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

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MBIA INSURANCE CORPORATION, :

Index No. 603751/09

Plaintiff, :

- against - :

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

Defendants.

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PLAINTIFF MBIA INSURANCE CORPORATION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 3

- A. Credit Suisse Fraudulently Induced MBIA's Participation 3
- B. Credit Suisse's Representations and Warranties 5
  - 1. Transaction Level Representations and Warranties 6
  - 2. Loan-Level Representations and Warranties 7
- C. MBIA's Broad Remedial Rights Under the Agreements 8
- D. Credit Suisse's Breaches and Frustration of the Parties' Agreements 8
- E. Procedural Posture 10

ARGUMENT 10

I. MBIA ADEQUATELY PLED ITS FRAUDULENT INDUCEMENT CLAIM 11

- A. MBIA Adequately Alleged Justifiable Reliance 11
  - 1. The Complaint Alleges That MBIA Conducted Relevant Diligence 11
  - 2. The General Disclosures In the Offering Materials Do Not Contradict Credit Suisse's Specific Misrepresentations 16
  - 3. Whether MBIA's Reliance Was Justified Is a Jury Question 17
- B. MBIA's Fraudulent Inducement and Contract Claims Are Not Duplicative 17

II. MBIA HAS SUFFICIENTLY ALLEGED ITS CONTRACT CLAIMS 21

III. THE CLAIM FOR BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS NOT DUPLICATIVE OF THE CONTRACT CLAIM 23

IV. MBIA IS ENTITLED TO PUNITIVE AND CONSEQUENTIAL DAMAGES 24

V. MBIA'S DEMAND FOR A TRIAL BY JURY IS APPROPRIATE. 25

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

AJW Partners LLC v. Cyberlux Corp.,
21 Misc.3d 1109(A), 2008 WL 4514171 (N.Y.Sup. Sept. 19, 2008) 20

Ambac Assur. Corp v. EMC Mortg. Corp.,
No. 08 Civ. 9464, 2009 WL 734073 (S.D.N.Y. Mar. 16, 2009) 1

Atkinson v. Mobil Oil Corp.,
205 A.D.2d 719 (2d Dep't 1994)..22

Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc.,
174 A.D. 2d 963 (3d Dep't 1991)..25

Bi-Economy Market, Inc. v. Harleysville Ins. Co.,
10 N.Y.3d 187, 192-94 (2008)..24

Board of Managers of 411 East 53rd Street Condominium v. Dylan Carpet, Inc.,
182 A.D.2d 551 (1st Dep't 1992)..11

Citi Mgmt. Group, Ltd. v. Highbridge House Ogden, LLC,
45 A.D.3d 487 (1st Dep't 2007)..23

Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.,
183 A.D.2d 742 (2d Dep't 1992)...14

DDJ Mgmt., LLC v. Rhone Group LLC,
60 A.D.3d 421 (1st Dep't 2009)..15

Deerfield Comm. Corp. v. Chesebrough-Ponds, Inc.,
68 N.Y.2d 954 (1986)..18

Dragon Inv. Co. II LLC v. Shanahan,
49 A.D.3d 403, (1st Dep't 2008)...15

Duane Thomas LLC v. 62 Thomas Partners LLC,
300 A.D.2d 52 (1st Dep't 2002)..15

EED Holdings v. Palmer Johnson Acquisition Corp.,
387 F. Supp.2d 265 (S.D.N.Y. 2204)...11

Elghanian v. Harvey,
249 A.D.2d 206 (1st Dep't 1998)...15

TABLE OF AUTHORITIES

Page(s)

Ferry v. Poughkeepsie Galleria Co.,
602 N.Y.S.2d 267 (4th Dep't 1983) 25

First Bank of the Americas v. Motor Car Funding, Inc.,
257 A.D.2d 287 (1st Dep't 1999) 19, 20

Freedman v. Pearlman,
271 A.D.2d 301 (1st Dep't 2000) 11

HSH Nordbank AG v. UBS AG and UBS Secs. LLC,
No. 600562/08, 2008 WL 4819599 (N.Y. Sup. Oct. 21, 2008) 20

Hawthorne Group LLC v. RRE Ventures,
7 A.D.3d 320, 776 N.Y.S.2d 273 (1st Dep't 2004) 20

In re Enron Corp.,
2005 WL 356985 (S.D.N.Y. Feb. 15, 2005) 20

J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc.,
243 A.D.2d 422, 663 N.Y.S.2d 211 (1st Dep't 1997) 20

Jo Ann Homes at Bellmore, Inc. v. Dworetz,
25 N.Y.2d 112 (1969) 18

Kelley v. CINAR Corp. (In re CINAR Corp. Secs. Litig.),
186 F. Supp.2d 279 (E.D.N.Y. 2002) 18

Knight Securities L.P. v. Fiduciary Trust Co.,
5 A.D.3d 172 (1st Dep't 2004) 15, 17

Kramer v. Carl M. Loeb, Rhoades & Co.,
20 A.D.2d 634 (1st Dep't 1964) 22

LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate, Inc.,
No. 01 Civ. 4389 (AGS), 2002 U.S. Dist. LEXIS 23323 (S.D.N.Y. Dec. 5, 2002) 20

Levi v. Utica First Ins. Co.,
12 A.D.3d 256 (1st Dep't 2004) 23

Lone Star Fund V(US), LP v. Barclays Bank PLC,
No. 08-11038, 2010 WL 60897 (5th Cir. Jan. 11, 2010) 20

MBIA Ins. Corp. v. Countrywide Home Loans, Inc., et al.,
No. 602825/08 (N.Y. Sup. Jul. 13, 2009) 1, 12, 13, 19, 23

TABLE OF AUTHORITIES

Page(s)

MBIA v. Residential Funding Co., LLC,
26 Misc.3d 1204(A), 2009 WL 5178337 (N.Y. Sup. Dec. 22, 2009)................1, 19, 24, 25

Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.,
500 F.3d 171 (2d Cir. 2007)..14, 18

Metropolitan Coal Co. v. Howard,
155 F.2d 780 (2d Cir. 1946)..14

N.Y. Univ. v. Cont. Ins. Co.,
87 N.Y.2d 308 (1995) 23

P.T. Bank Central Asia v. ABN Amro Bank N.V.,
301 A.D.2d 373 (1st Dept 2003)..11, 15, 17

Panasia Estates, Inc. v. Hudson Ins. Co.,
10 N.Y.3d 200, 203 (2008) 24

Pramco III, LLC v. Partners Trust Bank,
15 Misc.3d 1142(A), 2007 WL 1574479 (N.Y.Sup. May 31, 2007)................................20

Private Equity Investors Fund, Inc. v. Salomon Smith Barney
288 A.D.2d 87 (1st Dept 2001)..15

Quaker Oats Co. v. Borden, Inc.,
No. 95 Civ. 9300 (RO), 1996 WL 255386 (S.D.N.Y. May 15, 1996)..............................17

Rather v. CBS Corp.,
68 A.D.3d 49, 886 N.Y.S.2d 121 (1st Dep't 2009)..23

R.I. Island House LLC v. North Town Phase II Houses, Inc.,
51 A.D.3d 890 (1st Dep't 2008)..23

Securities and Exchange Commission v. Angelo Mozilo,
No. CV 09-3994-(JFW), 2009 U.S. Dist. LEXIS 104689 (C.D.Cal. Nov. 3, 2009) 16

Sims v. First Consumers Nat'l Bank,
303 A.D.2d 288 (1st Dep't 2003)..24

Shilkoff, Inc. v. 885 Third Ave. Corp.,
299 A.D.2d 253 (1st Dep't 2002)..22

Swersky v. Dreyer & Traub,
219 A.D.2d 321 (1st Dep't 1996)..13, 24

TABLE OF AUTHORITIES

Page(s)

Tiffany at Westbury Condominium v. Marelli Develop. Corp.,
34 A.D.3d 791, (2d Dep't 2006)....25

UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney,
288 A.D.2d 87 (1st Dept 2001)....15

United Guaranty Mortgage Indemnity Co. v. Countrywide Financial Corp.,
660 F. Supp.2d 1163 (C.D.Ca. 2009) 15, 16

Uribe v. Merchants Bank of New York,
227 A.D. 2d 141 (1st Dep't 1996)....25

Valassis Commc'ns Inc. v. Weimer,
304 A.D.2d 448 (1st Dep't 2003)....15

Waltree Ltd. v. ING Furman Selz L.L.C.,
97 F. Supp.2d 464 (S.D.N.Y. 2000)....24

Wells Fargo Bank v. Stargate Films, Inc.,
18 A.D.3d 264, (1st Dep't 2005)....25

STATUTES

CPLR§ 3013....22

Plaintiff MBIA Insurance Corporation ("MBIA") respectfully submits this memorandum of law in opposition to the motion to dismiss of defendants Credit Suisse Securities (USA) LLC ("CS Securities"), DLJ Mortgage Capital, Inc. ("DLJ") and Select Portfolio Servicing, Inc. ("SPS") (collectively "Defendants" or "Credit Suisse").

PRELIMINARY STATEMENT

The arguments Credit Suisse raises in its motion to dismiss are without merit, having been recently and repeatedly rejected by Justices in this Commercial Part when offered by defendants in substantively indistinguishable actions. See MBIA v. Residential Funding Co., LLC, 26 Misc.3d 1204(A) (N.Y. Sup. Dec. 22, 2009) (Fried, J.) (App. A); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., et al., Index No. 602825/08 (N.Y. Sup. Jul. 13, 2009) (Bransten, J.) (App. B).[1] In view of these decisions—which MBIA recited to Credit Suisse before Credit Suisse filed this motion—Credit Suisse's motion appears to be nothing more than another tactic in furtherance of its strategy (alleged in the Complaint) to delay accountability for its fraudulent practices and its refusal to honor contractual obligations.

Credit Suisse's contention that MBIA's fraud claim should be dismissed because MBIA did not perform *any* due diligence blatantly ignores the allegations in the Complaint that detail the thorough due diligence MBIA conducted to assess the risk it assumed. Credit Suisse, in essence, contends that MBIA should have conducted the due diligence that Credit Suisse represented and warranted *it* had performed and that pertained to the risk *it* had assumed. Credit Suisse's argument, however, fails as a matter of law. Similarly unavailing is Credit Suisse's contention that MBIA's fraud claim is duplicative of the breach of contract claim. This

[1] An analogous motion to strike also was rejected in Ambac Assur. Corp v. EMC Mortg. Corp., No. 08 Civ. 9464, 2009 WL 734073 (S.D.N.Y. Mar. 16, 2009) (App. C). Unlike Credit Suisse, having received the adverse precedent, EMC properly did not make a motion to dismiss or strike in the next suit brought against it. See Syncora v. EMC Mortg. Corp., 09 Civ. 3106 (S.D.N.Y.).

argument has been rejected time and again by courts facing factually indistinguishable cases. 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 and to induce MBIA to issue its Policy.

Credit Suisse's challenges to MBIA's contract-based causes of action are equally without merit. The contention that these allegations are too "general" disregards the governing pleading standard and is simply wrong: the Complaint details the contractual provisions that have been breached and the specific manner in which they have been breached. And the Complaint quotes the provisions of the parties' agreement that refute Credit Suisse's unfounded assertion that MBIA is limited in its recovery only to the individual loan put-back remedy. As detailed in the Complaint, the parties' agreements make clear that MBIA is entitled to pursue without exclusion "whatever action in law or in equity" as may be necessary to make it whole.

Ultimately, MBIA's entitlement to relief is straightforward: Credit Suisse reaped enormous profits by securitizing loans made to borrowers with no ability to repay. Credit Suisse lied about the attributes of the securitized loans and the due diligence it purportedly conducted to induce MBIA to guaranty payments on the securities Credit Suisse issued. Credit Suisse was able to conceal its lies behind the market inflation that it helped fuel by serving as a rich source of funding for bad loans. But the falsity of Credit Suisse's representations was unveiled in the wake of the market downturn that it distastefully raises as a shield to MBIA's claims. And when presented with detailed proof of the breaches of its representations and warranties, Credit Suisse wholly disregarded its contractual commitment to repurchase non-conforming loans. Credit Suisse should be held accountable for its wrongdoing and its motion to dismiss should be denied.

FACTUAL BACKGROUND

Credit Suisse is an international investment bank, with three affiliates that acted in concert in connection with the securitization transaction at issue (the "Transaction"). DLJ, as the "sponsor," aggregated thousands of residential mortgage loans into a loan "pool," which was then transferred to a trust that Credit Suisse formed. The trust then issued securities that were to be paid down from the cash flow from the pooled loans. (Compl. ¶ 2.) CS Securities served as underwriter for the public offering and marketed the securities to investors. (Id.) SPS was the "servicer" of the Transaction tasked with the collection of monthly mortgage payments, monitoring performance of borrowers to maximize collections, and recovering from delinquent borrowers amounts due on the loans in the pool. (Id.) To enhance the marketability of certain classes of the securities, CS Securities solicited MBIA (and DLJ and SPS contracted with MBIA) to issue its policy. (Id.)

A. Credit Suisse Fraudulently Induced MBIA's Participation

Tim Kuo of CS Securities initially contacted MBIA in March 2007, soliciting a bid to provide insurance for the Transaction. (Compl. ¶ 20.) In his initial communications, Mr. Kuo stressed to MBIA that Credit Suisse required a quick decision from MBIA (*i.e.*, within days) given that the Transaction was then expected to close in less than a month. (Id. ¶ 22.)

Acting on behalf of CS Securities, Mr. Kuo made myriad representations, detailed in the Complaint to induce MBIA's participation in the Transaction. Mr. Kuo's representations responded to MBIA's requests for information necessary to assess its risks in the Transaction, and thus squarely refute Credit Suisse's assertion in its motion papers that MBIA failed to conduct reasonable due diligence.

As the Complaint explains, the basic bargain between the parties was that Credit Suisse bore the risk that the securitized loans conformed to Credit Suisse's representations, and

MBIA bore the risk that the loans bearing the represented attributes would not perform. (Compl. ¶¶ 40-42.) This risk allocation made sense. Credit Suisse dealt directly with the originators and set the requirements for the loans that it purchased, and could conduct extensive due diligence on the loans before purchasing them for securitization. In addition, Credit Suisse held the loan file for each loan it acquired and could conduct post-closing quality review. And Credit Suisse secured from each originator representations and warranties similar to (and likely broader than) those it gave MBIA, so Credit Suisse had recourse against originators in the event of a breach of the representations and warranties it gave. In stark contrast, MBIA was not in direct privity with the originators, did not own the loan files, and could not possibly re-underwrite thousands of loans given the limited time for closing the Transaction. (Id.)

MBIA therefore obtained representations from Credit Suisse that allocated to Credit Suisse the risks associated with the origination and underwriting of the loans, and MBIA then conducted extensive due diligence consistent with the market risk MBIA assumed. With respect to the loan underwriting, for example, MBIA requested and relied upon Credit Suisse's representations that it had performed extensive and thorough due diligence on the loans prior to purchasing them from the entities that originated them and that Credit Suisse "only buys the loans approved." (Id. ¶ 29.) Mr. Kuo of Credit Suisse gave MBIA detailed spreadsheets setting forth the results of the due diligence that Credit Suisse claimed to have performed on the loans to ensure compliance with the applicable originators' respective underwriting guidelines. (Id.) MBIA also obtained assurances regarding the underwriting guidelines that were purportedly used to originate each of the loans. (Id. ¶ 28) These guidelines set forth rigorous procedures to be followed by the respective originators in reviewing a loan application to assess a borrower's ability to repay the debt. (Id.)

In addition, MBIA demanded Credit Suisse's representations concerning attributes of the individual loans to be pooled in the Transaction. Credit Suisse provided the "loan tape," which set forth various important characteristics of each loan, such as the borrower's credit score and debt-to-income ratio, and the ratio of the loan amount to the value of the mortgaged property. (Id. ¶ 28.) Credit Suisse intended for MBIA to rely upon its representations concerning the veracity of the loan attributes disclosed, and MBIA did so. (Id.)

MBIA scrutinized the information Credit Suisse provided and used the disclosures to build models and analyzed the expected performance of the collateral under various market conditions, which is exactly the analysis a reasoned financial guarantor insurer could and would undertake. (Compl. ¶¶ 29, 31.) Moreover, because MBIA had not previously insured a securitization sponsored by Credit Suisse, MBIA conducted extensive due diligence of Credit Suisse, including (i) its institutional competence, (ii) its wherewithal to stand behind its representations, and (iii) the performance of its prior mortgage-backed securitizations, which Credit Suisse represented were similar to the Transaction. (¶¶ 26-27.)

And finally, MBIA did not simply take on faith Credit Suisse's pre-contractual representations. Rather, as detailed in the Complaint and as discussed below, MBIA required enforceable contractual representations and warranties that the loans complied with the represented attributes and relevant underwriting guidelines. (¶¶ 40, 42.)

B. Credit Suisse's Representations and Warranties

After CS Securities (primarily through Tim Kuo) made fraudulent misrepresentations to induce MBIA's participation, Credit Suisse affiliate DLJ entered into the written agreements (signed by Tim Kuo) that memorialized Credit Suisse's critical representations and warranties to MBIA for the deal. (Compl. ¶ 34.) Specifically, MBIA, DLJ and SPS entered into an insurance agreement dated as of April 30, 2007 (the "Insurance

Agreement"), which contained express representations and warranties and also incorporated the representations and warranties that were made in the Pooling and Servicing Agreement (the "PSA") among DLJ, SPS, their affiliate Credit Suisse First Boston Mortgage Securities Corp. and U.S. Bank National Association. (Id. ¶¶ 34, 46.) Credit Suisse made two types of representations and warranties to effectuate the agreed-upon risk allocation and to induce MBIA to participate in the Transaction: (1) those concerning its mortgage-loan operations and portfolios, as well as the veracity and completeness of information provided to MBIA in connection with the Transaction (the "transaction-level" representations and warranties); and (2) the "loan-level" representations and warranties concerning the key attributes of the individual loans securitized. (¶ 43.)

1. Transaction Level Representations and Warranties

Credit Suisse seeks to gloss over the transaction-level representations and warranties made in the Insurance Agreement and asserts that this Court must hold 15,000 mini-trials to address each and every loan level representation and warranty breached. That position fails for a number of reasons, including that the transaction-level representations and warranties made in the Insurance Agreement afford independent grounds for relief:

- *Accuracy of Information.* Neither the Transaction Documents nor other material information relating to the Mortgage Loans, the operations of the Servicer, the Seller or the Depositor (including servicing or origination of loans) or … any other information … contains any statement of a material fact by the Servicer, the Seller or Depositor which was untrue or misleading in any material adverse respect when made. . . .

- *Compliance with Securities Laws.* The offer and sale of the Securities comply in all material respects with all requirements of law. . . . Without limitation of the foregoing, the Offering Document does not contain any untrue statement of a material fact and does not omit to state a material fact necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading ….

(Compl. ¶ 44.) As the foregoing provisions illustrate, the transaction-level representations and warranties broadly attest that all of the information provided to MBIA concerning the mortgage loans, the Credit Suisse mortgage lending operations (*e.g.*, its loan-acquisition practices, underwriting guidelines and due diligence), or the marketing of the securities (*e.g.*, the prospectus and related offering documents (the "Offering Materials")), is true, accurate and complete. (Id. ¶ 45.) Thus, the transaction-level representations and warranties are breached by, among other things, Credit Suisse's pervasive, systematic, and undisclosed policy and practice of securitizing loans made to borrowers without the ability to repay them, and by the securitization loan pool's failure to conform to the key represented characteristics and underwriting criteria.

2. Loan-Level Representations and Warranties

The loan-level representations and warranties in the PSA include the following, among others, with respect to each loan included in the Transaction:

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

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

C. MBIA's Broad Remedial Rights Under the Agreements

Pursuant to the PSA, Credit Suisse agreed to cure any breach of the loan-level warranties, or repurchase the breaching loan from the pool (the "Repurchase Protocol"). (Compl. ¶ 50.) But the parties' agreements also provide that MBIA is *not* limited to the Repurchase Protocol. The Insurance Agreement affords MBIA the right to seek *any* remedy "at law or *in equity*" for Credit Suisse's breaches of its representations and warranties and notes that MBIA's remedies "*shall be cumulative* and shall be *in addition to other remedies* given under the Transaction Documents or existing at law or in equity." (Id. ¶ 53) (emphasis added).

D. Credit Suisse's Breaches and Frustration of the Parties' Agreements

As detailed in the Complaint, following the extraordinary number of defaults on the loans in the Transaction—which ultimately triggered MBIA's payment obligations under the policy—MBIA sought access to loan origination files, which were in the custody of SPS as servicer for the Transaction. (Compl. ¶ 58.) MBIA had a contractual right to access and review those files. (Id.) Nevertheless, SPS, to perpetuate the concealment of Credit Suisse's fraud, lied about not having the requested files and refused to provide them once that lie was exposed. (¶ 59.) It was only after MBIA terminated SPS as servicer—as MBIA was entitled to do under the PSA—that MBIA finally obtained access to the files that it had long demanded. (¶ 62.)

After obtaining those files, MBIA learned that SPS had improperly transferred charged-off loans to CS Securities without providing the contractually required notice to MBIA. (Compl. ¶ 63.) This improper conduct harmed MBIA in two ways. First, the transfer of the charged-off loan files deprived MBIA of access to those files in order to determine whether the

loans complied with the representations and warranties made by Credit Suisse. (Id. ¶ 66.) And second, the transfer of these loans improperly diverted to Credit Suisse assets from the Trust that could have been used to offset future payments MBIA must make under the Policy. (¶ 67.)

After terminating SPS and obtaining the loan files, MBIA retained a third-party consultant to review the files for compliance with Credit Suisse's representations and warranties. (Compl. ¶ 68.) The results of that review are alarming. From a sample of 1,386 defaulted loans in the Transaction, the consultant identified breaches in 87% of the loans (with an aggregate principal balance of approximately $78.1 million). (Id. ¶ 68.) A review of a sample of 477 randomly-selected loans from the Transaction (i.e., not simply those that are in default) yielded similar findings: ***79% of the loans reviewed***, with an aggregate principal balance of approximately $20.6 million, breached the representations and warranties. (¶ 68.)

As detailed in the Complaint, the breaching loans contained one or, in most cases, more than one defect that constituted a breach of one or more of Defendants' representations and warranties. These defects included (i) violations of the actual underwriting guidelines for each loan and of prudent and customary underwriting practices (including qualifying clearly ineligible borrowers through reduced documentation programs, failing to conduct income-reasonableness analysis, and lending to borrowers who were already overly debt-laden), (ii) rampant fraud (primarily involving misrepresentation of the borrower's finances or intent to occupy the property as a residence rather than investment), and (iii) the failure by borrowers to accurately disclose their liabilities, including other mortgage loans taken out to purchase investment properties. (Compl. ¶ 69.) These breaches materially and adversely affected MBIA's interests. Loans based upon misrepresentations, improper origination or underwriting practices are markedly more risky than loans not suffering from such shortcomings. (Id. ¶ 71.)

MBIA also commissioned a third-party consultant to review SPS's work as servicer. This review confirmed that SPS did not comply with its contractual obligations. It did not have appropriate personnel or procedures in place to fulfill its duties, and it did virtually nothing to try to collect on delinquent loans, as it was obligated to do. (Compl. ¶¶ 73-74.)

Finally, the Complaint alleges Credit Suisse shirked its responsibilities under the Repurchase Protocol. MBIA provided notice to Credit Suisse of breaching loans that it uncovered. (Compl. ¶ 76.) Contrary to its agreement, Credit Suisse refused to cure or repurchase ***a single loan,*** which given the documented 79% breach rate, demonstrates bad faith on Credit Suisse's part and an intent to frustrate MBIA's rights. (Id. ¶ 77.) As a direct result of Credit Suisse's misrepresentations and contractual breaches, MBIA has incurred and continues to incur significant damage. MBIA already has paid over $296 million in claims. (Id. ¶ 79.)

E. Procedural Posture

On December 30, 2009, Credit Suisse's counsel advised MBIA that Credit Suisse intended to move to dismiss the Complaint. MBIA's counsel responded by explaining that motions to dismiss and strike analogous complaints had been rejected recently and repeatedly by this Court, as well as the Southern District of New York. By letter dated January 14, 2010, MBIA cited for Credit Suisse the decisions rejecting similar motions to dismiss or strike. Despite repeated requests, Credit Suisse never provided any precedent to distinguish its proposed motion. As anticipated, Credit Suisse's instant motion presents no novel issues, and simply re-hashes the positions repeatedly rejected.

ARGUMENT

Credit Suisse bears a heavy burden in its motion to dismiss:

> The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed. The court must "accept the facts alleged as true ... and determine simply whether the facts alleged

> fit within any cognizable legal theory." The complaint must be construed "liberally" and the court must accept as true not only "the complaint's material allegations" but also "whatever can be reasonably inferred there from" in favor of the pleader.

P.T. Bank Central Asia v. ABN Amro Bank N.V., 301 A.D.2d 373, 375-76 (1st Dept 2003) (citations omitted). Credit Suisse's motion fails under this standard.

I. MBIA ADEQUATELY PLED ITS FRAUDULENT INDUCEMENT CLAIM

Credit Suisse raises two challenges to MBIA's fraud claim: (1) that MBIA has not alleged justifiable reliance; and (2) that the fraud claim is duplicative of the breach of contract claim.[2] Neither challenge has merit, and both already have been rejected by this Court.

A. MBIA Adequately Alleged Justifiable Reliance

Credit Suisse argues that MBIA cannot establish justifiable reliance for its fraud claim because (1) MBIA is a sophisticated party that declined to conduct due diligence prior to issuing the Policy; and (2) the disclosures in the Offering Materials contradict the fraudulent representations alleged in the Complaint. These arguments are wrong on the facts and law.

1. The Complaint Alleges That MBIA Conducted Relevant Diligence

Credit Suisse's contention that MBIA "fail[ed] to avail itself of readily available information or conduct ***any*** due diligence" (Defs. Br. at 12 (emphasis in original)) simply ignores the allegations of the Complaint.[3] As discussed above, MBIA alleged in great detail the

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[2] Although Credit Suisse half-heartedly suggests that the fraud claim should also be dismissed pursuant to New York's "economic loss" rule, Credit Suisse's lack of conviction in this position is shown by the fact that is it relegated to one sentence in a footnote. (Br. at 20 n.11.) Credit Suisse is correct to lack faith in this argument, as New York courts do not apply the economic loss doctrine as a bar to fraud claims. See, e.g., Freedman v. Pearlman, 271 A.D.2d 301, 302-03 (1st Dep't 2000) (allowing fraud claim for pure pecuniary loss); Board of Managers of 411 East 53rd Street Condominium v. Dylan Carpet, Inc., 182 A.D.2d 551, 552 (1st Dep't 1992) (same). Moreover, the federal law cited by Defendants for extending the economic loss rule to fraud claims has been criticized by New York federal courts as contrary to New York law. See EED Holdings v. Palmer Johnson Acquisition Corp., 387 F. Supp.2d 265, 277-78 (S.D.N.Y. 2004) (criticizing another federal court for extending the economic loss rule to fraud claims).

[3] The duplicity of Credit Suisse's argument is demonstrated by the shifting nature of its allegations. Credit Suisse variously alleges that MBIA conducted no due diligence (Defs. Br. at 12), that MBIA

thorough due diligence it undertook, which was commensurate with the nature of the risk it assumed in the Transaction. Thus, as MBIA alleged, it demanded and received Credit Suisse's representations and disclosures regarding the attributes of the securitized loans and its due diligence, the processes and protocols it used to issue mortgage-backed securities, and its financial status. MBIA used this information to conduct extensive modeling of the expected performance of the loans under various market conditions and to assess Credit Suisse's wherewithal to stand behind the representations and warranties it made to MBIA. (Compl. ¶¶ 25-31.) Credit Suisse's argument disregards those allegations, and fails as a result.

Credit Suisse instead asserts that MBIA should have undertaken as "due diligence" the individual-loan review that MBIA specifically alleged was impossible for it to undertake, that Credit Suisse represented that it had undertaken, and with respect to which the parties agreed that Credit Suisse would bear the risk of loss if not performed. (*See*, *e.g.*, Compl. ¶ 42) (The "Transaction did not contemplate or afford MBIA the opportunity to undertake its own review of the thousands of individual loan files comprising the proposed loan pool."). These allegations, which must be taken as true, are dispositive of the issue.

As this Court recently and squarely held in MBIA v. Countrywide, (App. B), MBIA cannot be faulted for not conducting additional due diligence that was impossible to perform, particularly where, as here, all reasonable inferences are that such diligence would not have discovered Credit Suisse's fraud. In response to defendant's motion to dismiss in that case, advancing the identical argument Credit Suisse makes here, Justice Bransten held:

> It is unclear, however, how much information regarding the securitizations MBIA could access. Even assuming MBIA

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conducted no due diligence *concerning the loans* (Id. at 6), and that MBIA failed to re-underwrite the 15,000 loans in the pool. (Id. at 14, 16.) Credit Suisse—not MBIA—had the duty to re-underwrite the loans, it was impossible for MBIA to do so, and MBIA did exactly the due diligence it should have.

> conducted a full inquiry under the circumstances in relation to the bidding process, it is not conclusive that MBIA could have discovered the alleged fraud. ... Justifiable reliance has been sufficiently alleged and Countrywide has not demonstrated its non-existence as a matter of law so as to warrant dismissal.

Id. at 12. More recently, in ruling on discovery issues, Justice Bransten underscored the patent implausibility of Credit Suisse's assertion that the type of fraud at issue could have been discovered with any reasonable due diligence:

> Furthermore, as a general proposition, to suggest that discovery of the true nature of the securitizations could have been achieved through reasonable investigation severely oversimplifies a product that has humbled many financial titans who considered themselves experts in understanding securitizations.[4]

Remarkably, Credit Suisse relegates Justice Bransten's first and indistinguishable decision to a footnote of its brief (Br. at 20 n.10),[5] and does not address the second at all. Justice Bransten's decisions were well-reasoned and consistent with established, controlling law.[6]

Credit Suisse's position also is contravened by the representations and warranties it gave attesting to the veracity of the loan attributes it conveyed, and the quality of the due diligence it purportedly undertook. Contrary to Credit Suisse's unfounded, unreasoned, and revisionist assertion, when it asked MBIA to participate in the Transaction without affording the opportunity to analyze the individual loan underwriting, MBIA was not limited to the "three options" of either (1) demanding more due diligence; (2) demanding more time; or (3) walking away. (Defs. Br. at 16.) MBIA instead proceeded as sophisticated parties typically do when

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[4] See MBIA v. Countrywide, *supra*, Decision dated January 14, 2010, p. 24 (App. D).

[5] Tellingly, Credit Suisse's only rejoinder to the case is the unsupported assertion that it is "factually distinguishable" and that it hopes the decision will be reversed on appeal.

[6] In addition, given that MBIA was at an information disadvantage as compared to Credit Suisse regarding the quality of the individual loans (Compl. ¶ 41), MBIA was justified in relying upon Credit Suisse's representations on the subject. See Swersky v. Dreyer & Traub, 219 A.D.2d 321, 327-28, (1st Dep't 1996).

faced with a situation where one party cannot reasonably confirm the veracity of a counterparty's representations: MBIA demanded that Credit Suisse provide explicit and enforceable contractual representations and warranties about the quality of the loans.

As a matter of law, MBIA was justified in relying upon Credit Suisse's representations and warranties as assurance of the attributes of the securitized loans. See Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 181-82 (2d Cir. 2007) (holding that the plaintiff could rely on representations and warranties to establish justifiable reliance for a fraudulent inducement claim without the need for "further investigation or sleuthing"). This holding reflects—for strong policy and practical reasons—the absolute binding nature of representations and warranties under New York law. As Judge Learned Hand long ago explained, "[a] warranty ... is intended precisely to relieve the promissee of any duty to ascertain the fact for himself." Metropolitan Coal Co. v. Howard, 155 F.2d 780, 784 (2d Cir. 1946). Indeed, one of the decisions relied upon by Credit Suisse acknowledges that the element of justifiable reliance can be satisfied by demanding contractual warranties. See Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc., 183 A.D.2d 742, 743-44 (2d Dep't 1992) (cited at Def. Br. at 15), (holding that plaintiff could not establish justifiable reliance where he "proceeded with the transaction without securing the available documentation ***or inserting appropriate language into the agreement for his protection***") (emphasis added).)

Credit Suisse ignores the foregoing precedent—including Justice Bransten's decisions and the settled New York law referenced therein—and instead relies upon inapposite cases. All the cases it cites involve situations where the plaintiff (i) had ready access to the information that would have disproved the defendant's representations, and (ii) did not obtain express contractual warranties on the issues the court found the plaintiff had failed to adequately

investigate. See, e.g., DDJ Mgmt., LLC v. Rhone Group LLC, 60 A.D.3d 421 (1st Dep't 2009) (plaintiff failed to review target company's financial books and records and did not obtain contractual warranties from the defendant with respect to the relevant representations); UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney, 288 A.D.2d 87 (1st Dept 2001) (plaintiff failed to review a handful of documents that would have alerted it to the misrepresentation and failed to obtain contractual warranties on that point).[7]

Credit Suisse places extensive and misguided reliance on United Guaranty Mortgage Indemnity Co. v. Countrywide Financial Corp., 660 F. Supp.2d 1163 (C.D.Ca. 2009) ("UGMI")—a federal decision applying California law to a markedly different type of insurance policy and involving an entirely different factual scenario. As Justice Bransten recently stated when presented with the UGMI decision, this Court need not consult California jurisprudence when New York authority is clear. See Transcript of Hearing dated December 9, 2009, at pp. 41; 21-24 (App. E).[8] See also P.T. Bank, 301 A.D.2d 373; Knight Securities L.P. v. Fiduciary Trust Co., 5 A.D.3d 172 (1st Dep't 2004).

To the extent California law is of interest, UGMI is highly distinguishable. The plaintiff in that action was a "mortgage pool" insurer, not a "financial guarantor" like MBIA. A

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[7] See also Dragon Inv. Co. II LLC v. Shanahan, 49 A.D.3d 403, 404 (1st Dep't 2008) (plaintiffs made "no inquiry" until well after their investment); Elghanian v. Harvey, 249 A.D.2d 206, 206 (1st Dep't 1998) (no "disparity of access to relevant information" between parties); Duane Thomas LLC v. 62 Thomas Partners LLC, 300 A.D.2d 52 (1st Dep't 2002) (no justifiable reliance based on defects in skylights and fire doors that plaintiff had itself inspected); Valassis Commc'ns Inc. v. Weimer, 304 A.D.2d 448 (1st Dep't 2003) (plaintiff failed to verify basic information on list of contracts, customers and suppliers that plaintiff was provided).

[8] "THE COURT: You know, you don't have to remind [anyone] again that my entire case should depend on a Central District California Court judge. I believe that, indeed, if you come to the commercial division in New York State, you have equal kind of judge and equal ability for this judge to reason, and equal, good Appellate Division to reverse if I'm wrong, and a Court of Appeals that has equal amount of standing than California.... Guess what? Where is a case from New York? Why isn't there a case from New York? Maybe because the Central District of California is wrong. And maybe I'm going to be making other kinds of law. So, please, please, there must be a New York case that we can rely on." *Id.*

mortgage pool insurer covers payments due on the mortgage loans; a financial guarantor covers payments due on the securities. The distinction, recognized by the UGMI court, is significant. Under the terms of its agreement, UGMI had the right and ability to underwrite the loans *before* the transaction closed, and again *before* making any coverage decisions. 660 F. Supp.2d at 1177, 1189. Indeed, the court concluded that UGMI insurance agreement could be read to *require* UGMI to have conducted such diligence. *Id.* In stark contrast, MBIA as a financial guarantor had no right or ability to underwrite the loans *before* the Transaction closed or *before* making its coverage payments. Rather, MBIA was required to advance its funds to make payments to the noteholders and only thereafter attempt to recover from Credit Suisse the amounts paid. Credit Suisse's heavy reliance on the UGMI decision therefore serves only to undermine its argument.[9]

2. The General Disclosures In the Offering Materials Do Not Contradict Credit Suisse's Specific Misrepresentations

Credit Suisse also is wrong in arguing that the disclosures in the Offering Materials undermine the reasonableness of MBIA's reliance. As an initial matter, the prospectus disclosures identified by Credit Suisse (Defs. Br. at 8-9) are not at odds with the oral or written representations that form the basis of MBIA's fraud allegation. For example, the disclosure that individual loans in the pool might not comply with each criterion of the underwriting standards as long as "the loan is in substantial compliance with the underwriting standards" (Def. Br. at 9 (citing Prospectus at 31)) could not possibly have alerted MBIA that the vast majority of the

[9] A more recent decision from the same California court is more applicable and supports MBIA. In Securities and Exchange Commission v. Angelo Mozilo, No. CV 09-3994-(JFW), 2009 U.S. Dist. LEXIS 104689 (C.D.Cal. Nov. 3, 2009) (App. F), the SEC sued senior executives at Countrywide Financial Corporation for securities law violations based on conduct that is indistinguishable, for all relevant purposes, from the allegations in this case. In denying the defendants' motion to dismiss, the court held: "The Court cannot conclude as a matter of law at the pleading stage that [Countrywide's] disclosures adequately communicated the extent and magnitude of Countrywide's departure from its underwriting guidelines. ... Indeed, it appears that some of the disclosures relied on by Defendants may have themselves included misleading statements that concealed the true extent of the poor quality of Countrywide's loans." Id. at *33-34.

loans—more than 80% based on MBIA's review (Compl. ¶ 68)—failed in material and myriad ways to comply with those standards, and that underwriters disregarded the fundamental principle of mortgage lending (i.e., the assessment of the borrower's ability and willingness to repay). Moreover, New York law is clear that general disclaimers in a contract do not absolve a defendant of liability for specific fraudulent misrepresentations. See P.T. Bank, 301 A.D.2d at 378 (disclaimer provision in underlying contract does not defeat claim of justifiable reliance where representations at issue were distinct, though related, to the disclaimer); Quaker Oats Co. v. Borden, Inc., No. 95 Civ. 9300 (RO), 1996 WL 255386, 2 (S.D.N.Y. May 15, 1996) (App. G) (general disclaimers in offering memorandum do not cure specific pre-contractual misrepresentations).

3. Whether MBIA's Reliance Was Justified Is a Jury Question

Ultimately, whether MBIA justifiably relied upon Credit Suisse's representations, including whether MBIA conducted appropriate due diligence for the risk it undertook, involves a fact-dependent inquiry that cannot be resolved on the pleadings. See P.T. Bank, 301 A.D.2d at 378 ("While the evidence might ultimately demonstrate that the information [the plaintiff] allegedly had regarding the true value of the loan collateral was either nonexistent or available to plaintiff with the exercise of reasonable [due] diligence ... it is inappropriate to determine those issues as a matter of law based solely on the allegations in plaintiff's complaint, at this point in the proceedings."); Knight Securities L.P. v. Fiduciary Trust Co., 5 A.D.3d 172, 173 (1st Dep't 2004) (same). Accordingly, Credit Suisse's motion to dismiss should be denied.

B. MBIA's Fraudulent Inducement and Contract Claims Are Not Duplicative

Credit Suisse next contends that its fraudulent misrepresentations are subsumed within its contractual representations and warranties and therefore the fraud claim must be dismissed as redundant. (Br. at 17-18.) This argument fails. As a matter of law, it is well-

settled that a fraudulent statement cannot "be absolved of its tortious impact simply by incorporating it verbatim into the language of the contract." Kelley v. CINAR Corp. (In re CINAR Corp. Secs. Litig.), 186 F. Supp.2d 279, 303 (E.D.N.Y. 2002). Indeed, this Court has repeatedly so held in denying motions to dismiss fraud allegations in cases that are indistinguishable from this one – cases that Credit Suisse ignores in this motion.

The Court of Appeals has long recognized that a claim of fraud lies where plaintiff alleges "a representation of present fact, not future intent, collateral to, but which was the inducement for the contract." Deerfield Comm. Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956 (1986) (holding that same oral representations formed the basis for the fraud and contract claims). New York courts have applied this principle to find that claims for fraud lie notwithstanding the fact that the representations that served as an inducement were subsequently included in the contract. See Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 119-20 (1969) (holding that fraud claim could proceed alongside contract claim based upon representations regarding the condition of the purchased property, even though those representations were also included in the purchase agreement); Merrill Lynch, 500 F.3d at 184 ("That the alleged misrepresentations would represent, if proven, a breach of the contractual warranties as well does not alter the result. A plaintiff may elect to sue in fraud on the basis of misrepresentations that breach express warranties. Such cause of action enjoys a longstanding pedigree in New York.")

The allegations in the Complaint satisfy this standard. Specifically, the Complaint alleges that CS Securities lied to MBIA about the quality of the loans that would be included in the transaction, including by providing false information about the characteristics of each loan, and false assurances about Credit Suisse's efforts to ensure the quality of the loans.

(Compl ¶¶ 28-29.) Facing virtually identical facts, this Court has repeatedly determined that fraud claims are not duplicative. In the MBIA v. Countrywide decision, Justice Bransten held:

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

Slip Op. at 10. (App. B). Justice Fried of this Court reached the same result in MBIA v. RFC:

> [T]he fraud cause of action survives here, because it is premised on allegations that RFC misrepresented various statistics and other existing facts about the underlying mortgage loans that RFC contributed to the mortgage loan pools. ... This cannot be characterized merely as an insincere promise of future performance. The alleged fraud is that RFC intentionally misrepresented material existing facts about the credit risks of the underlying mortgage loans so that they would appear to satisfy RFC's contractual representations and warranties, inducing MBIA to issue the Policies. "A fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim."

2009 WL 5178337 at *4. (App. A). In reaching his decision, Justice Fried relied upon First Bank of the Americas v. Motor Car Funding, Inc., 257 A.D.2d 287 (1st Dep't 1999). Like this case, plaintiff there sued based on losses suffered from loans that it had purchased from defendant, asserting that the loans did not comply with defendant's representations regarding the standards to which they were underwritten. The Appellate Division denied the motion to dismiss the fraud claim:

> Nor is the fraud claim rendered redundant by the fact that these alleged misrepresentations breached the warranties made by [defendant] in the Agreement. These warranties certified that as of the date of sale to [plaintiff], any individual loan would comply with certain underwriting guidelines. The core of plaintiff's claim is that defendants intentionally misrepresented material facts about various individual loans so that they would appear to satisfy these warranties, because otherwise plaintiff would have neither the obligation nor the desire to purchase them. This is fraud, not

> breach of contract. A warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim.

257 A.D.2d at 292.[10]

The cases relied upon by Credit Suisse are not to the contrary. They all involve the situation where the "only misrepresentation alleged ... was the contractual warranty itself," not a pre-contractual misrepresentation of present fact made to induce the plaintiff's agreement. Pramco III, LLC v. Partners Trust Bank, 15 Misc.3d 1142(A), 2007 WL 1574479 at *1 (N.Y.Sup. May 31, 2007) (cited at Def. Br. at 18). (App. H).[11] MBIA's Complaint does not simply allege that Credit Suisse never intended to fulfill their contractual obligations. Instead, the fraud claim is supported by numerous false statements of then-existing fact that were collateral to the contract and intended to induce MBIA's participation.

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[10] Credit Suisse attempts to limit First Bank by arguing that it stands only for the proposition that a fraud claim based on specific misrepresentations is not barred by general warranties in an agreement. (Defs. Br. at 19-20.) Even so, the Complaint meets that more limited criteria. Indeed, the In re Enron Corp. decision cited by Credit Suisse (Id. at 20) distinguished First Bank in a way that makes First Bank's applicability to the facts of this case undeniable: "In First Bank of the Americas, however, the warranties in the purchase and sale agreement at issue stated that certain loans to be offered to plaintiff subsequently would comply with certain underwriting guidelines. The alleged misrepresentations at issue involved the quality of the collateral, individual borrowers' credit history and the amount of the borrowers' down payments.... Although the court held that the alleged misrepresentations breached the general underwriting warranty in the underlying agreement, it appears that the misrepresentations also concerned matters relating to the individual loans that were not specifically addressed by that general warranty." 2005 WL 356985, at *11 n.44 (S.D.N.Y. Feb. 15, 2005) (App. I). Those may not have been the facts of In re Enron Corp., but they are precisely the facts alleged in the Complaint.

[11] See also HSH Nordbank AG v. UBS AG and UBS Secs. LLC, No. 600562/08, 2008 WL 4819599 (N.Y. Sup. Oct. 21, 2008) (App. J) (alleging defendant never intended to fulfill contractual obligations; there was no allegation of misrepresentation of present fact); Hawthorne Group LLC v. RRE Ventures, 7 A.D.3d 320, 776 N.Y.S.2d 273 (1st Dep't 2004) (same): J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc., 243 A.D.2d 422, 663 N.Y.S.2d 211 (1st Dep't 1997) (same); AJW Partners LLC v. Cyberlux Corp., 21 Misc.3d 1109(A), 2008 WL 4514171 (N.Y.Sup. Sept. 19, 2008) (App. K) (same); LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate, Inc., 01 Civ. 4389 (AGS), 2002 U.S. Dist. LEXIS 23323, at *34-35 (S.D.N.Y. Dec. 5, 2002) (App. L) (same); Lone Star Fund V(US), LP v. Barclays Bank PLC, No. 08-11038, 2010 WL 60897 (5th Cir. Jan. 11, 2010) (App. M) (under Texas law, fraud claim was duplicative where it was based on nothing more than representations in offering materials).

Finally, the irony of Credit Suisse's position should not be overlooked. 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 agreed 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.

II. MBIA HAS SUFFICIENTLY ALLEGED ITS CONTRACT CLAIMS

Credit Suisse's motion to dismiss MBIA's breach of contract claims contained in the Second and Fifth Causes of Action of the Complaint is perplexing and ultimately self defeating. Credit Suisse concedes that MBIA has adequately pleaded the Third Cause of Action in the Complaint for a breach of the Repurchase Protocol, i.e., that MBIA has pleaded the existence of a binding contractual obligation (i.e., the Repurchase Protocol) and how specifically it was breached (i.e., through "a breach of a representation and warranty that materially and adversely affects MBIA's interest" in the "specific loans" that have been identified for Credit Suisse). (Defs. Br. at 21 n.12). Notwithstanding this concession, Credit Suisse argues that the Complaint lacks adequate specificity with respect to the Second Cause of Action for Breach of the Representations and Warranties and the Fifth Cause of Action for Material Breach of the Insurance Agreement. (Defs. Br. at 22.) But the same facts establish all three causes of action. The breach of the loan-level representations and warranties found in the PSA is the trigger for the Repurchase Protocol. The pervasive and systemic nature of these breaches, the resultant breaches of the Repurchase Protocol and the breach of the transaction-level warranties found in the Insurance Agreement collectively give rise to the claims for material breach of the Insurance Agreement as a whole.

To maintain an action for breach of contract, a party need only provide notice of the transactions or occurrences underlying the claim. CPLR § 3013. The Complaint pleads: (1) that there was a valid agreement (the Insurance Agreement); (2) that Defendants breached particular provisions of that agreement, including the representations and warranties specifically identified in Paragraph 69; (3) that MBIA has conducted a review that has revealed breaches in more than 80% of the loans reviewed (Compl. ¶ 68); and (4) that MBIA has been harmed by, among other things, payment of more than $296 million in claim payments. This is sufficient to allege a cause of action for a breach of contract. See Shilkoff, Inc. v. 885 Third Ave. Corp., 299 A.D.2d 253, 254 (1st Dep't 2002) (declining to "hold plaintiff to particularity in a contract pleading"). Contrary to Credit Suisse's suggestion (Defs. Br. at 22), MBIA is not required to identify in the Complaint each of the thousands of loans that breach Defendants' warranties and representations.[12] These causes of action are not premised upon the breach of a warranty with respect to any single loan. Rather they arise from the pervasive nature of the loan-level breaches of the Repurchase Protocol, which Credit Suisse concedes are adequately plead, and which evince a material breach of the agreement as a whole. For example, Credit Suisse breached its warranty that the loans comply with prudent and proper underwriting guidelines because MBIA's sampling of the loans confirms that the vast majority do not. (Compl. ¶¶ 68-69.)[13] This breaches both the particular representation and warranty (Second Cause of Action) and – given the criticality of these warranties – of the Insurance Agreement itself (Fifth Cause of Action).

[12] The cases cited by Credit Suisse are not to the contrary. See Atkinson v. Mobil Oil Corp., 205 A.D.2d 719, 720 (2d Dep't 1994) (seeking to recover on contract theory for failure to obtain insurance, even though that failure was never mentioned in the Complaint); Kramer v. Carl M. Loeb, Rhoades & Co., 20 A.D.2d 634 (1st Dep't 1964) (dismissing complaint that was "barren of facts").

[13] If Credit Suisse's position is that MBIA's remedy is limited to the Repurchase Protocol, it is squarely at odds with the terms of the parties' agreement, which specifically states that the Repurchase Protocol is not "intended to be exclusive of any other available remedy ... and shall be in addition to other remedies given under the Transaction Documents or existing at law or in equity." (Compl. ¶ 53.)

Credit Suisse also argues that the Indemnification and Reimbursement causes of action must fail if the causes of action for breach of the Insurance Agreement fail. (Defs. Br. at 22.) Since, as set forth above, the latter causes of action should not be dismissed, neither should the Indemnification and Reimbursement claims.

III. THE CLAIM FOR BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS NOT DUPLICATIVE OF THE CONTRACT CLAIM

In moving to dismiss MBIA's claim for breach of the implied duty of good faith and fair dealing, Credit Suisse again ignores this Court's precedent. Facing virtually identical issues in the MBIA v. Countrywide case, Justice Bransten held that MBIA had properly stated a claim for breach of good faith and fair dealing by asserting "that corrective action—such as investigating loans which became over 30-days delinquent—would have preserved MBIA's benefits under the bargain, but [defendant] deliberately refused to take such action…." (App. B at 18). Similarly, MBIA alleges that Credit Suisse did not allocate sufficient resources to SPS to allow SPS to properly fulfill its servicing obligations in order to collect on the loans and retain value for the Trust (Compl. ¶¶ 60-61); that SPS stonewalled MBIA's efforts to obtain loan origination files (Compl. ¶ 59); and that SPS improperly chose to charge off loans rather than try to collect on them (Compl. ¶ 63-67). Thus, unlike the cases cited by Credit Suisse,[14] the Complaint does not simply allege that Credit Suisse did not perform its contractual duties. Rather, the Complaint details how Credit Suisse took steps separate and apart from its contractual obligations to prevent MBIA from enjoying the benefit of the parties' bargain. At the very least, the issue is not appropriate for resolution at this early stage. See Citi Mgmt. Group, Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487, 487 (1st Dep't 2007) (refusing to dismiss

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[14] See N.Y. Univ. v. Cont. Ins. Co., 87 N.Y.2d 308 (1995); Rather v. CBS Corp., 68 A.D.3d 49, 886 N.Y.S.2d 121 (1st Dep't 2009); Levi v. Utica First Ins. Co., 12 A.D.3d 256 (1st Dep't 2004); R.I. Island House LLC v. North Town Phase II Houses, Inc., 51 A.D.3d 890 (1st Dep't 2008).

as redundant a claim for breach of implied duty of good faith and fair dealing); Sims v. First Consumers Nat'l Bank, 303 A.D.2d 288, 290 (1st Dep't 2003) (same).[15]

IV. MBIA IS ENTITLED TO PUNITIVE AND CONSEQUENTIAL DAMAGES

Credit Suisse's motion to strike MBIA's demand for punitive and consequential damages should be denied based on black-letter law. "Punitive damages are available in a tort action where 'the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton.'" Waltree Ltd. v. ING Furman Selz L.L.C., 97 F. Supp.2d 464, 470-71 (S.D.N.Y. 2000) (quoting Swersky v. Dreyer and Traub, 219 A.D.2d 321, 328 (1st Dep't 1996)). Credit Suisse's conduct was willful and in conscious disregard of MBIA's rights. (Compl. ¶¶ 32-33, 57, 59, 63-67.) Accordingly, it is a jury issue whether or not MBIA is entitled to punitive damages. See MBIA v. RFC, 2009 WL 5178337 at *4 (App. A).

Regarding MBIA's demand for consequential damages, New York law recognizes that such damages are appropriate if the damages were reasonably foreseeable at or prior to the time of the contract. See Bi-Economy Market, Inc. v. Harleysville Ins. Co., 10 N.Y.3d 187, 192-94 (2008); Panasia Estates, Inc. v. Hudson Ins. Co., 10 N.Y.3d 200, 203 (2008). The Complaint alleges that the Policy was obtained in order to ensure that MBIA would make payments of interest and ultimately principal on certain securities in the event that the pool of loans in the Trust did not generate sufficient income to cover such payments. (Compl. ¶ 2.) Credit Suisse, as a sophisticated party with a long history in these types of transactions, (Id. ¶¶ 25-26), certainly understood the consequences to MBIA that would accompany a failure of the loans to conform

[15] Although Justice Fried dismissed the cause of action for breach of the implied duty of good faith and fair dealing in MBIA v. RFC, (App. A), that case did not include the allegations, as here, that the defendants underfunded the entity charged with servicing the loans and improperly diverted assets from the Trust (in the form of charged-off loans). As set forth above, these facts evince Credit Suisse's bad faith.

to their represented attributes. In any event, the issue of what damages were reasonably foreseeable is one for the jury. See MBIA v. RFC, 2009 WL 5178337 at *4 (App. A).

V. MBIA'S DEMAND FOR A TRIAL BY JURY IS APPROPRIATE.

Credit Suisse's motion to strike MBIA's jury demand should be denied. Although it is true that the Insurance Agreement includes a general jury-trial waiver (Defs. Br. at 24), such a waiver does not apply under New York law to a claim that would deny enforcement of the agreement, such as fraud. See, e.g., Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc., 174 A.D. 2d 963, 965 (3d Dep't 1991); Uribe v. Merchants Bank of New York, 227 A.D. 2d 141 (1st Dep't 1996). Under New York law, the question of fraud in the inducement of the contract should be tried to a jury. See, e.g., Wells Fargo Bank v. Stargate Films, Inc., 18 A.D.3d 264, 264 (1st Dep't 2005) (affirming denial of motion to strike jury trial on defense of fraud); Ferry v. Poughkeepsie Galleria Co., 602 N.Y.S.2d 267 (4th Dep't 1983) (same).[16]

CONCLUSION

Credit Suisse's motion to dismiss should be denied in all respects.

Dated: New York, New York
March 5, 2010

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[16] Tiffany at Westbury Condominium v. Marelli Develop. Corp., 34 A.D.3d 791, (2d Dep't 2006), relied upon by Credit Suisse, is distinguishable. There, the Second Department held that a jury-trial waiver applied to a breach of fiduciary duty claim arising from activities that occurred *after* the execution of the agreement. That is fundamentally different from the fraudulent inducement claim in this case, involving representations made *before* the execution that undermine the validity of the agreement.