SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

MBIA INSURANCE CORPORATION, Plaintiff, -against- CREDIT SUISSE SECURITIES (USA) LLC, DLJ MORTGAGE CAPITAL, INC., AND SELECT PORTFOLIO SERVICING, INC. Defendants.	Index No. 603751/09 Motion Sequence No. 13 Hon. Shirley Werner Kornreich

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO RENEW CONSIDERATION OF THE COURT'S DISMISSAL OF ITS FRAUD CLAIM

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Defendants Credit Suisse Securities (USA) LLC ("CS Securities"), DLJ Mortgage Capital, Inc. ("DLJ"), and Select Portfolio Servicing, Inc. ("SPS") (collectively, "Credit Suisse") respectfully submit this memorandum of law in opposition to Plaintiff MBIA Insurance Corporation's ("MBIA") motion pursuant to CPLR Rule 2221(e) for leave to renew consideration of this Court's June 1, 2011 Amended Decision and Order (the "June Order"), insofar as it dismissed MBIA's First Cause of Action against CS Securities for alleged fraudulent inducement and struck the related request for punitive damages.

PRELIMINARY STATEMENT

MBIA's cause of action for alleged fraudulent inducement against CS Securities is as fatally flawed today as it has always been. MBIA did not challenge the fraud dismissal by way of motion to reargue. The instant motion to renew is based solely on the Appellate Division, First Department's recent decision in MBIA Insurance Corp. v. Countrywide Home Loans, Inc., No. 602825/08 (June 30, 2011). Contrary to MBIA's repeated assertions, however, the allegations it made in Countrywide vary materially from those in this case, and nothing in the Countrywide decision provides any reason for this Court to disturb its determination that the fraud claim against CS Securities fails as a matter of law.

MBIA's motion to renew fails from the outset because it ignores that in its June Order, this Court carefully reviewed the alleged pre-contract representations allegedly made by CS Securities, which is the only defendant against whom MBIA asserts fraud. Having examined each of MBIA's specific allegations, the Court dismissed the fraud claim on three grounds. Although duplication was one of those grounds, it is not essential to the determination of dismissal.

Because Countrywide deals solely with duplication and because Countrywide involves different facts than this case, MBIA tries mightily to characterize its allegations here as no

different from the allegations it made in Countrywide. Thus, MBIA's statement that the June Order dismissed the "core representations" underlying its fraud claim on duplication grounds gives the misimpression that duplication was the only ground for the fraud dismissal. It was not. The other two equally important grounds were (i) puffery; and (ii) lack of justifiable reliance, based on Credit Suisse's extensive disclosures, the lack of any information peculiarly within Credit Suisse's knowledge, and the failure of MBIA, a sophisticated business party, "to investigate material facts disclosed in documents admittedly in its possession." June Order at 23. Remarkably, MBIA completely ignores these analyses and holdings in the June Order.

The Court first found that CS Securities' alleged statements about Credit Suisse's standing in the financial industry and its past successes are non-actionable puffery. June Order at 17-18. MBIA did not, and could not, challenge this finding by motion to reargue, and for present purposes, nothing in Countrywide addressed, let alone contradicts, this conclusion. Countrywide thus provides no basis to change this part of the Court's determination.

The Court then held that MBIA cannot show justifiable reliance as to pre-contract statements for which there are no contractual representations or warranties. This portion of the June Order focused on: (i) CS Securities' alleged pre-contract statements that the securitized loans were underwritten to "strict" guidelines; and (ii) alleged statements relating to Credit Suisse's due diligence performed when it purchased the loans from third-party originators. As the Court correctly found, extensive pre-closing disclosures to MBIA put it on notice of the precise risks of which it now complains. The Court held that these disclosures triggered MBIA's duty to investigate, which MBIA admits it did not do, nor did it bargain for contractual representations or warranties. The Countrywide decision does not address justifiable reliance at all, much less in the absence of a representation and warranty. The case therefore does nothing

to disturb this Court's determination that all of MBIA's fraud allegations against CS Securities relating to "strict" underwriting guidelines and due diligence fail for lack of justifiable reliance.

This leaves only two alleged misrepresentations by CS Securities that the Court did not expressly enumerate as falling within its findings of non-actionable "puffery" or statements that fail to support fraud for want of reasonable reliance. The first is MBIA's claim that the loan tape that CS Securities provided to MBIA before the Transaction closed allegedly contained false information. The Court held that "to the extent" MBIA alleges that information on the loan tape was inaccurate, the allegations subsume the breach of warranty claim against DLJ and dismissed the loan tape allegation on duplication grounds.

Yet the facts and reasoning underlying the Court's analysis of MBIA's "strict" underwriting guideline and due diligence allegations apply with equal force to the loan tape allegation. Although the Court initially found that where MBIA obtained a warranty, it was barred from dismissing the fraud claim by the Court of Appeal's decision in DDJ Management LLC v. Rhone Group, LLC, Credit Suisse respectfully submits that DDJ simply does not compel such an outcome in the circumstances alleged in MBIA's Complaint. The facts here show that: (i) the precise risk complained of was disclosed; and (ii) the facts represented were not peculiarly within the defendants' knowledge and the other party had the means available of knowing, by the exercise of ordinary diligence, the truth and quality of the representation. In such circumstances, a party must make use of those means or it will not be heard to complain that it was induced to enter into the transaction by misrepresentations. Even under DDJ, it is appropriate to dismiss the fraud claim as a matter of law.

The final pre-contract statement allegedly made by CS Securities was that "Credit Suisse itself would vouch for the New Century loans by providing express contractual representations and warranties about their quality." Compl. ¶ 30. This is a statement of future intent not of present fact, and thus cannot support a fraudulent inducement claim. Moreover, MBIA does not and cannot allege that the statement was false. It alleges instead that, in fact, it received warranties that allocated all of the risk of any breaching New Century loan to DLJ through the repurchase protocol.

Countrywide provides no reason for this Court to second guess its dismissal of MBIA's fraud claim. As the June Order recognizes, MBIA's fraudulent inducement claim fails for reasons entirely distinct from those at issue in Countrywide. Accordingly, the Court should deny MBIA's motion to renew.

FACTS

This case arises out of MBIA's decision in April 2007 to issue a certificate guaranty insurance policy (the "Policy") in connection with Credit Suisse's securitization of 15,000 closed-end second-lien residential mortgages.[1] DLJ purchased these mortgages from unaffiliated loan originators and packaged them into an investment vehicle known as the Home Equity Mortgage Trust 2007-2 (the "Transaction").

[1] Because the June Order granted Credit Suisse's motion to dismiss, pursuant to CPLR 3211(a)(7), the facts in this section are based largely upon the allegations in MBIA's Verified Complaint, dated December 15, 2009 ("Complaint" or "Compl."). Credit Suisse disputes the Complaint's allegations and denies any fault or liability for MBIA's alleged losses. The allegations are set forth here solely for purposes of this motion do not constitute an admission by Credit Suisse of any fact in the Complaint.

A. The Complaint's Allegations Of Fraudulent Inducement[2]

1. CS Securities' Alleged Acts Of Fraudulent Inducement

Section "A" of the Complaint (paragraphs 20 – 33) entitled "CS Securities Fraudulently Induces MBIA's Participation in the Transaction," sets forth the actions of CS Securities that allegedly induced MBIA to insure the deal. It alleges that on March 2, 2007, CS Securities (through its employee, Tim Kuo) first solicited a bid from MBIA. MBIA, however, "had reservations with respect to its participation in the Transaction" for two reasons. Id. ¶ 22. First, MBIA had not previously insured such a transaction for Credit Suisse. Id. ¶ 23. Second, MBIA "had a negative view of one of the primary originators of the loans, a company called New Century." Id. ¶ 24. CS Securities allegedly responded to MBIA's concerns by making certain statements and representations to MBIA, and by providing it with certain information about the underlying loans. The alleged acts of CS Securities upon which MBIA claims it relied are as follows.

Puffery. CS Securities allegedly assured MBIA that it was a "pillar of the financial industry," and its mortgaged-backed securities had a "track record of success." CS Securities referred to its "strong institutional pedigree" and made a presentation to MBIA about the successful performance of prior HEMT deals done by Credit Suisse. See Compl. ¶¶ 25, 26, 27.

Loan Tape. CS Securities allegedly made representations to MBIA "about the quality of the individual loans that would serve as collateral for the Transaction." Compl. ¶28. As part of its pre-contract disclosures for MBIA's review, CS Securities provided MBIA with a loan tape

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[2] Credit Suisse object to MBIA's reference to the purported evidence of fraud it alleges it has obtained during the course of discovery in this case. Not only does MBIA improperly attempt to go beyond the four corners of its complaint to defend its fraud claim against a motion to dismiss, it cites to materials filed in support of a motion to compel that was withdrawn, and therefore is not even in the record. Docket No. 146 (July 7, 2011 Decision & Order on MBIA's Motion to Compel). These materials are referenced nowhere in the complaint and thus have no relevance to the motion to dismiss.

(the "Loan Tape"), "which set forth information about each loan, including attributes about the borrower and his or her credit-worthiness . . . as well as attributes about the property serving as collateral for the loan." Id.

Strict Underwriting Guidelines. CS Securities allegedly "assured MBIA that the loans involved in the transaction were underwritten to strict guidelines created or approved by Credit Suisse." Compl. ¶ 28.

Due Diligence. The Complaint alleges that CS Securities represented to MBIA that it had "conducted due diligence" on the loans to "ensure compliance with the Credit Suisse-created or approved underwriting guidelines, and the borrowers' ability to repay." Compl. ¶ 29.

Credit Suisse Would Vouch Expressly For The New Century Loans. Finally, CS Securities allegedly addressed MBIA's hesitancy to insure loans originated by New Century by representing that "Credit Suisse itself would vouch for the New Century loans by providing express contractual representations and warranties about their quality." Compl. ¶ 30.

MBIA claims that the above representations were false and/or omitted information that was required to make them not misleading, and that had CS Securities made truthful disclosures, MBIA would not have insured the Transaction. Compl. ¶¶ 31-33.

2. DLJ Provides MBIA With The Prospectus And Prospectus Supplement, And Certain Contractual Representations and Warranties

Having itemized the alleged misrepresentations attributed to CS Securities, the Complaint confines them to the period before the Transaction closed and separates them from the alleged acts of DLJ, alleging that CS Securities made the "foregoing representations in advance of MBIA's execution of, and as an inducement for MBIA to issue," the Policy. Compl. ¶ 31. Then: "[a]fter CS Securities solicited MBIA's participation in the Transaction, its affiliate DLJ stepped

in to provide the contractual representations and warranties that MBIA required as a condition to insuring its insurance policy." Compl. ¶ 34.

On April 20 and 27, 2007 respectively, DLJ, as the Seller in the Transaction, provided MBIA with a Prospectus and Prospectus Supplement (the "ProSupp"). These "contained additional representations about the characteristics of the loans in the Trust." Compl. ¶¶ 36, 45. On April 30, 2007, MBIA entered into the Insurance Agreement and the Pooling and Servicing Agreement (the "PSA"). The PSA includes a schedule of information about the individual loans set forth on the Mortgage Loan Schedule, which is annexed as Schedule I to the PSA. See Compl. ¶ 48(v).

Having executed the Insurance Agreement and PSA, MBIA issued the Policy. Id. ¶ 39. MBIA alleges that, in addition to CS Securities' pre-contract solicitations, it issued the policy in reliance upon "DLJ's and SPS's representations, warranties, covenants and indemnities contained in and encompassed by the Insurance Agreement and the PSA." Id.

B. The Court's June 1 Order

On June 1, 2011, this Court issued its Amended Decision and Order, in which it dismissed the fraud claim against CS Securities as well as MBIA's request for punitive damages, which was tied to the fraud claim.[3] The Order sets forth three different separate bases for the fraud claim's failure.

First, as a threshold matter, the Court held that the various alleged statements by CS Securities about Credit Suisse's pedigree, standing in the industry, and the success of its prior RMBS were mere puffery and thus not actionable. June Order at 17-18.

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[3] MBIA's motion does not challenge the Court's dismissal in the June Order of MBIA's claim for breach of the implied covenant of good faith and fair dealing.

Second, the Court held that MBIA could not show that it justifiably relied on any allegedly false statements by CS Securities that were not later incorporated into contractual representations and warranties. June Order at 21 (citing DDJ). This portion of the June Order included CS Securities' alleged assurances that the underlying mortgages in the Transaction, including the New Century loans, had been underwritten to "strict" guidelines and its alleged statements about Credit Suisse's due diligence performed on the loans. Id.

In so ruling, the Court found that the Prospectus "disclosed that some of the loans were originated under programs with less than 'strict' underwriting standards, i.e., alternative documentation, reduced documentation, stated income/stated assets and NINA programs (Prospectus, pp. 30-33)." June Order at 22. Further, the ProSupp disclosed that "New Century had filed for bankruptcy, which might have adversely affected its ability to originate mortgage loans in accordance with customary standards and to exercise oversight and control over originators (ProSupp, p. S-20)." Id. The Court applied controlling New York law that, "where a sophisticated party has hints of falsity; its duty of inquiry is heightened and if it fails to investigate or insert protective language in the contract, it willingly assumes the risk that the facts are not as represented." Id. (citing Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93 (1st Dep't 2006)). And the Court found much more than hints, it found that the Prospectus and ProSupp "disclosed the risks of which [MBIA] now complains." Id. at 22. Thus the Court found that on the face of MBIA's Complaint, "MBIA, a sophisticated business entity, failed either to investigate material facts disclosed in documents admittedly in its possession or obtain contractual warranties." Id. at 23.

Finally, the Court enumerated five alleged misrepresentations that it identified as being covered by contractual representations and warranties. On that basis, the Court held that "to the

extent" MBIA's fraud claim relied on these misrepresentations, the "claims duplicate the second cause of action for breach of contractual representations and warranties in the Insurance Agreement and PSA." June Order at 19-20. The Complaint shows that two of the five alleged misrepresentations are alleged to have been made by CS Securities. One is the allegation that the Loan Tape provided by CS Securities contains false information. Compl. ¶¶ 28, 32. The other is CS Securities' alleged promise that Credit Suisse would expressly vouch in the agreements for the New Century loans. Id. at 20.

The Complaint also shows, however, that the other three alleged misrepresentations cited by the Court as duplicative were made by DLJ and are the subject of MBIA's warranty claim against DLJ, not the fraud claim against CS Securities. These include the allegations that the loans did not conform to the originators' guidelines (Compl. ¶¶ 69-71); that the loans did not conform to Credit Suisse guidelines (Compl. ¶¶ 69-71); and that the Prospectus and ProSupp did not adequately disclose information about the loans (Compl. ¶ 72).

ARGUMENT

The First Department's decision in Countrywide does nothing to save MBIA's fraudulent inducement claim. Countrywide addressed a specific set of alleged misrepresentations in a particular context. This case is substantially different, and the specific facts and causes of action alleged here by MBIA must be decided on their own terms. This Court did that in its comprehensive Order and correctly determined that the fraud claim fails as a matter of law.

A. The Facts In Countrywide Differ Fundamentally From The Facts In This Case

MBIA's statement that the Countrywide decision is based on "virtually identical allegations" as those at issue here is incorrect. The First Department's decision is based both on materially different facts and claims and does not address the most important issues at stake in

this case: namely, the comprehensive and detailed disclosures provided to MBIA, or any issue of justifiable reliance, which was not at issue on appeal.

First, MBIA asserts its fraud claim in Countrywide against all three Countrywide defendants. Here, fraud is only asserted against CS Securities, and breach of contract is asserted only against DLJ and SPS. No party in this case is subject to both MBIA's fraud and contract claims.

Second, perhaps the most crucial difference between the decision in Countrywide and this case involves the disclosures made by Credit Suisse to MBIA. Such issues are absent from the First Department's decision in Countrywide precisely because justifiable reliance was not before the court as an issue on appeal. As the Court's June Order details: (i) Credit Suisse made clear to MBIA through its disclosures that the loans "may have been made to mortgagors with imperfect credit histories, ranging from minor delinquencies to bankruptcy, or mortgagors with relatively high ratios of monthly mortgage payments to income or relatively high ratios of total monthly credit payments to income;" (ii) that the mortgage, real estate, and housing markets had experienced numerous difficulties; (iii) that the "underwriting standards applicable to the mortgage loans typically differ from, and are, with respect to a substantial number of the mortgage loans, underwritten to less stringent standards than required by Fannie Mae and Freddie Mac;" (iv) that certain mortgage loans "were originated under alternative documentation, reduced documentation, stated income/stated assets or no income/no asset programs;" (v) that certain data supplied by borrowers was not subject to verification; and (vi) that New Century was in bankruptcy and experienced difficulties that could affect "its ability to originate mortgage loans in accordance with its customary standards and to exercise oversight and control over its originations," such that its rate of delinquencies could be higher. June Order at pp. 4-7. For its

part, MBIA pleads that it was hesitant to enter the transaction due to its concerns with New Century as a lender, and its inexperience insuring Credit Suisse transactions. Id. at 4. None of these allegations are addressed or even present in the Countrywide decision.

Finally, also not present in Countrywide is MBIA's admission in its Complaint that, as a sophisticated business entity, it failed to conduct any investigation in the face of these disclosures. Thus, as the Court recognized, MBIA alleged that because it was "rushed," it did not review any loan files, instead allegedly relying solely on DLJ's contractual representations. June Order at 18. And it also alleged that after losses began to accrue, it then retained a consultant to review the very same loan files it chose not to review prior to issuing its policy – and only then determined that there allegedly were "pervasive violations of originators' underwriting standards" Id. at 15. The existence of or need for independent due diligence was not addressed or at issue in the First Department's Countrywide decision.

B. MBIA Does Not Challenge, And Countrywide Is Irrelevant To, This Court's Dismissal Of MBIA's "Puffery" Allegations

In considering MBIA's allegations that CS Securities made false statements concerning Credit Suisse's reputation, pedigree, and past successes, this Court correctly determined that these statements constitute mere "[p]uffery, opinions of value or future expectations" and thus "do not support a cause of action for fraud." See Compl. ¶¶ 25-27; June Order at 17. Nothing in Countrywide calls this conclusion into question, and MBIA does not contend otherwise. Cf. MBIA Mem. at 7 n.2.

C. MBIA Does Not Challenge, And Countrywide Is Irrelevant To, The Court's Holding Relating To "Strict" Underwriting Guidelines And Due Diligence

The same is true of MBIA's allegations that CS Securities falsely assured that the HEMT 2007-2 loans "were underwritten to strict guidelines created or approved by Credit Suisse" and that Credit Suisse conducted "rigorous due diligence" to ensure compliance with those "exacting

standards." Compl. ¶ 28-29. The Court rejected these allegations as a basis for fraudulent inducement for lack of justifiable reliance — an issue the First Department in Countrywide did not address. As this Court recognized, the offering documents for the Transaction disclosed, among other things, that the underwriting criteria of the loan originators "var[ied] significantly," that loans had been originated under "no income/no asset" programs, and that Credit Suisse had not "re underwritten any mortgage loan" in the pool. Prospectus 31-32; see also June Order at 4-8. Yet MBIA "chose to go forward with the Transaction without protecting itself by investigation or a bargained-for contractual warranty as to 'strict' guidelines." June Order at 21; see also In re Dean Witter Managed Futures Ltd. P'ship Litig., 282 A.D.2d 271, 271 (1st Dep't 2001) (holding that reliance on representations that have been contradicted by prospectuses and similar documents is "unjustifiable as a matter of law").

D. Dismissal Of The Loan Tape Allegations Is Not Barred By The Decision In DDJ Management v. Rhone Group

In its June Order, the Court held that the fraud claim against CS Securities was duplicative of MBIA's contract claim against DLJ "to the extent" MBIA had alleged as part of the fraud claim "that the information on the loan tape was inaccurate." June Order at 20. Although the Court found the Loan Tape allegations duplicative, they may also be dismissed for lack of justifiable reliance. The June Order states that the Court of Appeals' decision in DDJ Management, LLC v. Rhone Group, LLC, 15 N.Y.3d 147 (2010), "foreclose[s]" "defendants' argument that, as a matter of law, MBIA was not justified in relying on defendants' contractual representations and warranties, instead of doing its own due diligence." June Order at 18. Credit Suisse respectfully submits that this overstates the actual guidance and holding that the Court of

Appeals expressed in DDJ.[4]

DDJ expressly did not establish a per se rule that a sophisticated plaintiff has no obligation to conduct independent due diligence so long as it obtains a contractual representation, however egregious the facts. Rather, the Court reiterated the long-standing rule that a sophisticated party alleging fraud must take "reasonable steps to protect itself against deception," and, on the facts before it, merely held that a plaintiff may be justified in accepting a written representation instead of conducting its own investigation, but only if doing so constitutes taking such reasonable steps under the circumstances. DDJ, 15 N.Y.3d at 154.

There was no dispute that the fraud defendants in DDJ possessed, and hid from the plaintiff, unique financial information about itself that was allegedly fraudulently misrepresented in financial statements that the defendant prepared and provided to the plaintiff. DDJ, 15 N.Y.3d at 151-52. On that record, the Court of Appeals "decline[d] to hold as a matter of law" that the plaintiffs could not establish justifiable reliance, where they had obtained contractual warranties about the accuracy of the financials, but had not conducted an audit or questioned the people that prepared the statements. Id. at 156. Importantly, rather than hold that reliance on a contractual representation will always defeat a motion to dismiss, the Court cautioned that "[n]o two cases are alike in all relevant ways." Id. at 155 (emphasis added). The denial of the motion to dismiss in DDJ was thus a fact-specific decision. The Court explained that while a party who obtains a contractual representation "will often be justified in accepting that representation rather than

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[4] MBIA suggests, incorrectly, that this Court cannot revisit its assessment of DDJ because "there is no intervening authority upon which Credit Suisse could base a motion to renew." MBIA Mem. at 11 n.3. No intervening authority is necessary, and Credit Suisse need not move to renew. MBIA's burden for leave to renew is to show "a change in the law that would change the prior determination." CPLR 2221(e)(2) (emphasis added). Thus, it is entirely appropriate for Credit Suisse to argue that even if this Court decides that Countrywide affects its duplication analysis, the case provides no basis for the Court to "change the prior determination" -- i.e., the determination of dismissal of the fraud claim.

making its own inquiry," the Court contemplated that there undoubtedly will be circumstances where a party's reliance is unreasonable, as a matter of law. 15 N.Y.3d at 154.

An example is the Second Circuit's decision in Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91 (2d Cir. 1997), which the Court of Appeals cited approvingly. The plaintiff there entered into a licensing agreement with the Warhol Estate. The Estate represented in the agreement that it was the sole owner of copyrights to Warhol's works. The representations turned out to be false, and the plaintiff sued for fraud. The Second Circuit dismissed the fraud claim because "it was unreasonable for [the plaintiff], a sophisticated licensing concern, to rely on" the contractual representations, because before it signed the deal it was aware of "serious problems with the entire Estate," but failed to investigate. Id. at 99, 101. Even when representations are memorialized in contract, "[c]ircumstances may be so suspicious as to suggest to a reasonably prudent plaintiff that the defendants' representations may be false." Id. at 98. In such circumstances, "the plaintiff cannot reasonably rely on those representations, but rather must 'make additional inquiry to determine their accuracy.'" Id. (quoting Keywell Corp. v. Weinstein, 33 F.3d 159, 164 (2d Cir. 1994)); see also id. at 99 ("The Estate's actions, the Agreement, and other circumstances should have raised more than an eyebrow, compelling [plaintiff's] officers or employees to investigate the extent of the Estate's control over Warhol's works.").

The facts here are far removed from those in DDJ. Rather than hide the facts from MBIA, Credit Suisse gave disclosures to MBIA. These included: (i) the Loan Tape with summarized loan data (Compl. ¶ 28); (ii) spreadsheets showing Credit Suisse due diligence on thousands of the loans (Compl. ¶ 29); (iii) the Prospectus; and (iv) the ProSupp (Compl. ¶ 45). This Court's June Order reiterates in detail that MBIA was informed of a "less than rosy picture

of the potential value of the Trust investment" and of the "underwriting standards used by the originating banks, who made the loans to the borrowers." See June Order at 4-8. The June Order makes two additional findings in its dismissal of the "strict" underwriting guideline that are equally applicable to the Loan Tape allegations:

> The ProSupp disclosed that New Century had filed for bankruptcy, which might have adversely affected its ability to originate mortgage loans in accordance with customary standards and to exercise oversight and control over originators (ProSupp, p. S-20). (June Order at 22 (emphasis added)).
>
> Then too, the complaint admits that MBIA was alert to possible problems with New Century as an originator, which heightened its obligation of diligent inquiry. (Compl. ¶ 24). (June Order at 18 (emphasis added)).

As the Court correctly recognized, these pre-contract disclosures in the ProSupp together with MBIA's admitted pre-contract concerns about New Century speak directly to MBIA's allegations now that the data on the Loan Tape, which included the New Century loans, was incorrect. Far from a "hint," MBIA had its own reservations based on past knowledge about New Century, and it was then told expressly in pre-contract disclosures that of the risk that it may not be able to originate loans in accordance with customary standards.

Particularly applicable is this Court's findings that underlie the dismissal of the fraud claim are allegations made against Credit Suisse by Ambac Assurance Corporation relating to loans originated by Secured Funding. See Ambac Assurance Corp. v. DLJ Mortgage Capital, Inc., No. 600070/2010, 2011 WL 1348375 (N.Y. Sup. Ct. Apr. 7, 2011) (the "Ambac Order"). This Court in Ambac found that Ambac's complaint "admits that Ambac was alert to possible problems with Secured Funding as an originator, which heightened its obligation of diligent inquiry." Id. at 11. Further, this Court found that "[t]he fact that Ambac did due diligence after

the alleged breach that it did not do before the closing shows that Ambac had the ability to discover the facts. Id. (emphasis added). Both of these findings apply with equal force here.

The disclosures to MBIA, together with MBIA's own admitted concerns about New Century, triggered an obligation to investigate. As this Court correctly found: "[t]he Prospectus disclosed that some of the loans were originated under programs with less than 'strict' underwriting standards, i.e., alternative documentation, reduced documentation, stated income/stated assets and NINA programs." June Order at 22. In other words, MBIA, pre-contract, could have, and should have, conducted the same investigation that the Court properly found Ambac should have done. It knew of the precise issues of which it now complains and, by its allegations regarding its consultant's work, admits that an investigation would have revealed precisely what it now claims it did not know, and that none of the facts reviewed were peculiarly within Credit Suisse's knowledge.

This is a case where the Court can determine, as a matter of law, that there was no justifiable reliance. Based on the allegations made: (i) there is no justifiable reliance as to any of the pre-contract representations; and (ii) DDJ does not bar dismissal – and, indeed, cites to authority that supports dismissal of the fraud claim in the face of the allegations and facts here.

E. The Allegation That CS Securities Promised That Credit Suisse Would "Vouch" For The New Century Loans Fails To State A Claim

The Court's June Order indicates that MBIA's fraudulent inducement cause of action "duplicate[s]" its contract cause of action "to the extent that MBIA claims" that CS Securities falsely promised "Credit Suisse would back or vouch for the New Century loans by providing express contractual representations and warranties." June Order at 19-20. Countrywide in no way requires reinstatement of this allegation. The alleged vouching assurance simply cannot form the basis of a viable fraudulent inducement claim, for several basic reasons.

An alleged promise that "Credit Suisse would back or vouch for the New Century loans" cannot support a fraud claim, because it is not a statement of present fact; rather, it is a non-actionable statement of future intent. Orix Credit Alliance, Inc. v. R.E. Hable Co., 256 A.D.2d 114 (1st Dep't 1998) ("Allegations that a party entered into a contract without intent to perform do not state a cause of action for fraud."); Bencivenga & Co. v. Phyfe, 210 A.D.2d 22, 22 (1st Dep't 1994) (describing causes of action for fraud "based on future intent" as "palpably insufficient").

And, in any event, MBIA does not and cannot allege that this statement is false. MBIA alleges that DLJ warranties all of the loans, including those originated by New Century. MBIA necessarily admits this by pleading its theory of "risk allocation," which allegedly placed the risk of non-conforming loans on Credit Suisse through DLJ's representations and warranties. Conversely, if MBIA purports to claim that CS Securities falsely represented that deal would contain representations and warranties explicitly governing the New Century loans, MBIA was necessarily aware from the face of the deal documentation that the agreements did not contain such language, and did not insist on their inclusion.

F. MBIA's Jury Demand And Request For Punitive Damages Both Fail Irrespective Of Its Fraud Claim

As shown above, the Court properly dismissed the claim for fraudulent inducement. Consequently, the Court's dismissal of MBIA's jury demand and its requests for punitive damages were axiomatic, as explained in the Court's Order.

Yet even if the fraud claim had survived, MBIA's jury demand would still be improper. MBIA does not seek rescission of the Insurance Agreement. To the contrary, MBIA affirms the existence of the contract, and relies upon its provisions in seeking money damages. It is well settled law that where a fraud claimant affirms the existence of a contract that contains a jury

waiver, the jury waiver is enforceable. See, e.g., Leav v. Weitzner, 468, 51 N.Y.S.2d 775 (1st Dep't 1944); O'Brien v. Moszynski, 475 N.Y.S.2d 133 (2d Dep't 1984); Fay's Drug Co. v. P&C Property Coop., Inc., 380 N.Y.S.2d 398 (4th Dep't. 1976). MBIA cannot simultaneously adopt and affirm the contract, while repudiating the isolated provisions it finds objectionable. Because MBIA does not seek to rescind the contract or void it ab initio, MBIA may not avoid the jury waiver to which it explicitly agreed.

Finally, even if the Court sustains MBIA's fraud claim, MBIA cannot state a claim for punitive damages. The commercial conduct at issue in this case does not constitute "egregious tortious conduct....directed at the public generally." Rocanoya v. Equitable Life Assur. Soc., 83 N.Y.2d 603, 613 (N.Y. 1994); Inter-Atlantic Fund v. Alvaro, No. 0601611/2006, 2007 WL 2236595 (N.Y. Sup. Ct. Apr. 5, 2007) (dismissing punitive damages claim; "This garden-variety commercial dispute over a failed investment between sophisticated private parties does not implicate egregious tortious conduct directed at the general public.").

CONCLUSION

For the reasons and upon the authorities set forth above, the Court should deny MBIA's motion for leave to renew in its entirety.

Dated: August 12, 2011
New York, New York

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