| **Ambac Assur. Corp. v Nomura Credit & Capital, Inc.** |
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| 2016 NY Slip Op 32868(U) |
| December 29, 2016 |
| Supreme Court, New York County |
| Docket Number: 651359/2013 |
| Judge: Marcy Friedman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
*Justice*

AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

Plaintiffs,

-against-

NOMURA CREDIT & CAPITAL, INC. and NOMURA HOLDING AMERICA INC.,

Defendants.

INDEX NO. 651359/2013

MOTION DATE _____

MOTION SEQ. NO. 004 & 005

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

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

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ORDERED that defendants' motion to dismiss the amended compliant (motion seq. no. 5) is decided in accordance with the attached decision/order, dated December 29, 2016; and it is further

ORDERED that defendants' motion to strike the amended complaint and plaintiffs' cross-motion for leave to amend the complaint (motion seq. no. 4) are decided in accordance with the attached decision/order, dated December 29, 2016.

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

Dated: 12-29-16 _____, J.S.C.
MARCY S. FRIEDMAN

1. Check one: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

*Plaintiffs*,

– against –

NOMURA CREDIT & CAPITAL, INC. and NOMURA HOLDING AMERICA INC.,

*Defendants.*

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Index No.: 651359/2013

DECISION/ORDER

This action arises out of the issuance by plaintiff monoline insurer Ambac Assurance Corporation (Ambac) of policies insuring two residential mortgage-backed securities Transactions (RMBS).[1] By Decision and Order, dated June 2, 2015, this court granted in part and denied in part the motion of the defendant sponsor, Nomura Credit & Capital, Inc. (NCCI), and its alleged alter ego, defendant Nomura Holding America Inc. (Nomura Holding), to dismiss the initial complaint, which pleaded two causes of action for breach of contract. (See Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2015 WL 3490753 [Sup Ct, NY County, June 2, 2015, No. 651359/13] [the Prior Decision].) After defendants' motion to dismiss was fully submitted, but before the court issued its Prior Decision, Ambac filed and served an amended complaint, which pleads an additional cause of action for fraudulent inducement. Defendants now move "to strike" the amended complaint on the ground that it was filed without leave of court. They separately move to dismiss the amended complaint pursuant to CPLR 3211 (a) (1),

[1] The action is also brought by plaintiff The Segregated Account of Ambac Assurance Corporation, an entity to which Ambac's claims were "allocated" in connection with a statutory rehabilitation. (Am. Compl., ¶ 18.)

(5) and (7). Ambac opposes the motions and cross-moves for leave to amend pursuant to CPLR 3025 (b).[2]

BACKGROUND

The allegations of the initial complaint are discussed at length in the Prior Decision, familiarity with which is presumed. As is relevant to these motions, the Prior Decision declined to dismiss Ambac's first cause of action for breach of contractual representations and warranties regarding the underlying mortgage loans, based on the holding that defendants' argument that Ambac lacked standing to enforce the representations and warranties implicated questions of fact. (2015 WL 3490753, at * 2-8.) The court also upheld the first cause of action as it related to liquidated loans, and held that the pleading of the complaint was sufficiently specific as to the representations breached and the identity of the loans affected by the breaches. (Id., at * 8.) The court, however, dismissed the second cause of action for breach of the repurchase protocol as well as Ambac's claim for rescissory damages. (Id.) The court also dismissed the complaint as against defendant Nomura Holding for failure to state a claim for alter ego liability. That dismissal was without prejudice to Ambac's maintenance, if appropriate, of post-judgment enforcement proceedings against Nomura Holding, in the event that Ambac recovers a judgment against NCCI in this action. (Id., at * 8-9.)

Ambac's amended complaint restates the claims addressed in the Prior Decision, but also pleads a new first cause of action for fraudulent inducement against NCCI and Nomura Holding

[2] By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this [C]ourt alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities." This court has accordingly issued numerous decisions in the RMBS litigation. In determining issues on this motion that were previously decided on substantially similar pleadings, the court will generally rely on the reasoning of, and authorities cited in, the prior decisions.

as its alter ego. (Am. Compl., ¶¶ 121-128.) The amended complaint alleges that NCCI directly or indirectly made numerous misrepresentations to Ambac in advance of the closing of the two Transactions that Ambac insured, including misrepresentations as to the characteristics of the pooled loans, the underwriting guidelines purportedly followed, and the due diligence purportedly conducted. (Id., ¶ 2.) According to the amended complaint, NCCI falsely represented to Ambac that it conducted "rigorous due diligence" on the mortgage loans that served as collateral for the Transactions. (Id., ¶¶ 3, 29-38.) NCCI failed to disclose that it systematically disregarded underwriting standards and ignored unfavorable due diligence information. (Id.) Further, when NCCI was allegedly notified by third-party due diligence providers "that a significant percentage of loans in its collateral pools were defective, NCCI nonetheless 'waived in' a substantial percentage of those defective loans and included them in its transactions." (Id., ¶¶ 3, 35-37.)

The amended complaint also pleads that through Bear Stearns (the lead underwriter), NCCI disseminated spreadsheets, loan tapes, and other documents containing materially false and misleading information regarding the occupancy status, loan-to-value ratios (LTVs), debt-to-income ratios (DTIs), documentation types, and credit scores relevant to the loans. (Am. Compl., ¶¶ 39-48.) Similarly false metrics were allegedly set forth in the Offering Documents, which included Free Writing Prospectuses, Prospectuses, Prospectus Supplements, and drafts of these documents. (Id., ¶¶ 49-54.) As alleged in the amended complaint, NCCI supplied the same inaccurate data to the rating agencies, resulting in misleading shadow ratings[3] on which Ambac relied. (Id., ¶ 54.)

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[3] As explained in the amended complaint, a shadow rating is "an assessment of the risk without consideration of the protection afforded by the financial-guaranty policy." (Id., ¶ 54.)

NCCI also allegedly misrepresented to Ambac, during meetings prior to the closing, that the underwriting guidelines it provided to Ambac pre-closing were the guidelines that applied to the securitized loans. (Id., ¶¶ 55-57.)

Finally, the amended complaint pleads that Ambac relied not only on these pre-closing representations but also on contractual representations and warranties regarding the quality and characteristics of the loans, made by NCCI as Sponsor to another Nomura entity as Depositor, in the Mortgage Loan Participation Agreements (MLPAs) for the Transactions. (Am. Compl., ¶¶ 70-73.) In section 8 of the MLPAs, NCCI represented, among other things, that no fraud was committed by any party to any loan, including the borrowers; that at closing, no loan was in default, and there had not been any breach, violation, or event of acceleration under any mortgage securing any loan; and that the loans were underwritten in accordance with applicable underwriting guidelines. (Id., ¶ 73.) The Pooling and Servicing Agreements (PSAs) by which the loans were transferred to the Trusts incorporated the MLPA section 8 representations and further represented and warranted that these section 8 representations and warranties were true and correct as of the closing dates for the Transactions. Ambac was named as an express third-party beneficiary of the PSAs. (Id., ¶¶ 76-77; Prior Decision, 2015 WL 3490753, at * 5.)

DISCUSSION

The Motion to Strike the Amended Complaint

Defendants contend that the amended complaint was served outside the period for amendments as of right provided in CPLR 3025 (a), because it was served after defendants' prior motion to dismiss had been fully submitted for consideration. Ambac contends that the amended complaint was served as of right because it was served before defendants served an answer to the initial complaint.

There are apparently conflicting authorities on the issue of whether a complaint may be amended as of right at any time during the pendency of a motion to dismiss. (Compare Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 647 [1st Dept 2013] with Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty, 71 AD3d 533 [1st Dept 2010] and STS Mgt. Dev., Inc. v New York State Dept. of Taxation & Fin., 254 AD2d 409 [2nd Dept 1998].) There is, however, substantial authority that even where an amended complaint is served as of right during the pendency of a motion to dismiss the original complaint, the motion to dismiss does not necessarily abate. Rather, the movant may be given the option to apply the motion to the amended complaint or the court may direct such application, subject to the movant's right to object. (See Sage Realty Corp. v Proskauer Rose L. L. P., 251 AD2d 35, 38 [1st Dept 1998].) The court may also, if appropriate, direct the motion toward the original complaint. (Fownes Bros. & Co., Inc. v JPMorgan Chase & Co., 92 AD3d 582, 582-583 [1st Dept 2012].)

Here, the court need not decide whether the amended complaint was served as of right. Even assuming that it was not, the court heard and determined the motion to dismiss the initial complaint. Moreover, although defendants moved to strike the amended complaint on the ground that it was served after the time to amend as of right, and Ambac cross-moved for leave to amend, defendants brought a subsequent motion to dismiss the amended complaint. The motion to strike has been rendered moot by the motion to dismiss, discussed below, on which defendants have had a full opportunity to address the sufficiency of the amended complaint. Alternatively, even if Ambac was required to seek leave to amend, the court does not find on this

record that the amendment "is palpably insufficient or patently devoid of merit." (See MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 499 [1st Dept 2010].)[4]

The Prior Decision will apply to the amended complaint to the extent that the claims for breach of the repurchase protocol and for rescissory damages will be dismissed, as will the alter ego claims against Nomura Holdings. No new arguments were made with respect to those claims in the motions directed toward the amended pleading. The determination of the Prior Decision as to Ambac's standing will also remain in effect.

The Motion to Dismiss the Amended Complaint

In moving to dismiss, defendants argue that the fraudulent inducement claim is duplicative of the contract claim and is insufficiently pleaded. "[T]o state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is

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[4] The authorities in this Department are in conflict as to the extent of the evidentiary showing that must be made as to the merit of a proposed amendment. Quoting Non-Linear Trading Co., Inc. v Braddis Assocs., Inc. (243 AD2d 107, 116 [1st Dept 1998], some Courts continue to hold that "a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." (E.g., Boaz Bag Bag v Alcobi, 129 AD3d 649, 649 [1st Dept 2015]; Barry v Clermont York Assocs. LLC, 144 AD3d 607 [1st Dept Nov. 29, 2016] [citing Boaz Bag Bag in support of its holding that the trial court "providently exercised its discretion in denying plaintiff's motion for leave to amend, since the motion was unsupported by evidentiary proof"].) Other Courts, like MBIA Ins. Corp. v Greystone, cited in the text, articulate the standard that a motion for leave to amend should be freely granted absent prejudice or surprise, "unless the proposed amendment is palpably insufficient or patently devoid of merit." (74 AD3d at 499.) MBIA cited Lucido v Mancuso (49 AD3d 220, 229 [2008], appeal withdrawn & discontinued 12 NY3d 813 [2009]), a Second Department case that expressly held that "[n]o evidentiary showing of merit is required under CPLR 3025 (b)," and that "[t]he court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit." MBIA, however, held that "the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony." (MBIA, 74 AD3d at 500; see also e.g. Greentech Research LLC v Wissman, 104 AD3d 540 [1st Dept 2013] [holding that plaintiffs' request for leave to replead the complaint was properly denied "given the absence of an affidavit of merits and evidentiary proof to support their request"]; 1 Model Mgt., LLC v Kavoussi, 82 AD3d 502, 504 [1st Dept 2011] [holding that leave to amend the complaint "was properly denied in the absence of a sufficient evidentiary showing that the proposed claims were viable"].) This court is unaware of any First Department decision that has adopted the Lucido Court's categorical rejection of a requirement that an evidentiary showing of merit be made on a motion for leave to amend.

Assuming that this Department continues to require some evidentiary showing of the merit of the proposed amendment, this court finds that such showing is made here by the affidavit submitted in support of Ambac's cross-motion for leave to amend, by Patrick McCormick, Managing Director in Ambac's Portfolio Risk Management area of the Residential Mortgage Group. This affidavit attests to Ambac's reliance on pre-closing information provided to Ambac by Nomura and Bear Stearns in connection with the Transactions.

intended to deceive another party and induce that party to act on it, resulting in injury." (Wyle Inc. v ITT Corp., 130 AD3d 438, 439-440 [1st Dept 2015] [internal quotation marks and citation omitted].) As a general rule, where the parties have entered into a contractual relationship, a separate, viable claim for fraud may be maintained where it is based on misrepresentations of "present facts that [are] collateral to the contract, and involve[] a breach of duty distinct from, or in addition to, the breach of contract." (Shugrue v Stahl, 117 AD3d 527, 528 [1st Dept 2014] [internal quotation marks and citations omitted]; Wyle Inc., 130 AD3d at 439 [same].)[5]

In MBIA Insurance Corp. v Countrywide Home Loans, Inc. (87 AD3d 287 [1st Dept 2011] [MBIA]), the Appellate Division applied these principles in the RMBS context to the pleading of a fraud claim by a monoline insurer against the defendant securitizers. In holding that the insurer had sufficiently pleaded a fraud claim independent of its breach of warranty claim, the Court cited the following allegations: The defendants provided the insurer with loan documentation, including loan tapes, that contained false and misleading representations as to the characteristics of the loans, including LTV and DTI ratios; the prospectuses contained false representations about the defendants' compliance with underwriting guidelines and the independence of third-party appraisers; the defendants provided the insurer with false and misleading shadow ratings; the defendants made regular presentations to the insurer falsely representing their risk-management systems and loan origination practices; and the defendants made all of these representations "with knowledge of their falsity and to induce" the insurer to

[5] Although not at issue here, a fraud claim may also be maintained based on specific factual allegations from which a present intention not to fulfill a promise in future may be inferred. (See HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289, * 13 [Sup Ct, NY County Mar. 3, 2014, No. 652678/11] [this court's prior decision collecting authorities].)

provide the financial guaranty insurance for the transactions. (87 AD3d at 294.) The Court reasoned:

> "A fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff's breach of contract claim. 'Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract . . . and therefore involves a separate breach of duty'.
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> . . .
>
> Because MBIA alleges misrepresentations of present facts, and not future intent, made with the intent to induce MBIA to insure the securitizations, the fraud claim survives. . . . It is of no consequence that some of the allegedly false representations are also contained in the agreements as warranties and form a basis of the breach of contract claim. . . . It simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into the language of a contract."

(Id. [quoting First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287, 292 (1st Dept 1999), and citing this case for its holding that the defendants intentionally misrepresented facts about individual loans so that they would appear to satisfy warranties in the parties' agreements] [other internal quotation marks and citations omitted]; see also Wyle Inc., 130 AD3d at 440-441 [approvingly citing and quoting MBIA and First Bank].)

The allegations of the amended complaint are virtually identical to those sustained in MBIA. Ambac's fraudulent inducement claim is therefore not subject to dismissal as duplicative of its breach of contract claim.[6]

Defendants' argument that Ambac has failed to plead fraud with particularity under CPLR 3016 (b) also lacks merit. The fraudulent inducement claim in the amended complaint is

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[6] In arguing that the fraud and breach of contract claims are duplicative, defendants rely on Assured Guar. Mun. Corp. v DLJ Mtge. Capital, Inc. (2014 WL 3288335, * 8 [Sup Ct, New York County July 3, 2014, No. 652837/11 Kornreich, J].) This case dismissed the fraud claim on various alternative grounds, chief among them the court's finding as to the parties' agreement regarding the allocation of risk. In any event, this court is bound on the duplication issue by this Department's directly controlling precedent in MBIA (87 AD3d 287, supra).

substantially similar to the pleading upheld by the Appellate Division in MBIA (87 AD3d at 295 ["The amended complaint sufficiently identifies Countrywide's misrepresentations and describes when and how they were made to MBIA, including through false and misleading loan tapes and prospectuses"]; see also Allstate Ins. Co. v Credit Suisse Secs. (USA) LLC, 2014 WL 432458, * 9-11 [Sup Ct, NY County Jan. 24, 2014, No. 650547/11] [Allstate/Credit Suisse] [this court's prior decision upholding investor fraud claim based on substantially similar allegations as to misrepresentations, among others, regarding data material to the assessment of the quality of the loans, credit ratings, and compliance with underwriting standards]; HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289, * 15 [Sup Ct, NY County Mar. 3, 2014, No. 652678/11] [HSH Nordbank/Barclays] [same].) The fact that some of the allegations are pleaded upon information and belief does not render the pleading insufficient, where, as here, plaintiffs have "set forth sufficient information to apprise defendants of the alleged wrongs." (Allenby, LCC v Credit Suisse, AG, 134 AD3d 577, 579 [1st Dept 2015] [internal quotation marks and citation omitted].)

Defendants' specific objections to the sufficiency of the allegations of scienter, justifiable reliance, and causation are also without merit. With respect to scienter, as the Appellate Division has explained, "[o]rdinarily, intent to commit fraud is a question of fact which cannot be resolved on a motion to dismiss, and proof of intent is to be determined from surrounding circumstances." (ACA Fin. Guar. Corp. v Goldman, Sachs & Co., 131 AD3d 427, 428-429 [1st Dept 2015] [internal citations omitted] [CDO securitization].) To plead scienter, the complaint must "contain[] some rational basis for inferring that the alleged misrepresentation was knowingly made." (Houbigant, Inc. v Deloitte & Touche, LLP, 303 AD2d 92, 98 [1st Dept 2003]; accord Seaview Mezzanine Fund, LP v Ramson, 77 AD3d 567, 568 [1st Dept 2010].)

However, this "requirement should not be confused with unassailable proof of fraud." (Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 492 [2008].)

As this court has previously held in RMBS actions based on substantially similar pleadings, the element of scienter is satisfied by the allegations regarding defendants' receipt of pre-closing due diligence reports from Clayton Holdings, LLC and other third-party due diligence providers, and by their purportedly extensive due diligence on the third-party loan originators. (See Am. Compl., ¶¶ 30-37; HSH Nordbank/Barclays, 2014 WL 841289, at * 15-17; Allstate/Credit Suisse, 2014 WL 432458, at * 12.) The high breach rate and the nature of the breaches discovered in the loan-level forensic review conducted, prior to the institution of this action by Ambac's consultant, also support an inference of scienter. (See Am. Compl., ¶¶ 93, 95-97; HSH/Barclays, 2014 WL 841289, at *18 [allegations of pervasive noncompliance with underwriting standards, together with other circumstantial evidence, held sufficient to plead scienter].)

Justifiable reliance and loss causation are also adequately pleaded. In this court's recent decision in Ambac Assurance Corp. v Countrywide Home Loans, Inc. (2016 NY Misc Lexis 4698 [Sup Ct, NY County Dec. 19, 2016, No. 653979/14] [Ambac/Countrywide]), to which the parties are referred, this court extensively discussed the authorities on, and standards for, pleading and proof of these elements of a fraud claim by a monoline insurer in the RMBS context. Here, Ambac alleges that it conducted due diligence on the underlying loans using third-party providers. It further alleges that it was a third-party beneficiary of the PSAs, in which it obtained written representations and warranties about the characteristics of the loans. This pleading is sufficient to raise a question of fact as to whether Ambac reasonably relied on defendants' representations. (See CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co., 106

AD3d 437, 437-438 [1st Dept 2013] [upholding monoline insurer claim for fraudulent inducement, citing substantially similar allegations].) Ambac's failure to review the loan files does not vitiate its pleading. (Id. at 438; Ambac/Countrywide, 2016 NY Misc Lexis 4698, at * 24-27 [collecting authorities on this issue].)[7]

In pleading causation, Ambac alleges that as a result of the misrepresentations discussed above, it insured a pool of loans that had a risk profile far greater than it had been led to believe and has been required to pay out over $100 million in claims, with more claims expected. (Am. Compl., ¶¶ 118, 126.) As in Ambac/Countrywide (2016 NY Misc Lexis 4698, at * 33-44), these allegations are sufficient to plead loss causation. Ambac's claim for punitive damages is also cognizable at the pleading stage. The viability of the claim should await discovery or proof at trial of the culpability necessary to support such damages. (HSH /Barclays, 2014 WL 841289, at * 21 [collecting cases].)

Finally, defendants argue that the fraudulent inducement claim is time-barred under the six-year statute of limitations imposed by CPLR 213 (8), as the amended complaint was filed in September 2014 and the last alleged misrepresentation was made over seven years earlier in June 2007. Defendants appear to concede that the cause of action would have been timely if included in the initial complaint that was filed in April 2013. They contend, however, that the fraud claim does not relate back to the initial complaint because the contract based claims pleaded there did not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved under CPLR 203 (f). (Defs.' Memo in Supp. of Motion to Dismiss, at 8-10.)

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[7] Given this court's conclusion that justifiable reliance is adequately pleaded for purposes of a common law fraud cause of action, the court need not address Ambac's additional argument that Insurance Law § 3105 dispenses with the requirement of justifiable reliance. (See Ambac/Countrywide, 2016 NY Misc Lexis 4698, at * 13 n 6 [discussing authorities addressing this statute].)

The court holds that the initial complaint gave notice that Ambac's agreement to insure the two RMBS Transactions was allegedly induced by fraudulent misrepresentations. In that pleading, Ambac alleged that defendants' representations were "false on a massive scale" (Compl., ¶ 4); that NCCI knowingly waived in nearly half of the loans its due diligence provider identified as failing to comply with underwriting guidelines (id., ¶10); and that Ambac insured the Transactions based on NCCI's false loan representations. (Id., ¶ 71.) Moreover, the initial complaint by its terms alleged that the loans were affected by a "pervasive, systemic fraud." (Compl. ¶¶ 34, 65.) It is immaterial that the earlier pleading did not plead the tort by name, as "the salient inquiry is not whether defendant had notice of the claim, but whether, as the statute [CPLR 203 (f)] provides, the original pleading gave 'notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading.'" (Giambrone v Kings Harbor Multicare Ctr., 104 AD3d 546, 548 [1st Dept 2013], appeal withdrawn 22 NY3d 1038; see also Jennings–Purnell v Jennings, 107 AD3d 513 [1st Dept 2013].)[8]

It is accordingly hereby ORDERED that the motion of defendants Nomura Credit & Capital, Inc. and Nomura Holding America Inc. to dismiss the amended complaint is granted to the following extent: The third cause of action for breach of the repurchase protocol and the claim for rescissory damages are dismissed; and the first, second, and third causes of action, as against Nomura Holding America Inc., are dismissed; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that defendants' motion to strike is denied as moot; and it is further

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[8] Defendants' reliance on Serradilla v Lords Corp. (117 AD3d 648, 648-649 [1st Dept 2014]) is misplaced. In that case, the original complaint against an architect pleaded claims only for breach of contract and professional malpractice, and "lacked factual allegations to indicate intentionally misleading or malicious conduct on the architect's part." The fraud claim asserted against the architect in an amended pleading 10 years later was held not to relate back to the earlier pleading.

ORDERED that the cross-motion of plaintiffs Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation for leave to amend is denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
December 29, 2016

MARCY FRIEDMAN, J.S.C.