SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 603751/2009

MBIA INSURANCE CORPORATION

vs

CREDIT SUISSE SECURITIES

Sequence Number : 003

DISMISS

INDEX NO. ______

MOTION DATE 5/14/10

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
	E-FILED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	12-20
Answering Affidavits — Exhibits ______	
Replying Affidavits ______	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

Dated: 7/30/10

______ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

CREDIT SUISSE SECURITIES (USA) LLC, DLJ MORTGAGE CAPITAL, INC., and SELECT PORTFOLIO SERVICING, INC.,

Defendants.

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Index No. 603751/09

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

In this action, plaintiff MBIA Insurance Corporation ("MBIA") asserts that it was fraudulently induced to insure payments on $900 million in securitized residential mortgages, and that defendants have breached various contractual representations and warranties in connection with the underlying loans. Defendants Credit Suisse Securities (USA) LLC ("CS Securities"), DLJ Mortgages Capital Inc. ("DLJ", and together with CS Securities, "Credit Suisse"), and Select Portfolio Servicing, Inc. ("SPS") move to dismiss the first, second, fourth, fifth, seventh and eighth causes of action for failure to state a claim and upon documentary evidence (CPLR 3211[a][1], [7]). Defendants also seek to strike the plea for punitive damages and the demand for a jury trial.

The Complaint

MBIA alleges that in 2007, CS Securities, DLJ and SPS – affiliated entities under common control -- consummated a transaction to securitize $900 million in approximately 15,000 closed-end, second-lien residential mortgages (the "Transaction") (Compl. ¶¶ 2, 3, 21).

DLJ, as "sponsor," aggregated the loans into a loan pool which was transferred to a trust, the Home Equity Mortgage Trust Series 2007-2 (the "HEMP Trust")(Compl. ¶¶ 1-2). The trust was formed to issue securities that were to be paid down based on the cash flow from the loans (Compl. ¶ 2). SPS serviced the loans by, *inter alia*, collecting the mortgage payments, monitoring the performance of the borrowers and pursuing delinquent borrowers (*Id.*). CS Securities, as underwriter for the public offering, marketed the securities to investors (*Id.*).

To enhance the marketability of the securities, CS Securities solicited, and DLJ and SPS contracted with, MBIA to issue a financial guaranty insurance policy (the "Policy") to guarantee payment of interest and ultimately the principal of the loans (*Id.*). The basic bargain between the parties was that Credit Suisse was to bear the risk that the securitized loans conformed to their representations regarding their quality and attributes, including representations that they were originated pursuant to specified practices and controls. MBIA was to bear the risk relating to whether the loans conforming to those representations would perform as expected in the prevailing market conditions (Compl. ¶¶ 8, 42).

MBIA was initially contacted by Tim Kuo of CS Securities in March 2007 (Compl. ¶ 21). Kuo indicated that the Transaction would close later that month and that MBIA would have to decide quickly whether to participate (Compl. ¶ 22). Because of the short time frame, MBIA alleges that it was impossible for it to review the individual loan files in the pool to determine whether each borrower could repay (Compl. ¶¶ 22, 42).

Instead, consistent with the manner in which the parties were to allocate the risk, MBIA relied upon certain representations and information provided by CS Securities regarding the quality of the individual loans that would serve as collateral for the Transaction. Among other things, CS Securities provided MBIA a loan schedule, or "tape," which set forth information

about each loan, including attributes of the borrowers' credit-worthiness, such as their debt-to-income ("DTI") ratio, and attributes about the property serving as collateral for the loan, such as the combined loan-to-value ratio ("CLTV") (Compl. ¶ 28). CS Securities also assured MBIA that the loans were underwritten to strict guidelines created or approved by Credit Suisse (Id.).

Furthermore, CS Securities assured MBIA that it had conducted due diligence on the loans to ensure compliance with the Credit Suisse underwriting guidelines and the borrowers' ability to repay the pooled loans. In this connection, CS Securities emphasized that Credit Suisse had rejected a large number of loans from the pool (Compl. ¶ 29). Kuo sent MBIA spreadsheets illustrating the purportedly rigorous due diligence that had been performed, including an individualized review of thousands of the loans included in the pool (Compl. ¶ 28).

MBIA ultimately entered into a series of written agreements with DLJ and SPS which memorialized the representations and warranties made by CS Securities to induce MBIA's participation. Specifically, the parties entered into an insurance agreement dated as of April 30, 2007 (the "Insurance Agreement"), which contained express representations and warranties, and also incorporated the representations and warranties that were made in a Pooling and Servicing Agreement (the "PSA") among DLJ, SPS, their affiliate Credit Suisse First Boston Mortgage Securities Corp. and U.S. Bank National Association (Compl. ¶¶ 34, 46).

In the agreements, DLJ made two types of representations and warranties to MBIA: "transaction-level" and "loan-level." The transaction-level representations and warranties concerned, *inter alia*, the attributes of the Transaction loan pool in the aggregate and DLJ's mortgage-lending operations, practices and protocols and related disclosures (Compl. ¶ 43). The loan-level representations and warranties applied to each individual loan securitized in the Transaction (Id.).

The transaction-level representations and warranties included the following:

> (i) *Accuracy of Information.* Neither the Transaction Documents nor other material information relating to the Mortgage Loans, the operations of the Servicer, the Seller or the Depositor (including servicing or origination of loans) or the financial condition of the Servicer, the Seller or the Depositor or any other information (collectively, the "Documents"), as amended, supplemented or superseded, furnished to the Insurer by the Servicer, the Seller or the Depositor contains any statement of a material fact by the Servicer, the Seller or Depositor which was untrue or misleading in any material adverse respect when made . . .
>
> (k) *Compliance with Securities Laws.* The offer and sale of the Securities comply in all material respects with all requirements of law . . . . Without limitation of the foregoing, the Offering Document does not contain any untrue statement of a material fact and does not omit to state a material fact necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading; provided, however, that no representation is made with respect to the Insurer Information. Neither the offer nor the sale of the Securities has been or will be in violation of the Securities Act or any other federal or state securities laws.

(Compl. ¶ 44, quoting Insurance Agreement § 2.01). MBIA alleges that these transaction-level warranties apply not only to the information provided by DLJ concerning its mortgage loans, the Credit Suisse mortgage lending operations (loan-acquisition practices, underwriting guidelines and due diligence), but to representations later made to market the securities, including an April 20, 2007 Prospectus (the "Prospectus") and an April 27, 2007 Prospectus Supplement (the "ProSupp")(Compl. ¶¶ 36, 45).

The loan-level warranties were made in the PSA, and included the following:

> The Mortgage Loan complies with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of origination of such Mortgage Loan, which in all material respects are in accordance with customary and prudent

> underwriting guidelines used by originators of closed end second lien mortgage loans.
>
> The information set forth in the Mortgage Loan Schedule, attached to the Agreement as Schedule I, is complete, true and correct in all material respects as of the Cut-off Date.
>
> The origination, underwriting, servicing and collection practices with respect to each Mortgage Loan have been in all respects legal, proper, prudent and customary in the mortgage lending and servicing business, as conducted by prudent lending institutions which service mortgage loans of the same type in the jurisdiction in which the Mortgaged Property is located.
>
> There is no material monetary default existing under any Mortgage or the related Mortgage Note and there is no material event that, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration under the Mortgage or the related Mortgage Note . . .

(Compl. ¶ 48). The loan-level representations and warranties are breached by, *inter alia*, loans made to borrowers who have falsely stated their income, or who have not demonstrated a reasonable ability to repay the loans as due (Compl. ¶ 49).

Under the PSA, Credit Suisse agreed to cure any breach of the loan-level warranties, or repurchase the breaching loan from the pool (the "Repurchase Protocol") (Compl. ¶ 50). In addition, the Insurance Agreement provides that MBIA may seek any remedy "at law or in equity" for Credit Suisse's breaches of its representations and warranties and states that MBIA's remedies "shall be cumulative and shall be in addition to other remedies given under the Transaction Documents or existing at law or in equity" (Compl. ¶ 50).

MBIA's payment obligations under the Policy were ultimately triggered by an inordinate number of defaults on the loans underlying the Transaction, and MBIA sought to exercise its contractual right to access loan origination files in the custody of SPS (Compl. ¶ 58). SPS at

first falsely denied having the requested files and refused to produce them under a variety of pretexts (Compl. ¶ 59). MBIA gained access to the files only after it terminated SPS as servicer (Compl. ¶ 62)

MBIA then learned that SPS had improperly transferred more than 2,000 charged-off loans to CS Securities without providing the contractually required notice to MBIA (Compl. ¶ 63). As a consequence, MBIA was improperly denied access to those files in order to determine whether the loans complied with the representations and warranties made by Credit Suisse (Compl. ¶ 66). Furthermore, the transfer improperly diverted to Credit Suisse assets from the Trust that could have been used to offset future payments MBIA must make under the Policy (Compl. ¶ 67).

Upon obtaining the loan files, MBIA retained a third-party consultant to review them for compliance with Credit Suisse's representations and warranties (Compl. ¶ 68). The consultant determined that out of a sample of 1,386 defaulted loans with an aggregate principal balance of approximately $78.1 million, breaches had occurred in 87% of them (*Id.*). A review of a sample of 477 randomly-selected loans from the Transaction, including loans not in default, revealed breaches in 79% of the cases (*Id.*). The breaching loans contained one or more defects that constituted a breach of one or more of defendants' representations and warranties, including:

> pervasive violations of the originators' actual underwriting standards, and prudent and customary origination and underwriting practices, including (i) qualifying borrowers under reduced documentation programs who were ineligible for those programs; (ii) systemic failure to conduct the required income-reasonableness analysis for stated income loans, resulting in the rampant origination of loans to borrowers who made unreasonable claims as to their income and (iii) lending to borrowers with debt-to-income and loan-to-value ratios above the allowed maximums;

> rampant fraud, primarily involving misrepresentation of the borrower's income, assets, employment, or intent to occupy the property as the borrower's residence (rather than as an investment), and subsequent failure to so occupy the property; and failure by the borrower to accurately disclose his or her liabilities, including multiple other mortgage loans taken out to purchase additional investment property.

(Compl. ¶ 68).

MBIA also commissioned a third-party consultant to review SPS's work as servicer. The review revealed that SPS breached its contractual obligations by failing to have appropriate personnel or procedures in place, and by doing virtually nothing to collect on delinquent loans (Compl. ¶¶ 73-74).

Finally, MBIA alleges that Credit Suisse breached its obligations under the Repurchase Protocol. MBIA provided notice to Credit Suisse of 564 breaching loans that it uncovered, but Credit Suisse refused to cure or repurchase a single loan (Compl. ¶¶ 76-77). MBIA asserts that because of Credit Suisse's misrepresentations and contractual breaches, MBIA has incurred and continues to incur significant damages, including the $296 million in claims it has paid out so far (Compl. ¶ 78-79). MBIA alleges that it would not have participated in the Transaction had it been aware of Credit Suisse's fraud (*Id.*).

Based upon defendants' alleged conduct, MBIA brought the instant complaint containing eight causes of action. The six claims which are the subject of this motion are: the first cause of action for fraudulent inducement against CS Securities; the second cause of action for breach of representations and warranties in the Insurance Agreement and PSA against DLJ; the fourth cause of action for breach of the implied duty of good faith and fair dealing against DLJ and SPS; the fifth cause of action for a material breach of the Insurance Agreement against DLJ; the

seventh cause of action for indemnification under the Insurance Agreement against DLJ; and the eighth cause of action for reimbursement under the Insurance Agreement against DLJ.

Defendants' Motion

In moving to dismiss the fraudulent inducement claim, defendants' do not challenge the allegation that Credit Suisse made false or misleading statements. Rather, they argue that MBIA was a sophisticated party who could not have relied on any such misrepresentations as a matter of law, since (1) it failed to conduct due diligence, and (2) it was on notice of the various deficiencies of the loans from information provided by Credit Suisse and set forth in the Prospectus and the ProSupp. Defendants further argue that MBIA'S receipt of contrary representations and warranties in the contractual documents did not excuse it from its duty of inquiry.

With respect to the question of due diligence, defendants contend that MBIA's pleading admission that it did not review the thousands of individual loan files (Compl. ¶ 42) is fatal to the fraudulent inducement claim. With regard to MBIA's knowledge of the deficiencies, defendants contend that the Prospectus disclosed that the pooled loans included "NINA" (no income/no asset) loans, for which a borrower is "not required to state his or her income or assets, and, therefore, no verification of such mortgagor's income or assets is undertaken by the originator." The Prospectus also cautioned that: "No assurance can be given that the values of any . . . properties . . . have remained or will remain at their levels on the dates of origination of the related mortgage loans." Additionally, defendants note that the loan tape and the ProSupp disclosed information about borrowers' credit scores, debt-to-income ratios, combined loan-to-value ("CLTV") ratios, and other characteristics of the pooled loans. Defendants argue that MBIA could have deduced the possibility of a high rate of default from examining this data.

Moreover, defendants point to the following other disclosures in the Prospectus and ProSupp which they claim defeat any claim of reasonable reliance:

> The various loan originators applied underwriting standards that were not as strict as Fannie Mae and Freddie Mac guidelines.
>
> Applicable underwriting standards could vary significantly among the originators.
>
> Individual loans in the pool might not comply with each criterion even of these "less strict" underwriting standards, as long as "the loan is in substantial compliance with the underwriting standards."
>
> A particular loan might comply with the underwriting standards despite the fact that one or more of the criteria were not satisfied, as long as "other factors compensated for the criteria that were not satisfied."
>
> Neither CS Securities nor any affiliate had re-underwritten any of the mortgage loans.
>
> One of the originators of the pooled loans, New Century Mortgage Corporation, was in bankruptcy, which may have "adversely affected its ability to originate mortgage loans in accordance with its customary standards."

Defendants also seek dismissal of the fraudulent inducement claim on the ground that it is duplicative of the contract causes of action.

In moving to dismiss the contract claims under the Insurance Agreement and PSA (claims 2 and 5), defendants assert that MBIA has failed to specifically allege a breach of representation or warranty with respect to any particular loan. Because the indemnification and reimbursement causes of action (claims 7 and 8) arise out of those breaches, defendants' seek their dismissal on the same ground. As to the claim for breach of the implied duty of good faith and fair dealing, defendants assert it is duplicative of the contract claims.

Finally, defendants seek to strike the demand for punitive damages by reason of the alleged deficiency of the fraud claim. They argue that the demand for a jury trial must be stricken in view of section 6.09 of the Insurance Agreement, which expressly waives "any right to a trial by jury."

Discussion

For the following reasons, the motion to dismiss is denied except to the extent of dismissing the fourth cause of action for breach of the implied duty of good faith and fair dealing, and striking the demand for a jury trial.

Fraudulent Inducement

Defendants' arguments that MBIA cannot establish justifiable reliance are foreclosed by a recent Court of Appeals' ruling on this issue and a number of persuasive trial court decisions. In particular, defendants' contention that a sophisticated entity such as MBIA was required to look beyond Credit Suisse's contractual representations and conduct extensive due diligence was rejected in *DDJ Capital Management, LLC v Rhone Group L.L.C.*, ___ NY3d ___, 2010 WL 2516811, 2010 N.Y. No. 131 (2010). Affirming that "[t]he question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" (DDJ, 2010 N.Y. No. 131 at 8, quoting *Schlaifer Nance & Co. v Estate of Warhol*, 119 F3d 91, 98 [2d Cir1997]), the Court of Appeals rejected the Appellate Division's holding that a party which has obtained representations and warranties from the defendant was nevertheless obligated, in all cases, to inspect the underlying books and records to confirm the truth of the representations:

> Where, however, a plaintiff has taken reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred. In particular, where a plaintiff

> has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry. Indeed, there are many cases in which the plaintiff's *failure* to obtain a specific, written representation is given as a reason for finding reliance to be unjustified.

DDJ, 2010 N.Y. No. 131 at 8.

The court in *DDJ* reached this conclusion despite noting that "there were hints from which [the plaintiff lenders] might have been put on guard in this transaction," including a "too good to be true" improvement in the borrower's profitability in the last month of the year, a lengthy delay in the auditor's review of the borrower's financial statements, and a high interest rate which demonstrated that plaintiffs "knew the transaction carried considerable risk" (*DDJ*, 2010 N.Y. No. 131 at 10-11). Noting that the plaintiffs "made a significant effort to protect themselves against the possibility of false financial statements" by obtaining representations affirming their accuracy, the court concluded:

> We decline to hold as a matter of law that plaintiffs were required to do more-either to conduct their own audit or to subject the preparers of the financial statements to detailed questioning. If plaintiffs can prove the allegations in the complaint, whether they were justified in relying on the warranties they received is a question to be resolved by the trier of fact.

(*DDJ*, 2010 N.Y. No. 131 at 11). *See Merrill Lynch & Co. v Allegheny Energy Inc.*, 500 F3d 171, 181-82 (2d Cir 2007)("The warranties contained in §§ 3.12(b), 3.12(c) and 3.16 imposed a duty on Merrill Lynch to provide accurate and adequate facts and entitled Allegheny to rely on them without further investigation or sleuthing")(cited in *DDJ*, 2010 N.Y. No. 131 at 9).

Defendants relied heavily on the now-repudiated pleading standard for reasonable reliance applied in the Appellate Division's ruling in *DDJ*. The reversal naturally undermines

most of their arguments addressing that issue. Additionally, even prior to the reversal in *DDJ*, MBIA prevailed on a CPLR 3211 motion in another mortgage securitization action where arguments identical to those raised here were proffered (*see MBIA Ins. Co v Countrywide Home Loans, Inc.*, NY Co Index No 602825/08 (Sup Ct, NY County 2009)(unpublished disposition). Addressing defendants' contention that MBIA's lack of diligence defeated the reliance element of its fraud claim, the court (Bransten, J.) noted:

> It is unclear, however, how much information regarding the securitizations MBIA could access. Even assuming MBIA conducted a full inquiry under the circumstances in relation to the bidding process, it is not conclusive that MBIA could have discovered the alleged fraud. ... Justifiable reliance has been sufficiently alleged and Countrywide has not demonstrated its nonexistence as a matter of law so as to warrant dismissal.

Countrywide, at p. 12. In a later discovery ruling in the same case, the court made an observation which underscores the difficulty of resolving the reliance question as a matter of law:

> [A]s a general proposition, to suggest that discovery of the true nature of the securitizations could have been achieved through reasonable investigation severely oversimplifies a product that has humbled many financial titans who considered themselves experts in understanding securitizations.

MBIA Ins. Corp. v Countrywide Home Loans, Inc., 27 Misc3d 1061, 1077 (Sup Ct, NY County 2010). Consequently, in the complex and fact-sensitive context in which this case arises, the court cannot hold as a matter of law that MBIA was obligated to perform due diligence beyond that which it pursued in extracting the various representations and warranties from Credit Suisse.

Furthermore, as in *DDJ*, the court cannot determine at the pleading stage whether the facts known to MBIA rendered its reliance unreasonable. Although Credit Suisse has identified various disclosures and disclaimers in the offering materials that suggested possible risks

relating to the underlying loans, a hint of a "considerable risk" will not necessarily trigger an obligation to do more than obtain representations and warranties (*DDJ*, 2010 N.Y. No. 131 at 10-11). Defendants have pointed to no disclosures that would have conclusively alerted MBIA to the pervasive loan fraud of which it complains. Rather, the disclosures it relies upon merely raised the possibility that there would be some variations in the quality of the loans due to the identity of the loan originator and other factors. *See SEC v Mozilo*, 2009 WL 3807124,*11 (CD Cal 2009)("The Court cannot conclude as a matter of law at the pleading stage that [Countrywide's] disclosures adequately communicated the extent and magnitude of Countrywide's departure from its underwriting guidelines . . . Indeed, it appears that some of the disclosures relied on by Defendants may have themselves included misleading statements that concealed the true extent of the poor quality of Countrywide's loans.").

The court also rejects defendants' contention that the fraudulent inducement claim is duplicative of the contract claims. Contractual warranties against false or misleading information do not limit a plaintiff to a breach of contract action. "A warranty is not a promise of performance, but a statement of present fact . . . a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 292 [1st Dept 1999]; *In re CINAR Corp. Securities Litigation*, 186 F Supp 2d 279 [EDNY 2002]["(i)t simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into the language of a contract"]). The court concurs with the court's reasoning on this point in *MBIA v Countrywide*, NY Co Index No 602825/08 (Sup Ct, NY County 2009):

> Here, MBIA alleges that Countrywide misrepresented, among other things, the origination and quality of the mortgage loans to induce it into entering the Insurance Agreement. Because MBIA's claim relates to representations in connection with entering into the Insurance Agreement, and not simply a breach of its terms, the fraud claim is not duplicative.

See also MBIA v Residential Funding Co., 2009 WL 5178337, *4 (Sup Ct, NY Co 2009).

Here, the fact that MBIA sought and received contractual warranties from DLJ does not estop it from pursuing a tort claim based on the theory that CS Securities employed those same representatitions to induce MBIA to contract. Hence, the motion to dismiss the claim for fraudulent inducement is denied. Insofar as defendants' demand to strike the punitive damages claim was premised on the insufficiency of the fraud claim, it is denied as well.

The Contract Claims

The motion to dismiss the contract claims for lack of specificity (i.e., failure to identify thousands of loan-level breaches) is denied. Under, CPLR § 3013, a party bringing an action for breach of contract need only provide notice of the transactions or occurrences underlying the claim. Particularity in a contract action, is not required (*Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253, 254 [1st Dept 2002]). Plaintiff has alleged the existence of a valid agreement (the Insurance Agreement); that defendants breached particular provisions of that agreement, including the representations and warranties identified in Paragraph 69; that MBIA has conducted a review that has revealed breaches in more than 80% of the loans reviewed; and that MBIA has been harmed by, inter alia, payment of more than $296 million in claim payments.

Although MBIA may ultimately be required to itemize the loan-level breaches constituting its contract claim, the pleadings give sufficient notice of the claim at this juncture. Furthermore, the claim itself is not a claim for a breach at the loan level. Rather, plaintiff alleges

that the pervasive and systemic nature of these breaches, the resultant breaches of the Repurchase Protocol and the breach of the transaction-level warranties found in the Insurance Agreement collectively give rise to the claims for material breach of the Insurance Agreement as a whole. Because the contract claims have been sustained, the motion to dismiss the related claims for indemnification and reimbursement under the agreement, also is denied.

Breach Of The Implied Duty Of Good Faith And Fair Dealing

The fourth cause of action for breach of the implied duty of good faith and fair dealing asserts that:

> DLJ and SPS were obligated under the Insurance Agreement and PSA to act in good faith to allow MBIA to receive the benefit of its bargain under those agreements, including the right to assess and seek recovery for breaches of DLJ's representations and warranties . . . DLJ and SPS breached their duty of good faith and fair dealing by failing to provide MBIA with access to the information necessary to effectuate the Repurchase Protocol, and thereby actively concealing the falsity of the representations and warranties made to induce MBIA to enter into the Insurance Agreement and issue its Policy."

(Compl. ¶96-97). The claim is dismissed as duplicative of the contract claims.

MBIA has not identified any breach of duty relating to defendants' failure to provide access to loan information that is not already covered by a specific contractual provision. It is "in essence, a contract-based cause of action, and thus, any damages or remedies recoverable for [defendants'] alleged breaches will be governed by the parties written agreements" (*Amcam Holdings, Inc. V Canadian Imperial Bk. Of Commerce*, 70 AD3d 423 [1st Dept 2010]).

Jury Trial Demand

MBIA's demand for a jury trial is stricken. Section 6.09 of the Insurance Agreement provides that "[e]ach party hereto hereby waives, to the fullest extent permitted by law, any right

to trail by jury in respect of any litigation arising directly or indirectly out of, under or in connection with any of the Transaction Documents or any of the transactions contemplated thereunder." The provision is enforceable. "It is well settled that by written agreement parties may expressly waive their right to a jury trial on any claim . . . Moreover, when a party joins a claim for which it has a right to a jury trial with another claim for which it does not, that party waives its right to a jury trial on both claims if they arise from the same transaction," (*Tiffany At Westbury Condominium v Marelli Dev. Corp.*, 34 AD3d 791, 791-92 [2d Dept 2006]).

MBIA's interposition of a fraudulent inducement claim does not change this result. MBIA is not challenging the validity of the Insurance Agreement through that claim (*see, e.g.*, *Well Fargo Bank v Stargate Flims, Inc.*, 18 AD3d 264 [1st Dept 2005]) or seeking rescission. MBIA is seeking contractual damages. It contends it is compelled to make payments under the agreement and asserts claims based upon its terms, seeking to enforce them. Under the circumstances, the waiver must stand (*see Kimi Jewelers, Inc. v Advance Burglar Alarm Sys., Inc.*, 161 AD2d 273, 273 [1st Dept 1990]["plaintiff should not be permitted to assert claims arising out of the agreement while, at the same time, repudiating the jury waiver clause"]; *Fay's Drug Co. v P&C Property Coop., Inc.*, 51 AD2d 887 [4th Dept 1976] (enforcing jury-trial waiver despite counterclaim for fraudulent inducement because counterclaimant also sought contract damages); *Leav v Weitzner*, 268 AD 466, [1st Dept 1944][plaintiffs bound by jury-trial waiver where they asserted fraudulent inducement and contract claims, but not rescission]). Accordingly, it is

ORDERED that the motion to dismiss the first, second, fifth, seventh and eighth causes of action is denied, and it further

ORDERED that the motion to dismiss the fourth cause of action is granted, and the fourth cause of action is severed and dismissed, and it is further

ORDERED that the motion to strike the demand for a jury trial is granted, and the demand is hereby stricken, and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants answer the complaint within thirty days of this decision.

Dated: July 30, 2010

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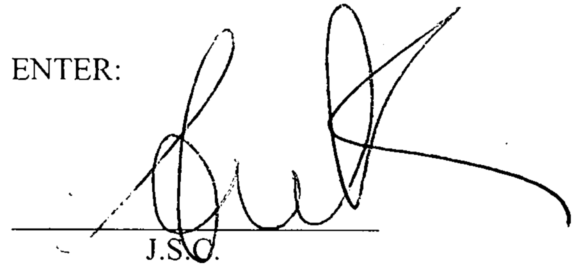

J.S.C.