Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge. Capital, Inc.
2014 NY Slip Op 30263(U)
January 27, 2014
Sup Ct, NY County
Docket Number: 653787/12
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER PART 45
Justice

HOME EQUITY MORTGAGE TRUST SERIES 2006-5,
by U.S. BANK NATIONAL ASSOCIATION,
solely in its capacity as Trustee,

Plaintiff,

-vs-

DLJ MORTGAGE CAPITAL, INC. and
SELECT PORTFOLIO SERVICING, INC.,

Defendants.

INDEX NO. 653787/12

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that DLJ's motion to dismiss is denied with respect to (i) standing, (ii) the statute of limitations, (iii) appraisal value, (iv) compensatory damages for breach of the cure or repurchase obligation, and (v) the striking of allegations; and it is further

ORDERED that DLJ's motion to dismiss is granted with respect to (i) anticipatory breach, (ii) compensatory damages for breach of R&Ws, (iii) consequential and recissory damages for breach of R&Ws and the cure or repurchase obligation, and (iv) declaratory judgment; and it is further

ORDERED that DLJ's motion to strike is denied.

All per the attached Decision and Order.

Dated: January 27, 2014

MELVIN L. SCHWEITZER, J.S.C.

MELVIN L. SCHWEITZER

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

Check one: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ GRANTED ☑ DENIED ☑ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPT. ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

HOME EQUITY MORTGAGE TRUST SERIES 2006-5, by U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee,	Index No. 653787/12
Plaintiff,	DECISION AND ORDER
-against-	Motion Sequence No. 003
DLJ MORTGAGE CAPITAL, INC. and SELECT PORTFOLIO SERVICING, INC.,	
Defendants.	

MELVIN L. SCHWEITZER, J.:

Home Equity Mortgage Trust Series 2005-1 (HEMT 2005-1 Trust), (Trust), acting by U.S. Bank National Association, solely in its capacity as trustee of the Trust (Trustee), has filed a complaint alleging breach of contract and unjust enrichment claims against DLJ Mortgage Capital, Inc. (DLJ) arising out of a residential mortgage-backed securitization transaction. DLJ has moved to dismiss the complaint and to strike certain of its allegations.

Facts

The facts are as alleged in the complaint.

The Trust is a New York common law trust that purchased more than 12,000 mortgage loans (Loans) from DLJ as a part of a securitization transaction. The Trust was created to hold and own the Loans that DLJ securitized and in which it sold interests to Certificateholders. The creation of the Trust was accomplished as follows. First, DLJ acquired the Loans from third-party originators. Second, it transferred those Loans to a special-purpose entity called the Depositor, Credit Suisse First Boston Mortgage Securities Corp. (CS Corp.), via a contract called

the Assignment and Assumption Agreement. Finally, the Depositor in turn assigned the Loans to the Trust through a Pooling and Servicing Agreement (PSA) which created the Trust. The parties to the PSA were DLJ as Seller; CS Corp. as Depositor; U.S. Bank National Association as Trustee; and Select Portfolio Servicing, Inc. (SPS) as Servicer and Master Servicer. SPS is an affiliate of DLJ under common control by Credit Suisse (USA), Inc. In the PSA, DLJ made more than twenty representations and warranties (R&Ws) about the credit quality and legal compliance of each of the Loans.

The PSA was executed on its closing date; namely, October 31, 2006. Prior to the closing date, the Depositor (and DLJ) had not sold the Loans to the Trust, nor had the parties agreed to any of the terms in the PSA.

DLJ's R&Ws include that:

> The Loans complied with all the terms, conditions and requirements of the originators' underwriting standards in effect at the time of origination of the Loans.
>
> The information set forth in the Mortgage Loan Schedule (MLS) – a sheet of loan data attached to the PSA – was complete, true and accurate in all material respects.
>
> No Loan had a combined loan-to-value ration (CLTV) of more than 100%.
>
> Each Loan complied in all material respects with applicable local, state and federal laws.

Under the PSA, DLJ promised to cure every Loan materially and adversely breaching any of the R&Ws or else repurchase those Loans within 120 days of the earlier of its discovery or its receipt of written notice of the breach from any party.

In December 2011, the Trustee notified DLJ that an automated valuation model (or AVM), had been used to test the accuracy of the R&Ws with respect to more than 395 Loans in the Trust (the AVM Review). Used in the mortgage industry, an AVM considers objective criteria such as the condition of a property and sale prices of comparable properties in the same locale as the subject property to determine an objective and reliable historical market value of the property in question. The AVM Review analyzed whether the properties' values supported R&Ws that were made based on certain assumptions about those values. For example, the Trust MLS contained representations about CLTV ratios for every Loan, as well as the total amount of the Loan. DLJ represented that all information on the MLS was complete, true and correct in all material respects. If the AVM Review derived a value for a given property that was 10% lower than the value stated on the MLS, it found a breach of DLJ's R&Ws that the MLS was true and correct, among other R&Ws, with respect to the Loan collateralized by that property. On December 7, 2011, the Trustee put DLJ on notice of at least 284 unique breaching Loans (the First Repurchase Letter).

A forensic investigation of the Loans' origination files was then undertaken. The origination files are critical to assessing the full set of DLJ's R&Ws and are kept by the Servicer of the Trust. As noted, one of those Servicer is SPS. Thus, SPS was and is in possession of the documents that establish its affiliate's repurchase liabilities. SPS allegedly refused to permit the Trustee to bring a sufficient number of underwriters to SPS's offices to review origination files, allowed the Trustee one week only to review those files in spite of the significant undertaking involved, and advised that if the Trustee were to review the loan files at all, it would not be allowed to make any copies of the documents.

The Trust ultimately received a subset of the origination files from the Trusts' other Servicer and conducted a "re-underwriting" of them – *i.e.* examined them anew for compliance with the R&Ws (the Re-Underwriting Review). Instrumental to the underwriting of a loan file are the underwriting documents known as "guidelines." These are the credit rules that each originator of the Loans purported to follow in executing a Loan, and are linked to DLJ's R&W that the Loans complied with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of their origination. DLJ refused the Trustee's requests for the underwriting guidelines underlying its R&Ws. Further, DLJ at one point asserted that the Trustee lacked contractual authority to enforce DLJ's R&Ws.

The Re-Underwriting Review examined the origination files using guidelines materially similar to the applicable originators' guidelines and with so-called "loan approvals" in the files themselves, which indicated the names and dates of the guidelines used by the Loans' originators and revealed some of the particular guidelines used by them. Of the 272 Loans re-underwritten by the Trust, 255 breached one or more of the R&Ws.

The Trustee identified these breaching Loans to DLJ on December 14, 2012 in the "Second Repurchase Letter" and on February 27, 2013 in the "Third Repurchase Letter." On April 12, 2013, DLJ wrote to the Trustee and stated that it would neither cure nor repurchase the Loans identified in the Second Repurchase Letter because the Trustee had not furnished DLJ with the Loans' origination files. DLJ neither cured nor repurchased any of the Loans identified in this letter.

DLJ did not respond but asserts in its submission to the court that the 120-period for responding to the request did not run until August 10, 2013.

On October 30, 2012, the Trust commenced this lawsuit by filing a summons with notice bringing breach of contract, anticipatory breach of contract, and declaratory judgment claims against DLJ. The summons with notice was filed one day before the sixth anniversary of the date on which the PSA was executed and closed, October 31, 2006. On April 8, 2013, the Trust filed its complaint.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual

allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Standing

DLJ argues that the complaint must be dismissed in its entirety because the Trust, as opposed to the Trustee, is the actual plaintiff bringing suit and a Trust does not have the requisite standing to sue to enforce the PSA. It argues that because the Trustee is not a plaintiff in the action, the Trust cannot assert claims on its behalf.

Recently, this issue was correctly and succinctly addressed in *Mastr Adjustable Rate Mortgages Trust 2006-0A2, Mastr Adjustable Rate Mortgages Trust 2007-1, and Mastr Adjustable Rate Mortgages Trust 2007-3 v UBS Real Estate Securities Inc.*, 2013 U.S. Dist. LEXIS 15532. The court said:

> "UBS's first ground for dismissal is that the Trusts, which appear in the caption as plaintiffs, may not sue to enforce the provisions of the PSAs, unlike the Trustee. However, this concern is sufficiently addressed by the introductory paragraph of the Complaint: 'Plaintiffs . . . acting through U.S. Bank National Association, solely in its capacity as Trustee [ ] for the Transactions . . . alleges as follows.' Compl. 1. While the caption identifies only the Trusts as Plaintiffs, it is '[t]he substance of the pleadings, not the caption, that determines the identity of the parties.' *Mateo v JetBlue Airways Corp.*, 847 F Supp 2d 383, 384 (EDNY 2012) (citations omitted). Here, the Complaint leaves no doubt that the Trusts' rights are being enforced by the Trustee. *See E.E.O.C. v Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 580*, 139 F Supp 2d 512, 525 (SDNY 2001)."

The reasoning of this decision is clearly applicable as the introductory paragraph of the complaint reads:

> "Plaintiff . . . acting by U.S. Bank National Association, solely in its capacity as Trustee . . . hereby alleges as follows:"

DLJ's motion to dismiss is denied with respect to standing.

Statute of Limitations

DLJ argues that (1) the HEMT 2006-1 Trust's contract claims, filed on October 30, 2012, are untimely because the six-year statute of limitations began to run on a contractual "as of" date before its contract with DLJ was executed; and (2) the Trust's contract claims should be dismissed because they were filed prior to the close of DLJ's 120-day period to cure or repurchase the applicable Loans and are now time-barred.

DLJ argues that the Trust's contract claims were not filed within New York's six-year statute of limitations period because (a) if the R&Ws were breached at all, that occurred on what DLJ terms the PSA's "as of" date – October 1, 2006; and (b) the sixth anniversary of October 1, 2006 lapsed before the summons and notice was filed on October 30, 2012. The Trust contends this is wrong saying first, the breach triggering accrual of the Trusts' claims occurred when DLJ failed to comply with its obligation to cure or repurchase defective Loans identified in the Repurchase Letters and second, even if the triggering breach were linked to a PSA date, that would be the date when the contract was executed and closed.

The Trust argues that under New York law, where a party's contractual obligation to cure defects in its performance continues for the life of the agreement, a claim for breach of that obligation accrues upon the failure to cure, not upon some earlier date. *See Bulova Watch Co., Inc. v Celotex Corp.*, 46 NY2d 606 (NY 1979). In *Bulova*, the question presented was the timeliness of contract claims against a roofing material supplier who both guaranteed the quality of its roofing and promised to repair defective roofing for a period of 20 years from the date of sale. *Id.* at 603. The New York Court of Appeals held that "a cause of action accrues upon each breach of that undertaking which occurs within the 20-year period and [ ] the Statute of

Limitations runs after six years from the date when the particular breach for which any such suit is brought has taken place." *Id.* The *Bulova* plaintiff's claims were timely more than six years after defendant's sale of roofing material because the defendant's failure to repair was an independent breach. *Id.*

The Trust contends that DLJ's promises are no different: it made R&Ws about the Loans and promised to cure or repurchase Loans that breach them. They say the PSA does not limit this remedy to a specific number of years in the life of a Loan. For the Loans identified in the Repurchase Letters, DLJ's failure to cure or repurchase began in 2012 and thus the Trust's claims are timely. *See also Lehman Bros. Holdings, Inc. v Nat'l Bank of Ark*, 2012 U.S. Dist. LEXIS 87265, at *12-13 (E.D. Ark. June 25, 2012) (holding that plaintiff's loan repurchase claim accrued when the defendant breached its obligation to repurchase the loans).

Further, the Trust contends that even if the claims accrued on a PSA date it would be the date the contract was executed – the Closing Date, or October 31, 2006 – not the pre-execution "as of" date it was deemed executed and made effective (October 1, 2006) identified by DLJ. They say it is hornbook contract law that a contract claim cannot possibly accrue before there is a contract in the first place. *See Yatter v William Morris Agency, Inc.*, 256 AD2d 260, 261 (1st Dept 1998).

The Trust points out the R&Ws were, in fact, expressly made operative "as of" October 31, 2006 the same day that the PSA was signed. They argue a contract did not exist in fact prior to October 31, 2006 and the Trust could not have sued on the R&Ws between October 1, 2006 and October 31, 2006. They say the "as of" date relied on by DLJ has nothing to do with when the contract was executed, much less with when the relevant R&Ws became

effective: the "as of" date was the date chosen by the parties for measuring the aggregate principal balance and price of the Loans for a deal that actually was executed on October 31, 2006.

The court rejects DLJ's argument that the statute of limitations with respect to the Trusts' contract claims runs from a date earlier than the date of execution of the PSA. A contract claim cannot possibly accrue before the contract is executed. The Trusts could not have brought suit for breach of the R&Ws prior to October 31, 2006.

In *Ace Securities Corp. v DB Structured Prods., Inc.*, Index No. 650980/2012 (1st Dept 2013), the court held that claims in a similar financing arrangement accrued on the closing date of the purchase agreement, which was the date when any breach of the representations and warranties occurred. It held the motion court had erred in finding the claims did not accrue until the defendant either failed to timely cure or repurchase a defective mortgage loan. While this decision impacts one of the Trusts arguments, it does not alter the court's decision.

DLJ's motion to dismiss is denied with respect to the statute of limitations.

DLJ moves to dismiss the Trust's claims because they were purportedly filed before DLJ failed to cure or repurchase Loans from the Trust at the close of the contractually-provided 120-day repurchase window and thus before they had accrued. DLJ's argument fails for several independent reasons.

First, DLJ's 120-day cure or repurchase period for the First and Second Repurchase Letters closed before the Complaint was filed on April 8, 2013. As for the First Repurchase Letter, DLJ does not dispute that its 120-day period ran before both the Summons with Notice and Complaint were filed. Instead, DLJ argues that the letter did not "provide any details as to

how the claimed investigation revealed any issues with any specific loans" and therefore that DLJ did not "discover" a breach in any Loan, triggering its 120-day clock. As the exhibits attached to DLJ's Motion show, the First Repurchase Letter provided a 55-page, loan-by-loan analysis of breaches in DLJ's R&Ws. The First Repurchase Letter also notified DLJ of pervasive breaches in the Trust's loan pool and demanded that DLJ repurchase *all* breaching Loans. The complaint alleges that DLJ "discovered" breaching Loans from this letter. Whether DLJ in fact "discovered" breaches in these Loans is a factual question that cannot be resolved at the motion to dismiss stage. *See e.g. Grand Realty Co. v City of White Plains*, 125 AD2d 639, 640, 510 NYS2d 172, 174 (1st Dept 1986) ("[A] question of fact [is] . . . not appropriately [] considered on a [motion to dismiss]."). Because the letter put DLJ on notice of "pervasive" breaches in the loan pool, DLJ's 120-day period ran for all breaching Loans in the Trust before the Summons with Notice and Complaint were filed. *See e.g. Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 11 CIV. 2375 JSR, 2013 WL 440114 (SDNY Feb. 5, 2013).[1]

As for the Second Repurchase Letter, DLJ received a copy of it on December 5, 2012. The Complaint alleges that DLJ "discovered" the breaches therein on December 5, 2012. *Id.* Even assuming *arguendo* that DLJ's 120-day repurchase clock was not triggered for *all* breaching loans through the First Repurchase Letter, DLJ's 120-day clock on the Second Repurchase Letter closed on April 3, 2013, five days before the complaint was filed. DLJ cites

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[1] "To the extent that [Defendant] argues that it must be notified as to each loan as to which a material breach is claimed with sufficient specificity to allow [Plaintiff] to identify the loan and investigate the alleged breach, this requirement inappropriately places the burden of notification on [Plaintiff], when, as discussed above, the Court has found that [Defendant's] responsibilities are triggered merely by awareness." 2013 WL 440114, at *37; *see also CIFG Assur. North America, Inc. v Goldman, Sachs & Co.*, Index No. 652286/2011, 2012 WL 1562718 (N.Y. Sup. Ct. May 1, 2012) (Sherwood, J.) ("The complaint need not make specific representations as to each of the individual loans.") *affd*, 2013 WL 1876243, at *2 (1st Dept May 7, 2013) ("Notice of breach was sufficiently alleged.").

no authority for the proposition that a ripe claim in the operative pleading must be dismissed simply because it may have been unripe at the time a now-superseded summons with notice was filed. There is none.

DLJ's motion to dismiss is denied with respect to the statute of limitations.

Anticipatory Breach

The Trust alleges DLJ's anticipatory breach of its duty to cure and repurchase Loans. The Trust asks the court to grant them damages as to all other Loans breaching DLJ's representations and warranties, i.e. as to Loans for which the Trustee has not made any cure or repurchase demands.

The complaint alleges that DLJ (1) informed the Trust that not even the Trustee is authorized to enforce the R & Ws; (2) refused to supply the Trustee with the guidelines used to test the accuracy of its R & Ws; and (3) put forward an untenable interpretation of the PSA under which its representation that no Mortgage Loan had a CLTV over 100% means nothing more than DLJ accurately transcribed the values of the Loans' properties as represented to it by any appraiser whether qualified or not.

Under New York common law, "[a] party's repudiation, or anticipatory breach, of its future obligations under a bilateral contract . . . may take the form either of a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach," or "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Merrill Lynch Int'l v XL Capital Assurance INC.*, 564 F Supp 2d 298 (SDNY 2008)[quoting *Computer Possibilities*

Unlimited, Inc. v Mobil Oil Corp., 301 A.D.2d 70 . . . (1st Dept 2002)(quoting Restatement (Second) of Contracts §250...)].

None of the Trust's allegations can be read as such a statement, or positing such an affirmative act. The first reflects an oral negotiating position by DLJ's counsel, and the second and third are tactical actions by DLJ, whether or not in compliance with the terms of the PSA, taken in reference *only* to the circumstances of the cure or repurchase process with respect to the Loans at issue here. They are not predictive of future total breach.

DLJ's motion to dismiss is granted with respect to anticipatory breach.

Appraisal Value

DLJ contends the Trust's claims should be dismissed, insofar as they are based on alleged misstatements in appraisal values and loan-to-value ratios, because the PSA provides that LTV ratios and the appraised values on which they are based are opinions, not statements of an absolute true value. DLJ argues that the PSA defines both "Appraised Value" and "Combined Loan-to-Value Ratio as follows. The term "Combined Loan-to-Value Ratio" means:

> With respect to any Mortgage Loan and as of any date of determination, the fraction (expressed as a percentage) the numerator of which is the sum of (i) original principal balance of the related Mortgage Loan at such date of determination and (ii) the unpaid principal balance of the related First Mortgage Loan as of either the date of origination of that Mortgage Loan or the date of origination of the related First Mortgage Loan and the denominator of which is the most recent Appraised Value of the related Mortgaged Property.

The term "Appraised Value" means "[t]he amount set forth in an appraisal of the related Mortgage Loan as the value of the Mortgaged Property." The Appraised Value of a property on which CLTV is calculated, therefore, is the value set forth in the most recent appraisal of the property.

DLJ posits, citing *Tsereteli v Residential Asset Securitization Trust 2006-A8*, 692 F Supp 2d 387, 393 (SDNY 2010) and *N.J. Carpenters Health Fund v Novastar Mortg., Inc.*, No. 08 Civ 5310(DAB), 2011 WL 1338195, at *11 n.9 (SDNY Mar. 31, 2011), that because appraisals are opinions, not statements of fact, the Trust has not alleged a cognizable misrepresentation. DLJ contends the Trust does not allege (and has no basis to allege) that the LTVs and CLTVs on the Loans were inaccurately reported or did not in fact comply with the relevant PSA.

The Trust responds that DLJ confuses the standards for bringing fraud and federal securities act claims, where the distinction between an opinion and statement of fact stems from the elements of those causes of action, with contract claims being brought here. It points out that here DLJ represented that no Loan had a "combined loan-to-value ratio of more than 100%," not that no Loan had a CLTV over 100% assuming the accuracy of appraisers' opinion. Further, they say appraisals are actionable where they do not represent the appraiser's true belief as to the value of the property. *See e.g. Fed. Hous. Fin. Agency v UBS Americas, Inc.*, 858 F Supp 2d 306, 326 (SDNY 2012). It points to the complaint which alleges that (1) originators did not follow their guidelines in making Loans that exceeded CLTV ceilings due to inflated appraisals; (2) DLJ understood that its originators were widely disregarding their underwriting rules, which included conducting proper appraisals; and (3) DLJ's CLTV R&Ws deviated significantly from plaintiffs' AVM results.

It notes that although DLJ moves to dismiss all claims based on CLTVs, many of the Trust's CLTV claims are not based on flawed appraisals. For example, Loans were issued at CLTVs above the ratio permitted under the originators' guidelines, even assuming the accuracy

of the appraisal in the ratio's denominator. In this respect, it says DLJ made other R&Ws that do not turn on the PSA's definition of "Appraised Value"; namely, that all Loans were originated according to the requirements of the originators' guidelines. Thus, when an inflated appraised property value that led to a CLTV higher than that allowed under the originators' guidelines, there was a breach of DLJ's R&W that the guidelines requirements were followed, not just DLJ's R&W that no Loan had a combined loan-to-value ratio of more than 100%.

The court finds the Trust's primary position compelling. DLJ made R&Ws which are allegedly wrong. The R&Ws were not qualified by the concept of "opinion" relevant in federal securities law claims. The Trust's additional positions are also correct.

DLJ's motion to dismiss is denied with respect to appraisal value.

Damages

The Trust alleges that DLJ is in breach of its R&Ws and its cure and repurchase obligations. The Trust specifically seeks compensatory, consequential, rescissory, and/or equitable damages in connection with its claims for breach of DLJ's R&Ws. It also requests such further relief as may be just and proper in connection with each of their causes of action.

DLJ argues that under the sole-remedy provision in Section 2.03(g) of the PSA, the Trust is precluded from seeking any remedy other than the cure or repurchase of defective Loans. DLJ says that the Trust cannot avoid the contract by alleging breach of the PSA's cure or repurchase obligation by DLJ because this remedy was established to deal with the very type of Loan-level breaches the Trust now alleges.

DLJ asserts the Trust's claim for consequential damages must be dismissed for the independent reason that under New York law, damages for lost profits are not available when the

contract itself does not provide for their recovery and "no factual issue [is] otherwise raised" as to whether the parties intended that they would be able to recover damages due to lost profits. *Brody Truck Rental, Inc. v Country Wide Ins. Co.*, 277 AD2d 125 (1st Dept 2000). DLJ says the sole-remedy provision shows that the parties did not agree to consequential damages.

DLJ argues the Trust is specifically barred from seeking rescissory damages for a number of reasons. First, rescission and rescissory damages are available only when a party "lacks a complete and adequate remedy at law and where the status quo may be substantially restored." *Alper v Seavey*, 78 NYS2d 564, 566 (1st Dept 2004) (internal quotation marks omitted).

Second, the Trust is not entitled to rescissory damages because the complaint does not seek rescission. Without a viable claim for rescission, the Trust is limited, at most, to contract damages. *Raymond Weil, S.A. v Theron*, 585 F Supp 2d 473, 488 (SDNY 2008).

Third, the Trust abandoned any claim to rescission or rescissory damages by suing to enforce the PSA. *Clearview Concrete Prods. Corp. v Charles Gherardi, Inc.*, 453 NYS2d 750, 754 (party abandoned right to rescind when "it accepted the benefits of the contract and thereby affirmed it"); *see also Bernstein v Cooke*, 478 NYS2d 294, 298 (1st Dept 1984) ("One elects either to continue with the contract fraudulently induced or to rescind it. If one elects to continue with it, one accepts all the burdens contained in the contract as well as the benefits.").

The court holds that while the PSA clearly provides that the sole remedy for breach of a R&W made pursuant to Section 2.03 (f) or (g) of the PSA is the repurchase or cure of defective Loans, and that the Trust may not recover damages for such breach, this does not preclude the Trust from recovering damages for DLJ's breach of its cure or repurchase obligation. The parties underscored this in the last sentence of Section 2.03 (f) or (g) by providing for an "*obligation*

under this Agreement . . . to cure, repurchase or substitute any Mortgage Loan. . . ." (emphasis added) This obligation is independent and unqualified.

It follows that the Trust must be permitted to petition the court for all remedies available at law or in equity arising from breach of the cure or repurchase obligation. These include an order of specific performance and damages.[2] The court will not read into the contract a provision limiting the Trust relief to an order of specific performance. The PSA could easily have been drafted this way, but it was not. The court will not seek to divine an intent of the parties to read damages out of the contract in this respect.

To be clear, the court is holding that a remedy of damages is available with respect to breach of the cure and repurchase obligation relating to Loans for which notice has been given. The holding is not meant to be read to imply that a breach of the cure and repurchase obligation eliminates the sole remedy provision for breach of R&Ws in the future.

The court holds that with respect to consequential damages DLJ's position is correct. The SPA does not provide for their recovery and there is no factual issue raised as to whether the parties intended that they would be able to recover damages due to lost profits. The arguments the Trust makes for consequential damages are unavailing.

As to rescissory damages, the court again agrees with DLJ's position. Like consequential damages, rescission is a "rarely used equitable tool." *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 (1st Dept 2013). Rescissory damages are generally available

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[2] The Trust has petitioned for an order of specific performance with respect to the cure or repurchase obligation in paragraph (a) of the complaints prayer for relief. In the prayer for relief, the Trust has not specifically sought damages arising out of such breach, as opposed to damages arising from breach of the R&Ws. They have requested an award of such further relief as may be just and proper in paragraph (i) of the prayer for relief, and the court finds this sufficient with respect to petitioning for damages for breach of the cure or repurchase obligation. Paragraph 10.6 of the complaint can also be read to request damages for breach of the cure or repurchase obligation.

only where rescission is impracticable and there are no alternative legal remedies. See *MBIA Ins. Corp.*, 105 AD3d at 413 (1st Dept 2013); *Alper v Seavey*, 9 AD3d 263, 264 (1st Dept 2004). The Trust's arguments supporting an award of rescissory damages are unavailing because they do not seek rescission and also because there is an available alternative remedy.

DLJ argues that because the Trust is seeking to enforce the PSA, it cannot simultaneously seek to rescind the same agreement. Despite the Trust's adamant averments that they have claimed their rights to rescind the PSA, but are seeking rescissory damages instead because rescission is impracticable, the pleadings show that the Trust is not seeking rescission; they seek enforcement of the PSA. An award of rescissory damages is an alternative remedy in cases where rescission itself is not viable. See *MBIA Ins. Corp.*, 105 AD3d at 413 (holding that granting a motion for summary judgment awarding rescissory damages was inappropriate because rescission was not warranted).[3] Here, rescission was not sought and therefore rescissory damages are unavailable.

That the Trust has an alternative remedy to protect their contractual rights also supports a denial of rescissory damages. As previously discussed, Section 2.03 of the PSA offers the cure or repurchase obligation as the sole remedy for any breach of R&Ws. The agreement itself offers the Trust a viable remedy that it is seeking to enforce in this action. Further, the Trust may seek damages for breach of the cure or repurchase obligation.

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[3] Although the court in *MBIA Ins. Corp.* found that rescissory damages were legally unavailable because the plaintiff had previously given up its right to seek rescission, the court also recognized that the plaintiff did not actually seek rescission. *MBIA Ins. Corp.*, 105 AD3d at 413 ("Plaintiff should not be permitted to utilize this very rarely used equitable tool . . . to reclaim a right it voluntarily contracted away or to obtain relief it never actually requested").

DLJ's motion to dismiss is granted with respect to compensatory damages for breach of the DLJ's R&Ws.

DLJ's motion to dismiss is denied with respect to compensatory damages for breach of the cure or repurchase obligation.

DLJ's motion to dismiss is granted with respect to consequential and rescissory damages for breach of DLJ's R&Ws and the cure or repurchase obligation.

Declaratory Judgment

Under First Department precedent, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records, Inc. v Capitol Records, Inc.*, 529 NYS2d 279, 281 (1st Dept 1988); *see also Artech Info Sys., L.L.C. v Tee*, 280 AD2d 117, 125 (1st Dept 2001). A declaratory judgment would find that DLJ breached Loan-level R&Ws. The Trust's first and second causes of action for breach of contract relating to breach of the R&Ws depend entirely on this identical premise. Declaratory judgment claims must be dismissed when they duplicate plaintiffs' breach of contract claim. *See James v Alderton Dock Yards*, 256 NY 298, 305 (1931); *Singer Asset Fin. Co. v Melvin*, 822 NYS2d 68, 71 (1st Dept 2006).

DLJ's motion to dismiss is granted with respect to declaratory judgment.

Unjust Enrichment and Alleged Irrelevant Allegations

DLJ moves to dismiss the Trust's claim that DLJ was unjustly enriched when it entered into secret settlements with Loan originators, received cash payments from them for "early-payment defaults," failed to notify the Trust of breached R&Ws or pay those settlement

moneys to the Trust, and was thereby enriched at the Trust's expense. It argues that this claim impermissibly arises from the same subject matter that is governed by the PSA.

To plead unjust enrichment, the Trust must allege (1) DLJ was enriched; (2) at the expense of the Trust; (3) and equity and good conscience militates against permitting DLJ to retain what the Trust seeks to recover. *See e.g. Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 (NY 1972). The complaint alleges that DLJ discovered that Loans were defectively underwritten, entered into undisclosed settlements with originators, and failed to return those recoveries to the Trust which own the Loans DLJ recovered on.

DLJ takes the position that its contracts with originators are not incorporated into the PSA, do not cover the same R&Ws, and therefore that any of DLJ's undisclosed settlements have no bearing on the Trust's contract claims. Its argument that unjust enrichment claims may not be brought for events arising out of subject matter governed by the parties' agreements is wrong. The Trust is entitled to plead alternative and inconsistent causes of action and to seek alternative forms of relief: *if* the PSA strictly requires DLJ to transmit its settlement recoveries to the Trust, the Trust's contract claims will control; *if*, as DLJ argues, the PSA does *not* cover the same R&Ws through which DLJ secretly settled with originators, the Trust's unjust enrichment claim is not precluded for covering the same "subject matter" as the contract claims. *See e.g. Air Atlanta Aero Eng'g Ltd. v SP Aircraft Owner I, LLC*, 637 F Supp 2d 185, 195 (SDNY 2009) ("Courts have permitted pleading in the alternative in the face of a written agreement . . . when there is a dispute as to the agreement's validity or enforceability).

Similarly, DLJ's motion to strike allegations concerning DLJ's secret settlement practices is based on the inapposite principle that scandalous and prejudicial material may be stricken.

Gerseta Corp. v Silk Ass'n of Am., 220 AD 302, 305, 222 NYS 7, 10 (1st Dept 1027) ("Motions to strike out parts of a pleading . . . are not favored by the court. Where, under any possible circumstances, evidence of the facts pleaded in the allegations sought to be stricken out have any bearing on the subject-matter of the litigation, the motion will be denied.") The complaint alleges that DLJ entered into a number of undisclosed settlements with loan originators – and failed to return those moneys to the trusts – and ties these allegations directly to the unjust enrichment claim, as well as the Trusts' cure or repurchase claims.

DLJ's motion to dismiss is denied with respect to unjust enrichment and the striking of allegations. Accordingly, it is hereby

ORDERED that DLJ's motion to dismiss is denied with respect to (i) standing, (ii) the statute of limitations, (iii) appraisal value, (iv) compensatory damages for breach of the cure or repurchase obligation, and (v) the striking of allegations; and it is further

ORDERED that DLJ's motion to dismiss is granted with respect to (i) anticipatory breach, (ii) compensatory damages for breach of R&Ws, (iii) consequential and recissory damages for breach of R&Ws and the cure or repurchase obligation, and (iv) declaratory judgment; and it is further

ORDERED that DLJ's motion to strike is denied.

Dated: January 27, 2014

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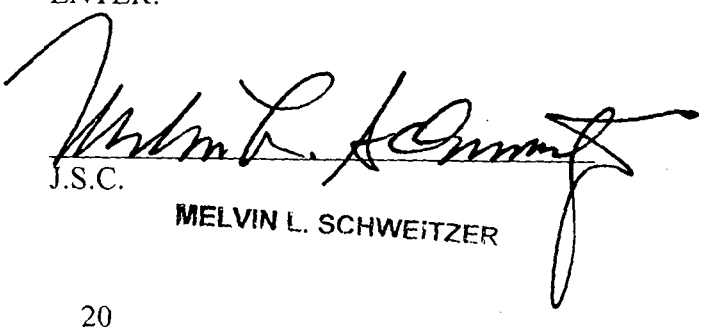

J.S.C.

MELVIN L. SCHWEITZER