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Assured Guar. Mun. Corp. v DLJ Mtge. Capital, Inc.
2014 NY Slip Op 51044(U)
Decided on July 3, 2014
Supreme Court, New York County
Kornreich, J.
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Decided on July 3, 2014

Supreme Court, New York County

Assured Guaranty Municipal Corp., F/K/A FINANCIAL SECURITY ASSURANCE INC., and ASSURED GUARANTY CORP., Plaintiffs,

against

DLJ Mortgage Capital, Inc., CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE BOSTON MORTGAGE SECURITIES CORP., Defendants.

652837/2011

Patterson Belknap Webb & Tyler LLP, for Assured (in DBSP).

Quinn Emanuel Urquhart & Sullivan, LLP, for Assured (in DLJ).

Latham & Watkins LLP, for Deutsche Bank.

Orrick, Herrington & Sutcliffe LLP, for Credit Suisse.

Murphy & McGonigle, P.C., for GreenPoint.

Shirley Werner Kornreich, J.

This decision is being issued in conjunction with a decision in a related residential mortgage backed securities (RMBS) case brought by a monoline insurance company, styled *Assured Guaranty Municipal Corp. v DB Structured Prods., Inc.*, Index. No. 650705/2010 (*DBSP*). The decisions are meant to be read together. In the instant case, the monoline alleges both fraud and contractual put-back claims, while in *DBSP*, the monoline only asserts contractual put-back claims. The court assumes familiarity with the *DBSP* decision, the procedural history of this action, and the prior rulings of this court and the Appellate Division.Before the court are Motion Sequence Numbers 004, 005, and 006, which are consolidated for disposition. In motion 006, defendants DLJ Mortgage Capital, Inc. (DLJ), Credit Suisse Securities (USA) LLC (CSS), and Credit Suisse First Boston Mortgage Securities Corp. (CS Boston) (collectively, Credit Suisse) seek dismissal of the Amended Complaint's (the AC): (1) fraud claims (the first and second causes of action); and (2) claims against new defendant CS Boston. The motion is granted and the fraud claims are dismissed for the reasons stated below.

The dismissal of the fraud claims directly impacts motions 004 and 005, which seek to compel discovery. In motion 004, plaintiffs Assured Guaranty Municipal Corp. and Assured [*2]Guaranty Corp. (collectively, Assured) move to compel Credit Suisse to produce documents concerning: (1) the repurchase analysis Credit Suisse performed after Assured made pre-litigation repurchase demands; and (2) credit default swaps (CDS) entered into by Credit Suisse. For the reasons explained below, Assured is entitled to Credit Suisse's non-privileged repurchase records but Assured is not entitled to Credit Suisse's CDS records.

In motion 005, Credit Suisse moves to compel Assured to produce documents regarding Assured's: (1) knowledge of alternative loan documentation programs; (2) internal RMBS policies and procedures; (3) understanding of risk in RMBS transactions; (4) originator due diligence; and (5)

retrospective review. The motion is denied.

I.Procedural History

This litigation concerns six RMBS transactions for which Assured, a monoline insurer, provided financial guaranty coverage. DLJ originated or acquired the loans, CSS was the underwriter, and CS Boston was the depositor.Assured commenced this action on October 17, 2011, asserting contractual put-back claims against DLJ and CSS. *See* Dkt. 2. Assured did not assert a fraud claim. On October 21, 2013, Assured filed the AC, which asserted fraud claims and added CS Boston as a defendant. *See* Dkt. 118.[FN1] In an order dated February 27, 2014, the Appellate Division partially reversed this court's decision on the original motion to dismiss [37 Misc 3d 1212(A)] regarding the "sole remedy" clause. 114 AD3d 598. On May 6, 2014, the Appellate Division modified its decision to reflect the scope of the issues appealed, and the rescissory damages claim dismissed by this court on multiple grounds [37 Misc 3d 1212(A), at *6-7] was not reinstated. 117 AD3d 450.One such ground was Assured's continued acceptance of premiums, a well established bar to rescinding an insurance policy. *See* 37 Misc 3d 1212(A), at *7 (collecting cases). In fact, before the Appellate Division issued its modified order, Assured voluntarily stipulated "not to seek rescissory damages." *See* Dkt. 135. Hence, coming into this motion, Assured's sole avenue to a rescission-type remedy was limited to its fraud claims. Since, for the reasons explained below, the fraud claims are dismissed, Assured now is limited to litigating its contractual put-[*3]back claims.[FN2] On April 10, 2014, during oral argument on the instant motions, the parties were directed to submit supplemental briefs on the applicability of the New York Insurance Law. The parties filed these briefs on May 1, 2014. *See* Dkt. 137 & 138.

II.Credit Suisse's Motion to Dismiss (Seq. 006)

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. Amaro v Gani Realty Corp., 60 AD3d 491 (1st Dept 2009); Skillgames, LLC v Brody, 1 AD3d 247, 250 (1st Dept 2003), citing McGill v Parker, 179 AD2d 98, 105 (1992); see also Cron v Harago Fabrics, 91 NY2d 362, 366

(1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. Skillgames, id., citing Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. Amaro, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." Skillgames, 1 AD3d at 250, citing Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 326 (2002) (citation omitted); Leon v Martinez, 84 NY2d 83, 88 (1994).

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009); Perrotti v Becker, Glynn, Melamed & Muffly LLP, 82 AD3d 495, 498 (1st Dept 2011). Pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491 (2008).

B.Assured's Fraud Claims and the RMBS Risk Structure

*Assured alleges it was fraudulently induced to issue the subject financial guarantee policies based on Credit Suisse's countless misrepresentations about the loans in the transaction. Some of the alleged malfeasance expressly falls under the ambit of the PSA's representations and warranties, such as lies about borrowers' income.[FN3] Other malfeasance, such as "wholesale [*4]abandonment of underwriting standards," does not.[FN4]*

As discussed in DBSP, before a monoline agrees to guarantee revenue to RMBS investors, the monoline and the bank negotiate their risk of loss. Monolines take no risk on non-conforming loans and expressly negotiate the universe of loan defects that constitute non-conformance, negotiations which result in the representations and warranties. Banks want to limit their exposure by negotiating for as narrow a universe of representations as possible (even if banks can put-back non-conforming loans to originators under MLPAs,[FN5] because originators pose more counterparty credit risk than global banks). The universe of representations ultimately agreed-to is the only universe of non-conformance coverage that monolines are entitled to. The monoline's risk

is every possible problem with the loans not covered by the representations and warranties. So, for instance, when Assured does not negotiate for the inclusion of a "no fraud rep"[FN6] (or any other representation not included in the PSA), perhaps, thereby, charging a higher premium, it makes a conscious decision to take the risk that if such non-included representations cause losses resulting in claims payments, Assured will not be reimbursed by Credit Suisse via a put-back.[FN7]

Here, Assured agreed to issue insurance to investors for all loan losses, while bargaining for partial reinsurance from Credit Suisse for non-conforming loan losses. By asserting a fraud claim, Assured is trying to broaden the scope of its bargained-for partial loan loss protection to cover all loan loss risk. Stated another way, Assured is trying to rewrite the contract by broadening the scope of its non-conformance protection. This is an attempt to retroactively alter the parties' risk allocation the crux of this transaction. To allow this is not only commercially unreasonable, it would violate the axiom that courts should interpret contracts "in accord with the parties' intent" and may not "alter the contract to reflect its personal notions of fairness and equity." Greenfield v Philles Records, Inc., 98 NY2d 562, 569-70 (2002).

Assured, in seeking a way around this problem, relies on the general principle that one need not expressly list every possible way in which one might be defrauded in a contract. This is true. See Silver Oak Capital L.L.C. v UBS AG, 82 AD3d 666, 667 (1st Dept 2011). Only specific, itemized waivers disclaiming reliance on particular representations are valid. Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 137 (1st Dept 2014); Steinhardt Group Inc. v Citicorp, 272 AD2d 255, 256 (1st Dept 2000), accord Danann Realty Corp. v Harris, 5 NY2d 317 (1959). Nonetheless, "a fraud claim is barred where a sophisticated and well-counseled entity fails to include an appropriate prophylactic provision in the agreement governing the transaction from which the legal dispute arises to ensure against the possibility of misrepresentation." ACA Fin. Guar. Corp. v Goldman, Sachs & Co., 106 AD3d 494, 495 (1st Dept 2013) (emphasis added), accord Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 76 AD3d 310, 320-21 (1st Dept 2010). To be sure, appellate authority [e.g., CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co., 106 AD3d 437, 437-38 (1st Dept 2013)] precludes this court, on a motion to dismiss, to deem Assured's failure to conduct due diligence on the loan files as an absolute bar to a fraud claim. Cf. UST Private Equity Invs. Fund v Salomon Smith Barney, 288 AD2d 87, 88 (1st Dept 2001) ("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").[FN8] But the issue here is not whether Assured's reliance on the representations and warranties that it bargained for was reasonable since, when one procures an express contractual warranty, one may absolutely rely on it. CBS Inc. v Ziff-Davis Pub. Co., 75 NY2d 496, 503 (1990) ("The critical question is not whether the buyer believed in the truth of the warranted information but whether [it] believed [it] was purchasing the [seller's] promise [as to its

*truth].'"). Instead, the relevant inquiry here, where the contract itself was insurance one big prophylactic mechanism and where all the risk was on the negotiating table and expressly [*5]allocated between sophisticated parties, is: can Assured sue for fraud arising from the very risk it bargained to assume? The answer, of course, is no.[FN9] See ACA, 106 AD3d at 496 ("because parties can seldom be certain that the representations made by other contracting parties are indeed true, they must lest their cause of action for fraud be barred insert the requisite prophylactic provision to ensure against the possibility of misrepresentation.") (emphasis added).C.The Scope of Assured's Fraud Claims*

Assured asserts fraud claims which are duplicative of the bargained-for representations. The PSA's warranties cannot give rise to Assured's fraud claim because they implicate the very contractual put-back duties covered by its breach of contract claim. This makes the claim duplicative. See Mosaic Caribe, Ltd. v AllSettled Group, Inc., 117 AD3d 421, 422-23 (1st Dept 2014),[FN10] citing Manas v VMS Assocs., LLC, 53 AD3d 451, 453 (1st Dept 2008). Fraud claims, like all tort claims, are not viable when they arise from the same facts and implicate the very same duties governed by the contract. See id. Indeed, by reasserting the breach of contract claim as fraud, Assured, in effect, dispenses with its burden of proving that its contractual damages arose from breaches of its bargained-for representations and warranties, and the negotiated put-back remedy is undermined.

Assured's remaining fraud claims seek to recover for malfeasance that is not contractually defined non-conformance that is, risk not covered by the representations and warranties. The argument supporting these claims is that since Assured cannot contractually recover for losses arising from such risk, these losses arise from a "breach of duty distinct from, or in addition to, the breach of contract." See Shugrue v Stahl, 117 AD3d 527 (1st Dept 2014), quoting Non-Linear Trading Co. v Braddis Assocs., Inc., 243 AD2d 107, 118 (1st Dept 1998). However, just because losses are not recoverable under the contract does not mean that a duty extraneous to the contract exists or that such duty was breached. Though contracts do not and cannot cover every eventuality and always include an implied duty of good faith and fair dealing [see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002)], when the contract itself sets forth an express risk allocation, one cannot claim that one's counterparty had an unremunerated duty to warn of or prevent a loss when the duty to diligence the risk of such loss cannot be fairly imputed to that counterparty.

Here, Credit Suisse had neither the duty nor the incentive to thoroughly vet the loan pool. Just as Assured claims it reasonably declined to review loan files since it had warranty protection, so too can Credit Suisse claim that it declined to make similar diligence efforts since it had put-back rights to the originators.[FN11] Credit Suisse, like so many banks sponsoring RMBS transactions,

*had no interest in making the sort of underwriting or due diligence efforts that insurance companies typically perform. Banks wanted a fee for structuring RMBS transactions,[FN12] not RMBS market risk.[FN13] By having Assured issue insurance, the burden of [*6]diligencing risk not covered by the representations and warranties could be shifted from Credit Suisse to Assured. Though Credit Suisse still had some incentive to diligence non-conforming loan loss risk, it had no incentive to diligence conforming loan loss risk, since the former is the only liability Credit Suisse was left with under the negotiated transaction documents (and which was supposed to be mitigated by put-backs to originators).*

It is not Credit Suisse's job to conduct Assured's due diligence. Moreover, Assured, a sophisticated financial insurance company, is supposed to decide for itself the relevant universe of risk it deems to be material to diligence before issuing insurance. And Assured did just that. Assured made the business decision to forgo conducting a thorough investigation of the state of the origination market and, instead, relied on warranty protection as a cheap proxy that it hoped would correlate to all origination risk. Reasonable minds may disagree about whether this was a prudent strategy. In hindsight, Assured's decision looks terrible. But hindsight is irrelevant. What matters is whether Assured, when it decided to issue the insurance, made a conscious decision to not conduct robust due diligence on the U.S. mortgage origination industry, and, instead, took the risk that it would be sufficiently protected by representations and warranties. This is no nettlesome inquiry; it is clearly what occurred.

*So, to summarize, there are an infinite number of "bad" facts that make lending money to prospective homeowners a risky venture. Insufficient income, substantial debt, and poor credit are only some of the risks. But, when a sophisticated insurance company and global bank sit down at the negotiating table to bargain for the exclusive list of conditions entitling the insurance company to put-back loans, courts must give deference to the outcome of that negotiation. Insuring a billion dollar transaction is not a casual pastime that one does without a profound understanding of the relevant market risks. An insurer might not review the loan files if the cost of doing so is incompatible with its business model.[FN14] However, if an insurer forgoes conducting [*7]due diligence on the loan files and negotiates to bear the risk of malfeasance that such diligence would reveal, it then cannot claim it was fraudulently induced to enter into the transaction. Conduct due diligence or procure a sufficient prophylactic coverage to protect against your undiligenced risk. Do neither, and you are limited to your contractual bargain. At the end of the day, Assured cannot use a fraud claim to broaden the scope of its warranties.[FN15]*

1.MBIA

In an order dated July 30, 2010 (MBIA I), this court initially declined to dismiss fraud claims raised by MBIA, another monoline. See Index No. 603751/2009, Dkt. 40. MBIA I, rendered in 2010, was the first decision in which this court grappled with the complexities of RMBS. Over the next four years, this court handled numerous RMBS cases, including investor RMBS put-back and fraud claims involving RMBS, CDOs, CDSs, other synthetic securities, and, of course, other monoline cases, such as DBSP. Involvement with these cases has given the court a deeper understanding of RMBS transactions. What has become clear is that not all RMBS cases are the same. Contractual put-back cases are very different from securities fraud cases. Additionally, the factors relevant to fraudulent inducement of investments in RMBS and synthetic CDOs differ greatly.

Shortly after the court's initial decision in MBIA I, it realized it had erred.[FN17] *In an order dated June 1, 2011 (MBIA II), the court sua sponte vacated its MBIA I decision and dismissed the fraud claims. See 32 Misc 3d 758. MBIA II, in painstaking detail, parsed all of the relevant contracts, the prospectus supplement and case law, explaining why MBIA's fraud claims were not legally viable.*

However, less than a month later, on June 30, 2011, the Appellate Division issued Countrywide I, in essence, overruling MBIA II. MBIA, therefore, moved for renewal. In an order dated October 7, 2011 (MBIA III), the court felt compelled to reinstate MBIA's fraud claim, but it, nonetheless, extensively analyzed the transaction documents setting the case up for appeal. See 33 Misc 3d 1208(A). The court focused heavily on the prospectus and prospectus supplement, which provided MBIA with clear notice of the very loan issues that formed the gravamen of its fraud claims. For example, the decision noted:

[T]he 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.*

*MBIA III, 33 Misc 3d 1208(A), at *15 (bold in original; italics added). But Credit Suisse did not appeal, and MBIA II and MBIA III were never expressly considered at the appellate level.***[FN18]**

This court will not make the same mistake here. The primary purpose of the instant decision is to set forth what this court hopes is a compelling explanation of why the risk allocation in RMBS transactions makes the allowance of Assured's fraud claims unreasonable both legally and economically.

2.Countrywide

*In the MBIA decisions, this court principally relied on DDJ Mgmt., LLC v Rhone Group L.L.C., 15 NY3d 147 (2010),***[FN19]** *which, along with Countrywide I and its progeny, preclude [*8]dismissal based on reasonable reliance for failure to review the loan files.***[FN20]** *However, as explained earlier, the reasonable reliance issue is not at stake; the prophylactic provision rule is a rule reaffirmed by the Appellate Division in 2013,***[FN21]** *even after Countrywide II was decided. Though ABACUS (see ACA, 106 AD3d 494) and the subject transaction are different (ABACUS was a synthetic CDO, not an RMBS), the prophylactic provision rule should apply to similarly sophisticated monolines like ACA and Assured when they protest the conduct of the sponsor bank, be it Goldman Sachs or Credit Suisse.*

*When read closely, neither Countrywide I nor Countrywide II expressly preclude dismissal of Assured's fraud claims on the grounds discussed herein. The Countrywide decisions concerned three main issues: (1) reasonable reliance; (2) duplication of contract and fraud [*9]claims; and (3) loss causation. The first issue is inapposite because, as explained earlier, Assured's failure to review loan files is not, on its own, enough to grant a pre-discovery motion to dismiss. But see MBIA Ins. Corp v J.P. Morgan Secs. LLC, supra, 43 Misc 3d 1221(A) (failure to review fraudulent report supposedly relied on by MBIA warrants dismissal of fraud claim on summary judgment motion); Phoenix Light, SF Ltd. v Goldman Sachs Group, Inc., supra, 43 Misc 3d 1233(A) (granting motion to dismiss RMBS fraud claim due to failure to review loan files).*

However, the second issue, the duplication of contract and fraud claims, has become an issue of

much confusion. Lately, it seems that virtually every commercial breach of contract case in New York involves fraud claims. This is regrettable. **[FN22]** *In fact, a fair reading of the majority of non-monoline appellate precedent in this state does provide clear guidance as to when fraud claims are barred as duplicative: if the contract governs the scope of the disputed subject matter, there cannot be a fraud claim unless "a breach of duty which is collateral or extraneous to the contract" is identified. Rather v CBS Corp., 68 AD3d 49, 59 (1st Dept 2009), quoting Krantz v Chateau Stores of Canada Ltd., 256 AD2d 186, 187 (1st Dept 1998) (collecting cases); see Vue Mgmt., Inc. v Photo Assocs., 81 AD3d 569 (1st Dept 2011) (fraud claim not allowed where it "was premised upon factual allegations germane to its initial claim for breach of contract") (emphasis added). This has always been the law. As the Court of Appeals explained:*

A tort obligation is a duty imposed by law to avoid causing injury to others. It is "apart from and independent of promises made and therefore apart from the manifested intention of the parties" to a contract. Thus, [a] defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations. The very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim. Where a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort, or where a party engages in conduct outside the contract but intended to defeat the contract, its extraneous conduct may support an independent tort claim. Conversely, where a party is merely seeking to enforce its bargain, a tort claim will not lie.

NY Univ. v Continental Ins. Co., 87 NY2d 308, 316 (1995) (citations omitted; emphasis added).

In 2011, when Assured commenced this action by making contractual put-back claims, it merely sought to enforce its bargain with Credit Suisse. The parties' loan loss risk was on the negotiating table and allocated pursuant to warranties and prospectus supplements. **[FN23]** *Although [*10]RMBS transactions have lots of moving parts and involve lots of parties (banks, originators, insurance companies, trusts, investors, etc.), the contract between the monoline and the bank is not that broad. To wit, the only real subject matter of the contract is insurance. The very purpose of the contract is the allocation of risk between Assured and Credit Suisse. To contend that Assured's unprotected risk* **[FN24]** *can be deemed to arise from an independent, extra-contractual duty, misses the point of the contract and is flatly contradicted by Assured's own pleadings. See AC ¶ 265 (loans not "underwritten in accordance with the applicable Underwriting Guidelines" are non-conforming*

and may be put-back).Turning now to loss causation, Countrywide II held that the "[trial] court was not required to ignore the insurer/insured nature of the relationship between the parties to the contract in favor of an across the board application of common law." Countrywide II, 105 AD3d at 412. The context was whether the loss causation principle of ruling out intermediate causes (e.g., the market crash) was required where New York Insurance Law §§ 3105 & 3106 applied. See 34 Misc 3d 895, 905-09; see generally Loreley, supra, 42 Misc 3d at 863-64 (collecting cases). Justice Bransten held §§ 3105 & 3106 applied and the Appellate Division affirmed. Based on the parties' supplemental briefs, this court agrees that §§ 3105 & 3106 applies to Assured's financial guarantee policies.However, if the elements of a monoline's common law fraud claim are to be informed by the Insurance Law, then the whole of insurance law ought to be considered. It is well settled that "an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived.'" ELRAC, Inc. v Ward, 96 NY2d 58, 75 (2001), quoting Penn. Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, 468 (1986). The purpose of this rule is to prevent an insurance company from recovering for "the very claim for which the insured was covered." Jefferson Ins. Co. of NY v Travelers Indem. Co., 92 NY2d 363, 373 (1998); Fireman's Ins. Co. of Newark, N.J. v Wheeler, 165 AD2d 141, 144 (3d Dept 1991) ("A person not named in an insurance policy is considered an insured for purposes of preventing subrogation when, under the circumstances, the insurer seeking subrogation is attempting, in effect, to recover from the insured on the risk the insurer had agreed to take upon payment of the premium") (emphasis added), quoting 6A Appleman, Ins. Law and Prac. § 4055, at 77 (1990 supp).

*Here, monolines paid claims to investors and made put-back claims that are both direct and derivative of the investors' rights. Though monolines are not actually suing their own insured, and hence strict antisubrogation does not apply, a prohibition on insurance companies recovering their claims paid in a manner which retroactively eliminates for themselves the very risk they insured (conforming loan losses) is precisely the sort of insurance law principle that should "inform" Assured's fraud claims because this court is not supposed to ignore the "insurer/insured nature of the relationship between the parties." If the court is to fashion a special, less burdensome common law loss causation standard on a monoline, it is fair game to [*11]apply quasi-antisubrogation risk shifting limits to that fraud claim.That being said, and even if the fraud claims were not dismissed, the applicability of §§ 3105 & 3106 does not affect the need to prove basic proximate causation. Even though Assured does not have to parse out losses caused by non-conformance from losses caused by market forces, it still must prove that its losses were caused by non-conforming, as opposed to conforming loans. Put another way, non-conforming loan losses that would have been caused by market forces are recoverable, but conforming loan losses are not recoverable because conforming loan losses do not arise from a breach.*

*This, at the end of the day, is really the point: a monoline cannot recover for the very risk it assumed, no matter if one frames the matter as an issue of quasi-antisubrogation or basic proximate causation. Assured and Credit Suisse, highly sophisticated parties, bargained for a specific risk distribution. That bargain precludes Assured's fraud claim, which is dismissed.Finally, notwithstanding all of the above, the instant case is very much a viable breach of contract action. The allegation that Credit Suisse has unjustifiably refused to repurchase non-conforming loans, if proved, is galling for the reasons explained by Judge Haight. See Deutsche Bank Nat'l Trust Co. v WMC Mortg., LLC, 2014 WL 1289234, at *10 (D Conn Mar. 31, 2014) ("the grief WMC professes over a lost opportunity to cure is not genuinely felt: rather, that purported lost opportunity is a fiction, fashioned for the sake of advocacy").*

III.Assured's Motion to Compel (Seq. 004)

The court now turns to the motions to compel.

Assured requests documents concerning Credit's Suisse CDS transactions. Since the fraud claims are dismissed, CDS transactions, where Credit Suisse was "short" RMBS, are irrelevant because motive is not an element of a put-back claim. Loans were either conforming or not, no matter what Credit Suisse thought of the RMBS market.

*However, banks often use CDSs or other shorting mechanisms for reasons that have nothing to do with the subject transaction. Banks hedge their market exposure in ways that make it difficult, if not impossible, to align a hedge with a corresponding transaction.[FN25] Nonetheless, even where the netting process can be untangled, banks' hedging is usually not nefarious, even if [*12]it looks that way in hindsight.[FN26] Banks will often take short term exposure on client trades, and then immediately offload or hedge the exposure. Banks pocket a fee on the transaction, and their profit is their fee minus the cost of the hedge. Without a showing that such information is directly material and necessary to the claim at issue, this court will not compel banks to reveal their net position on a market.*

As for Assured's request for Credit Suisse's repurchase analysis conducted in response to Assured's repurchase demands, this issue has been dealt with extensively by Magistrate Judge Francis in

similar litigation in federal court in the Southern District of New York. See Assured Guar. Mun. Corp. v UBS Real Estate Secs. Inc., 2013 WL 1195545 (Mar. 25, 2013); MASTR Adjustable Rate Mortgages Trust 2006-OA2 v UBS Real Estate Secs. Inc., 2013 WL 6405047 (Dec. 6, 2013) and 2014 WL 25709 (Jan. 2, 2014); see also Syncora Guarantee Inc. v EMC Mortg. Corp., 2013 WL 2552360 (ND Cal Jun. 10, 2013) (concurring with Judge Francis' analysis). Judge Francis explained:

[B]ecause the agreements governing the certificates at issue in this litigation obligated defendant [UBS] to conduct reviews of loans subject to repurchase demands, "UBS would have performed [ ] repurchase analyses even had there been no threat of litigation." More specifically, such an analysis was required so that UBS could determine, within the 90-day period allowed in the agreements, whether to cure the alleged breach, substitute a conforming loan, or repurchase the loan. [In footnote 1, Judge Francis states that "UBS' assertion that the agreements did not obligate UBS to perform such an analysis in order to decide how to respond to a repurchase demand is untenable."]. Because they were created in accordance with a contractual obligation, such analyses are not protected by the work product doctrine unless UBS can show that they were specifically directed to litigation strategy or defenses and were therefore created in a form significantly different than they otherwise would have been.

*2013 WL 6405047, at *1 (citations omitted).*

This court agrees with Judge Francis' analysis. Indeed, the Appellate Division has held that "documents and information concerning defendants' repurchase review, generated in response to plaintiff's repurchase requests, are discoverable." MBIA Ins. Corp. v Countrywide Home Loans, Inc., 93 AD3d 574, 575 (1st Dept 2012). Here, as in these other monoline cases, Credit Suisse has a contractual obligation to conduct a repurchase analysis, making the documents discoverable. Of course, if Credit Suisse contends that some of the requested repurchase documents are privileged, Credit Suisse must serve Assured with a privilege log. Disputes will be referred to Special Referee Jeremy Feinberg.IV.Credit Suisse's Motion to Compel (Seq. 005)

Credit Suisse seeks documents about Assured's: (1) knowledge of alternative loan documentation programs; (2) internal RMBS policies and procedures; (3) understanding of risk in RMBS transactions; (4) originator due diligence; and (5) retrospective review. These documents are irrelevant given that the fraud claim was dismissed. In this put-back action, Assured's knowledge, policies, understanding, due diligence, and retrospective review are all irrelevant to whether

*Assured can recover losses caused by non-conforming loans. Assured's [*13]reliance on a particular warranty is irrelevant since Assured negotiated and purchased the right to rely on the warranted fact being true. See Ziff-Davis, 75 NY2d at 503. Ziff-Davis concerned a transaction where the seller made "express warranties as to the truthfulness of the previously supplied financial information. Thereafter, pursuant to the purchase agreement, the buyer conducted its own investigation which led it to believe that the warranted information was untrue." Id. at 498-99 (emphasis added). Nonetheless, the Court of Appeals allowed the buyer to enforce the warranty.Credit Suisse further argues that Assured's knowledge about the riskiness of loans is relevant to determining whether a false warranty "materially and adversely affect[ed] its interest." Credit Suisse is reading this as a subjective standard, dependent on Assured's expectations. Credit Suisse is wrong. It is well settled that this is an objective standard. See Countrywide II, 105 AD3d at 413, citing Syncora Guarantee Inc. v EMC Mortg. Corp., 874 FSupp2d 328, 339 (SDNY 2012).*

As for the rest of Credit Suisse's requests, which seek information about Assured's general knowledge of the RMBS market, such discovery demands have been rejected by most courts. See Ambac Assur. Corp. v Countrywide Home Loans, Inc., 2013 WL 6816251 (Sup Ct, NY County Dec. 17, 2013),[FN27] citing MBIA Ins. Corp. v Countrywide Home Loans, Inc., 27 Misc 3d 1061, 1077 (Sup Ct, NY County 2010); see also Assured Guar. Mun. Corp. v UBS Real Estate Secs. Inc., 2012 WL 5927379 (SDNY 2012) (Francis, J.) ("Assured's general knowledge of the RMBS market, however, is too tenuously related to any plausible defense to be a proper subject of discovery"). Only transaction-specific documents are relevant to this case. Credit Suisse's motion, therefore, is denied. Accordingly, it is

ORDERED that defendants' motion to dismiss the fraud claims is granted, and the first and second causes of action in the Amended Complaint are dismissed; and it is further

ORDERED that plaintiffs' motion to compel is (1) denied on the CDS documents; but (2) granted on defendants' repurchase analysis, which must be produced within 30 days of the entry of this order on the NYSCEF system, along with a privilege log if defendants claim that any portion of the documents are privileged; and it is furtherORDERED that defendants' motion to compel is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a status conference on July 24, 2014 at 11:00 in the forenoon.

Dated: July 3, 2014ENTER:

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J.S.C.

Footnotes

Footnote 1: *The AC cannot be dismissed for failure to satisfy CPLR 3016(b)'s particularity requirements. Credit Suisse's dim view of the loans [AC ¶¶ 18, 23-24], knowledge of a broken due diligence process [¶ 19], relationship to systemic underwriting and post-origination misconduct [¶¶ 20-21], and violation of SEC regulatory reporting rules [¶ 22] are discussed with a level of detail that is to be commended. To be sure, all of this is problematic, if not criminal. But, the morality or legality of Credit Suisse's role in the financial crisis is not at issue. Scores of dismissed lawsuits across the country demonstrate that banks' involvement in the crisis does not mean that every RMBS related investment can be rescinded. Indeed, the monolines themselves played a key role in propping up the RMBS market, since without their AAA credit rating (discussed further below), non-investment grade RMBS would not have been sold to certain institutional investors, and the size of the RMBS market would have been drastically smaller. Nonetheless, even if a complaint sets forth particularized, specific, interesting, and even scandalous detail, the wealth of such detail is no substitute for actually stating a claim for fraud.*

Footnote 2: *The parties' disputes concerning whether CS Boston was properly added as a new defendant or if the fraud claims asserted against it are time-barred are moot because the fraud claims against all defendants are dismissed on the merits.*

Footnote 3: *Assured admits that loans not "underwritten in accordance with the applicable Underwriting Guidelines" are non-conforming and may be put-back. See AC ¶ 265. This is a breach of contract issue, for which Assured might recover. Assured does not need a fraud claim for this. However, if loans complied with their Underwriting Guidelines and were not otherwise non-conforming, not only was Assured not defrauded, there was no breach of contract.*

Footnote 4: *The "wholesale abandonment" claim is viable in investor RMBS fraud suits, where the trustee and monolines, but not the investors, have put-back protection. See Allstate Ins. Co. v Credit*

*Suisse Secs. (USA) LLC, 42 Misc 3d 1220(A), at *10 (Sup Ct, NY County 2014) (Friedman, J.) (collecting cases); see generally Walnut Place LLC v Countrywide Home Loans, Inc., 96 AD3d 684 (1st Dept 2012).*

Footnote 5: *It should be noted that some MLPAs provide broader representations and warranties (reps) to banks than the corresponding PSA does to the monoline (e.g., early payment defaults). Consequently, just because a loan was put-back by a bank to an originator, it does not necessarily follow that the inclusion of such loan in the trust is a breach of the monoline's reps. However, since non-conforming loans may simultaneously breach multiple reps (and indeed, early payment defaults likely correlate to other breaches), a bank cannot nominally invoke a rep it has but the monoline does not, receive put-back funds from the originator, and place the loan in the trust if that loan also breaches another rep in the PSA. If the subject loan actually breaches a PSA rep, the monoline can put it back. What the monoline cannot do is obtain loan refunds for conforming loans. Of course, if banks improperly diverted put-back funds rightfully belonging to the trust (which might flow to investors and monolines under the waterfall), that would be a breach.*

Footnote 6: *See generally NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co., 693 F3d 145, 151 (2d Cir 2012) (example of a no fraud rep).*

Footnote 7:*Moreover, if Assured was uncomfortable with the level of protection it was capable of bargaining for, it should not have entered into the transaction. When time is limited and the opportunity to conduct due diligence is not available, there is more of a risk that things will go wrong. Unless this risk is contractually protected against, a sophisticated party cannot invoke its rush to enter into the transaction as a factor militating in favor of its reliance being deemed reasonable. If anything, such haste traditionally weighs against the risk taker, whose actions imply it was so desirous of the opportunity it was willing to accept substantial risk without conducting due diligence.*

Footnote 8: *See also Phoenix Light SF Ltd. v Goldman Sachs Group, Inc., 43 Misc 3d 1233(A), at *5-6 (Sup Ct, NY County 2014) (Ramos, J.) (dismissing RMBS fraud claim because "[t]he true nature of the risk being assumed could, admittedly, have been ascertained from reviewing these loan files and plaintiffs never asked for them."), accord Stuart Silver Assoc. v Baco Dev. Corp., 245 AD2d 96, 98-99 (1st Dept 1997) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations").*

Footnote 9: *The court is aware that the "prophylactic provision" rule is controversial, since, broadly read, it might appear to bar fraud claims among all sophisticated parties. Justice*

*Schweitzer explained the need for caution in applying this rule in an overbroad manner. See Syncora Guarantee Inc. v Alinda Capital Partners LLC, 2013 NY Slip Op 31489(U), at *16-18 (Sup Ct, NY County 2013). This court does not profess to know the full scope of this rule. Nonetheless, if the prophylactic provision rule does not apply here, it is hard to see how it ever applies.*

Footnote 10: *Mosaic Caribe is noteworthy because it expressly reaffirms two critical, well established principles of law: (1) loss causation must be pled and cannot simply be ignored until summary judgment; and (2) failure to conduct due diligence is a real ground for dismissal ["Plaintiff cannot credibly claim that it had no available means of verification, as such information would have been available from defendant or the proposed defendants had plaintiff requested it] (emphasis added). Id. at 422.*

Footnote 11: *Though all of the loans in the transaction flowed though Credit Suisse's "Conduit" [see AC ¶ 44], the majority of the loans in the transaction were originated by entities others than Credit Suisse. See AC ¶¶ 48-54. Assured alleges that "Credit Suisse and DLJ were contractually entitled to and did conduct ongoing due diligence on pools of mortgage loans originated by originators in order to identify problems such as elevated levels of early payment defaults, and were also afforded the opportunity to question officers of the originators about the mortgage loans opportunities that Assured and the rating agencies did not have." AC ¶ 45. Credit Suisse allegedly kept "this unparalleled inside knowledge' to themselves." AC ¶ 46. These allegations gloss over many issues, such as the fact that Credit Suisse cared about certain breaches more than others (as mentioned earlier, non-overlapping reps such as early payment defaults mattered to Credit Suisse), and while Credit Suisse likely had certain originator access that Assured did not, this does not obviate the need for Assured, the insurer, also to critically assess the state of the origination market.*

Footnote 12: *Of course, "the motive to earn fees alone is, without more, insufficient for the court to infer scienter under CPLR 3016(b)." Basis Pac-Rim Opportunity Fund (Master) v TCW Asset Mgmt. Co., 40 Misc 3d 1240(A) at *5-6 (Sup Ct, NY County 2013) (collecting cases). The analysis of scienter in RMBS cases should distinguish between a bank's motive to earn fees for structuring a deal and a bank's motive for lying about aspects of the deal so that the bank can trade against the client or otherwise facilitate a bank's net position on the RMBS market (e.g., structuring a CDO so the bank can transfer RMBS exposure from its own balance sheet to the CDO). Though reasonable minds can surely disagree about profit motive being insufficient to infer scienter, there are good reasons why this is the law. See In re Merrill Lynch & Co., Inc. Research Reports Secs. Lit., 289 FSupp2d 416, 428 (SDNY 2003) ("If this Court were to accept the plaintiffs' allegations of scienter as adequate, it would essentially read the scienter element out of existence. All firms in the*

securities industry want to increase profits and all individuals are assumed to desire to increase their compensation.").

Footnote 13: *Banks' prop trading desks, of course, did take substantial RMBS market risk. However, the only parties to the subject transaction who took direct market risk (as opposed to indirect market risk via counterparty credit risk) were uninsured investors and Assured, who had exposure to conforming loan losses. Though Credit Suisse had nominal non-conformance liability to Assured, its net non-conformance exposure was substantially minimized by its put-back rights to originators under MLPAs. Therefore, Credit Suisse's due diligence incentives were minimal and Assured, as a sophisticated insurance company, should have understood this when making its own decision about how much diligence to conduct. Assured's major exposure was substantial losses arising from market toxicity not covered by its warranties and Credit Suisse's major exposure was substantial aggregate defaults leading to originator insolvency, putting Credit Suisse on the hook for non-conforming losses (i.e. originator credit risk).*

Footnote 14: *The primary value added by a monoline to an RMBS transaction was the monoline's AAA credit rating. No matter the true risk of the RMBS, an investor with financial guarantee coverage was taking monoline credit risk (nominally AAA, but subject to the risk that if the market crashes, and there are massive defaults across the market, even a AAA rated monoline likely will not have the capital reserves to pay out all claims), not mortgage default risk. Hence, in a sense, monolines were the real RMBS investors, in that they were the true risk takers on conforming loan defaults. If the underwriting industry was corrupted ("wholesale abandonment of underwriting standards"), this was an inherent investment risk taken by the monolines. The monolines are effectively arguing that they have no duty to review loan files, no duty to pay for sufficiently broad prophylactic provisions, and no duty to adequately assess the risk of the market they are insuring. These considerations need to be seriously taken into account when considering what securities should be deemed investment grade and how monoline capital requirements ought to be regulated. Of course, the costlier the due diligence process and the higher the capital requirements, the more expensive mortgages become for ordinary Americans. These trade-offs are matters of public policy, not law, but the recognition that such trade-offs exist are legally relevant to the understanding of the nature of the parties' risk allocation (i.e. "the insurer/insured nature of the relationship between the parties").*

Footnote 15: *The court is not ignoring the notion that a monoline is not expected to divine every way in which it might be defrauded. See Basis Yield, 115 AD3d at 137. This principle means that a monoline need not predict every permutation of origination malfeasance that may cause loan losses. But, again, that is why there were representations and warranties. No one needed to guess how loans might have gone bad, since both itemized warranty defects (e.g., excessive borrower debt) and general failure to conform to Underwriting Guidelines subject loans to put-back claims. Much of the alleged fraud is covered by these breaches. Hence, the alleged fraud goes beyond such*

defects, into broad based misconduct like "wholesale abandonment", a market risk that needs to be diligenced (to the extent it was, it was not taken seriously, as most assumed that aggregate default rates would not be so high that is, the assumption was made that not everything would go bust at once, leading to massive foreclosure rates, a flooding of the foreclosure market, and hence a crash in real estate prices, leading to even more defaults). It also should be noted that, to prove fraud, substantial, expensive, and time consuming discovery on intent and reliance is necessary, all of which are irrelevant to a contractual put-back claim. This could (and based on similar cases would likely) take years.

D.Monoline Caselaw

Assured's fraud claims, however, cannot be dismissed without a discussion of MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287 (1st Dept 2011) (Countrywide I); MBIA Ins. Corp. v Countrywide Home Loans, Inc., 105 AD3d 412 (1st Dept 2013) (Countrywide II); and MBIA Ins. Corp. v Credit Suisse Secs. (USA) LLC, Index No. 603751/2009 (MBIA).[FN16] The procedural history of MBIA, discussed below, is similar to another of this court's monoline cases, styled Ambac Assur. Corp. v DLJ Mortg. Capital, Inc., Index No. 600070/2010. See 31 Misc 3d 1208(A) (Apr. 7, 2011) and 33 Misc 3d 1208(A) (Oct. 7, 2011). The Ambac case settled.

Footnote 17: *Somewhat ironically, the court realized this during the first oral arguments in the Assured and Ambac cases.*

Footnote 18: *See 102 AD3d 488 (1st Dept 2013) (reversing the court's striking of MBIA's jury demand, the only issue appealed).*

Footnote 19: *DDJ's holding that assessing the reasonableness of reliance is typically too "nettlesome" an inquiry for resolution on a motion to dismiss has nothing to do with whether the failure to procure adequate prophylactic coverage bars a fraud claim based on the very risk a plaintiff failed to diligence. In other words, Credit Suisse cannot argue that Assured unreasonably relied on the representations and warranties in the PSA. However, Assured cannot claim fraud for malfeasance not covered by the representations and warranties, such as an origination industry gone bad, since that is a distinct, systemic risk that Assured is supposed to assess before getting into the business of insuring RMBS.*

Footnote 20: *Notwithstanding this rule, another court recently issued a comprehensive and*

compelling decision (albeit on summary judgment) dismissing MBIA's fraud claim because MBIA did not review the very fraudulent report supposedly relied on by MBIA in deciding to enter into the transaction (though leave to amend to assert claims under the Insurance Law was granted). See MBIA Ins. Corp v J.P. Morgan Secs. LLC, 43 Misc 3d 1221(A) (Sup Ct, Westchester County, May 6, 2014) (Scheinkman, J.)

Footnote 21: *The Appellate Decision's recent decision in Loreley Financing (Jersey) No. 3 Ltd. v Citigroup Global Markets Inc., 2014 NY Slip Op 03358, 2014 WL 1809781 (1st Dept May 8, 2014) did not disclaim ACA's prophylactic provision rule. Rather, the Court purported to distinguish ACA on other grounds [see Slip Op at 15], implying ACA is still good law. As explained earlier, if the prophylactic provision rule does not apply here, it can never apply.*

It should be noted that the securities at issue in Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., Index No. 652966/2011, 37 Misc 3d 1212(A) (Sup Ct, NY County 2012), aff'd in relevant part, 115 AD3d 128 (1st Dept 2014), may be fairly characterized as part of extraordinarily complex transactions involving considerations this court's decision on the motion to dismiss did not come close to addressing. To be sure, there are overlapping allegations in Loreley and Basis Yield. But, Basis Yield survived a motion to dismiss by alleging a fraudulent scheme that had many distinct components (e.g., Goldman's margin calls, improper sourcing of collateral, etc.). However, not all "schemes" are fraudulent, even if they make one uneasy (to grossly simplify, purging your own balance sheet of RMBS exposure is not the same as facilitating an insider edge for another short investor in exchange for a fee, though these goals are not necessarily mutually exclusive). No matter what one thinks of the so-called "Magnetar scheme" in Loreley, it was far more similar to ABACUS in ACA, which also involved a secret short-side collateral manager (Paulson), than the "scheme" in Basis Yield. It should be noted that buying the equity tranche, as Paulson did in ACA, is not incompatible with a strategy of shorting the senior tranche. Even if you are told that the collateral selector is long on the equity, it is still unreasonable to simply assume that he is also not shorting the senior tranches. See Loreley Financing (Jersey) No. 4 Ltd. v UBS Ltd. 42 Misc 3d 858, 859 n.2 (Sup Ct, NY County 2013) (explaining that a fund net-short on a CDO may want to purchase the equity to finance its short bet so its investors will not pull their money before the bet pays off).

Footnote 22: *Nonetheless, this may be inevitable if it is true that "[t]he entire edifice of modern financial capitalism is built on 100-page documents drafted by exhausted 26-year-olds and read by nobody [and] [t]he reason disputes like this always bring out people talking about how important it is to dig deep into the documents is that nobody ever does." See Matt Levine, BloombergView, Caesars and the $450 Million And', http://www.bloombergview.com/articles/2014-05-13/caesars-and-the-450-million-and (May 13, 2014) (emphasis in original).*

Footnote 23: *As in MBIA, the AC relies heavily on prospectus supplements. The court will not*

rehash its position on Credit Suisse's prospectus supplements, which was discussed at length in MBIA III.

Footnote 24: *If there is any doubt that part of a monolines' risk was fraud, consider that RMBS often contained NINA (no income no asset) loans, where the borrower does not provide documentary proof of his ability to pay the mortgage, and the duly imposingly named NINJA loans, where the borrower provides no evidence of having any income, assets, or even a job.*

Footnote 25: *There are many legitimate reasons why Credit Suisse might want to use a CDS to "bet" against the very transaction it structured. For instance, if the originator goes bankrupt and cannot make put-back payments to Credit Suisse, Credit Suisse will be on the hook for Assured's claims even though the MLPA's purpose was to pass-through non-conforming loan losses to the originator. In other words, purchasing protection on the transaction with a CDS can be used to hedge originator credit risk. To be sure, Credit Suisse, like many other banks, appears to have shorted the RMBS market when it came to believe that a collapse was imminent, but still wanted to earn fees for structuring deals, a perhaps morally-bankrupt decision. Yet, even if Credit Suisse used CDSs to do this, merely piecing together Credit's Suisse's net position on the RMBS market at a particular moment in time is immensely difficult, if not impossible given the chaos of collateral pricing in late 2006 and early 2007.*

Footnote 26: *Cf. Basis Yield, 37 Misc 3d 1212(A), at *8, accord Dodona I, LLC v Goldman, Sachs & Co., 847 FSupp2d 624 (SDNY 2012).*

Footnote 27: *Aff'd 2014 WL 2882908, 2014 NY Slip Op 04866 (1st Dept Jun. 26, 2014)*

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