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

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2007-ASAP2, by HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee,

Plaintiff,

-against-

DB STRUCTURED PRODUCTS, INC.,

Defendant.

INDEX NO. 651936/2013

MOTION DATE _____

MOTION SEQ. NO. 001

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

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 defendant's motion to dismiss is decided in accordance with the attached decision/order, dated August 28, 2014.

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

Dated: 8-28-14

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

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 S. Friedman, JSC

ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2007-ASAP2, by HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee,

Plaintiff,

- against -

DB STRUCTURED PRODUCTS, INC.,

Defendant.

Index No.: 651936/2013

DECISION/ORDER

This residential mortgage backed securities (RMBS) action for breach of contract, commonly known as a put-back action, arises out of the alleged failure of defendant DB Structured Products, Inc. (DBSP) to repurchase defective loans from plaintiff Trust. Defendant moves to dismiss the action. Except as discussed below, the action is based on substantially similar pleadings and raises issues that do not differ in any material respect from those determined by this court in a recent decision in Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc., 2014 WL 2890341 (Index No. 653390/12, June 26, 2014 [Nomura].)

On the authority and reasoning relied on in the June 26, 2014 decision, the court holds that the relief available to plaintiff is limited by the sole remedy provisions in the Pooling and Servicing Agreement (PSA) and the Mortgage Loan Purchase Agreement (MLPA) which govern the securitization at issue, and that the claim in the first cause of action for rescission and/or

rescissory damages should be dismissed. (2014 WL2890341, at * 10-11, 13-14.) As further held in Nomura Home Equity Loan Trust, Inc. v Nomura Credit & Capital, Inc., (Index No. 650337/13, July 18, 2014), even assuming arguendo that a contractual limitation on damages such as the sole remedy provision may be rendered unenforceable by willful misconduct or gross negligence, the allegations in the complaint fall far short of alleging the willful intent to harm the plaintiff, or the tortious conduct that smacks of intentional wrongdoing, which is necessary to obtain relief from such provision.

The court rejects defendant's further contention that liquidated (i.e., foreclosed) loans are not subject to repurchase. The PSA contains a number of provisions that bear on the calculation of the purchase price for loans that are required to be repurchased. However, the interrelationship of these provisions has not been thoroughly addressed on the record of this motion.[1] In any event, as discussed further below, the complaint alleges that the Seller's repurchase obligation arose as a result of DBSP's own discovery of breaches of representations and warranties regarding the loans, and that such discovery occurred at the time of the

[1]In this, as in other RMBS put-back cases, discussion of the issue of whether foreclosed loans are subject to repurchase has generally addressed, but not been limited to, the definitions in the PSA of Mortgage Loans and Purchase Price. The definition of Purchase Price in the PSA here differs from that in Nomura. This definition provides for calculation of Purchase Price based on Stated Principal Balance, as opposed to "outstanding principal balance" as in Nomura. The definition of Stated Principal Balance provides that the Stated Principal Balance is zero for mortgage loans as to which proceeds of a Liquidation Event would have been distributed. The term Liquidation Event includes Mortgage Loans as to which a Final Recovery Determination has been made. The term Final Recovery Determination is defined as: "With respect to any defaulted Mortgage Loan . . . (other than a Mortgage Loan . . . purchased by an originator, the Sponsor or the Terminator pursuant to or as contemplated by Section 2.03 . . . of this Agreement), a determination made by Servicer that all Insurance Proceeds, Liquidation Proceeds and other payments or recoveries which the Servicer, in its reasonable good faith judgment, expects to be finally recoverable in respect thereof have been so recovered . . . ." The parties dispute whether the making of a Final Recovery Determination applies to all loans which have been foreclosed (defendant's position) or whether the parenthetical exempts loans which should have been repurchased but were not (i.e., loans that PSA 2.03 "contemplated" would be repurchased) (plaintiff's apparent position). The parties have not undertaken the comprehensive textual analysis of these and other relevant provisions of the PSA that is necessary to enable the court to resolve this issue on this motion, and to determine whether or not the PSA is ambiguous with respect to the Sponsor's obligation to repurchase foreclosed loans.

securitization. The record on this motion to dismiss is not developed as to the extent to which loans in the pool had been foreclosed prior to the date on which DBSP's alleged obligation to repurchase arose. Nor need this issue be addressed at the pleading stage. (See Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA 1, 958 F Supp 2d 488, 497 [SD NY July 24, 2013] [Sweet, J.] [holding that even if DBSP were correct that liquidated loans are not subject to repurchase, issues of fact exist as whether all of the non-conforming loans fell into this category].)

The court also rejects defendant's contention that the action should be dismissed for failure to serve a timely repurchase demand – i.e., a notice from the Trustee demanding repurchase, pursuant to which the time to repurchase has expired prior to the commencement of the lawsuit. It is undisputed that a repurchase demand was served on May 16, 2013, approximately two weeks before filing of the summons with notice on May 30, 2013. The summons with notice was served before the 90 day repurchase period under section 2.03 of the PSA expired. Another repurchase demand was served on September 24, 2013, before the filing of the complaint on November 4, 2013. The action was commenced by filing of the summons with notice (CPLR 304 [a]) on the last day of the limitations period – i.e., exactly six years from May 30, 2007, the Closing Date of the PSA and the MLPA, and the date as of which the representations and warranties were made. If service of a repurchase demand were a condition precedent to commencement of the action, neither of the repurchase demands here would satisfy the condition precedent because, as the Appellate Division reasoned in ACE Securities Corp. v DB Structured Products, Inc. (112 AD3d 522, 523 [2013]) (ACE), the repurchase period "had not elapsed" prior to filing of the summons with notice.

ACE did not, however, hold that service of a repurchase demand is a condition precedent, where the Sponsor's repurchase obligation under the operative contracts is triggered either by a repurchase demand from the Trustee or by the Sponsor's own discovery of breaches of representations and warranties regarding the mortgage loans. As discussed in Nomura, the plaintiff in ACE itself argued that its cause of action accrued not at the time the representations and warranties regarding the loan were made but, rather, when the defendant breached its allegedly independent obligation to repurchase the loans in response to the plaintiff's demand for repurchase. (See 2014 WL 2890341, at * 14 [quoting ACE plaintiff's appellate brief that the "Trustee is not entitled to sue" until the Trustee demands repurchase and Seller refuses to do so].) In this context, the ACE Court held that the plaintiff failed to comply with a condition precedent to commencement of suit, because the plaintiff commenced the action before the expiration of the time to repurchase pursuant to the plaintiff's repurchase demand.[2]

In the instant action, in contrast, plaintiff alleges that the Sponsor's own discovery of breaches of the representations and warranties gave rise to an obligation to repurchase that was independent of any obligation that would have arisen pursuant to a repurchase demand. PSA section 2.03, the repurchase provision, obligates DBSP, as Sponsor (i.e., Seller) of the mortgage loans, to repurchase the loans where prompt notice of material breaches of the representations and warranties with respect to the loans is given to the Sponsor by the Trustee. Section 7 (a) of the MLPA, however, obligates DBSP as Seller of such loans to cure or repurchase them within

[2] Review of the ACE appellate briefs confirms that the PSA section 2.03 at issue in ACE provided for the Sponsor's repurchase upon either notice from the Trustee (a repurchase demand) or upon the Sponsor's own discovery of breaches of representations and warranties regarding the mortgage loans. (Brief for Plaintiff-Respondent at 12.) Although the terms of this PSA provision were noted, plaintiff's position, as argued to the Appellate Division, was that "DBSP only breaches its continuing repurchase obligation – and the Trust's cause of action only accrues – when DBSP fails or refuses to repurchase Defective Loans upon the Trustee's demand." (Id. at 19; 20-24; 27-29.)

specified time periods of "its discovery or its receipt of notice" of such breaches. Under the MLPA, the Seller's own discovery of breaches is thus an independent trigger of the Seller's obligation to cure or repurchase. (See Nomura, 2014 WL 2890341, at * 15 [and authorities cited therein].)[3]

DBSP contends that its obligation under the MLPA to repurchase upon its own discovery of breaches terminated upon the execution of the PSA, and that under the PSA, its sole obligation is to repurchase upon notice of breaches from the Trustee. This contention is unsupported by any provision of the MLPA or PSA. On the contrary, MLPA section 3 (c) provides that "[p]ursuant to the Pooling and Servicing Agreement, the Purchaser [ACE Securities Corp.] will assign all of its right, title and interest in and to the Mortgage Loans . . . to the Trustee for the benefit of the Certificateholders." Section 16 of the MLPA further provides that "[t]he Seller [DBSP] agrees that . . . the representations, warranties and agreements made by the Seller herein . . . shall survive the delivery of and payment for the Mortgage Loans and shall continue in full force and effect, . . . notwithstanding subsequent termination of this Agreement, the Pooling and Servicing Agreement or the Trust Fund." PSA section 2.01 consistently provides that "[t]he

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[3] PSA § 2.03 (a) provides in pertinent part:

> "Upon discovery or receipt of notice of . . . a breach by the Sponsor of any representation, warranty or covenant under the [MLPA], . . . the Trustee shall promptly notify the Sponsor and the Servicer of such . . . breach and request that the Sponsor . . . cure such defect or breach within ninety (90) days . . . and if the Sponsor does not . . . cure such defect or breach . . . during such period, . . . the Trustee shall enforce the obligations of the Sponsor under the [MLPA] . . . to repurchase such Mortgage Loan . . . at the Purchase Price . . . ."

MLPA § 7 (a) provides in pertinent part:

> "Upon discovery by the Seller, the Purchaser or any assignee, transferee or designee of the Purchaser . . . of a breach of any of the representations and warranties . . . , the party discovering such breach shall give prompt written notice to the Seller. Within sixty (60) days of its discovery or its receipt of notice of . . . any such breach . . . , the Seller promptly shall . . . cure such defect or breach in all material respects or, in the event the Seller . . . cannot cure such defect or breach, the Seller shall, . . . within ninety (90) days of its discovery or receipt of notice . . . repurchase the affected Mortgage Loan at the Purchase Price . . . ."

Depositor [ACE Securities Corp.] . . . does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust, . . . for the benefit of the Certificateholders, all the right, title and interest of the Depositor . . . in and to the Mortgage Loans, [and] the rights of the Depositor under the Mortgage Loan Purchase Agreement . . . (including, without limitation the right to enforce the obligations of the other parties thereto thereunder) . . . ." DBSP was not a party to the PSA, and the PSA does not by its terms eliminate DBSP's repurchase obligation under the MLPA.

As contemporaneous contracts governing the same transaction, the MLPA and PSA "must be read together." (Gulf Ins. Co. v Transatlantic Reins. Co., 69 AD3d 71, 81 [1st Dept 2009] [internal quotation marks and citation omitted].) As a federal RMBS court reasoned in construing an identically worded MLPA section 3 (c) and PSA section 2.01, "DBSP's reading allows it to sit on its hands after discovering a breach merely because the Trustee has not also discovered and noticed the same breach, effectively nullifying the 'discovery' language in section 7 (a) of the MLPA. . . . DBSP's reading would also imply, counterintuitively, that section 2.03 (a) of the PSA obligates the Trustee to 'notify' DBSP of breaches that DBSP has already discovered before it may enforce DBSP's repurchase obligation with respect to those breaches." (ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Prods., Inc., 2014 WL 1116758, * 16 [SD NY Mar. 14, 2014] [Nathan, J.] [ACE [Nathan, J.]].)

The court holds that the MLPA and PSA authorize an action for breach of the representations and warranties regarding the mortgage loans to be maintained based upon service of a repurchase demand as a condition precedent to commencement of the action, or on the

Seller's independent discovery of breaches of the representations and warranties, or on both. (See Nomura 2014 WL 2890341, at * 15 [and authorities cited therein].)[4]

The court further holds that the allegations of the complaint as to DBSP's discovery of the breaches of the representations and warranties are sufficient, at the pleading stage, to support plaintiff's claims. The complaint alleges that DBSP "was aware of and discovered the breaches long before receiving notice from the Trustee," based on its integral involvement in origination and due diligence. (Compl., ¶ 28.) In particular, "DBSP and its affiliates were integrally involved in the origination of the majority of the Mortgage Loans," and, according to the Prospectus Supplement, the Mortgage Loans were originated in accordance with DBSP's underwriting guidelines. (Id., ¶ 25.) As the sponsor of the securitization, DBSP selected the loans to be securitized, and performed due diligence on the loans before placing them into the Trust. (Id., ¶ 26.) The complaint further alleges that the originators failed to adhere to their underwriting guidelines in an "extremely high percentage of cases." Id., ¶ 30.) Plaintiff's own "Data Review" of 1254 of the mortgage loans in the Trust allegedly revealed breaches "so fundamental and numerous as to eliminate any possibility that they were the result of mere inadvertence or accident." (Id., ¶ 36.) Specifically, the Data Review showed that 851, or over 67 percent, of the reviewed loans were sold to the Trust in breach of one or more of DBSP's representations and warranties. (Id., ¶¶ 30-35.)

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[4]In Nomura (2014 WL 2890341, at * 15), this court held that the plaintiff Trust's allegations as to the Seller's discovery of breaches of the mortgage representations were sufficient, at the pleading stage, to support the plaintiff's claims in the action. As the Trust had also served at least one timely repurchase demand the court did not reach the issue, which is squarely presented by the instant action, of whether the Seller's own discovery of breaches could alone support the complaint. In ACE [Nathan, J.] (2014 WL 1116758, at * 14), the plaintiff had also served timely repurchase demands. However, the Court did not resolve the issues raised by DBSP on the motion to dismiss as to the adequacy of the demands, as the court upheld the pleading based on the plaintiff's allegations as to DBSP's discovery of breaches of the representations and warranties.

These allegations as to discovery are as, or more, specific than the allegations which this court, and the weight of authorities, have found sufficient to support breach of contract claims in RMBS cases. (See Nomura, 2014 WL 2890341, at * 15 [holding that claim of Seller's discovery of breaches was adequately supported by allegations as to Seller's due diligence – namely, that Clayton Holdings, Inc. performed due diligence for the plaintiff and determined that in the period between the first quarter of 2006 and 2007, approximately 38% of the mortgage loans did not comply with underwriting guidelines, but that 58% of such non-complying loans were "waived in" to the loan pools]; ACE[Nathan, J.], 2014 WL 1116758, at * 12-13 ["By alleging that DBSP [Sponsor] conducted due diligence on loan pools that suffered from obvious and widespread breaches, Plaintiff has adequately alleged that DBSP discovered those breaches, and therefore that its cure-or-repurchase obligations were triggered independent of any notices"]; Deutsche Alt-A Secs., 958 F Supp 2d at 497 [Sweet, J.] [holding that allegation of seller's discovery of breaches "through its due diligence efforts" was sufficient to plead that seller's obligation to repurchase defective loans not identified in demand notice had been triggered]; Morgan Stanley Mtge. Loan Trust 2006-10SL v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 3924620, * 3 [Sup Ct, NY County Aug. 8, 2014] [Bransten, J.] [holding that allegation that seller "knew that numerous loans breached warranties, irrespective of the Breach Notices, due to its role as originator and underwriter" was sufficient to plead breach of contract claims based on seller's own discovery of breaches as to loans not identified in Breach Notices]; SACO I Trust 2006-5 v EMC Mtge. LLC, 2014 WL 2451356, * 8 [Sup Ct, NY County May 29, 2014] [Bransten, J.] [holding that contractual notice was adequately pleaded where plaintiff alleged that seller discovered breaches during its post-closing audit, quality control reviews, and when performing loan modifications]. But see Citigroup Mtge. Loan Trust 2007-AMC3 v Citigroup

Global Markets Realty Corp., 2014 WL 1329165, * 5-6 [SD NY Mar. 31, 2014] [Daniels, J.] [holding that plaintiff's breach of contract claim based on defendant's discovery of breaches of representations and warranties was not maintainable based on allegations that "defendant 'performed its own comprehensive re-underwriting' of some of the loans, and hired a third-party due diligence firm to conduct due diligence on the loans before securitizing them," and that defendant "'knew at the time [of its due diligence] that it was highly likely that more than one out of every eight loans it securitized . . . did not comply with the applicable underwriting guidelines.'"].)

Defendant contends that the pleading of defendant's discovery of breaches of representations and warranties is deficient because the complaint does not specifically identify each of the loans as to which defendant is claimed to have discovered breaches. At the pleading stage, however, the allegations of the complaint as to defendant's role in the securitization, together with the allegations as to the widespread nature of the breaches, as confirmed by plaintiff's loan-level analysis, are sufficient to support a reasonable inference that defendant discovered widespread breaches.[5] (See e.g. Morgan Stanley Mtge. Loan Trust, 2014 WL 3924620, at * 3-4 [Bransten, J.]; ACE[Nathan], 2014 WL 1116758, at * 17; Deutsche Alt-A Secs., 958 F Supp 2d at 497; Deutsche Bank Natl. Trust Co. v WMC Mortgage, LLC, 2014 WL 1289234, * 15 [D Conn Mar. 31, 2014] [Haight, J.]; contra Citigroup Mtge. Loan Trust 2007-AMC3, 2014 WL 1329165, at * 6.)

[5]Similar allegations have been cited by courts in upholding the sufficiency of repurchase demands that refer to specific allegedly defective loans identified by the plaintiff's statistical sampling of the loan pool or other loan-level investigation, but that demand repurchase of all defective loans in the loan pool. (See Assured Guaranty Mun. Corp. v Flagstar Bank, 2011 WL 5335566, * 7 [SD NY Oct. 31, 2011] [Rakoff, J.] [notification of pervasive breaches affecting the loan pool "rendered [Seller] constructively 'aware' – or, at minimum, put [Seller] on inquiry notice – of the substantial likelihood that these breaches extended beyond" the loans identified by plaintiff's review; see also Nomura, 2014 WL 2890341, at * 16 [and cases cited therein].)

It bears emphasizing that although the complaint sufficiently pleads defendant's discovery of breaches of representations and warranties, plaintiff will have the ultimate burden of proving whether and to what extent defendant discovered the breaches. (See ACE[Nathan], 2014 WL 1116758, at * 13.)

The court further holds that the second cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of the first cause of action for breach of contract. The two causes of action are based on the same allegations as to defendant's pervasive breaches of the representations and warranties, its awareness of the breaches, and its failure to repurchase the defective loans.

Plaintiff's claim for reimbursement of attorney's fees should also be dismissed. The definition of Purchase Price under the PSA includes: "(iv) in the case of a Mortgage Loan required to be repurchased pursuant to Section 2.03 of this Agreement, expenses reasonably incurred . . . by . . . the Trustee in respect of the breach or defect giving rise to the purchase obligation . . . ." MLPA § 4 (d) similarly provides: "Any expense reasonably incurred by or on behalf of the Purchaser or the Trustee in connection with enforcing any obligations of the Seller under this Agreement will be promptly reimbursed by the Seller." These provisions for indemnification for the Trustee's expenses in enforcing the Seller's obligations do not expressly include attorneys' fees among the covered expenses. The court accordingly holds that the parties' intent to indemnify plaintiff for its attorney's fees in litigating this action is not unmistakably clear from the terms of the parties' agreements. (See Hooper Assoc. v AGS Computers, 74 NY2d 487, 492 [1989]; Nomura Home Equity Loan Trust, Index No. 650337/13, July 18, 2014 [and authorities cited therein].)

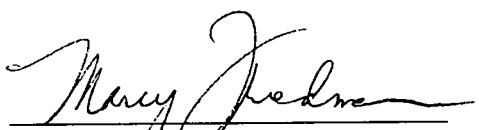
It is accordingly hereby ORDERED that defendant's motion to dismiss the complaint is granted to the following extent:

It is ORDERED that the first cause of action for breach of contract is dismissed only to the extent that it demands rescission or rescissory damages and attorneys' fees; and it is further

ORDERED that the second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
August 28, 2014



MARCY FRIEDMAN, J.S.C.