurer to subrogation is expressly
6 provided for in the policy, its rights must be governed by the terms of the policy.”

7 Here, Plaintiff MBIA alleges that “[u]nder the Insurance and Indemnity Agreements, the
8 Indenture Agreement, and operational law, MBIA has full rights as subrogee with respect to any
9 payments it has made.”³ Defendants claim that none of these agreements (i.e., the “Transaction
10 Documents”) give MBIA any rights as subrogee to any Note Purchasers’ claims for securities
11 law and common law violations.

12 As noted *supra*, these Transaction Documents are attached as exhibits to the Complaint.
13 There are a number of relevant provisions of the Transaction Documents. Section 5.12 of the
14 Indenture Agreement (the provision entitled “Subrogation”) between IndyMac Home Equity
15 Mortgage Loan Asset-Backed Trust, Series 2006-H4 and Deutsche Bank National Trust
16 Company (the “Indenture Trustee”), provides:

17 The Indenture Trustee shall receive as attorney-in-fact of each Holder of Notes
18 any Insured Payments from the Insurer [MBIA] pursuant to the Policy. Any and
19 all Insured Payments disbursed by the Indenture Trustee from claims made under
20 the Policy shall not be considered payment by the Insurer, and shall not discharge
21 the obligations of the Issuer with respect thereto. The Insurer shall, to the extent
22 it makes any payment with respect to the Notes, become subrogated to the rights
23 of the recipient of such payments *to the extent of such payments*.⁴

24 ³ Complaint, ¶126.

25 ⁴ Exhibit D to Declaration of Danielle Gilmore (“Gilmore Decl.”) in Opposition to Motion at 31 (emphasis added).

1 Exhibit E – the “Note Guaranty Insurance Policy” – states in pertinent part that “[s]ubject
2 to the terms of the Agreement, the Insurer shall be subrogated to the rights of each Owner to
3 receive payments under the Obligations *to the extent of any payment by the Insurer hereunder.*”⁵

4 Importantly, the Insurance and Indemnity Agreement⁶ states in pertinent part:

5 Section 3.04. Indemnification with Respect to IndyMac, the Issuer, the
6 Depositor, and the Insurer

7 (a) In addition to any and all of the *Insurer’s rights of reimbursement,*
8 *indemnification, subrogation and to any other rights of the Insurer pursuant*
9 *hereto or under law or in equity,* IndyMac agrees to pay, and to protect,
10 indemnify and save harmless, the Insurer and its officers, directors, shareholders,
11 employees, agents and each Person, if any, who controls the Insurer ... from and
12 against any and all claims...paid by the Insurer...of any nature arising out of or
13 relating to the breach by IndyMac or the Issuer of any of the representations or
14 warranties contained in Sections 2.01 or 2.02 or arising out of or relating to the
15 transactions contemplated by the Transaction Documents....⁷

16 The Insurance and Indemnity Agreement also states that “no remedy herein
17 conferred or reserved is intended to be exclusive of any other available remedy, but each
18 remedy *shall be cumulative and shall be in addition to other remedies given under the*
19 *Transaction Documents or existing at law or in equity.*”⁸

20 Finally, the Sale and Servicing Agreement⁹ provides at §4.02 that “the Insurer [MBIA]
21 will be fully subrogated to the rights of such Holders [i.e., the Note Holders] to receive such
22 principal and interest, as applicable, from the Trust[.]”

23 ⁵ Gilmore Decl., Exh. E at 33 (emphasis added).

24 ⁶ Gilmore Decl., Exh. G.

25 ⁷ Gilmore Decl., Exh. G at 50.

⁸ Exh. G to Gilmore Declaration at 51, §5.02(b).

⁹ Exhibit A to Gilmore Declaration.

1 The question under *Knight* and *J.B. Schonfeld* is whether the Court can resolve, at the
2 pleading stage, whether the contractual subrogation provisions at issue can be construed
3 specifically and narrowly as a limitation on, or a waiver of, MBIA's subrogation rights. The
4 Court determines that whether Plaintiff MBIA is contractually limited as a subrogee is an issue
5 that cannot be decided at the pleading stage on a motion for judgment on the pleadings.

6 In examining the relevant provisions of the Transaction Documents set forth above, the
7 term "extent" of such payments does not appear to limit the *remedies* MBIA may seek as a
8 contractual subrogee, but rather impose a limitation on the amount that may be recovered on any
9 subrogation claim. The fact that the Insurance and Indemnity Agreement states that the remedies
10 of MBIA "shall be cumulative" and "in addition to other remedies given under the Transaction
11 Documents" suggests (at least at the pleading stage) that MBIA may not be limited from
12 pursuing its rights by way of contractual subrogation. The fact that the Note Guaranty Insurance
13 Policy states that MBIA is subrogated to the rights of each Owner (i.e., each Noteholder) to
14 receive payments under the Obligations "to the extent of any payment by the Insurer" will
15 necessarily require a determination as to whether such rights go beyond the Noteholder's rights
16 under the Note to include rights against third parties.

17 While the decision on the demurrers and motion to strike in *MBIA Insurance*
18 *Corporation v. Bank of America Corporation, et al.*, LASC Case No. BC417572¹⁰ is not binding
19 on this Court, the court there did interpret similar subrogation provisions and found that "[i]n
20 terms of the alleged contractual subrogation right, the Court finds that the issue cannot be
21 decided at the demurrer stage."¹¹ In doing so, the court rejected the Defendants' reliance on
22 *MBIA Ins. Corp. v. Spiegel Holdings, Inc., et al.*, No. 03-10097, 2004 U.S. Dist. LEXIS 17484
23

24 ¹⁰ Exhibit 6 to Defendants' Request for Judicial Notice ("RJN").

25 ¹¹ Exhibit 6 to Defendants' RJN at 7:15-17.

1 (S.D.N.Y. Aug. 31, 2004), and stated that it did not agree that the policy language at issue was
2 “clear and unambiguous.”

3 In *Spiegel*, MBIA filed suit against defendant sellers, alleging that the sellers violated §§
4 11, 12 of the Securities Act of 1933, 15 U.S.C.S. §§ 77k, 77l, § 10(b) of the Securities Exchange
5 Act of 1934, and Rule 10b-5, in connection with two asset-backed note offerings. The sellers
6 filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting in part
7 that MBIA did not have standing to bring the lawsuit.

8 The sellers offered two asset-backed note offerings that were funded in part by the
9 receivables of a retail credit card company owned by one of the seller's entities. As part of the
10 transactions, MBIA entered into an insurance and reimbursement agreement whereby MBIA, as
11 the insurer, agreed to insure the distributions that were to be made to the noteholders from the
12 receivables in the event of a default of that obligation by the sellers. The retailer filed for
13 bankruptcy and MBIA filed suit, purportedly on behalf of the noteholders, alleging violations of
14 federal securities law. The federal court held that MBIA did not have standing to bring the action
15 because it did not actually purchase any of the securities at issue. Additionally the federal court
16 found that MBIA did not fall within a specified category of "surrogate plaintiffs" that had
17 authority to assert an action on behalf of the noteholders under federal securities law. The
18 transaction documents, the court determined, did not provide MBIA with specific authority to
19 bring the action, because the documents did not contemplate litigation by the insurer for the
20 noteholders.

21 *Spiegel*, however, is distinguishable. Again, the issue there was whether MBIA had
22 standing to bring the action for securities violations. The court held that MBIA did not have
23 standing because it was not a purchaser or seller of securities, as specifically required under the
24 statutes. The concept of contractual subrogation was not at issue in *Spiegel*, and it is therefore
25 distinguishable.

1 Accordingly, with respect to the contractual subrogation component of the motion, the
2 motion is denied. Plaintiff has potentially viable subrogation claims for amounts actually paid
3 on its policies.

4 **(2) Equitable subrogation**

5 In *National Union Fire Ins. Co. v. Cambridge Integrated Serv. Group, Inc.* (2009) 171
6 Cal.App.4th 35, 53, the Court of Appeal observed:

7 Equitable subrogation permits a party who has been required to satisfy a loss
8 created by a third party's wrongful act to 'step into the shoes' of the loser and
9 pursue recovery from the responsible wrongdoer. In the insurance context, the
10 doctrine permits the paying insurer to be placed in the shoes of the insured and to
11 pursue recovery from third parties responsible to the insured for the loss for which
12 the insurer was liable and paid. Because subrogation rights are purely derivative,
13 an insurer cannot acquire anything by subrogation to which the insured has no
14 right and can claim no right the insured does not have. The subrogated insurer is
15 said to stand in the shoes of its insured, because it has no greater rights than the
16 insured and is subject to the same defenses assertable against the insured. (internal
17 citations and quotes omitted).

18 To successfully assert equitable subrogation, an insurer must establish:

19 1) *The insured has suffered a loss* for which the party to be charged is liable,
20 either because the latter is a wrongdoer whose act or omission caused the loss or
21 because he is legally responsible to the insured for the loss caused by the
22 wrongdoer;

23 2) the insurer, in whole or in part, has compensated the insured for the same loss
24 for which the party to be charged is liable;

25 3) *the insured has an existing, assignable cause of action* against the party to be
charged, which action the insured could have asserted for his own benefit had he
not been compensated for his loss by the insurer;

4) the insurer has suffered damages caused by the act or omission upon which the
liability of the party to be charged depends;

5) justice requires that the loss should be entirely shifted from the insurer to the
party to be charged, whose equitable position is inferior to that of the insurer; and

6) the insurer's damages are in a stated sum, usually the amount it has paid to its
insured, *assuming the payment was not voluntary and was reasonable. Patent
Scaffolding v. Wm. Simpson Construction Co.* (1967) 256 Cal.App.2d 506, 508.

1 See also *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1292.

2
3 Importantly, "[t]he doctrine of subrogation cannot be invoked to override the contract of
4 the parties. It is not applicable where...its enforcement would be inconsistent with the terms of
5 the contract, or where the contract, either expressly or by implication, forbids its application."

6 *Knight v. Alefosio, supra*, 158 Cal.App.3d at 723.

7 Here again, the Court cannot find, as a matter of law, that MBIA may not pursue the
8 equitable subrogation claim alleged in the Complaint. MBIA, in the prayer, seeks to recover "to
9 the full extent of payments MBIA has made to the Note Purchasers." As MBIA notes, this is the
10 limit of what MBIA may seek under the Transactional Documents referenced above (in
11 particular, the Indenture, §5.12¹²). On its face, the prayer for equitable subrogation does not
12 appear to be inconsistent with the terms of the contract. Of course, a plaintiff is permitted to
13 pursue alternative theories of recovery arising out of the same transaction (so long as it seeks
14 only one recovery). See, e.g., *In re DeLaurentiis Ent.'t Group, Inc.* (9th Cir. 1992) 963 F.2d
15 1269, 1272, n.3. To the extent Plaintiff MBIA in fact seeks as an equitable subrogee relief
16 *inconsistent* with what is available under the terms of the Transaction Documents as contractual
17 subrogee, such relief may be limited. However, in the Court's view, the interpretation of the
18 Transaction Documents will determine the limitations, if any, on MBIA's right to equitable
19 subrogation. In this regard, it is the Court declines to interpret the Transaction Documents as
20 requested by the moving parties at the pleading stage. It is the Court's view that such a
21 determination should be made upon an evidentiary record that addresses the issue of whether
22 certain of the Transaction Documents are subject to interpretation without the aid of extrinsic
23 evidence.

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¹² Exhibit D to the Gilmore Declaration at 31.

1 For these reasons, the motion for judgment on the pleadings with respect to the request
2 for equitable subrogation is denied.

3 **b. Ripeness**

4 The Defendants claim that the action is not ripe, as the Note Purchasers have suffered no
5 loss and therefore have no claims for MBIA to assert in subrogation. However, the Complaint
6 alleges as follows at ¶8:

7 As a direct result of IndyMac’s misconduct, thousands of mortgage loans
8 underlying the securitizations are in default and/or foreclosure, events that would
9 not have occurred if IndyMac had followed the loan-origination practices that it
10 represented to investors it was following. *But for MBIA’s provision of financial*
11 *guaranty insurance, the holders of the RMBS Notes would have been deprived of*
12 *payments on the Notes.* The purchasers of the RMBS Notes did not have
13 knowledge of any significant delinquencies or defaults on the underlying
14 mortgage loans until November 2007 at the earliest, when the trustee of the Trusts
15 began making claims to MBIA, and even then it was only to ensure timely
16 payments to the Note Purchasers, for missed principal and interest payments.¹³

17 Under the third requirement of equitable subrogation under *Patent Scaffolding, supra*, the
18 insured must have “an existing, assignable cause of action against the party to be charged, which
19 action the insured could have asserted for his own benefit had he not been compensated for his
20 loss by the insurer[.]” *Patent Scaffolding*, 256 Cal.App.2d at 509. This is what is essentially
21 alleged in ¶8 of the Complaint.

22 To the extent MBIA has not made certain payments to the Note Holders, this may operate
23 as an affirmative defense. Once again, however, the Court cannot resolve, as a matter of law and
24 at the pleading stage, whether MBIA failed to make such payments, For these reasons, the Court
25 determines that the “ripeness” issue cannot be adjudicated at the pleading stage, and the motion
is denied on this ground.

¹³ Complaint, ¶8 (emphasis added).

1 **c. Indemnification Agreement as to the Underwriters and concept of “Privity”**

2 The Underwriter Defendants (Credit Suisse Securities (USA) LLC; JP Morgan Chase &
3 Co.; and UBS Securities, LLC) claim that the Indemnification Agreement they entered into with
4 MBIA was limited to specific warranties concerning narrow representations they made in the
5 Prospectus Supplement, “none of which relate to the subject matter of the misrepresentations
6 MBIA alleges here.”

7 The Indemnification Agreement is attached as Exhibit 1 to Defendants’ Request for
8 Judicial Notice and as Exhibit H to the Gilmore Declaration. The Indemnification Agreement
9 provides in pertinent part:

10 (a) [MBIA] agrees, upon the terms and subject to the conditions of this
11 Agreement, to indemnify, defend and hold harmless each Underwriter Party
12 against any and all Losses incurred by them with respect to the offer and sale of
13 any of the Offered Notes and resulting from the Insurer’s breach of any of its
14 representations and warranties set forth in Section 2 of this Agreement.

15 (b) Each Underwriter hereby agrees, severally and not jointly, upon the terms and
16 subject to the conditions of this Agreement, to indemnify, defend and hold
17 harmless each Insurer Party against any and all Losses incurred by it with respect
18 to the offer and sale of any of the Offered Notes and resulting from such
19 Underwriter’s breach of any of its representations, warranties set forth in Section
20 3 of this Agreement.

21 Section 3 of the Indemnification Agreement, in turn, which is entitled “Agreements,
22 Representations and Warranties of the Underwriters,” states that “[e]ach Underwriter, on behalf
23 of itself, severally warrants to and agrees with [MBIA] that the Underwriter Information is true
24 and correct in all material respects.”

25 Once again, it is unclear whether these provisions will bar the subrogation claims asserted
by MBIA under the terms of other Transaction Documents, or as an equitable subrogee. There
is nothing in the Indemnification Agreement that purports to release the Underwriters from
liability to the Note Holders, or any other third parties. To the extent MBIA is subrogated to the
rights of the Note Holders, whether under the doctrine of contractual subrogation or equitable

1 subrogation, it does not appear that the provisions of the Indemnity Agreement would bar such a
2 claim. There is also nothing which mandates that MBIA establish privity to assert the
3 subrogated claims against the Underwriters.

4
5 **d. The Note Purchasers as the Insureds**

6 The Defendants also claim that the Note Purchasers were not the “insureds” as a matter
7 of law, and cannot be subrogated to their claims. However, the Complaint alleges that the Note
8 Purchasers are the insureds at ¶¶11 and 124. (“MBIA brings these claims as subrogee of the
9 Note Purchasers it has insured” and “MBIA, as subrogee to the claims of the Note Purchasers,
10 has the right to recover for harm to the Note Purchasers.”)

11 Again, as discussed *supra*, the effect of the Transaction Documents and the “insured”
12 status of the Note Purchasers is not entirely clear. In particular, the following language from the
13 Transaction Documents raises an ambiguity as to the specific status of these Note Purchasers,
14 vis-à-vis MBIA:

15 1) the notion that the Indenture Trustee receives MBIA’s payments “as attorney-
16 in-fact of each Holder of Notes”¹⁴ and agrees to hold the payments “solely for the
use and the benefit of the Noteholders”¹⁵;

17 2) The Prospectus Supplement guaranteeing, by MBIA to any Noteholder, that
18 payments will be received by the Indenture Trustee on behalf of the
Noteholders¹⁶; and

19 3) The Sale and Servicing Agreement, stating that MBIA shall “deliver the Policy
20 to the Indenture Trustee, for the benefit of the Noteholders.”¹⁷

21
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¹⁴ Exhibit D to Gilmore Decl. at 31 (§5.12).

23 ¹⁵ *Id.* at 29.

24 ¹⁶ Exh. F to Gilmore Decl. at 42.

25 ¹⁷ Exh. A to Gilmore Decl. at 8, §2.01(a).

1 The status of the Note Purchasers cannot be resolved at the pleading stage, given the ambiguity
2 in these provisions and given the specific allegation at ¶¶11 and 124 that MBIA was the insurer
3 of the Note Purchasers. For these reasons, the Court cannot adjudicate, as a matter of law and at
4 the pleading stage, that the Note Purchasers were not “insureds,” and the motion is denied on that
5 ground.

6 **V.**

7 **RULING AND ORDER**

8 For the foregoing reasons, the motion for judgment on the pleadings is denied, in its
9 entirety. In denying this motion, the Court makes no determination as to the viability of MBIA’s
10 claims for contractual and equitable subrogation, the “insured” under the MBIA policies, or the
11 status of MBIA as a traditional insurer as opposed to merely the provider of a component of the
12 “security” or note that was sold to the Note Purchasers.

13 The Court has set a further status conference in this matter for September 27, 2010 at
14 1:30 p.m. The parties are to file an original copy, plus one courtesy copy, of their Joint
15 Statement no later than September 22, 2010.

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17 Dated: August 3, 2010

18 **CARL J. WEST**
19 _____
20 Carl J. West
21 Judge of the Superior Court
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