SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

MBIA INSURANCE CORPORATION, Plaintiff, -against- CREDIT SUISSE SECURITIES (USA) LLC, DLJ MORTGAGE CAPITAL, INC. and SELECT PORTFOLIO SERVICING, INC., Defendants.	Index No. 603751/09

MEMORANDUM OF LAW OF DEFENDANTS CREDIT SUISSE SECURITIES (USA) LLC, DLJ MORTGAGE CAPITAL, INC. AND SELECT PORTFOLIO SERVICING, INC. IN OPPOSITION TO PLAINTIFF MBIA INSURANCE CORPORATION'S MOTION TO COMPEL

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Defendants Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc. and Select Portfolio Servicing Inc. (collectively, "Credit Suisse") respectfully submit this Memorandum of Law in opposition to Plaintiff MBIA Insurance Corporation's ("MBIA") motion to compel.

I. PRELIMINARY STATEMENT

The Court should deny MBIA's motion for one basic reason: it is moot. The motion is based almost entirely on MBIA's professed need to find support for its claim that it was fraudulently induced to insure the HEMT 2007-2 residential mortgage-backed securitization (the "Transaction") at issue in this case. On April 7, 2011, however, the Court announced that it will issue an order granting Credit Suisse's motion to dismiss MBIA's fraud claim. This motion to compel was baseless to begin with, but the Court's April 7 announcement and forthcoming dismissal of the fraud count will eliminate MBIA's burden of proving fraud and therefore eliminates the bases for the motion.

MBIA's remaining causes of action are all contract-based. The claims stem from alleged breaches by Credit Suisse of specific representations and warranties contained in the Transaction Documents that allegedly "materially and adversely" affected MBIA's interests. Rather than relate to the contract claims that are actually at issue in this case, MBIA's motion seeks (i) financial accounting data relating to Credit Suisse's recoveries from third-party originators under contracts that are unrelated to the Transaction, and (ii) still more quality control information in addition to the voluminous quality control data and documents already provided. There simply is no legitimate argument that the far-flung discovery sought in this motion is remotely relevant to the claims in this case.

The request for financial data on originator recoveries is baseless. Credit Suisse purchased the loans that ultimately were securitized in HEMT 2007-2 from more than 200 unaffiliated originators. It made those purchases under master loan purchase agreements

("MLPAs") to which MBIA is neither a party nor a beneficiary. Contrary to the impression MBIA tries to create, the MPLAs between the originators and Credit Suisse are distinct from the Transaction and the rights and obligations in the Transaction Documents. Notably, the loan originators' representations and warranties to Credit Suisse in the MPLAs are different from — and materially broader than — Credit Suisse's representations and warranties in the Pooling and Servicing Agreement (the "Pooling Agreement") for HEMT 2007-2. Among other things, the MPLAs contain "fraud reps" and also protect Credit Suisse against the risk of early payment default ("EPD"). MBIA's motion, however, omits that Credit Suisse gave neither a fraud rep nor an EPD provision in the Transaction.

Credit Suisse resolved originators' breaches of these provisions by accepting payments as a negotiated compromise of claims for breaches of the MLPAs. MBIA argues that these recoveries should have been passed along for MBIA's benefit. That argument ignores that Credit Suisse's MLPAs with the originators are separate and different from MBIA's Pooling Agreement with Credit Suisse. The motion fails because it relies on the false assumption that Credit Suisse's contractual remedies vis-à-vis the originators under the MLPAs are the same as, and linked to, Credit Suisse's obligations under the Transaction Documents. This is simply wrong, and MBIA's suggestion to the contrary is a classic red-herring that has nothing do with the issues in this case: whether any of the 3,750 loans in MBIA's repurchase demands breached a representation or warranty in the Transaction Documents and whether such breach materially and adversely affected MBIA's interests in those loans.

The other prong of MBIA's motion seeks still more quality control data from Credit Suisse, but now MBIA wants data irrespective of whether the review included loans that

ultimately were included in the Transaction. On its face, the request is based entirely on MBIA's search for evidence in support of its soon to be dismissed fraud claim. It likewise is moot.

Should the Court consider the quality control request, it is even farther afield than the first request. To date, Credit Suisse has produced more than 125,000 non-loan file documents, more than 530,000 loan file documents, and data on more than 100,000 loans, both as to the 15,000 loans securitized in HEMT 2007-2 as well as 85,000 other loans in the channels from which the securitized loans were acquired. See Teshima Aff. ¶ 15. This includes thousands of documents related to the quality control process, including spreadsheet reports for the monthly quality control samples that contained any HEMT 2007-2 loan.

The additional quality control data MBIA now seeks is not related to the HEMT 2007-2 loans, and is not even related to the loans that were reviewed in post-acquisition monthly quality control buckets that contained any HEMT 2007-2 loans. Although couched in confused and vague terms, the request essentially asks for production of every single monthly quality control review that Credit Suisse performed on its entire inventory of loans, irrespective of whether the reviews contained a HEMT 2007-2 loan. The Court has previously denied this same request and other requests for data as to pools of loans that did not contain a HEMT 2007-2 loan. The Court should do so yet again.

II. PERTINENT FACTS

A. The Complaint Has No Allegations About Credit Suisse's Exercise Of Its Unique Contractual Remedies in the MLPAs with Originators

In its Complaint, MBIA does not allege that Credit Suisse made pre-contractual statements regarding the underlying MPLAs pursuant to which it acquired loans from third-party originators. It does not allege that Credit Suisse made any pre-contractual promises about proceeds that Credit Suisse might obtain from such originators as a result of Credit Suisse

asserting its contractual rights against the originators. Nor does it allege (because it cannot) that Credit Suisse has an obligation under the Transaction Documents to provide to MBIA any recoveries it obtains from these originators in the course of resolving their liabilities under these contracts. Finally, the Complaint does not allege that these recoveries in any way absolve Credit Suisse of its contractual obligations to MBIA under the Pooling Agreement.

B. The Complaint Has No Allegations About Credit Suisse's Quality Control Process

Nowhere in the Complaint does MBIA allege that Credit Suisse made pre-contractual misrepresentations about its existing quality control process or any changes to that process that it may make subsequent to the Transaction. The Complaint does not alleged (nor could it) that Credit Suisse made a contractual representation or warranty regarding its quality control reviews. In fact, the term "quality control" does not appear in the Complaint. See Haas Aff. Ex. 24.

C. The Originators Made Fraud Reps and Early Payment Default Reps In Their Loan Purchase Agreements With Credit Suisse

As alleged in the Complaint, Credit Suisse acquired the loans that it ultimately securitized in HEMT 2007-2 from more than 200 different unaffiliated originators. See id. at ¶ 24. Credit Suisse purchased the loans from these originators pursuant to MLPAs to which MBIA was not a party. In the MLPAs (which are substantially similar to each other), the originators made certain representations and warranties to Credit Suisse about the loans it purchased. These included so-called "fraud reps" and an early payment default ("EPD") provision. For example, Credit Suisse purchased loans from Decision One Mortgage Company, LLC ("Decision One") pursuant to an MLPA, subsection 8.02(ww) of which provides in pertinent part:

> No fraud, error, omission, misrepresentation, negligence or similar occurrence with respect to a Mortgage Loan has taken place by the Seller or the Mortgagor, or, on the part of any other party involved in the origination of the Mortgage Loan.

Affirmation of Darren S. Teshima ("Teshima Aff.") Ex. A at CS_M0004226723 (emphasis added); see also Teshima Aff. Ex. B at CS_M0004200063. The MLPAs also included EPD provisions. For example, the MLPA with Texas Capital Bank, NA provides at Section 3.05:

> If (a) a Mortgagor is thirty (30) days or more delinquent with respect to any of the first three (3) Monthly Payments due to the Purchaser on the related Mortgage Loan immediately following the applicable Closing Date or (b) a Mortgage Loan is in bankruptcy or litigation within the first three (3) months immediately following the applicable Closing Date, [Texas Capital], at [Credit Suisse's] option, shall promptly repurchase such Mortgage Loan. . . .

Teshima Aff. Ex. B at CS_M0004200075 (emphasis added); see also Teshima Aff. Ex. A at CS_M0004226727.

From time to time, Credit Suisse sought to enforce its rights pursuant to the fraud reps and EPD provisions by issuing loan repurchase demands to originators. See Haas Aff. Ex. 10. In some instances, the originator agreed to repurchase the loan, and in turn Credit Suisse repurchased that securitized loan out of HEMT 2007-2 so it could deliver it back to the originator. See Teshima Aff. Exs. C & D.

In other instances, however, the originator failed to repurchase the loan or was unable financially to pay the full repurchase price. In such a case, Credit Suisse and the originator sometimes reached a negotiated settlement whereby the loan was re-priced at a discount that the originator paid to Credit Suisse in exchange for a release. Haas Aff. Ex. 15; Ex. 21 (internal Credit Suisse email recommending settlement with Decision One "in light of the fact that D1 [Decision One] is defunct"). The loan, however, remained in the securitization, and MBIA's rights under the Transaction Documents as to that loan remained unchanged.

D. Credit Suisse Refused MBIA's Requests For A Fraud Rep In HEMT 2007-2

Two weeks before the Transaction closed, MBIA sent Credit Suisse a letter containing list of representations and warranties that it wanted included in the Pooling Agreement. Teshima Aff. Ex. F. In that letter, MBIA sought the following fraud rep:

> (nnn) There was no fraud in the origination of any Mortgage Loan by the mortgagee or by the Mortgagor, any appraiser or any other party involved in the origination of the Mortgage Loan.

Id. at MBIA_CS00028171. Credit Suisse rejected the fraud rep request, responding: "We do not give a fraud rep in any of our deals. This is not required by the rating agencies and is not market standard." Teshima Aff. Ex. H at MBIA_CS00024920 (emphasis added). Consistent with these negotiations, the Pooling Agreement does not include a fraud rep.

E. Credit Suisse Refused MBIA's Requests For An EPD Rep In HEMT 2007-2

Also two weeks before the closing, MBIA emailed Credit Suisse and asked it to confirm that "any loan not past their EPD timeframe will be covered by CS [Credit Suisse]." Teshima Aff. Ex. E. Credit Suisse responded: "there is no EPD rep for the deal." Id. Later that day, MBIA's again sought an EPD provision by requesting that Credit Suisse:

> Add [a] repurchase obligation of Seller if [first, second or third] Monthly Payment due on any Mortgage Loan after the Cut-Off Date is not received by the Servicer within thirty days of the related Due Date for such Monthly Payment on such Mortgage Loan.

Teshima Aff. Ex. F at MBIA_CS00028171. And again, Credit Suisse rejected the EPD, telling MBIA "There is no EPD protection for this deal. We've already discussed this." Teshima Aff. Ex. H at MBIA_CS00024921 (emphasis added). Consistent with these negotiations, the Pooling Agreement does not include any EPD provision.

Documents produced by MBIA to date evidence that it apparently agreed to insure the deal without an EPD provision by relying instead on its internal assessment of the amount of "seasoning" the loan pool had undergone. "Seasoning" means the average time between

origination of the loans in the pool and the HEMT 2007-2 securitization. MBIA's Credit Memo for HEMT 2007-2 states: "this pool is seasoned 5 months on average, which mitigates concerns for early payment default risk." Teshima Aff. Ex. G at MBIA_CS00004765) (emphasis added).

In an April 16, 2007 email, a member of MBIA's Executive Credit Committee, questioned whether five months of seasoning was sufficient to protect MBIA's interests, as follows:

> The [credit] memo states that the pool is seasoned 5 months on average, mitigating early payment default risk, and the combined loan to value is 97.2%. Given that housing values may already be under some stress, is 5 months of seasoning enough?

Teshima Aff. Ex. I (emphasis added).[1] In response, MBIA's business manager for the Transaction, wrote "There is no data that I am aware of that will show that 5 months seasoning washes out borrowers that are having problems making payments." Id. MBIA nevertheless insured the Transaction.

F. Credit Suisse Has Fully Complied with the Court's Discovery Orders

MBIA does not dispute that Credit Suisse has produced data and documents relating to each monthly quality control review containing a HEMT 2007-2 loan. Instead, MBIA now contends that that Credit Suisse has delayed and/or obfuscated its purported obligations under Item No. 4 in the Court's June 24, 2010 Compliance Conference Order (the "June 2010 Order"). MBIA is wrong. That Order addressed production of post-acquisition quality control data maintained by Credit Suisse, as follows:

> [Defendants] shall produce [i] all data relating to sampling of loans for performance on a monthly basis in buckets that included any of the securitized loans [and ii] all documents relating to the manner in which the performance of the sampled loans were evaluated, for

[1] MBIA's reference to the "combined loan to value [of] 92.7%" reflects its pre-contractual understanding that for all 15,000 loans in the Transaction, the amount of the borrowers' first and second mortgages averaged 97.2% of the appraised value of the homes.

> the period beginning with the first securitized loan purchased by [Defendants] through 4/30/2007.

Haas Aff. Ex. 32. The monthly "buckets" referenced by the Court are the monthly post-acquisition quality control samples reviewed by Credit Suisse. Haas Aff. Ex. 33 at CS_M0005721866 ("Quality Control (QC) is a post-funding review of quality on a sample of all loans that have been acquired or originated by Credit Suisse through the Bulk, MiniBulk, Loan by Loan (LBL) and Wholesale channels. . . . It is performed on a monthly basis in Credit Suisse."). Because these monthly samples pull loans from all origination channels, not every monthly sample would include a loan that was later included in the HEMT 2007-2 Transaction. Thus, the June 2010 Order requires that Credit Suisse produce data and documents related to each monthly quality control review "bucket" that "included any of the securitized loans." Haas Aff. Ex. 32.

Based on Credit Suisse's investigation following the June 2010 Order, it believed that this monthly quality control information was not maintained in a database, but instead was maintained in individual spreadsheet reports. See Teshima Aff. Ex. J. Credit Suisse produced these spreadsheets in September 2010. See id.

Upon further review, however, in March 2011, Credit Suisse recognized that its PBS database (which historically was used by personnel no longer employed by the company) also contains quality control information. See Haas Aff. Ex. 31. Accordingly, and in accordance with the June 2010 Order, Credit Suisse promptly advised MBIA on March 16, 2011 that it would produce "any quality control data on PBS related to the HEMT 2007-2 loans and the quality control pools (or "buckets," as referred to in Item 4 of the Court's June 24, 2010 Order) in which an HEMT 2007-2 loan was reviewed." Id. Credit Suisse, therefore, agreed to produce all of the quality control information called for in the June 2010 Order.

III. ARGUMENT

A. Credit Suisse's Financial Records Of Its Recoveries From Originators Under The MPLAs Are Irrelevant To MBIA's Claims

MBIA's motion seeks "documents sufficient to show the treatment in Credit Suisse's books and records of any consideration recovered" by Credit Suisse from an originator under an MPLA for any loan that was include in HEMT 2007-2. MBIA Br. at 23. MBIA fails to demonstrate how this financial information is necessary or material to any claim in this case.

1. The Request For Originator Recovery Financial Data Is Moot

According to MBIA, the reason it seeks Credit Suisse's accounting records of its recoveries from originators is "so that MBIA can establish the full scope and breadth of this fraud." MBIA Br. at 3. Pursuant to the Court's April 7 announcement, however, the fraud claim will be dismissed. Teshima Aff. ¶ 14. The motion thus seeks plainly irrelevant information, is moot, and should be denied for this reason alone. See, e.g., Pryon v. Banque Francaise du Commerce Exterieur, 256 A.D. 2d 204, 205 (1st Dep't 1998) (holding that party was not entitled to discovery where it failed to "demonstrate any relevance" of the information sought); Cheng v. Young, 60 A.D.3d 989, 991 (2d Dep't 2009) (affirming denial of motion to compel where discovery requests "are largely irrelevant to the sole remaining issue in this action").[2]

[2] Even if MBIA's fraud claim had survived, its motion fails because there are no alleged pre-contractual statements by Credit Suisse about its financial recoveries under the MPLAs with originators. Rather, the motion cites to Credit Suisse's "pitch book" that it used for marketing and which states, "The materials may not be used or relied upon in any way." MBIA Br. at 5-6; Haas Aff. Ex. 1. But even then, there is nothing in the pitch book about Credit Suisse's exercise of its remedies against originators.

2. Credit Suisse's Originator Recovery Data Has Nothing To Do With MBIA's Alleged Claims

MBIA's only argument that Credit Suisse's accounting records of its recoveries obtained from originators are relevant to its contract claims is that the information will show Credit Suisse's "motivation" to deny MBIA's loan repurchase demands under the Pooling Agreement. The argument is groundless and the discovery request should be denied. See, e.g., Furia v. Furia, 116 A.D.2d 694, 695 (2d Dep't 1986) (motivation not an element of breach of contract claim).

MBIA's entire argument is couched in the meaningless terminology that Credit Suisse has refused to repurchase "defective loans" from the securitization, while at the same time obtaining recoveries from originators "bearing the same defects." MBIA Br. at 5. However, Credit Suisse's repurchase obligations under the Pooling Agreement are triggered only by specific contract terms and conditions. "Defective" is not one of those contractual terms, and the term has no useful meaning in this litigation. Rather, MBIA bears the burden to prove that a breach of one of the specific representations and warranties in the Pooling Agreement "materially and adversely" affected MBIA's interests in each one of the loans in its repurchase demands. Teshima Aff. Ex. C at § 2.03(d). Yet one would never know that by reading MBIA's motion. The motion simply ignores that the MPLAs are separate and apart from the Transaction and they contain different provisions than the ones MBIA obtained in the Transaction. Credit Suisse's MLPAs with the originators contain (i) fraud reps in which the originator(s) expressly warranted that the borrower made no fraudulent representation in the loan origination process, and (ii) protection for Credit Suisse against early payment default whereby the originator(s) agreed to repurchase any loan where the borrower missed the first few monthly mortgage payments of the loan term.

By contrast, MBIA's rights against Credit Suisse relate only to the loans in HEMT 2007-2 and are defined in the Transaction Documents, particularly the Pooling Agreement and the Insurance Agreement, which are the two contracts that MBIA alleges Credit Suisse breached. See Haas Aff. Ex. 24 (Compl.) at ¶¶ 86-94. MBIA tries to create the impression that the Pooling Agreement includes similar fraud reps and EPD protection. But the opposite is true: MBIA agreed to insure the Transaction knowing full well there was no fraud rep or EPD provision in the deal. The motion also baselessly implies that when Credit Suisse recovers monies from an originator due, for example, to EPD on a loan, MBIA has some contractual right to these proceeds. In fact, there is no such right in the Transaction Documents, which explains why MBIA has not cited to one. How Credit Suisse enforces its rights under the separate and unique terms of the MPLAs with the originators is completely irrelevant to MBIA's claims that Credit Suisse breached a different and narrower set of representations and warranties contained in the Transaction Documents.

For example, a loan referenced in MBIA's motion illustrates the distinction between the reps the originators gave Credit Suisse in the MPLAs and the reps Credit Suisse made in the Pooling Agreement. In June 2007, Credit Suisse demanded that Decision One repurchase loan number 500919816 because of early payment default. Teshima Aff. Ex. K. By contrast, in December 2009, MBIA demanded that Credit Suisse repurchase this same loan, not because of early payment default (because the Pooling Agreement does not have an EPD provision), but because of alleged "Employment Misrepresentation" and "Missing/Defective Documentation."[3] Teshima Aff. Ex. L.

[3] Credit Suisse disputes that MBIA has demonstrated that this loan breached a representation or warranty that materially and adversely affected MBIA's interest in this loan, and disputes any obligation to repurchase the loan.

MBIA's argument that Credit Suisse has improperly benefited at MBIA's expense by being paid twice on certain loans is wrong because it ignores that Credit Suisse has ongoing obligations under the Transaction Documents. None of Credit Suisse's settlements with originators bought it peace on any of MBIA's contract claims nor did they otherwise restrict any of MBIA's rights against under the Transaction Documents. Thus, MBIA has demanded that Credit Suisse repurchase some 3,750 loans that allegedly breach the representations and warranties in the Pooling Agreement. If MBIA proves such breaches (which Credit Suisse asserts it cannot) and that those breaches "materially and adversely" affected MBIA's interests in the loans, the Pooling Agreement provides that Credit Suisse shall either cure the breach or repurchase the non-compliant loans. This would be the case whether or not the same loans had been subject to a settlement agreement between Credit Suisse and an originator.

B. MBIA Is Not Entitled To Any Additional Quality Control Information

1. The Request For Additional Quality Control Information Is Moot

The pending dismissal of the fraud claim moots MBIA's request because the fraud claim is the only purported basis on which MBIA contends it is entitled to the quality control information on Credit Suisse's PBS database. There are no allegations in the Complaint about Credit Suisse's quality control process or any alleged misrepresentations about this process.

In any event, since the Court's June 2010 Order, Credit Suisse already has produced hard copy spreadsheets of the quality control information called for in that Order, and has agreed to produce additional quality control data — again, consistent with the June 2010 Order — from the PBS database. See Teshima Aff. Ex. J; Haas Aff. Ex. 31. However, that Order was based on MBIA's argument that its fraud claim entitled MBIA to discover the quality control data. Given the forthcoming dismissal, the Court should vacate item No. 4 from its June 2010 Order rather

than put Credit Suisse to the substantial but unnecessary burden of producing additional documents and data not relevant to the contract claims left in this case.

2. MBIA Seeks Irrelevant Quality Control Information That The Court Has Already Precluded From Discovery

MBIA wrongly accuses Credit Suisse of failing to comply with the Court's discovery orders. A faithful reading of the Court's June 2010 Order demonstrates that Credit Suisse is in full compliance, and MBIA simply is seeking additional, irrelevant discovery. That Order requires Credit Suisse to "produce all data relating to sampling of loans for performance on a monthly basis in buckets that included any of the securitized loans [and] all documents relating to the manner in which the performance of the sampled loans were evaluated." Haas Aff. Ex. 32. By its terms, it requires that Credit Suisse produce only data and documents related to each monthly quality control "bucket" that "included any of the securitized loans." Id. Credit Suisse has agreed to produce precisely this information. Haas Aff. Ex. 31.

Not satisfied with the vast amounts of data already produced and agreed to be produced by Credit Suisse, MBIA tries to create a dispute where none exists by alleging that Credit Suisse is not in compliance with the Court's discovery orders. It asserts that Credit Suisse is improperly refusing to produce "the analysis of samples drawn from pools that include Loans in the Transactions if the Loans were not included in such samples." MBIA Br. at 4 (emphasis added). That argument turns the June 2010 Order on its head, which by its terms is limited to "buckets that included any of the securitized loans." Haas Aff. Ex. 32 (emphasis added). The second clause of Item 4, requiring the production of "all documents relating to the manner in which the performance of the sampled loans were evaluated," similarly is limited to documents related to the evaluation of the sampled HEMT 2007-2 loans.

Perhaps most importantly, quality control information about review buckets that did not include a HEMT 2007-2 loan is not remotely relevant. The Court has already held that MBIA is not entitled to this irrelevant data. Id. Consistent with the scope of discovery provided by the CPLR, the Court should summarily reject MBIA's request.

IV. CONCLUSION

For the reasons and upon the authorities set forth above, the Court should deny MBIA's motion to compel in its entirety.

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