SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 603751/2009
MBIA INSURANCE CORPORATION
vs.
CREDIT SUISSE SECURITIES
SEQUENCE NUMBER : 013
RENEWAL

INDEX NO. _____
MOTION DATE 9/22/11
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for E-Filed 151-155

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with accompanying memorandum decision.

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

Dated: 10/7/11

JUSTICE SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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MBIA INSURANCE CORPORATION,

Index No. 603751/09

Plaintiff,

DECISION & ORDER

-against-

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

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

This is a motion by plaintiff, MBIA Insurance Corporation (MBIA), to renew the motion that resulted in this court's June 1, 2011 decision and order (June 2011 Order). The June 2011 Order vacated the court's orders of June 30, 2010 and January 26, 2011 (Prior Orders). It dismissed MBIA's claim for fraudulent inducement and struck its demands for a jury trial, punitive damages and consequential damages. The reader's familiarity with the June 2011 Order and the Prior Orders is assumed.

The basis for MBIA's renewal motion is a recent First Department decision in *MBIA v Countrywide*, 2011 NY Slip Op 5640; 928 NYS2d 229; 2011 NY App. Div. LEXIS 5509 (nor)(*Countrywide*). MBIA asserts that *Countrywide* mandates reinstatement of the fraudulent inducement claim. It argues that this court's ruling that certain alleged misrepresentations duplicated MBIA's claims for breaches of contractual representations and warranties, is antithetical to the *Countrywide* holding. MBIA's Reply MOL, pp. 2-3.

Defendants oppose the motion. They argue in opposition that: 1) the fraud claim was

properly dismissed, including for reasons other than duplication; 2) the *Countrywide* holding is distinguishable and would not change this court's determination; and 3) MBIA's demands for punitive damages and a jury trial should be stricken even if the fraud claim survives.[1]

I. *Background*

Most relevant facts are set forth in detail in the June 2011 Order, with which the reader's familiarity is assumed. The abbreviations used below mirror those in the June 2011 Order.

A. *The Securitization Transaction*

MBIA's claims arise from a 2007 securitization of second lien, residential mortgage loans (HELOCs). DLJ, as the "sponsor" in the securitization Transaction, aggregated more than fifteen thousand of these loans into a "pool," which subsequently was transferred to a Trust. Compl. ¶2. The Trust issued securities that were to be paid from the cash flow of repayments on the pooled loans. *Id.* CS Securities served as the underwriter for the public offering of the securities and marketed them to investors. *Id.* MBIA, an insurance company in the business of insuring certain types of financial risk, issued a Policy guaranteeing certain payments on the securities pursuant to a contract with DLJ and defendant Special Portfolio Servicing, Inc. (SPS). *Id.* MBIA brought this action for, *inter alia*, fraudulent inducement and breach of warranty.

B. *MBIA's Allegations of Fraudulent Inducement*

MBIA's fraudulent inducement claim is premised on allegations of certain pre-contractual representations by CS Securities. The alleged representations fall into five categories.

Loan Tape. The complaint alleges that "CS Securities provided MBIA with a loan

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[1]Defendants do not challenge the motion insofar as it seeks to reinstate MBIA's demand for consequential damages.

schedule or 'tape,' which set forth material information about each loan, including attributes about the borrower and his or her credit-worthiness, such as the borrower's debt-to-income ("DTI") ratio, as well as attributes of the property serving as collateral for the loan, such as the combined loan-to-value ratio ("CLTV")." Compl. ¶28. MBIA alleges that it discovered that the "disclosures on the loan tape concerning the key attributes of each loan were false and misleading," when it retained a third-party consultant who "reviewed the files created during the origination of the loans." Compl. ¶32.

Guidelines. The complaint alleges that CS Securities "assured MBIA that the loans were underwritten to strict guidelines created or approved by Credit Suisse." Compl. ¶28. The complaint does not allege specifically that this representation was false. Compl. ¶32.

Due Diligence. CS Securities allegedly "assured MBIA that it had conducted due diligence on the loans included in the transaction to ensure compliance with the Credit-Suisse created or approved underwriting guidelines and the borrowers' ability to repay the pooled loans." Compl. ¶29. CS Securities allegedly "touted the fact that it had rejected a large number of loans from the pool as proof that Credit Suisse was scrupulous in ferreting out loans that did not meet its exacting standards...." *Id.* The complaint alleges that on April 13, 2007, Mr. Kuo of CS Securities sent MBIA spreadsheets "illustrating the purportedly rigorous due diligence that CS Securities (through Mr. Kuo) represented had been performed on the loans." *Id.* The spreadsheets "depict an individualized review of thousands of loans included in the pool." *Id.* CS Securities allegedly assured MBIA that there had been "strict due diligence performed by Credit Suisse on the loans – including those originated by New Century...." Compl. ¶30. MBIA's expert review allegedly "confirmed that the due diligence CS Securities conveyed to

MBIA was not designed or conducted to assess the loans' compliance with underwriting guidelines, including whether the borrowers' stated income was reasonable or adequate to repay the loan." Compl. ¶32. The complaint does not say that CS Securities made false allegations regarding due diligence. *Id.*

New Century Loans. MBIA alleges that CS Securities said that "Credit Suisse itself was backing" the loans originated by New Century. Compl. ¶25. MBIA does not allege that this representation was false. Compl. ¶¶ 30, 32.

Prior Securitization. MBIA alleges that CS Securities "assured it that it was a pillar of the financial industry and that its mortgage-backed securities business--and the 'shelf' from which the loans proposed for securitization were drawn – had a track record of success." Compl. ¶25. CS Securities "also touted to MBIA the impressive performance of its prior securitizations, noting in a March 22, 2007 email that 'the performance of our HEMT shelf [is] far superior to all other securitization shelves.'" Compl. ¶27. CS Securities "made a presentation to MBIA about the specific financial performance of Credit Suisse's prior HEMT deals, which were purportedly structured similarly to the Transaction. In that presentation, CS Securities represented the high quality and performance of the HEMT shelf and the steps it had taken to ensure improved performance in the future." *Id.* MBIA does not allege that these representations were false. Compl. ¶32. With respect to the presentation, the complaint alleges that "the performance data disclosed was....materially and intentionally misleading" because "CS Securities knew full well that the loans in those prior HEMT securitizations were originated through the same defective underwriting practices as those included in the Transaction...." Compl. ¶27.

Documentary Evidence

Section 2.01(k) of the Insurance Agreement, dated April 30, 2007, between, *inter alia*, MBIA and DLJ provides that:

> 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 therein, in light of the circumstances under which they were made, not misleading....

"Offering Document is defined in the Insurance Agreement to mean the Prospectus and the Prospectus Supplement (ProSupp), dated respectively April 23 and 27, 2007. Insurance Agreement, Art. I, p. 3.

The ProSupp contains a section entitled "Originators" which states in pertinent part:

> [DLJ] acquired 34.43% of the mortgage loans (by principal balance as of the cut-off date) through its whole-loan flow acquisition channel from originators that [DLJ] has determined met its qualified correspondent requirements. Such standards require that the following conditions be satisfied: (I) the related mortgage loans were originated pursuant to a mortgage loan purchase agreement between [DLJ] and the applicable qualified correspondent that contemplated that ***such qualified correspondent would underwrite mortgage loans from time to time, for sale to [DLJ], in accordance with underwriting guidelines designated by [DLJ] ("Designated Guidelines") or guidelines that do not materially vary from such Designated Guidelines***; (ii) such mortgage loans were ***in fact underwritten as described in clause (I) above*** ... and (iv) [DLJ] employed, at the time such mortgage loans were acquired by [DLJ], certain ***quality assurance procedures designed to ensure that the applicable qualified correspondent from which it purchased the related mortgage loans properly applied the underwriting criteria designated by [DLJ].*** The Designated Guidelines are substantially similar to the guidelines described in the prospectus under "***The Trust Fund - Underwriting Standards*** for Mortgage Loans--Single and Multi-Family Mortgage Loans." [emphasis supplied]

ProSupp, S-33.

The "Trust Fund - Underwriting Standards" subsection of the Prospectus provides in relevant part:

> The mortgage loans either have been originated by the seller [DLJ] or purchased

by the seller from various banks, savings and loans associations, mortgage bankers (which may or may not be affiliated with that seller) and other mortgage loan originators and purchasers of mortgage loans in the secondary market, and were ***originated generally in accordance with the underwriting criteria described herein***.... [emphasis supplied]

The underwriting standards applicable to the mortgage loans typically differ from, and are, with respect to a substantial number of mortgage loans, ***generally less stringent than, the underwriting standards established by Fannie Mae or Freddie Mac*** primarily with respect to ***original principal balances, loan to value ratios, borrower income, required documentation, interest rates, borrower occupancy of the mortgaged property and/or property types***. To the extent the programs ***reflect underwriting standards different from those of Fannie Mae and Freddie Mac***, the performance of the mortgage loans thereunder may reflect ***higher delinquency rates and/or credit losses***. In addition, certain ***exceptions to the underwriting standards described herein are made in the event that compensating factors*** are demonstrated by a prospective borrower. ***Neither the depositor[2] nor any affiliate, including DLJ Mortgage Capital, has reunderwritten any mortgage loan***.... [emphasis supplied]

The mortgage loans have been originated under "full" or "alternative," "reduced documentation," "stated income/stated assets" or "no income/no asset" programs. The "alternative," "reduced documentation," "stated income/stated assets" or "no income/no asset" programs ***generally require either alternative or less documentation and verification*** than do full documentation programs which generally require standard Fannie Mae/Freddie Mac approved forms for verification of income/employment, assets and certain payment histories. . . . Generally, under both "full" and "alternative" documentation programs at least one year of income documentation is provided. Generally under a "***reduced documentation***" program, ***either no verification of the mortgagor's stated income*** is undertaken by the originator ***or no verification of the mortgagor's assets*** is undertaken by the originator. Under a "***stated income/stated assets***" program, ***no verification of either a mortgagor's income or a mortgagor's assets*** is undertaken by the originator although both income and assets are stated on the loan application and a "reasonableness test" is applied. Generally under a "***no income/no assets***" program, the ***mortgagor 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. [emphasis supplied]

Prospectus, 31-32.

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[2]The "depositor" is Credit Suisse First Boston Securities Corp. Prospectus, 1.

The ProSupp discloses that of the 15,615 initial mortgage loans in the securitized pool, 10,152 or ***69.41%*** (by aggregate principal balance outstanding) were ***"reduced documentation"*** loans for which no verification of either the mortgagor's stated income or the mortgagor's assets was undertaken by the originator. ProSupp, S-32. The ProSupp further discloses that 1,512 loans, or ***10.06 %*** (by aggregate principal balance outstanding), were ***"stated income/stated asset"*** loans for which no verification of the mortgagor's stated income and the mortgagor's stated assets was undertaken by the originator. *Id.* Finally, the ProSupp discloses that 755 of the loans or ***4.26%*** (by aggregate principal balance outstanding) were ***NINA*** [***"no income/no assets"***] loans for which verification of neither the mortgagor's income nor assets was undertaken by the originator. *Id.* In total 12,428 loans or ***83.73%*** were loans for which the originator did not verify either the mortgagor's stated income or the mortgagor's stated assets, or both. *Id.*

The ProSupp further discloses that 14.87% (by aggregate principal balance) of the initial mortgage loans were originated by New Century Mortgage Corporation (New Century). ProSupp, S-34. Neither the Prospectus nor the ProSupp states that the New Century loans were originated by a qualified correspondent bank in accordance with guidelines similar to DLJ's Designated Guidelines. Instead, with respect to New Century's origination practices, in a section entitled "Risk Factors," the ProSupp discloses that:

> ***New Century ... has filed for bankruptcy protection*** .... Any originator whose financial condition was weak or deteriorating at the time of origination may have experienced personnel changes that ***adversely affected its ability to originate mortgage loans in accordance with its customary standards***. It may also have experienced ***reduced management oversight or controls with respect to its underwriting standards***. Accordingly, the rate of delinquencies and defaults on these mortgage loans may be higher than would otherwise be the case.

ProSupp, S-20. As previously noted, the Prospectus alerted investors that "[n]either the

depositor nor any affiliate, including DLJ Mortgage Capital has re underwritten any mortgage loan." Prospectus, 31.

Balloon loans was a further risk identified in the Prospectus and ProSupp. Prospectus, 29; ProSupp, S-10. Balloon loans comprised 55.69% and 59.90% (by aggregate principal balance), respectively, of the Group I and Group II loans, or approximately ***59.65%*** of the loans in the pool (by aggregate principal balance).[3] ProSupp, S-10. The Prospectus states that:

> A mortgagor's ability to pay the balloon amount at maturity, which, based upon the amortization schedule of those loans, is ***expected to be a substantial amount***, will ***typically depend on the mortgagor's ability to obtain refinancing of the related mortgage loan or to sell the mortgaged property*** prior to the maturity of the balloon loan. The ability to obtain refinancing will depend on a number of factors prevailing at the time refinancing or sale is required, including, without limitation, ***real estate values***, the mortgagor's financial situation, the level of available mortgage loan interest rates, the mortgagor's equity in the related mortgaged property, taxes, ***prevailing economic conditions and the terms of any related first lien mortgage loan***.

Prospectus, 29.

The ProSupp disclosed that:

> Balloon loans pose a ***special payment risk*** because the mortgagor must pay, and the servicer [SPS] is NOT obligated to advance, a lump sum payment of principal at the end of the loan term. If the mortgagor is unable to pay the lump sum or refinance such amount, you may suffer a loss if the net proceeds from the collateral for such loan available after satisfaction of the first lien is insufficient and the other forms of credit enhancement are insufficient or unavailable to satisfy the loss.

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[3]Group I consisted of 1,457 loans with an aggregate principal balance of $52,752,034.10 ProSupp, S-26. Group II consisted of 14,158 loans with an aggregate principal balance of $847,247,134.95 (Total Loans= $899,999,169.05). Thus, $29,377,607.79 of the Group I loans (55.69% of $52,752,034.10) and $507,501,033.84 of the Group II loans (59.9% of $847,247,134.95), a total of $536,878,641.63 (by aggregate principal balance) or 59.65% of the loans were balloon loans. ($536,878,641.63 Total Balloon Loans/$899,999,169.05 Total Loans = 59.65%).

ProSupp, S-10.

II. *Discussion*

A motion to renew may be based upon "a change in the law that would change the prior determination." CPLR 2221(e). MBIA's motion meets this standard based upon the *Countrywide* decision.

A. *Fraudulent Inducement*

1. *Duplication*

In the June 2011 Order, the court granted defendants' motion to dismiss MBIA's fraudulent inducement claim, in part, because it found that the fraud claim duplicated MBIA's breach of contract claims. That is, the court found that MBIA's fraudulent inducement claim – in so far as it was premised on CS Securities' alleged representations regarding the underwriting of the non-New Century loans – was a topic addressed by express contractual representations and warranties and, thus, duplicative of MBIA's breach of contract claims.

The court grants MBIA's motion to renew because it is bound to follow the recent decision of the First Department in *Countrywide*, *supra*. In that case addressing the duplication issue, the First Department held that the claims are not duplicative merely because "some of the allegedly false representations are also contained in the agreements as warranties and form a basis of the breach of contract claim." *Id.*, 2011 NY App. Div. LEXIS 5509 at ***11-12. The ruling applied to this case mandates a decision that MBIA's fraudulent inducement claim does not duplicate the breach of contract claims.

2. *Justifiable/Reasonable Reliance*

Fraudulent inducement requires the presence of a misrepresentation and "justifiable

reliance" on the misrepresentation. *Channel Master Corp. v Aluminium Ltd. Sales, Inc.*, 4 NY2d 403, 407 (1958).

> The general rule is that if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

Schumaker v Mather, 133 NY 590, 596 (1892). Where a party

> has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented. Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament.

Rodas v Manitaras, 159 AD2d 341, 342-43 (1st Dept 1990).

Procedurally,

> [a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties.

UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney, 288 AD2d 87, 88 (1st Dept 2001).

DDJ Management creates an exception to this general rule. *DDJ Management, LLC v Rhone Group LLC*, 15 NY3d 147, 154 (2010). Specifically,

> where a plaintiff has gone to the trouble to insist on a written representation [or warranty] that certain facts are true, it will ***often*** be justified in accepting that representation [or warranty] rather than making its own inquiry. [emphasis supplied]

Id. Where such are the facts, whether a party was "justified in relying on the warranties [it] received is a question to be resolved by the trier of fact." *Id.* at 156.

The *DDJ Management* exception applies to the party making the written false representation as well as to a party "controlling" the party making the representation. *Id.* at 157. In *DDJ Management,* the Court applied the exception to defendants Rhone and Quilvest based on the following grounds:

> [i]t can be inferred from the allegations of the complaint that plaintiffs believed Rhone and Quilvest would not knowingly cause a company they ***controlled*** to make false representations in a loan agreement as to the accuracy of financial statements. We cannot say as a matter of law that this was an ***unjustifiable*** belief. [emphasis supplied]

Id. Under New York law, "control . . . means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise." NY BCL § 912(a)(8). In sum, the threshold issue is whether the *DDJ Management* exception applies to CS Securities' representations in this case.

a. *The Alleged Representations Regarding the Loan Tape, Guidelines, Due Diligence and the New Century Loans*

The contractual representations and warranties at issue here were made in the Insurance Agreement and the Pooling and Service Agreement (PSA). CS Securities is not a party to either of these contracts – *DLJ is.* Thus, CS Securities did not make any contractual representations or warranties to MBIA. Consequently, CS Securities' representations would fall within the scope of the general rule of *Schumaker* and its progeny, and the *DDJ Management* exception would not apply, ***unless CS Securities controlled DLJ.***

MBIA does not allege in the amended complaint that CS Securities **controlled** DLJ. *Contrast with Countrywide*, 2011 LEXIS 5509 **11 (1st Dept 2011) ("MBIA further alleges that Countrywide Financial directed the activities of Countrywide Home and Countrywide Securities."). In its complaint, MBIA only alleged that CS Securities and DLJ are "affiliates under **common control**." [emphasis supplied] Compl. ¶ 3. *See also* Complaint, ¶34 ("After 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 issuing its insurance policy. Evidencing the ***concerted conduct of the Credit Suisse affiliates***, Mr. Kuo of CS Securities also acted on behalf of...DLJ with respect to the two agreements that contained the representations and warranties....") In fact, in its memorandum of law in opposition to the motion to dismiss and its reply memorandum on this renewal motion, MBIA argued only that CS Securities and DLJ were ***different Credit Suisse affiliates***.[4] However, MBIA has not asserted a fraudulent inducement claim against, or identified, the party or parties that control CS Securities and DLJ "in common." Since CS Securities did not make the

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[4]"CS Securities is situated in precisely the same position as Countrywide Securities in *Countrywide*, and for that matter, defendants Rhone and Quilvest in *DDJ*, because one or more defendant is alleged to have made fraudulent representations, while a different defendant provided the contractual warranties." MBIA Reply MOL, 8/26/11, E-filed Doc 155, p. 7. *See also*, "MBIA does not only allege that ***one Credit Suisse affiliate--DLJ--failed to perform its contractual covenants***. Rather, the Complaint details numerous ***misrepresentations*** of present facts made ***by a second Credit Suisse affiliate*** – CS Securities – before the Transaction closed...." MBIA's MOL, 3/5/10, p. 2 (E-filed Doc 16). ***"MBIA's fraudulent inducement claim is alleged against CS Securities*** (for representations made before closing), while ***MBIA's contract claims are alleged against DLJ*** (based on representations and warranties made in the closing documents). Credit Suisse heretofore has not argued that it disregarded corporate formalities in directing the concerted conduct of its ***affiliates***. Credit Suisse's argument that the fraud and contract claims are duplicative therefore is disingenuous and should be rejected." *Id.*, p. 21.

contractual representations and warranties at issue here and MBIA does not allege that CS Securities controlled DLJ, the party making them, CS Securities' alleged representations most likely fall outside the *DDJ Management* exception and within the general rule of *Schumaker* and its progeny. This would include the representations that were allegedly covered by DLJ's contractual warranties.

Under the *Schumaker/Rodas/UST* analysis, in turn, MBIA's reliance on CS Securities' alleged representations regarding the underwriting guidelines, due diligence and loan tape for the mortgage loans would be unreasonable as a matter of law. MBIA admits that it did not "review the loan files in the pool to determine whether each borrower could repay." Compl. ¶ 23. Nor does MBIA allege that it requested the files. Hence, MBIA "cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations" if it "failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties." *See UST Private Equity Investors*, 288 AD2d at 88.

MBIA alleges that the means of verification were not available to it because "[g]iven the large number of loans involved, and the limited amount of time available to complete the transaction, it was impossible for MBIA to review the loan files...." Compl. ¶ 23. Again, MBIA does not allege that it requested the loan files as a condition to making its insurance commitment. Any timing limitations were self-imposed because MBIA did not ***have to*** make a commitment to issue the insurance Policy. The fact that MBIA lacked the requisite time to test CS Securities' representations might be a reason not to enter into this particular transaction or this type of transaction altogether, but not an excuse for entering into it blind. *Rodas*, 159 AD2d at 342-343.

Moreover, the reasonableness of MBIA's reliance on CS Securities' representations

regarding the guidelines, due diligence, and loan tape is in doubt even if the alleged representations fell within the *DDJ Management* exception discussed above. In *DDJ Management* the Court of Appeals held that reliance would ***often*** be reasonable even if there were "***hints*** from which plaintiffs might have been put on their guard" about the truth of defendants' representations, where plaintiffs receive written representations and warranties that the facts represented are true from the appropriate parties. [emphasis supplied] *See DDJ Management*, 15 NY3d at 156. In its analysis, the Court cited with approval a decision by the Southern District of New York where "[e]xamining the facts of several state and federal cases applying New York law, the [SDNY] court concluded that they 'do not support the interpretation that a duty to inquire is necessarily triggered as soon as a plaintiff has the ***slightest 'hints' of any 'possibility' of falsehood***." [emphasis supplied] *See DDJ Management*, 15 NY3d at 155, citing *JP Morgan Chase Bank v Winnick,* 350 FSupp2d 393 (SDNY 2004). The *JP Morgan* Court, summarizing New York law, explained that:

> [i]n assessing whether reliance on allegedly fraudulent misrepresentations is reasonable or justifiable, New York takes a contextual view, focusing on the level of sophistication of the parties, the relationship between them, and the information available at the time of the operative decision. . . .
>
> In addition, "[a] heightened degree of diligence is required where the victim of fraud had hints of its falsity." This rule applies where the "circumstances [are] ***so suspicious as to suggest to a reasonably prudent plaintiff that the defendants' representations may be false***"; in such cases, a plaintiff "cannot reasonably rely on those representations, but rather must 'make additional inquiry to determine their accuracy.'" Once the duty to inquire is triggered, . . . a plaintiff is foreclosed from bringing a claim for false representations if no inquiry is made. . . .
>
> In each of these cases, the notice to the plaintiff ***was clear and direct***: it was either provided by plaintiff's own direct knowledge of the fraud, ***by the terms of an operative contract***, or by circumstances surrounding the parties' relationship (e.g. litigation) that would normally arouse suspicion. In each of these circumstances,

> the plaintiff may be said to have been "placed on guard or practically faced with the facts" of the complained of fraud, and fulfilling the duty to inquire was a necessary precondition to proceeding with a misrepresentation claim" [citations omitted] [emphasis supplied]

JP Morgan, 350 FSupp2d at 406, 408.

It appears that MBIA's notice in this case went well beyond mere "hints" of falsehood. MBIA had "clear and direct" notice "by the terms of operative contract[s]" – the Prospectus and ProSupp[5] – that CS Securities' alleged representations regarding underwriting guidelines, due diligence, and the loan tape were false. *Siemens Westinghouse Power Corp. v Dick Corp.*, 299 FSupp2d 242, 247 (SDNY 2004) ("Where there is a 'meaningful' conflict between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations."), citing *Bango v Naughton*, 184 AD2d 961, 963 (2d Dept 1992) ("The conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter."); *see also Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 304 (2001) ("a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it").

Regarding the underwriting guidelines, MBIA maintains that "CS Securities assured MBIA that the loans involved in the transaction were ***underwritten to strict guidelines created or approved by Credit Suisse***."[emphasis supplied] Comp. ¶ 28. This alleged belief appears inconsistent with the disclosures in the ProSupp and, therefore, seemingly unreasonable. The ProSupp explained that Credit Suisse's "Designated Guidelines" applied only to the "34.43% of

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[5] As discussed, MBIA is a party to the Insurance Agreement, which incorporated by reference and warranted the information in the Prospectus and the ProSupp. Insurance Agreement, §2.01(k) and Art. I, p. 3 definition of "Offering Document"; *see also* discussion *supra* at 5.

the mortgage loans (by principal balance as of the cut-off date) through its whole-loan flow acquisition channel from originators that [DLJ] has determined met its qualified correspondent requirements." ProSupp, S-33. No such statement is made regarding the remaining **65.57%** of the loans. The ProSupp further described the underwriting guidelines for the New Century loans, comprising 14.87% of the pool, without making ***any*** reference to DLJ's "Designated Guidelines." *Id.*, S-20, S-33.

Regarding the due diligence conducted on the HELOC pool, MBIA alleges that CS Securities represented that it "had conducted due diligence on the loans included in the Transaction to ensure compliance with the Credit Suisse-created or approved underwriting guidelines, and the borrowers' ability to repay the pooled loans," and "touted the fact that it had rejected a large number of loans from the pool as proof that Credit Suisse was scrupulous in ferreting out loans that did not meet its exacting standards before they were added to the HEMT shelf." Compl. ¶ 29. CS Securities allegedly further represented that "the strict due diligence performed by Credit Suisse on the loans" included "those originated by New Century...." Compl. ¶30. The complaint says that CS Securities sent MBIA spreadsheets illustrating the purportedly rigorous due diligence that CS Securities ... had performed on the loans," which "depicted an individualized review of thousands of the loans included in the pool."[6] Compl. ¶29. Finally, MBIA alleges that in response to its concerns about New Century, CS Securities "assured MBIA that Credit Suisse itself was backing those loans." Compl. ¶25.

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[6] MBIA does not specifically state that the CS Securities' representations regarding due diligence were false. Compl. ¶32. The court notes that MBIA does not allege that CS Securities made statements regarding the results of the due diligence, including the level of compliance with Credit Suisse's "Designated Guidelines."

The disclosures in the ProSupp seemingly belie these representations. The ProSupp discloses that – with respect to 34.43% of the mortgage loans that DLJ acquired "through its whole-loan flow acquisition channel from originators that [DLJ] has determined met its qualified correspondent requirements" – DLJ "employed certain quality assurance procedures designed to ensure that the applicable qualified correspondent from which it purchased the related mortgage loans properly applied [the Designated Guidelines]." ProSupp, S-33. The ProSupp claims no diligence regarding the remaining **65.57%** of the mortgage loans. On the contrary, as discussed, the Prospectus stated that "[n]either the depositor nor any affiliate, including DLJ Mortgage Capital, has reunderwritten ***any*** mortgage loan." [emphasis supplied] Prospectus, 31.

With respect to New Century, which originated **14.87%** of the loans, the ProSupp alerted MBIA that New Century's bankruptcy may have "***adversely affected its ability to originate*** mortgage loans in accordance with its customary standards" and it "may have experienced ***reduced management oversight and controls*** with respect to its underwriting standards." ProSupp, S-20. The ProSupp appears to contradict the allegation that CS Securities was "backing" the New Century loans, to the extent that the representation could be interpreted to mean that CS Securities did due diligence on, or reunderwrote them.[7]

Regarding the loan tape, MBIA alleges that "CS Securities made representations about the quality of the individual loans that would serve as collateral for the Transaction. CS Securities provided MBIA a loan schedule or 'tape,' which set forth material information about each loan, including attributes about the borrower and his or her credit-worthiness, such as the

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[7]If interpreted as a representation that CS Securities would guarantee the New Century loans, the guarantee would be unenforceable because it is not in writing. GOL §5-701(a)(2).

borrower's debt-to-income ('DTI') ratio, as well as attributes about the property serving as collateral for the loan, such as the combined loan-to-value ratio ('CLTV')." Compl. ¶28. MBIA alleges that "the disclosures on the loan tape concerning key attributes of each loan were false and misleading (Compl. ¶32), and "Credit Suisse intended MBIA to rely on this information in evaluating the risk of issuing its policy...." (Compl. ¶31).

Even if the court were to infer from these allegations that CS Securities represented that the information in the loan tape was "true, accurate and complete,"[8] the reasonableness of MBIA's belief in this representation is questionable in light of the disclosures in the ProSupp. As discussed, the ProSupp discloses that **83.73%** of the initial mortgage loans were loans for which either no verification of the mortgagor's stated income or assets (or both) was undertaken ProSupp, S-32, Prospectus, 31-32. If such information was not verified in 83.73% of the loans, and yet included in the loan tape, there would be ***no reason*** to believe that the information in the loan tape was "true, accurate and complete." A belief for which there is no reason is *prima facie* ***unreasonable***. As a result, MBIA's belief in CS Securities' alleged representation that the information in the loan tape was "true, accurate and complete" would be unreasonable as well.

MBIA's alleged belief in CS Securities' assurances that its due diligence confirmed that "the borrowers' stated income was reasonably adequate to repay the loan," is seemingly further undermined by the ProSupp's disclosure that **59.65%** were balloon loans, with "substantial" non-amortizing balances that posed a special risk of default in the event that they could not be

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[8] MBIA does not claim that CS Securities represented that the loan tape data was "true, accurate and complete" – only that CS Securities ***intended*** MBIA to believe that. Mere intentions are not actionable as fraud because they are not representations of fact. As to the representations regarding due diligence, they have been addressed above.

refinanced or paid off. Prospectus, 29, ProSupp, S-10.

In conclusion, because the disclosures in the Prospectus and ProSupp seem to "meaningfully contradict" CS Securities' alleged representations regarding the minimum origination guidelines, the due diligence conducted on the pool of HELOCs, the information contained in the loan tape, the borrowers' ability to repay the loans, and New Century's origination practices, the circumstances were likely "so suspicious as to suggest to a reasonably prudent plaintiff that [CS Securities'] representations may be false." *See JP Morgan Chase,* 350 FSupp2d at 406; *Siemens Westinghouse*, 299 FSupp2d at 247; *Bango*, 184 AD2d at 963. If that was the case, MBIA could not have "reasonably rel[ied] on those representations, but rather must [have] 'ma[d]e additional inquiry to determine their accuracy.'" *See JP Morgan Chase,* 350 FSupp2d at 406. If MBIA's "duty to inquire [was] triggered, . . . [MBIA] [would be] foreclosed from bringing a claim for false representations if no inquiry [wa]s made. . . ." *Id.* By its own admission, MBIA made no inquiry. Compl. ¶23.

The fact that MBIA received certain contractual representations and warranties from DLJ – such as that "the information in the Loan Schedule[9] was complete, true and correct in all material respects as of the related Cut-Off Date"[10] – only supports the conclusion that MBIA reasonably relied on this representation ***for the purposes of an action for breach of express warranty***. However, it does not change the analysis of MBIA's reliance ***for the purposes of a tort action based on fraud or misrepresentation***. As the New York Court of Appeals explained

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[9] The Court is drawing an inference in favor of MBIA that the loan tape allegedly sent by CS Securities and the Loan Schedule incorporated in the PSA contained the same information.

[10] PSA, 2.03(d)(5), Schedule IV(v), p. HH-5.

in *CBS Inc v Ziff-Davis Publishing Co.*, the analysis of reliance in a tort action based on fraud or misrepresentation [tort reliance] differs from the analysis of reliance in actions for breach of express warranties [warranty reliance]. *CBS Inc v Ziff-Davis Publishing Co.*, 75 NY2d 496, 502-506 (1990). The Court of Appeals in *Ziff-Davis* adopted the reasoning of the Southern District of New York in *Ainger*, which clarifies that for the purposes of tort reliance the plaintiff must have

> ***believed*** [the representation] ***to be true***. If it appears that he knew the facts, or believed the statement to be false, ***or that he was in fact so skeptical as to its truth that he reposed no confidence in it***, it cannot be regarded as a substantial cause of his conduct. [emphasis supplied]

See Ziff-Davis, 75 NY2d at 503 ("We believe that the analysis of the reliance requirement in actions for breach of express warranties adopted in *Ainger v Michigan Gen. Corp.* (supra) and urged by CBS here is correct."), following *Ainger v Michigan General Corp.*, 476 F Supp 1209, 1224 (SDNY 1979), citing W. Prosser, *Handbook on the Law of Torts*, §108, at 714-15 (4th ed. 1971).

By contrast, in warranty reliance, "the critical question is ***not*** whether the [plaintiff] ***believed in the truth of the warranted information*** . . . but whether ***it believed it was purchasing the [defendant's] promise as to its truth***." [citations omitted] [emphasis supplied] *Ziff-Davis Publishing Co.*, 75 NY2d at 503; *see also Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 500 F3d 171, 186 (2d Cir 2007) (applying New York law) ("In contrast to the reliance required to make out a claim for fraud, the general rule is that a buyer may enforce an express warranty even if it had reason to know that the warranted facts are untrue. . . . [as long as] it believed that it was purchasing seller's promise regarding the truth of the warranted facts."). The distinction between tort and warranty reliance is grounded on the definition of warranty which is "a promise to

indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past." *Metropolitan Coal Co. v Howard*, 155 F2d 780, 784 (2d Cir 1956) (Hand, J.).

The distinction between tort and warranty reliance that the court established in *Ziff-Davis* mandates that a party "may not satisfy its burden simply by pointing to the warranties because, for purposes of showing fraud, a party cannot demonstrate justifiable reliance on representations it knew were false." *Merrill Lynch*, 500 F3d at 182 (A party's "asserted reliance on . . . financials despite its receipt of a different financial report appears at first blush to evince the sort of recklessness or knowing blindness that raises doubt about its reliance.").

The distinction drawn and the analysis employed in *Ziff-Davis* supports the conclusion that MBIA's reliance could be reasonable for the purposes of a claim for breach of express warranty without being necessarily reasonable for the purposes of a fraud claim. The court notes that MBIA's complaint is replete with allegations of suspension of judgment and outright skepticism regarding the subject matter of CS Securities' alleged representations. These allegations include the following:

> ...MBIA would need to decide quickly whether it wanted to participate. MBIA initially had ***reservations*** with respect to its participation in the Transaction. Its ***concern*** was driven primarily by two issues.
>
> First, MBIA had never previously insured a mortgage-backed securities transaction for Credit Suisse, and more particularly, involving Credit Suisse's "Home Equity Mortgage Trust" or "HEMT" platform. MBIA's decision whether to bid, ... depended on its assessment of the likelihood that the loans would generate sufficient cash flow to fund the amounts due to the security holders. Unlike traditional first-lien mortgage loans used to finance the purchase of a home, the loans in the proposed transaction were second mortgage loans. ***Because the loans were not secured by a priority lien on the underlying property, the likelihood that the holder of the loans would recover the amounts***

was highly dependent on the borrowers' ability to repay the loans in full (and less so on an expectation of recovery from foreclosure in the event of default). ***Given the large number of loans involved, and the limited amount of time to complete the transaction, it was impossible for MBIA to review the loan files*** in the pool to determine whether each borrower could repay.

Second, MBIA had ***concerns*** regarding one of the originators of the loans securitized in the Transaction.... MBIA had a negative view of one of the primary originators of the loans, a company called New Century. Indeed, MBIA had ***previously declined to insure*** at least one other mortgage-backed securities transaction specifically because it included ***loans originated by New Century***.

Given MBIA's limited ability to review information about the individual loans, ***combined with its concerns*** about the practices of one of the primary originators, ***MBIA required strong assurances*** from Credit Suisse regarding its business and the loans proposed for securitization as condition to MBIA's participation in the Transaction.

CS Securities responded to both of MBIA's ***concerns*** by providing direct and explicit representations designed to induce MBIA's participation. With respect to MBIA's first concern about its lack of prior insurance of a Credit Suisse securitization, CS Securities assured MBIA that Credit Suisse was a pillar of the financial industry and that its mortgaged-backed securities business – and the 'shelf' from which the loans proposed for securitization were drawn – had a track record of success. With respect to MBIA's ***concerns*** about certain of the loans in the pool being originated by ***New Century***, CS Securities assured MBIA that Credit Suisse itself was backing those loans.

...to ***address the novelty*** of Credit Suisse's solicitation of financial guaranty insurance for a securitization involving its HEMT shelf, CS Securities pointed to its strong institutional pedigree....Given Credit Suisse's stature, MBIA was assured that it could trust the representations being made about the Transaction.

CS Securities also made representations to address MBIA's ***concerns*** about the fact that many of the loans had been originated by ***New Century***. In addition to providing the assurances outlined above regarding strict due diligence performed by Credit Suisse on the loans – including those originated by New Century – CS Securities assured MBIA that Credit Suisse itself would vouch for the New Century loans by providing ***express contractual representations and warranties*** about their quality. That all of the representations and warranties for the deal were to come from Credit Suisse – and MBIA did not bear the ***risk*** that New Century or any of the originators had provided ***false information*** – was a crucially important inducement to MBIA's participation in the transaction.

Compl. ¶¶ 22-30.

Further, the complaint alleges that "***[a]fter CS Securities solicited MBIA's participation*** in the Transaction, its affiliate DLJ stepped in to provide contractual representations and warranties that ***MBIA required as a condition to issuing its insurance policy***." [emphasis supplied] Compl. ¶34. In sum, MBIA conclusively alleges that it believed CS Securities' representations while also alleging "reservations," and "concern" about the very subject matter of the representations and insisting on contractual representations and warranties from DLJ – covering certain matters implicated in CS Securities' alleged representations – "as a condition to issuing its insurance policy."

Moreover, as discussed, the Prospectus and ProSupp disclose that ***neither DLJ nor any of its affiliates re-underwrote*** any of the mortgage loans, the information in the Loan Schedule with respect to ***83.73%*** of the mortgage loans was ***unverified***, ***59.65%*** of the loans had ***substantial balloons*** posing a ***special risk of non-payment*** in the event they could not be paid off or refinanced, and ***14.87%*** were originated by New Century whose underwriting procedures might have been undermined by bankruptcy. In sum, the specific allegations in the complaint and the documentary evidence suggest that MBIA could not have reasonably "believe[d] in the truth of the warranted information . . . but [only that] it was purchasing [DLJ's] ***promise*** as to its truth." [emphasis supplied] This type of reliance is sufficient to sustain a breach of warranty claim, not a fraud claim based on misrepresentation. *Ziff-Davis Publishing Co.*, 75 NY2d at 502-506.

b. *The Alleged Representations Regarding the Prior Securitization*

"To constitute actionable fraud, the false representation relied upon must relate to a past

or existing fact, or something equivalent thereto, as distinguished from a mere estimate." *Zanani v Savad,* 217 AD2d 696, 697 (2d Dept 1995). "[Nor will a] representation of opinion . . . sustain an action for fraud." *Id.* Puffery, opinions of value or future expectations do not support a cause of action for fraud. *Sidamonidze v Kay*, 304 AD2d 415 (1st Dept 2003); *Longo v Butler Equities II, L.P.*, 278 AD2d 97 (1st Dept 2000).

MBIA alleges that CS Securities "assured it that it was a pillar of the financial industry and that the its mortgage-backed securities business--and the 'shelf' from which the loans proposed for securitization were drawn--had a track record of success [First Representation]." Compl. ¶25. CS Securities "also touted to MBIA the impressive performance of its prior securitizations, noting in a March 22, 2007 email that 'the performance of our HEMT shelf [is] far superior to all other securitization shelves [Second Representation].'" Compl. ¶27. CS Securities "made a presentation to MBIA about the specific financial performance of Credit Suisse's prior HEMT deals, which were purportedly structured similarly to the Transaction. In that presentation, CS Securities represented the high quality and performance of the HEMT shelf and the steps it had taken to ensure improved performance in the future [Third Representation]." *Id.* According to MBIA, "[a]s CS Securities knew full well, the loans in those prior HEMT securitizations were originated through the same defective underwriting practices as those included in the Transaction, and the performance ***data disclosed was therefore materially and intentionally misleading***." Compl. ¶27.

The First and Second Representations are non-actionable puffery and/or estimates of value/statements of opinion. *Sidamonidze*; *Longo*; *Zanani*, *supra.* In addition, the complaint does not allege that they were false. Compl. ¶32. The Third Representation does not allege

falsity but, rather, an "incomplete and misleading disclosure," which relates to a claim for "fraudulent concealment." *L.K. Station Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 (1st Dept 2009). Such a claim requires "an allegation that the defendant ***had a duty to disclose*** material information and that it failed to do so." [emphasis supplied] *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003). Under the "special facts" doctrine, that duty arises "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *Swersky v Dreyer and Traub,* 219 AD2d 321, 327 (1st Dept 1996).

"As a threshold matter, the ['special facts'] doctrine requires satisfaction of a two-prong test: that the material fact was information 'peculiarly within the knowledge' of [defendant], and that the information was not such that could have been discovered . . . through the 'exercise of ordinary intelligence.'" *Jana L. v West 129th Street Realty Corp.*, 22 AD3d 274, 278 (1st Dept 2005). Here, if the earlier securitizations had the same structure – as alleged – the borrowers' income and assets and, consequently, their ability to pay back the loans would have been ***unverified*** in 83% of the loans and borrower non-payment posed a special risk in the 59% that were ***balloon loans***. Moreover, MBIA fails to allege that the relevant "information was not such that could have been discovered . . . through the 'exercise of ordinary intelligence.'" *Id.* Indeed, MBIA did not need to "discover" these facts because, as previously discussed, the Prospectus and ProSupp disclosed them. Thus, the allegations in the complaint do not seem to support the "special facts" doctrine that would give rise to a duty to disclose on the part of CS Securities.

This analysis notwithstanding, the court declines to dismiss MBIA's claim for fraudulent inducement at this time. The question of reasonable reliance is fact-intensive. *Schlaifer Nance*

& Co. v Estate of Warhol, 119 F3d 91, 98 (2d Cir 1997). It would benefit from a complete record created after the completion of the parties' discovery.

B. *Demand for a Jury Trial*

The court granted defendants' motion to strike MBIA's demand for a jury trial based on its decision to dismiss the fraudulent inducement claim. Since the fraudulent inducement claim is being reinstated, this reason for striking the jury demand is no longer valid. The court, however, is adhering to its decision to strike the demand. The Insurance Agreement between MBIA and DLJ contains a jury waiver provision that applies to MBIA's fraudulent inducement claim.

"A party who has signed an agreement may not simultaneously rely upon it as the foundation of the claim for damages and repudiate a provision contained therein to the effect that the right to a trial by jury is waived." *O'Brien v Moszynski*, 101 AD2d 811, 812 (2d Dept 1984) citing, *inter alia*, *Leav v Weitzner*, 268 AD 466, 467-68 (1st Dept 1944). By contrast, where a fraudulent inducement claim challenges ***the validity*** of the contract containing the jury waiver provision, the jury waiver provision is inapplicable to the fraudulent inducement claim. *China Development Industrial Bank v Morgan Stanley & Co.*, 86 AD3d 435 (1st Dept 2011); *Wells Fargo Bank, National Association v Stargate Films Inc.*, 18 AD3d 264, 265 (1st Dept 2005) ("waiver does not apply to a sufficiently pleaded defense that amounts to a claim of fraudulent inducement challenging the ***validity*** of the agreement") [emphasis supplied].

However, where "plaintiffs do not question the ***validity*** of the contract on the basis of a claim for fraudulent inducement, [thereby requiring rescission] plaintiffs' ***reliance upon the tenet*** that 'one who disaffirms for fraud a writing which contains a jury waiver clause should not

be required to proceed to trial without a jury until there has been a determination as to the validity of the disputed instrument' ***is misplaced.***" [emphasis supplied] *O'Brien*, 101 AD2d at 812; *see also Leav*, 268 AD at 468 ("plaintiffs are not in a position to contend, as they might contend in an action for ***rescission***, that the stipulation waiving a jury trial perished with all the rights and obligations under the lease") [emphasis supplied].

Section 6.09 of the Insurance Agreement provides:

> Each party hereby waives, ***to the fullest extent permitted by law, any right to a trial 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.*** Each party hereto (a) certifies that no representative, agent or attorney of any party hereto has represented, expressly or otherwise, that it would not, in the event of litigation, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into the Transaction Documents to which it is a party by, among other things, this waiver.

Insurance Agreement §6.09. "Transaction Documents" is a defined term under the Insurance Agreement and refers, *inter alia*, to the Insurance Agreement and the PSA – the two documents containing the representations and warranties at issue in this case. Insurance Agreement, Article I, p. 4.

The jury waiver provision of the Insurance Agreement is sufficiently broad to cover MBIA's fraudulent inducement claim against CS Securities, which, by MBIA's own allegations, arises "in connection with" the Insurance Agreement. Compl. ¶82 ("MBIA reasonably relied upon CS Securities' statements and omissions when it entered into the Insurance Agreement and issued the Policy."). Hence, unless MBIA's fraudulent inducement claim challenges the validity of the Insurance Agreement or seeks rescission, the jury waiver provision applies to the fraudulent inducement claim as a matter of simple contract interpretation. *O'Brien*, 101 AD2d at

812; *Leav*, 268 AD at 468.

MBIA does not expressly challenge the validity of the Insurance Agreement. Nor does it seek rescission on the basis of its claim for fraudulent inducement. Compl. p. 35, "Prayer for Relief", ("For an ***award of all legal, equitable and punitive damages***, to be proven at trial, for CS Securities' fraudulent inducement of MBIA's participation in the Transaction and issuance of its Policy.") [emphasis supplied].

A challenge to the validity of the Insurance Agreement cannot properly be implied either. In fact, MBIA's allegation of "reasonable reliance" on CS Securities' representations – and, *a fortiori*, the validity of the fraudulent inducement claim against CS Securities – depends in part on the warranties contained in the Insurance Agreement. Without these warranties, MBIA's reliance on the representations of CS Securities would be unreasonable as a matter of law. *DDJ Management,* 15 NY3d at 154; *Schumaker*, 133 NY at 596; *Rodas*, 159 AD2d at 342-43; *UST Private Equity Investors Fund*, 288 AD2d at 88; *see also* MBIA's MOL 7/22/11, E-Filed Doc 152, p. 2 ("the misrepresentations are encompassed by contractual warranties and form the basis for alternative claims for fraudulent inducement and breach of contract."). In other words, far from challenging the validity of the Insurance Agreement, MBIA's fraudulent inducement claim ***affirms*** it.

C. *Demands for Punitive and Consequential Damages*

As the court is reinstating the fraud claim, the evaluation of the merits of MBIA's demand for punitive damages would benefit from a full record after completion of disclosure. MBIA's motion to reinstate their demand for consequential damages is granted in the absence of opposition. Accordingly, it is

ORDERED that MBIA's motion for leave to renew its motion to dismiss its fraudulent inducement claim is granted; and it is further

ORDERED that, upon renewal, the court denies defendants' motion to dismiss MBIA's fraudulent inducement claim and to strike its demand for punitive damages; grants, in the absence of opposition, MBIA's motion to reinstate its demand for consequential damages; and adheres to its decision to grant defendants' motion to strike MBIA's demand for a jury trial; and it is further

ORDERED that MBIA's fraudulent inducement cause of action, and its demands for punitive and consequential damages are reinstated, and MBIA's demand for a jury trial is stricken.

Dated: October 7, 2011

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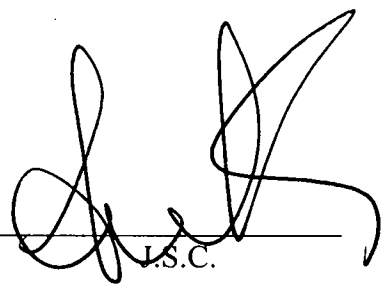

J.S.C.