SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

MBIA INSURANCE CORP.,	:	
	:	
Plaintiff,	:	
	:	Index No. 64676/2012
v.	:	Honorable Alan D. Scheinkman
	:	Commercial Division
J.P. MORGAN SECURITIES LLC (formerly known as BEAR, STEARNS & CO. INC.),	:	Motion Sequence No. 2
	:	(Oral Argument Requested)
	:	
Defendant.	:	
	:	

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT PURSUANT TO CPLR 3212

Richard A. Edlin
Eric N. Whitney
Anastasia A. Angelova
Misty L. Archambault
GREENBERG TRAURIG, LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 801-9280
Facsimile: (212) 801-6400

Counsel for J.P. Morgan Securities LLC

November 4, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

Defendant J.P. Morgan Securities LLC ("JPMS") (formerly known as Bear, Stearns & Co. Inc. ("Bear Stearns")) respectfully submits this reply memorandum in further support of its motion, pursuant to Rule 3212 of the New York Civil Practice Law and Rules ("CPLR"), for summary judgment in favor of JPMS and against plaintiff MBIA Insurance Corp. ("MBIA").

PRELIMINARY STATEMENT

MBIA cannot dispute the specific evidence before this Court that MBIA did ***not*** read or review the so-called "doctored version" of the MDMC due diligence report that Bear Stearns transmitted to MBIA for the 2006-HE4 Securitization.[1] Instead, MBIA tries to manufacture an issue of fact by submitting a self-serving affidavit from Lauren Desharnais—the only MBIA employee who could have conceivably reviewed the due diligence results prior to closing—contradicting her prior deposition testimony. Desharnais testified repeatedly that she could not recall anything about the 2006-HE4 Securitization, could not recall whether she reviewed the due diligence results before closing, and would have immediately noticed the absence of loan grades in those results. In her new affidavit, however, Desharnais now claims that she "reviewed due diligence results prior to closing on all [deals]" and that she has "no reason to believe that [she] deviated from [her] standard practice." (Desharnais Aff. ¶¶ 11, 12). Desharnais is now "reliably confident" that she went to MBIA's office in Armonk on the day of closing, after she arrived back in New York from Minnesota, "to ensure that the final due diligence results showed no major issues." (*Id.* at ¶ 13). None of this new testimony helps MBIA, because a party cannot defeat summary judgment by submitting a self-serving affidavit from a witness examined at length at deposition. *See Amplo v. Milden Ave. Realty Assocs.*, 52 A.D.3d 750, 751 (2d Dep't 2008); *Phillips v. Bronx Lebanon Hosp*., 268 A.D.2d 318, 320 (1st Dep't 2000). MBIA did not review the due diligence results before closing—and this undisputed fact requires dismissal of MBIA's fraud claim as a matter of law.

---

[1] Capitalized terms have the same meaning here as in Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment Pursuant to CPLR 3212 ("Def.'s Opening Br."), and in the Opposition.

MBIA also tries to sidestep the record evidence entirely by changing the nature and basis of its fraud claim so that it no longer resembles the claim alleged in its Complaint. There, MBIA alleged that it "received," "reviewed," "relied," and "justifiably relied" upon the due diligence report. (Ex. B[2] ¶¶ 6, 26, 39, 59-60, 70). Of particular importance, according to the Complaint, was Bear Stearns's alleged alteration of the report to omit "loan grades." (*Id*. ¶¶ 4-5, 37, 48, 51, 54, 57, 60, 67-68, 70). The Complaint, in other words, asserts a traditional common law fraud claim premised upon the supposed deficiencies and alterations in the due diligence report. Yet, in its Opposition, MBIA now claims for the first time that (i) its fraud claim arises under the New York Insurance Law; (ii) Bear Stearns had a duty to disclose due diligence issues, regardless of whether MBIA bothered to review the results prior to closing; and (iii) MBIA "separately relied" on the transmittal e-mail for the report. None of these issues is mentioned in MBIA's Complaint, but even if they were, they are neither legally nor factually viable.

MBIA's Opposition does nothing to alter the conclusion that its fraud claim fails on the grounds of actual reliance, justifiable reliance and materiality. No amount of misdirection or confusion of the issues—and MBIA goes to great lengths to distract the Court from the precise legal questions at issue on this motion—can change the record evidence that MBIA's fraud claim, invented by its lawyers to salvage its derailed lawsuit against GMAC Mortgage, is based on a due diligence report that it never considered before issuing its insurance policy.

ARGUMENT

I. MBIA CANNOT MANUFACTURE AN ISSUE OF FACT BY SUBMITTING A SELF-SERVING AFFIDAVIT

MBIA does not dispute that only Webb, Murray and Desharnais received the due diligence results, and Murray testified they did not review the results prior to closing. (MBIA Resp. to Rule 19-A Stmt. at 28, 34.) Nor does MBIA dispute that Desharnais repeatedly testified

[2] Exhibits A to DD are exhibits to the Angelova Affirmation, dated October 9, 2013. Exhibits EE to KK are exhibits to the Second Angelova Declaration, dated November 4, 2013. Numbered exhibits are exhibits to the Greenwald Affirmation, dated October 28, 2013.

she had no recollection of receiving, reviewing or discussing the due diligence results prior to closing. (*Id.* at 40.) As MBIA would put it, this created a "big problem"—MBIA's fraud claim is not supported by actual facts, which is not surprising since MBIA concocted the claim only after its attempt to sue GMAC Mortgage for the same alleged losses on the same deal collapsed. To address this failure of evidence, MBIA decided to submit an affidavit by Desharnais, who now claims that, although she lacks "specific recall" of the 2006-HE4 Securitization, she "would have" reviewed the due diligence report and found it acceptable prior to closing, and "would not have allowed" the transaction to close without reviewing the due diligence report or if MBIA had known "the true results of the due diligence." (Opp., pp. 9-10, *citing* Desharnais Aff. ¶¶ 11-13, 15). MBIA also conjectures that Desharnais could have driven from her home in New Rochelle to MBIA's headquarters in Armonk and reviewed the due diligence results prior to closing. Desharnais states in her affidavit that she is "reliably confident" that this is what she "would have" done, despite testifying repeatedly that she had ***no*** memory at all of anything she did that day. (*Id*., pp. 9-10; Desharnais Aff. ¶ 13; Ex. O at 54:5-16, 71:3-10, 73:19-22, 131:19-24). This affidavit cannot defeat summary judgment for at least two reasons—(i) it is improper and should not be considered, and (ii) it is based on mere conjecture and speculation.[3]

A. New York Law Is Clear That Self-Serving Affidavits from Previously Deposed Witnesses Cannot Defeat Summary Judgment

It is well-settled in New York that an affidavit which contradicts prior deposition testimony fails to raise a triable issue of fact, and "should not [be] considered" in deciding a summary judgment motion. *Amplo*, 52 A.D.3d at 751. *See also Lipsker v. 650 Crown Equities*,

[3] MBIA's reliance on *Brunetti v. Musallam*, 11 A.D.3d 280, 281 (1st Dep't 2004), to suggest fraud claims are "not subject to summary disposition" also fails." *Brunetti* denied summary judgment because there were "material factual issues" in dispute. *Id.* Summary judgment is often granted in fraud cases where, as here, the record on elements of the fraud claim is uncontested. *See, e.g., Gass v. Countrywide Home Loans, Inc.*, 105 A.D.3d 999, 999 (2d Dep't 2013); *Ventur Grp., LLC v. Finnerty*, 68 A.D.3d 638, 639 (1st Dep't 2009); *Adrian Family Partners I., L.P. v. ExxonMobil Corp.*, No. 19344/01, 2007 WL 6370971 (N.Y. Sup. Ct. Westchester Cnty. June 11, 2007), *aff'd*, 61 A.D.3d 901 (2d Dep't 2009).

LLC, 81 A.D.3d 789, 790 (2d Dep't 2011); *Cent. Irrigation Supply v. Putnam Country Club Assocs., LLC*, 27 A.D.3d 684, 685 (2d Dep't 2006). As explained by the First Department:

> While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.

Phillips, 268 A.D.2d at 320.

B. Even If the Court Considers the Desharnais Affidavit, It Does Not Raise a Genuine Issue of Fact on Actual Reliance

Even if the Court were to consider the affidavit (and it should not), it is based on mere speculation and conjecture and thus fails to raise any triable issue of fact. *Harris v. Pitts*, 109 A.D.3d 790, 791 (2d Dep't 2013). Desharnais admits she lacks "specific recall" of the 2006-HE4 Securitization, but speculates at length regarding what "would have" or "would not have" occurred prior to closing, including speculating that she is "reliably confident" she "would have" driven from her home to MBIA's headquarters in Armonk and reviewed the due diligence results there prior to closing. (Desharnais Aff. ¶¶ 11-13, 15).[4] This hypothetical drive to Armonk is pure conjecture and does not raise any triable questions of fact.

First, Desharnais' affidavit is directly contradicted by her many admissions at deposition that she has no memory of anything she did on the day the transaction closed. (Desharnais Aff. ¶ 13; Ex. O at 54:5-16, 71:3-10, 73:19-22, 131:19-24). Desharnais reiterated her lack of recall no fewer than ***seventy-six (76)*** times. (*See* App. A, attached hereto). Desharnais also says in her affidavit that her review of due diligence results would "usually provide sufficient comfort to

[4] Notably, MBIA produced Desharnais' remote login records for September 27, 2006, reflecting that she could not have reviewed the due diligence results while traveling because she logged in for less than two minutes. (Ex. CC). Yet MBIA has failed to produce a single record of Desharnais' office login activity (if any) for the same day to prove MBIA's purely hypothetical narrative. (Exs. EE, FF).

Ms. Murray." (Desharnais Aff. ¶ 11). Yet, at her deposition, Desharnais said the exact opposite, stating that she was "a hundred percent" sure that she "would have discussed [the due diligence results] with Ms. Murray" before allowing the deal to close. (Ex. 15 at 79:14-18). MBIA's attempt to change the record evidence is "insufficient to raise a triable issue of fact" to defeat summary judgment. *Phillips*, 268 A.D.2d at 320.

Second, Desharnais' testimony regarding her "general practice" of reviewing due diligence results is not sufficient to establish a "custom or practice" under New York law. "Custom and practice evidence draws its probative value from the repetition and unvarying uniformity of the procedure involved," demanding a "strict routine in relation to a particular repetitive practice. . . ." *Galetta v. Galetta*, 21 N.Y.3d 186, 197-98 (2013). Desharnais' self-serving affidavit stating that based on "general practice," she "would not have" allowed the transaction to close without reviewing the due diligence results is not evidence of a strict protocol, repeated and invariable use, deliberate and repetitive practice, or control. And it is belied by her earlier admissions that MBIA did in fact allow transactions to close without review of due diligence results and that this was not "infrequent."[5] (Ex. DD at 80:2-81:10). Murray confirmed this was "not unusual," and testified to a number of specific instances in which MBIA issued policies ***before*** receiving final due diligence reports. (Ex. G at 102:4-107:15, Exs. GG, HH, 33).[6] And the record reflects that other practices Desharnais considered to be "a hundred

[5] The Opposition also attempts to explain away Desharnais' post-closing e-mail of October 3, 2006 as mere delivery of a "purely administrative" pricing memorandum. (Opp., pp. 10-11 & n.4). Yet, the October 3, 2006 e-mail is also the ***first and only*** time Desharnais ever discussed the due diligence results with Murray, confirming Murray's testimony that MBIA did not review the due diligence results until six days after closing. (Ex. G at 108:18-109:5, Ex. V).

[6] MBIA mistakenly argues that this "narrower" custom and practice standard is limited to "cases dealing with negligence or due care." (Opp., p. 20). *Galetta*, however, is neither a negligence nor due care case, nor is its discussion of custom and practice evidence limited to those contexts. 21 N.Y.3d at 188, 197-98. MBIA's principal authority, *Soltis v. State*, 188 A.D.2d 201 (3d Dep't 1993), precedes *Galetta* by two decades, and holds only that, in non-negligence cases, custom and practice evidence is not limited to "personal habit or custom" and does not require "total control of the circumstances." *Id*. at 204. Nothing in *Soltis* or MBIA's other authorities

(continued . . .)

percent," such as that she "would have discussed" the due diligence results with Murray before closing, also did not occur, demonstrating Desharnais' lack of control. (Ex. 15 at 79:14-18; Ex. G at 107:16-109:5).

In addition, the definitive proof of MBIA's lack of actual reliance comes from Murray, who was the person actually responsible for reviewing and signing off on the due diligence. She testified specifically about the 2006-HE4 Securitization, in contrast to the "general practice" testimony on which the Opposition solely relies, and said that MBIA did not review the due diligence report until after closing, that she released the policy in MBIA's system two days before MBIA received the report, and that MBIA at the time was committing to transactions at the business stage and never backed out of a bid. (Ex. G at 18:13-20:17, 22:2-28:5, 31:24-33:19, 50:19-51:23, 68:15-76:7, 107:16-109:5; Ex. 16 at 35:6-15, 40:10-41:4; Ex, M, Ex. H, MBIA Resp. to Rule 19-A Stmt. at 12). These are undisputed facts, transaction-specific, and not contradicted by anything Desharnais or any other witness has to say regarding "general practice."

II. MBIA CANNOT SIMPLY CHANGE THE NATURE OR FACTUAL BASIS OF ITS FRAUD CLAIM TO CIRCUMVENT THE RECORD EVIDENCE

In addition to revising the facts, MBIA also seeks to replace the fraud claim alleged in its Complaint, and the common law reliance standard, with a wholly new, previously unalleged fraud claim. (Opp., pp. 12-18). In its Complaint, MBIA alleged that it relied upon the due diligence results provided by Bear Stearns to "test the accuracy" and "assess th[e] risks" of the warranties GMAC Mortgage made to MBIA. (Ex. B ¶¶ 3, 24-26). Of particular importance here, MBIA alleged that it actually reviewed the due diligence report before agreeing to insure the transaction. (*Id.* at ¶¶ 6, 26, 59-60, 70). Yet, MBIA now claims that (i) reliance is not an element of its claim, which suddenly arises under the New York Insurance Law because Bear Stearns was an "applicant for insurance," (ii) Bear Stearns had the obligation to disclose due diligence

---

(. . . continued)
diminishes *Galetta*'s admonition that the function of custom and practice evidence lies in "repetition and unvarying uniformity." 21 N.Y.3d at 197-98. Desharnais' testimony lacks both.

information, regardless of whether MBIA reviewed the due diligence report; and (iii) MBIA "separately relied" on the transmittal e-mail to the report. (Opp., pp. 13-14, 16-17, 22-23).

To begin, not a trace of any of these theories can be found in MBIA's Complaint. (*See* Ex. B ¶¶ 1-73). The theories are entirely new, invented by MBIA to replace the fatally defective allegations of its Complaint in an effort to stave off summary judgment, just as it invented a new theory of fraud after its lawsuit against GMAC Mortgage was derailed. But MBIA cannot defeat summary judgment simply by changing its theory of fraud in the Opposition. "A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint." *Mezger v. Wyndham Homes, Inc.*, 81 A.D.3d 795, 796 (2d Dep't 2011) (internal citations omitted).[7] In any event, MBIA's new fraud claim is just as defective as the one alleged in its Complaint.

A. New York Insurance Law Does Not Save MBIA's Fraud Claim

As a threshold matter, Section 3105 of the Insurance Law, on which MBIA relies, has no bearing here for the simple reason that Bear Stearns was not an "applicant for insurance." This Court must "give effect to the plain meaning" of the law. *In re Lucinda R.*, 85 A.D.3d 78, 86 (2d Dep't 2011) (internal citations omitted). Section 3105 applies only to a statement "made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof." N.Y. Ins. Law § 3105(a). MBIA does not dispute that GMAC Mortgage sponsored the 2006 HE-4 Securitization, and Bears Stearns was only the lead underwriter. (MBIA Resp. to Rule 19-A Stmt. at 2, 3). And it cannot dispute that Bear Stearns was not a party to the Insurance Agreement between MBIA and GMAC Mortgage; Bear Stearns did not apply for insurance protection from MBIA related to the 2006 HE-4 Securitization, and MBIA did not provide insurance protection to Bear Stearns. (Ex. II). Consequently, the provisions of Section 3105 do

[7] *See also Ostrov v. Rozbruch*, 91 A.D.3d 147, 154 (1st Dep't 2012); *Golubov v. Wolfson*, 22 A.D.3d 635, 636 (2d Dep't 2005).

not apply. *See Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, No. 12 Civ. 7372(RWS), 2013 WL 5230818, at *4 (S.D.N.Y. Sept. 10, 2013) (holding that § 3105 was inapplicable where the defendant "did not apply for any insurance").

MBIA nevertheless contends that Bear Stearns was an "applicant for insurance" due to its role in supplying certain information to MBIA and being copied on e-mails discussing the selection of MBIA, and relies on a series of cases applying the Insurance Law to "brokers." (Opp., p. 14). But Bear Stearns is ***not*** an insurance broker, and the inclusion of Bear Stearns' employees in GMAC Mortgage's e-mail correspondence related to MBIA's prospective insurance policy does not transform Bear Stearns into an insurance broker or agent. Insurance brokers are subject to vigorous licensing requirements, *see* N.Y. Ins. Law §§ 2102, 2104, and the defendants in MBIA's broker cases were all—unlike Bear Stearns—***insurance brokers***.[8] More fundamentally, the parties to the Insurance Agreement pursuant to which MBIA issued its policy on the 2006-HE4 Securitization are MBIA and GMAC Mortgage (and several other parties not including Bear Stearns). Thus, even if RMBS ***sponsors*** were deemed "applicants for insurance," that says nothing about whether an ***underwriter*** like Bear Stearns may be deemed an "applicant for insurance," and MBIA's authorities are inapposite.

For example, MBIA cites *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 34 Misc. 3d 895 (N.Y. Sup. Ct. N.Y. Cnty. 2012), for the proposition that Section 3105 can apply to entities other than the "insured entity." That is true enough, but the plain language of Section 3105 only extends one step further—to "applicants." *Id*. at 903-05. As the Southern District of New York recently held, *MBIA v. Countrywide* is "inapplicable" where, as in this case, the defendant entity "did not apply for any insurance, nor did it enter into any sort of contract—

[8] *See Seneca Ins. Co. v. Wilcock*, No. 01 Civ. 7620(WHP), 2002 WL 1067828, at *1 (S.D.N.Y. May 28, 2002); *Equitable Life Assur. Soc'y of the U.S. v. Werner*, 286 A.D.2d 632, 632 (1st Dep't 2001); *Panepinto v. Allstate Ins. Co.*, 108 Misc. 2d 1079, 1079 (N.Y. Sup. Ct. Monroe Cnty. 1981); *Liberty Mut. Ins. Co. v. Ground Transp., Inc.*, No. 06 CV 3433(JG), 2007 WL 764542, at *1 (E.D.N.Y. Mar. 12, 2007).

insurance-related or otherwise," with the plaintiff. *Fin. Guar. Ins. Co.*, 2013 WL 5230818, at *4. There, as in this case, the defendant was alleged to have prepared materials containing misrepresentations on which the insurer relied in agreeing to issue insurance, but was neither the actual applicant nor insured entity. *Id*. at *1. In *MBIA v. Countrywide*, by contrast, MBIA and Countrywide were parties to Insurance & Indemnity Agreements, and the court thus concluded that Countrywide was "an applicant for insurance" and MBIA "provided insurance to the defendant[.]" *Id*. at *4. MBIA's reliance on *Syncora Guarantee Inc. v. Countrywide Home Loans*, 36 Misc. 3d 328 (N.Y. Sup. Ct. N.Y. Cnty. 2012) is misplaced for the same reason.[9] *Id.* at 341.

Even if Bear Stearns could be considered an "applicant for insurance" (it cannot) and MBIA's fraud claim were evaluated under Section 3105's standard of "materiality," it would still fail as a matter of law. MBIA cites Section 3105's definition that a misrepresentation is "material" if the insurer "would not have issued the policy had it known the facts misrepresented." (Opp., p. 14). MBIA then cites Desharnais' conclusory assertion that a due diligence report was an "important part of all deals," and MBIA "would not have closed a deal without it." (*Id*., p. 15). MBIA cannot create an issue of fact by relying on the Desharnais affidavit, but in any case, MBIA fails to address four undisputed facts defeating materiality:

1. Murray's admissions that it was "not unusual" for MBIA to issue insurance policies before receiving the final due diligence report, that this has occurred several times before, and that it happened again in connection with the 2006-HE4 Securitization (Ex. G at 102:4-109:5, Ex. V);

2. Desharnais' admission that it was not "infrequent" for transactions to close without review of final due diligence results (Ex. DD at 80:2-81:10);

[9] MBIA's other case, *Syncora Guarantee Inc. v. Alinda Capital Partners LLC*, No. 651258/2012, 2013 WL 3477133 (N.Y. Sup. Ct. N.Y. Cnty. July 1, 2013), is also inapposite. It refers to the Insurance Law and the *Syncora v. Countrywide* decision, but contains no analysis of whether the defendant was an applicant for insurance. *Id.* at *14-16. Its facts are also distinguishable, as the defendant was the advisory services arm of the entity that created the insured company. *Id.* at *1.

3. Murray's acknowledgment that she released the insurance policy for the 2006-HE4 Securitization in MBIA's system two days ***before*** MBIA received the due diligence report (Ex. G at 68:15-76:7, Ex. M); and

4. Murray's admission that MBIA was "effectively committing at the business stage," and never backed out of a transaction after approving it at the bidding stage (Ex. G at 18:13-20:17, 22:2-28:5, 50:19-51:23; Ex. 16: 40:10-41:4, Ex. H).

This evidence is clear and uncontroverted, and leaves no triable question that MBIA would have issued the policy regardless of what was contained (or not contained) in the due diligence report that it ***never read*** before closing on the 2006-HE4 Securitization.

Additionally, merely invoking the Insurance Law does not displace the actual and justifiable reliance elements of a common law fraud claim.[10] Section 3105 relates to an insurer's right to void a policy. MBIA cites two cases that used Section 3105 to "inform" the ***materiality*** standard in common law fraud claims by insurers against insureds, and argues that an insurer pursuing a fraud claim must "merely show" that a fact "would have been material to the insurer's decision to insure," without regard to reliance. (Opp., pp. 12-13, *citing MBIA v. Countrywide*, 34 Misc. 3d 895; *Syncora v. Countrywide*, 36 Misc. 3d 328). Those authorities, however, only hold that Section 3105 can "inform" the meaning of "material," as defined by Section 3105(b). *See MBIA*, 34 Misc. 3d at 905-06; *Syncora*, 36 Misc. 3d at 341; N.Y. Ins. Law § 3105(b). Both cases also hold that the insurer must still "prove all elements" of its common law claim, including reliance. *MBIA*, 34 Misc. 3d at 906; *Syncora*, 36 Misc. 3d at 341.[11] Thus, MBIA cannot evade its burden of proving actual and justifiable reliance on the due diligence report.

---

[10] Notably, MBIA alleges justifiable reliance in the Complaint. (Ex. B ¶¶ 60, 70).

[11] Neither of MBIA's authorities conflates materiality with reliance as MBIA proposes. Section 3105 cannot "inform" the element of ***reliance***, because it contains no definition of reliance, only "material." N.Y. Ins. Law § 3105. Indeed, even statutory claims under the Insurance Law require actual reliance. *See Friedman v. Prudential Life Ins. Co. of Am.*, 589 F. Supp. 1017, 1020 (S.D.N.Y. 1984) (requiring that insurer have "relied upon" false representation in issuing policy); *Edwards v. U.S. Liab. Ins. Co.*, 14 A.D.3d 649, 650 (2d Dep't 2005) (same). Subsequent cases have continued to evaluate common law fraud claims separately from Section 3105 claims, and have preserved the common law elements. *See, e.g., CIFG Assur. N. Am., Inc. v. Bank of Am., N.A.*, No. 654028/12, 2013 WL 5380385 (N.Y. Sup. Ct. N.Y. Cnty. Sept. 23, 2013).

B. MBIA Fails to Raise a Triable Claim for Fraudulent Concealment

As an alternative path to liability under the Insurance Law, MBIA posits that Bear Stearns withheld "material information" that, as an "applicant for insurance," it had a duty to disclose. (Opp., pp. 16-18). MBIA also asserts a similar concealment theory under the common law, on the theory that under "normal business practices at this time," the underwriter had a "responsibility" to "make the insurer aware of any issues arising in the due diligence review." (Opp., p. 23). Neither concealment theory raises a triable question of fact.

With respect to the Insurance Law concealment claim, the "duty to disclose" identified by MBIA pertains at best to an "applicant for insurance," which Bear Stearns was not. *See* § II.A, *supra*. MBIA's authorities reinforce this; in each case the "applicant" was the party ultimately insured. *See Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 264-65 (1937); *Meagher v. Exec. Life Ins. Co. of N.Y.*, 200 A.D.2d 720, 720-21 (2d Dep't 1994); *L. Smirlock Realty Corp. v. Title Guar. Co.*, 70 A.D.2d 455, 460-462 (2d Dep't 1979). Further, the duty only extends to "material information," and the due diligence results were not material to MBIA. *See* § II.A, *supra*.

With respect to the common law concealment claim, MBIA asserts (without any legal authority) a duty imposed on Bear Stearns under "normal business practice" at the time "to make the insurer aware of any issues arising in the due diligence review." (Opp., p. 23). MBIA's "evidence" of such a "normal business practice" is unsubstantiated and inadmissible, as it is based on a one-sentence, unsubstantiated conclusion from Desharnais' affidavit (which cannot be used to raise an issue of fact) and similar conclusory assertions from putative "expert" James Aronoff's report. (Opp., pp. 5-6, 9-11, *citing* Desharnais Aff. ¶¶ 8-9, 11-13, 15; Ex. 13 at 9-10).

In all of Desharnais' deposition testimony, she never once mentioned this purported "normal business practice." (*See, e.g.*, Ex. O at 86, 120.) Moreover, neither Desharnais nor Aronoff cites a single actual instance, much less sufficient occasions to constitute a "normal business practice," in which any underwriter made any insurer "aware of any issues arising in the due diligence review." (*Id.*). Their statements thus lack the required "substantial basis" in the specifics of their actual experiences to constitute admissible evidence. *Cadwalader, Wickersham*

& Taft v. Spinale, 197 A.D.2d 403, 403 (1st Dep't 1993); *LinkCo Inc. v. Fujitsu Ltd.,* No. 00 Civ. 7242(SAS), 2002 WL 1585551, *4 (S.D.N.Y. July 16, 2002).[12] Stated differently, their "normal business practice" opinions are *ipse dixit*, bare assertions to which they have affixed their signatures. Such testimony "unsupported by any evidentiary foundation" should be "given no probative force." *Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002).

Moreover, the putative "duty" posited by MBIA is legally indefensible. Under New York law, "the existence of a confidential or fiduciary relationship . . . [is] required for a viable cause of action sounding in fraud for any failure to disclose." *Wirsing v. Donzi Mar. Inc.*, 30 A.D.3d 589, 590 (2d Dep't 2006); *Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, No. 118057/05, 2006 WL 3393259, at *14 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 24, 2006) (*citing George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 114 A.D.2d 930, 931 (2d Dep't 1985), *appeal denied* 68 N.Y.2d 603 (1986)). Here, the Complaint does not allege and the Opposition does not propose any relationship or duty that would give rise to a duty to disclose.

C. MBIA's New Theory That It "Relied Separately" on a Transmittal E-Mail Is Factually and Legally Unsupportable

MBIA next asserts that there is "ample evidence" that MBIA "relied separately" on Durden's e-mail transmitting the due diligence report. (Opp., pp. 18, 22-23). In fact, there is ***no*** evidence of such reliance. Durden's e-mail said only that he was attaching "the due diligence report for the [2006-HE4] deal." (Ex. P). No witness from MBIA testified to any reliance upon this e-mail or its contents. The only source MBIA can cite for its claim of "reliance" is the e-mail

[12] Indeed, Aronoff has ***no*** relevant experience relating to "standard industry practice" for monoline insurers and underwriters "during the 2004 to 2007 time period." (Opp., p. 5 n.2). Aronoff's only work experience with monoline insurers was from 1989 to 1993 (with Financial Security Assurance), where he worked on the business development side, and 2000 to 2001 (with CDC IXIS Financial Guaranty), where he did not evaluate the results of third-party due diligence on mortgage loans. (Ex. 13, pp. 3-4, App. A; Ex. JJ at 25:18-26:5, 35:13-18, 37:7-11, 44:7-14). Expertise must be specific to the opinions offered. *O'Boy v. Motor Coach Indus., Inc.*, 39 A.D.3d 512, 513-14 (2d Dep't 2007). Aronoff is unqualified and his opinions are inadmissible. *See Schechter v. 3320 Holding LLC*, 64 A.D.3d 446, 450 (1st Dep't 2009).

itself. (Opp., pp. 22-23). Instead of reliance upon the e-mail, MBIA attempts to argue that it relied upon what the e-mail did not say—that is, that Bear Stearns had allegedly altered the due diligence report—and asserts that the failure to make this disclosure violated the "business practice at this time" to "make the insurer aware of any issues arising in the due diligence review." As already discussed, however, MBIA's "evidence" of this "business practice" is unsubstantiated and inadmissible, and its theory of a "duty to disclose" based on such a "business practice" is not viable under New York law. *See* §§ I.B, II.B, *supra*.

Indeed, MBIA's own Complaint does not once allege reliance on the transmittal e-mail. It alleges forty-six separate times that it was the due diligence ***results*** that mattered to MBIA. (*See* Ex. B ¶¶ 3-5, 24, B.1, 34, 36, 39-40, 42, 44-45, B.3, 47, 50, 52-53, 55-60, 67-68, 70). This attempt to change MBIA's claim in response to summary judgment is invalid. *See* § II.B.

Further, New York law is clear that MBIA cannot actually or justifiably rely on mere transmittal of the due diligence report, while failing to read the report itself. Even unsophisticated parties cannot state a claim for fraud based upon their putative reliance upon a document they did not read.[13] For sophisticated parties like MBIA, failure to read a document purportedly relied upon is immediately fatal to a claim of fraud, as is lack of recollection of having read the document. *See Jordan (Bermuda) Inv. Co., Ltd. v. Hunter Green Invs. LLC*, 566 F. Supp.2d 295, 298-99 (S.D.N.Y. 2008); *Schultz v. Commercial Programming Unlimited Inc.*, No. 91 CIV 7924(LJF), 1992 WL 396434, at *3 (S.D.N.Y. Dec. 23, 1992).[14]

The idea that a sophisticated investor could rely by implication on mere transmittal of a due diligence report is further refuted by *SIPC v. BDO Seidman*, 95 N.Y.2d 702, 709 (2001).

---

[13] *See Sabowitz v. Sabowitz*, No. 54896/2010, 2012 WL 3115702, at *11-12 (N.Y. Sup. Ct. Kings Cnty. June 27, 2012); *Eric Vaughn Flam, P.C. v. FTF Crawlspace Specialists Inc.*, No. 116473/01, 2002 WL 31955398, at *7-8 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 10, 2002).

[14] *See also Albion Alliance Mezzanine Fund L.P. v. State St. Bank and Trust Co.*, 797 N.Y.S.2d 699, 705 (N.Y. Sup. Ct. N.Y. Cnty. 2003); *Vitolo v. Mentor H/S, Inc.*, 426 F. Supp.2d 28, 37 (E.D.N.Y. 2006).

There, the plaintiff argued that it relied on an audit report it never saw by implication, on a "no news is good news" theory, due to the regulator's obligation to communicate any negative information reported to it. *Id*. at 709-10. The court held that plaintiff's "reliance on silence" from the regulator "cannot be equated with its reliance on any affirmative misrepresentation or concealment of material fact" by the defendant. *Id*. at 710-11. Here, too, MBIA's purported "no news is good news" reliance on Bear Stearns' mere transmittal of a due diligence report "cannot be equated" with a representation that there were no due diligence issues.

III. MBIA CANNOT AVOID ITS OBLIGATION TO ESTABLISH JUSTIFIABLE RELIANCE

MBIA asserts that justifiable reliance is "irrelevant" under the Insurance Law, but, as discussed above, the Insurance Law is inapplicable to this case. *See* § II.A, *supra*. Just like any other sophisticated party trying to establish fraud, MBIA must therefore plead and prove justifiable reliance,[15] in addition to actual reliance, as an element of its claim.

MBIA argues that, if required to show justifiable reliance, it has raised a triable issue of fact notwithstanding Desharnais' testimony and ready demonstration that she could easily identify the absence of loan grades in the due diligence report. (*See* Ex. O at 31:24-33:19, 35:6-15, 84:24-89:12, 134:11-135:4, Ex. P). MBIA addresses this by ignoring the repeated allegations of the Complaint, which focused almost exclusively on loan grades as the "most important[]" component of the due diligence results. (Ex. B ¶¶ 4-5, 37, 48, 51, 54, 57, 60, 67-68, 70). Instead, MBIA cites Desharnais' testimony that she was not "married to the loan grades" but "was interested in the evaluation and the observations," and states that "the important thing for [Ms.

[15] Regardless, MBIA's authority holds only that justifiable reliance is not necessarily an element of a statutory claim for avoidance under Section 3105, not that the statute dispenses with justifiable reliance under the common law. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc*., No. 602825/08, 2013 WL 1845588, at *3-4 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 29, 2013). Quite the opposite, the court assumed "for the sake of argument" that common law justifiable reliance is applicable even to "a statutory claim under Section 3105[.]" 2013 WL 1845588, at *4-7. MBIA's other case, *Aguilar v. U.S. Life Insurance Co.*, 162 A.D.2d 209, 210-11 (1st Dep't 1990), does not discuss reliance at all, just "materiality" under Section 3105.

Desharnais] was to be able to understand the substance of the due diligence firm's evaluation and observations regarding the quality of the collateral." (Opp., pp. 10, 24-25).

Not only does this theory once again conflict with the Complaint, *see* § II, *supra*, it is not viable. If Desharnais had actually extended her review beyond the missing loan grades, the undisputed record reflects that the due diligence report supplied by Bear Stearns was replete with "evaluations," "observations," and "substance" alerting Desharnais to the collateral's compliance defects. For example, the report contained a "DISPOSITION" column on the "Loan Summary Report" worksheet indicating that 32 of the reviewed loans had "FAILED". (Ex. P). Six of these loans also had corresponding entries in the "NOTES" column describing their compliance defects. *Id*. The "Data Comparison" worksheet of the report also contained 906 entries detailing the numerous discrepancies between the data provided to MBIA in the loan tape and the data obtained during MDMC's due diligence review. *Id*. Thus, MBIA as a sophisticated insurer could not justifiably rely upon the due diligence report as evidence of collateral compliance.

MBIA's judicial admissions in the GMAC Mortgage Complaint further admit that MBIA "justifiably relied" on just four sources of information which came exclusively from GMAC Mortgage, with no mention of Bear Stearns or the due diligence report. (Ex. K ¶¶ 3-7, 31-32, 46-69). MBIA responds that it "did not yet know that Bear had doctored the due diligence report" when it filed the GMAC Mortgage Complaint. But that is precisely the point. Before MBIA learned of the alleged "doctoring" of the due diligence report, it identified in the GMAC Mortgage Complaint the actual sources of information on which it relied to issue its policy, which had nothing to do with Bear Stearns or the due diligence results. Only later did MBIA learn of the due diligence report and invent a new reliance theory to fit the new facts, just as it now seeks yet again to invent a new theory in its Opposition. But facts are not fungible, and MBIA cannot switch reliance theories like changing clothes. Its allegations of justifiable reliance in the GMAC Mortgage Complaint bar the new claims against JPMS on new and contradictory allegations. *See Morgenthow & Latham v. Bank of N.Y. Co., Inc.*, 305 A.D.2d 74, 75 (1st Dep't. 2003).

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of JPMS and against MBIA, and dismiss MBIA's Complaint in its entirety with prejudice.

Dated: New York, New York
November 4, 2013

Respectfully submitted,

/s/ Richard A. Edlin
Richard A. Edlin
Eric N. Whitney
Anastasia A. Angelova
Misty L. Archambault
GREENBERG TRAURIG, LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 801-9280
Facsimile: (212) 801-6400

Counsel for J.P. Morgan Securities LLC

APPENDIX A

Lauren Desharnais Deposition Testimony Regarding Lack of Memory[1]

#	Line Cite	Quote
1	9:15	I don't remember.
2	17:10-11	Q: Do you remember this transaction? A: Not specifically.
3	17:17-20	Q: Okay. Now, this transaction closed on September 27th of 2006. Do you have any recollection of the closing of this transaction? A: No.
4	18:2-3	I don't remember things that happened this long ago.
5	26:8-9	I don't remember.
6	28:5-6	I don't remember what it refers to . . . .
7	28:9	I don't remember.
8	28:12	I don't remember.
9	30:5	I don't have direct memory . . . .
10	30:24	I can't remember.
11	31:8-10	Q: Okay. But other than that, you don't have any specific recollection of them? A: That's correct.
12	31:15	I can't remember.
13	31:23	I can't remember.
14	33:5	I can't remember if it was easy.
15	36:9	I don't remember.
16	38:25-39:1	I can't remember what that stands for.
17	46:14	I don't remember.
18	46:22	I can't remember . . . .
19	47:17-19	Q: Do you recall the voting on this particular transaction? A: No.
20	49:7	I don't have memory of it . . . .
21	50:5	I can't remember.
22	50:9-11	Q: Okay. But you don't actually remember him in any way? A: No.
23	53:9	I can't remember what it stood for . . . .
24	54:2-4	Q: Okay. Do you recall anything at all about being with Ms. Murray on this trip? A: No.
25	54:9-10	I have no direct memories of this day, of this time.
26	58:22-24	Q: And do you recall what the weighted average combined loan-to-value ratio was? A: No.

[1] *See* Exhibits O, KK, and 15 for relevant excerpts from the transcript of the deposition of Lauren Desharnais taken on May 20, 2013.

#	Line Cite	Quote
27	59:24	I don't recall.
28	62:7	I don't have direct memory . . . .
29	62:10-14	Q: But as you sit here today, you don't have any recollection of discussions with him other than what's based in the documents that you reviewed; is that fair? A: That's correct.
30	63:20-21	I don't remember if it was the 25th . . . .
31	65:21-22	Q: Do you recall Mr. Krinsman? A: No.
32	65:23-24	Q: Okay. Do you recall who Mr. Martin was at the Orrick firm? A: No.
33	66:7	I don't remember him.
34	66:9	I don't remember him.
35	66:11	I don't remember her.
36	72:19	I don't remember.
37	72:21	I don't remember.
38	73:16	I don't have direct memory . . . .
39	73:22	Not direct memory, no.
40	75:3	I don't remember.
41	77:19	I don't have a direct memory . . . .
42	78:11	I have no direct memory . . . .
43	79:3	I don't remember.
44	79:8	No, I have no memory.
45	79:23	I don't have a memory.
46	81:10	I don't have a memory.
47	82:3-6	Q: Okay. But you don't' have any recollection of, in fact, what you did or when you did it; is that fair? A: That's correct.
48	83:16-17	Q: Do you have any recollection of doing so? A: No.
49	83:20	I have no recollection.
50	84:2	I don't have a direct memory . . ..
51	84:21-23	Q: Okay. But again, you have no specific recollection of doing any of that; right? A: That's correct.
52	86:5-7	Q: Okay. But you have no specific knowledge of doing it on this case; right? A: That's correct.
53	88:3	I don't have any actual recollection.
54	90:22	I have no memory.
55	92:14	I don't recall.
56	93:6	I have no memory of it.
57	93:10	I have no memory of that.
58	96:12	I don't remember . . . .

#	**Line Cite**	**Quote**
59	97:10	I don't remember.
60	104:12	I don't recall.
61	109:15	I don't remember anything to that affect.
62	115:5	I don't have memory of it . . . .
63	115:14	I have no direct memory . . . .
64	116:17	I don't remember.
65	116:25-117:2	I can't remember.
66	117:16	I don't have direct memory.
67	121:11-13	Q: Okay. But you have no recollection of doing it? A: Correct. (objection omitted).
68	121:14-19	Q: And on the report that you analyzed earlier today that you flipped through at some length, you have no specific recollection of looking at that report on your computer on the 27th either; isn't that correct? A: That's correct.
69	126:4	I can't remember.
70	127:3-4	Q: Do you recall what hotel you were staying at? A: No.
71	127:7	I don't recall.
72	127:16	I don't recall.
73	127:17-19	Q: So you don't have any recollection of how you logged on? A: That's correct.
74	130:12	I don't remember.
75	131:19-21	Q: Do you recall whether you traveled with Ms. Murray out to Minneapolis, by any chance? A: I don't recall.
76	131:22-24	Q: Okay. You simply have no recollection of that trip? A: That's correct.