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

PRESENT: O. PETER SHERWOOD *Justice* PART 49

CIFG ASSURANCE NORTH AMERICA, INC.

Plaintiff,

-against-

GOLDMAN, SACHS & CO., *et al.*,

Defendants.

INDEX NO. 652286/2011

MOTION DATE April 12, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	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 this motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: May 1, 2012

O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

PRESENT: O. PETER SHERWOOD PART 49
Justice

CIFG ASSURANCE NORTH AMERICA, INC.

Plaintiff,

-against-

GOLDMAN, SACHS & CO., *et al.*,

Defendants.

INDEX NO. 652286/2011

MOTION DATE April 12, 2012

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

	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 this motion for a default judgment is decided in accordance with the decision and order accompanying Motion Sequence No. 001.

Dated: May 1, 2012

O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------X

CIFG ASSURANCE NORTH AMERICA, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 652286/2011

GOLDMAN, SACHS & CO., GOLDMAN SACHS MORTGAGE COMPANY, GS MORTGAGE SECURITIES CORP., and M&T BANK,

Defendants.

----------X

O. PETER SHERWOOD, J.:

I. OVERVIEW

This case arises out of the recent mortgage-backed securities crisis and involves securitization of a portfolio of over 6,000 second lien subprime residential mortgage loans which defendant, Goldman Sachs Mortgage Company("GSMC")(GSMC, together with Goldman, Sachs & Co., and GS Mortgage Securities Corp., ["Goldman"]) purchased from six originators, including defendant, M&T Bank.[1] Goldman Sachs & Co. ("Goldman Sachs") acted as the underwriter. Goldman did not originate the loans.

Plaintiff, CIFG Assurance North America, Inc. ("CIFG"), contends that Goldman induced it to provide guaranty insurance on over $275 million of securities issued in connection with that securitization by misleading plaintiff as to the quality and origination of the mortgage loans and by concealing what it actually knew about the loan pool. When the loans began to suffer defaults, CIFG reviewed a sample of the mortgage loans and allegedly found that 80% of the loans contained material defects.

CIFG commenced this action alleging fraud, breach of contract and accounting. Plaintiff alleges that defendants made "systematic misrepresentations and material omissions" in connection with the securitization including a failure by Goldman to disclose that "the securitization constituted

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[1]As is required on a motion to dismiss pursuant to CPLR 3211, the facts are taken from the complaint and are assumed to be true unless documentary evidence submitted with the motion "utterly refutes" the allegations in the complaint (*see Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]).

an integral part of an orchestrated corporate policy to offload billions of dollars in toxic exposure to mortgage-related assets, thereby duping investors and insurers such as CIFG to take on Goldman's enormous market risk" (Complaint, ¶ 1).

By separate motions, Goldman and M&T Bank move to dismiss the causes of action asserted against them, pursuant to CPLR 3211 (a)(1) and (7), for failure to state a cause of action and defenses based upon documentary evidence. In motion sequence number 001, M&T Bank seeks to dismiss the first, second and third causes of action. In motion sequence number 002, Goldman seeks dismissal of the first, second, fourth, fifth, seventh and eighth causes of action.

II. BACKGROUND

Goldman created the securitization involved here by aggregating 6,204 second lien residential mortgage loans (the "Loans") and selling them to GSAA Home Equity Trust 2007-S1 (the "Trust"), which in turn issued certificates to investors. The residential mortgage-backed securitization closed on or about February 28, 2007 and resulted in the issuance and sale by the Trust of $277,251,000 of Mortgage Pass-Through Certificates, Series 2007, one class of which, the Class A-1 Certificates (the "Certificates"), was insured by CIFG (Complaint ¶ 2). Payment of principal and interest on these Certificates was to be funded by the stream of interest and principal payments made by individual borrowers of the Loans held by the Trust. As a result of widespread defaults on the loans, the payment obligation of the Trust shifted to CIFG, as insurer of the Certificates (*id.*).

The structure of the securitization was as follows: GSMC, as Sponsor, acquired the Loans from six originators[2] which it then assigned to GS Mortgage Securities Corp. ("GS Mortgage"), as Depositor, pursuant to a separate Assignment, Assumption and Recognition Agreement ("AARs") with each of the originators. Simultaneously therewith, GS Mortgage sold the Loans to the Trust. The Trust then issued Certificates which Certificates Goldman Sachs in its role as underwriter sold to investors. In order to make the Certificates more attractive to investors, Goldman purchased insurance as a "credit enhancer" of the Certificates. The insurance issued by CIFG had the effect of improving the credit rating of the Certificates by guaranteeing to buyers that they would continue

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[2] The Loans originators were M&T Bank, GreenPoint Mortgage Funding, Inc., Irwin Union Bank & Trust, Accredited Home Lenders, Inc., Impac Funding Corporation and New Century Mortgage Corporation (Complaint ¶¶ 29-30). M&T Bank originated approximately 23.09% of the Loans.

to receive payment of principal and interest in the event the cash flow from the Loans was not sufficient to pay debt service (*id.* ¶ 36).

CIFG alleges in the Complaint that in light of the significant risk of loss involved that "could reach into the hundreds of millions of dollars", it "undertook extensive due diligence of the Loan originators and proposed Loan servicers, analyzed the collateral characteristics of the Loan portfolio and analyzed the deal structure, including risk of widespread losses to CIFG in the event of various adverse events, before agreeing to provide insurance" (*id.* ¶ ¶ 36, 39-40). CIFG concedes in the complaint that its due diligence did not include "a detailed, loan-by-loan analysis of the over 6,000 loans whose cash flow CIFG was being asked to insure because . . . such analysis would be both cost prohibitive . . . and impractical" (Complaint ¶ 39). However, it claims that Goldman was aware of the limitations on CIFG's conduct of due diligence. CIFG contends that it reasonably relied on representations and warranties made by Goldman and M&T Bank with respect to the Loans. CIFG claims that its due diligence was not sufficient to protect it from enormous losses because of Defendants' material omissions and misrepresentations. Plaintiff contends that the loan originators made broad representations and warranties regarding the quality of the Loans they sold (*id.* ¶ 30). The Loans held by the Trust totaled $298,440,360. Until the Certificates were marketed, Goldman Sachs bore the risk of loss on the Loans (*id).*

The Transaction Documents associated with the securitization include the Representations and Warranties Agreement, dated February 28, 2007, between GSMC and GS Mortgage (the "R&W Agreement"); the Pooling and Servicing Agreement, dated February 1, 2007, between GS Mortgage and certain Loan originators ("P&S Agreement") and Amendment No. 1 to the P&S Agreement, dated October 19, 2007 ("Amendment No. 1"), the Insurance and Indemnity Agreement, effective February 27, 2007, between CIFG and GSMC and GS Mortgage (the "I&I Agreement"); the Master Mortgage Loan Purchase and Servicing Agreement between GSMC and M&T Mortgage Corp., dated November 1, 2005 (the "Sale Agreement"); and the Assignment, Assumption and Recognition Agreement, dated February 28, 2007, between GSMC, GS Mortgage and M&T Bank ("M&T AAR").

Plaintiff contends that beginning in late 2006 (*i.e.* before the securitization at issue closed), Goldman Sachs recognized that the subprime residential mortgage industry was in distress and

worsening and that its inventory of mortgage-related assets was beginning to lose value. Goldman Sachs and its affiliates then began an "aggressive" sell-off of its mortgage-related assets and also sought to enforce its contractual rights to compel loan originators to repurchase defective loans. Plaintiff cites to the Report of the United States Senate on the Financial Collapse which found Goldman Sachs to have "engaged in troubling and sometimes abusive practices" to exploit the crisis in the subprime market for its own gain (Complaint ¶¶ 15-21). Plaintiff claims that Goldman Sachs recognized that the root of the problem was the quality of the underlying mortgage loans, that the loan originators were struggling with significant numbers of early payment defaults, were being required them to buy back the loans and take losses, and that many of the loan originators were thinly capitalized, and/or highly leveraged and therefore could not manage their repurchase obligations (Complaint, ¶ 22). Goldman Sachs is alleged to have adopted a strategy of seeking to liquidate its "toxic" residential mortgage based securities ("RMBS") position and "shorting" the mortgage market, thereby earning hefty profits while getting other parties to bear the brunt of the losses it knew were coming.

The complaint alleges that CIFG was induced to insure the Certificates without Goldman Sachs disclosing what it knew about the growing crisis. Plaintiff contends that instead Goldman Sachs and M&T Bank "sang the praises" of the Loans to CIFG by representing and warranting the quality of the Loans and backing the representations with broad indemnification and promises to buy back loans found to be not in accordance with the representations and warranties set forth in the R&W Agreement (*id.* ¶¶ 26, 31).

Plaintiff contends that within months of the closing, the loans began to default "at staggering rates" (Complaint ¶ 67), prompting CIFG to hire an outside consultant, Opus Capital Markets Consultants LLC ("Opus"), to conduct a review of the loan documentation to determine whether the loans were properly originated (*id.*). Upon a review of 491 non-performing Loans, Opus determined that 393 (approximately 80%) did not comply with one or more of the representations and warranties in the R&W Agreement or GSMC's underwriting guidelines (*id.*). Specifically, Opus reported that the borrower's income was consistently overstated. Opus also found that M&T Bank breached the representations and warranties in the Sale Agreement and the AAR, again particularly with respect to overstating the borrower's income (*id.* ¶¶ 73-74).

Based upon the Opus findings, CIFG demanded that GSMC repurchase 197 loans which had an aggregate principal value of $11,167,176 (*id.* ¶ 76). GSMC responded by letter dated October 16, 2009, that CIFG had failed to establish a valid repurchase claim by submitting sufficient documentation of the claimed breaches of the R&W Agreement (*id.* ¶ 77). Opus, on behalf of CIFG, made a second demand to GSMC for repurchase of 196 additional breaching loans, with an aggregate principal balance of approximately $13,510,457, which demand GSMC rejected (*id.* ¶ 78). On June 16, 2011, CIFG, through counsel, made a demand to M&T Bank that it repurchase 98 Loans originated by M&T Bank, with an aggregate principal amount of approximately $5,622,253. M&T Bank did not respond to the demand (*id.* ¶¶ 82-83).

In addition, CIFG claims that Goldman Sachs failed to account for the Loans that the loan servicers "charged off" based on the Loans being more than 180 days delinquent and which the loan servicer determined to discharge to Goldman Sachs. CIFG claims that approximately 20% of the entire principal balance of the loan pool with a principal balance of approximately $55,700,000, was released to Goldman Sachs (*id.* ¶¶ 87- 101).

On August 16, 2011, CIFG commenced this action against Goldman and M&T Bank alleging eight causes of action, as follows: fraudulent inducement (first cause of action against all defendants); breach of contract (R&W Agreement against GSMC)(second cause of action); breach of contract (M&T Bank Sale Agreement against M&T Bank)(third cause of action); breach of contract (I&I Agreement against GSMC and GS Mortgage)(fourth cause of action); breach of contract (AARs against GSMC) (fifth cause of action); breach of contract (M&T Bank AAR against M&T Bank)(sixth cause of action); breach of contract (I&I Agreement)(books and records inspection against GS Mortgage)(seventh cause of action); and accounting (against Goldman Sachs) (eighth cause of action). In lieu of answering, the defendants filed these motions to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (7).

CIFG acknowledges in the Complaint that in connection with the securitization, Goldman Sachs provided to it, and filed with the Securities and Exchanges Commission ("SEC"), a Prospectus, dated February 3, 2007 (the "Prospectus") and a Supplemental Prospectus, dated February 26, 2007 (the "ProSupp") (Complaint ¶ 34). These documents contain detailed disclosures about the risks associated with the securitization and the underlying Loans. A section bearing the

title "Risk Factors" in the ProSupp provided, in bold face and in pertinent part, the following headings, which were then explained in greater detail:

- Less Stringent Underwriting Standards and the Resultant Potential for Delinquencies on the Mortgage Loans Could Lead to Losses on Your Certificates.
- The Mortgage Loans Are Secured by Subordinate Mortgages; In the Event of a Default, the Mortgage Loans Are More Likely to Experience Losses
- Recently, the Subprime Mortgage Loan Market has Experienced Increasing Levels of Delinquencies and Defaults; Increased Use of New Mortgage Loan Products by Borrowers May Result in Higher Levels of Delinquencies and Losses Generally
- Violation of Various Federal, State and Local Laws May Result in Losses on the Mortgage Loans
- High Combined Loan-to-Value Ratios Increase Risk of Loss
- The Original Loan Sellers May Not Be Able to Repurchase Defective Mortgage Loans

(October 17, 2011 Hickey Affirm, Ex. "B", S16 - S31). The Prospectus and ProSupp documents also advised that the Loans originated primarily through "alternative documentation" programs which required less documentation and verification than full documentation programs and, in many instances, did not require the originator to verify the borrower's income and assets (*id.* S35-S36).

III. DISCUSSION

A. Motion to Dismiss, Applicable Standard

1. Standard CPLR § 3211(a)(1)

To succeed on a motion to dismiss, pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

2. CPLR § 3211(a)(7)

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" *EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a CPLR 3212 motion for summary judgment, the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no * * * cause of action" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

B. M&T Bank's Motion To Dismiss (Motion Sequence Number 001)

1. Breach of Contract (M&T's Sale Agreement)(Third Cause of Action)

M&T Bank contends that the third cause of action must fail because: (1) CIFG, who was not a party to the Sale Agreement, lacks standing to pursue this cause of action as it was not an intended third party beneficiary of the representations and warranties contained therein; (2) assuming CIFG is entitled to enforce the Sale Agreement, CIFG's claim is premature as to Loans, other than the 98 loans identified in its June 16, 2011 notice, that may be breached in the future as CIFG has given no written notice to M&T Bank of any alleged breaches or allowed M&T Bank the 60-day cure period provided in subdivision 7.03 of the Sale Agreement; (3) CIFG cannot demand specific performance of the Sale Agreement where it does not allege that an action at law for money damages would be an inadequate remedy; and (4) CIFG has failed to allege that it has suffered any damages.

The standing argument is predicated upon language in Section 7 of the Sales Agreement titled "Representations, Warranties and Covenants of the Seller; Remedies for Breach" which provides as to the Seller's representations, warranties and covenants that: "[T]he Seller represents, warrants and covenants to the Purchaser, its successors and assigns ...". The representations, warranties and covenants are then detailed. Similarly, subdivision 7.02 concerning the Seller's representations and warranties regarding individual loans, provides that: "[T]he Seller hereby represents and warrants to the Purchaser". The representations and warranties as to each mortgage loan are then stated. Subdivision 7.03, governing the remedies available for breach of the representations or warranties in subdivisions 7.01 or 7.02, states that such representations and warranties "shall inure to the benefit of the Purchaser, and its successors and assigns". (Affirmation in Support of Michael Luskin [Luskin Affirm] ¶ 4, Ex. "B").

M&T Bank notes that there is no dispute that CIFG is not GSMC's successor or assign and, therefore, cannot enforce any of the contractual representations under the Sale Agreement. In addition, M&T Bank argues that if the parties had intended to provide third party beneficiary rights to CIFG, they would have done so expressly as they did in the AAR and R&W Agreement. Particularly, M&T Bank observes that section 3 (a) of the M&T AAR provides for a modification of the Sale Agreement by adding a Section 35 to make Wells Fargo, as master servicer under the Pooling Agreement, a third party beneficiary of the Sale Agreement "entitled to all of the rights and benefits accruing to it as if it were a direct party to [the Sale] Agreement" (Luskin Affirm. Ex. "C").

M&T Bank maintains that the addition of this provision, and the exclusion of CIFG as a third party beneficiary, establishes the parties' intent that CIFG not be entitled to enforce the Sale Agreement in its own name.

CIFG claims that it has standing to enforce the provisions of the Sale Agreement as an intended third party beneficiary based on provisions of the ProSupp and M&T AAR Agreement. CIFG is an express beneficiary under the M&T AAR. Section 14 thereof states that: "[T]he parties agree that the Trustee and the Certificate Insurer [CIFG] are each intended to be, and shall have the rights of, a third party beneficiary of this Assignment Agreement." (Luskin Affirm. Ex. "C"). CIFG claims that because it is an express third party beneficiary under the M&T AAR, it is also the intended beneficiary under the Sale Agreement, "with the right to enforce, among other things, M&T's 'cure or repurchase' and indemnification obligations." This argument is predicated upon Section 1 (a) of the M&T AAR which provides, in relevant part:

> Assignment and Assumption. (a) The Assignor [GSMC] hereby assigns to the Assignee [GS Mortgage] . . . all of its right, title and interest in and to the Mortgage Loans and the Sale Agreement, to the extent relating to the Mortgage Loans (other than the rights of the Assignor [GSMC] (and if applicable its affiliates, officers, directors and agents) to indemnification thereunder) and the Assignee [GS Mortgage] hereby assumes all of the Assignor's [GSMC's] obligations under the Sale Agreement . . . and the Responsible Party [M&T Bank] hereby acknowledges such assignment and assumption and hereby agrees to the release of the Assignor [GSMC] from any obligations under the Sale Agreement . . .

(Luskin Affirm. Ex. "C"). Thus, CIFG claims that the very purpose of the M&T AAR is to give GS Mortgage, and by extension CIFG, the right to enforce the Sale Agreement. As further proof of its intended third party beneficiary status under the Sale Agreement, CIFG points to Section 15 of the M&T AAR which provides that: "Amendments. Neither this Assignment Agreement nor the Sale Agreement (solely with respect to the Mortgage Loans) may be amended without the prior written consent of the Certificate Insurer [CIFG]" (*id.*).

CIFG contends that the drafting history of the M&T AAR further demonstrates the parties' recognition that CIFG's enforcement rights under the Sale Agreement was a central point of negotiation as the language requiring CIFG's consent for amendments to the Sale Agreement was added only after CIFG's counsel noted that such language was initially provided with respect to amendments to the M&T AAR, but not with respect to the Sale Agreement.

CIFG also directs the Court's attention to an indemnification provision in the ProSupp under the "Representations and Warranties" section, which states: "M&T . . . [is] obligated to indemnify the depositor, the servicers, the master servicer, the issuing entity, the Certificate Insurer [CIFG], the custodian and the trustee for any third-party claims arising out of a breach by M&T . . . of representations or warranties regarding the related mortgage loans" (Hickey Affirm., Ex. "B", S-69). CIFG maintains that such provision is further evidence of the parties' intention to benefit CIFG in the Sale Agreement.

Turning then to the anticipatory breach claim, CIFG argues that M&T Bank's failure to respond to its June 16, 2011 Notice identifying breaches as to 98 loans demonstrates that M&T Bank does not intend to comply with subdivision 7.03 of the Sale Agreement and, therefore, CIFG's failure to give notice as to all defective loans was excused. In any event, CIFG avers that M&T Bank's repurchase obligation is triggered not only by notice, but also by M&T Bank's own discovery of breaches which, given the high breach rate discovered by Opus, M&T Bank must have also discovered. In addition, CIFG contends that M&T Bank's own conduct prevented CIFG from providing further details on specific M&T Bank guidelines that the loans at issue breached as M&T Bank requested.

As to the claim for specific performance, CIFG states that it is entitled to seek alternative forms of relief and that the relief of specific performance is appropriate because damages in mortgage-backed securities cases are difficult to ascertain.

M&T Bank responds that Section 1 of the M&T AAR through which CIFG claims third party beneficiary rights in the Sale Agreement cannot be read in isolation, but must be considered in conjunction with Section 4 of the M&T AAR which identifies the parties to whom the rights and obligations of the Sale Agreement would inure and does not include CIFG. Section 4 reads, in pertinent part, as follows:

> Recognition of Assignee. From and after the date hereof, the Responsible Party [M&T Bank] shall note the transfer of the Mortgage Loans to the Assignee [GS Mortgage] in its books and records, [and] shall recognize the Assignee [GS Mortgage] as the owner of the Mortgage Loans. It is the intention of the Assignor [GSMC] and Responsible Party [M&T Bank] that the Sale Agreement shall be binding upon and inure to the benefit of the Responsible Party [M&T] and the Assignee [GS Mortgage] and the Assignee [GS Mortgage] and their successors and assigns.

(Luskin Affirm. Ex. C, p. 2). M&T Bank contends that the absence of any reference to CIFG in this section 4, as well as section 3 (b) providing third party beneficiary status to Wells Fargo under the Sale Agreement, is dispositive of CIFG's claim that it was an intended third party beneficiary and has the right to enforce the obligations of the Sale Agreement.

M&T Bank claims that the court should not consider the drafting history of the M&T AAR in determining the issue of standing as CIFG's rights thereunder are evident from the face of the document. In any event, CIFG's subjective intent as to the inclusion of Section 15 regarding any amendments to the Sale Agreement is legally irrelevant. M&T Bank contends further that GSMC did not assign its indemnification rights under the Sale Agreement to GS Mortgage and, consequently, even if CIFG were a third party beneficiary to the Sale Agreement through the M&T AAR, it would not be entitled to indemnification from M&T.

As to any anticipatory breach, M&T Bank states that CIFG's reliance upon what M&T Bank should have known is entirely speculative and insufficient to support its claim. Moreover, M&T Bank claims that even if CIFG's frustration claim had any basis, CIFG would not be relieved of its obligation to identify breaches of representations and warranties before making a claim predicated thereon.

a. Standing

A nonparty to a contract has standing to sue for breach of contract where it is a third-party beneficiary of the subject contract (*see Equitable Life Assur. Soc. of the U.S. v Nico Const. Co., Inc.*, 235 AD2d 222, [1st Dept 1997]). A party seeking to recover as a third-party beneficiary of a contract must establish: (1) that a valid and binding contract exists between other parties; (2) that the contract was intended for the party's benefit; and (3) that the benefit was direct rather than incidental (*see State of California Public Emplotees' Retirement System v Sherman & Sterling,* 95 NY2d 427, 434-435 [2000]). "In determining whether a third party was an intended beneficiary to a contract, the actual intent of the parties is critical. The best evidence of the contracting parties' intent is the language of the agreement itself" (*Edge Mgmt. Consulting, Inc. v Blank,* 25 AD3d 364, 368-369 [1st Dept 2006]). Absent a clear intent to confer the benefit of the promised performance, the third party is merely an incidental beneficiary with no right to enforce the contract (*see Strauss v Belle Realty Co.,* 98 AD2d 424, 426 [2d Dept 1983]). In determining whether a party is a third-party beneficiary,

courts look to the overall purpose of the transaction (*see Internationale Nederlanden (US) Capital Corporation v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]).

In *U.S. Bank, N.A. v Greenpoint Mortgage Funding, Inc.* (26 Misc3d 1234 [2010]) Justice Bernard Fried of this court considered a similar claim by a trustee and CIFG in a case involving insured residential mortgage loans securitized for the benefit of numerous noteholders. In that case, CIFG alleged that the defendant, Greenpoint Mortgage Funding, Inc., breached sales agreements which contained numerous representations and warranties. On a CPLR 3211 motion by Greenpoint to dismiss the complaint, Justice Fried held that CIFG and the other insurer had failed to establish that they had standing and dismissed the complaint of the insurers. Justice Fried held that the sales agreements did not provide that the insurers, including CIFG, were intended third party beneficiaries to the representations and warranties contained in the sales agreements nor did any of the other documents involved in the securitization transaction at issue in that case give the insurers a direct right to rely on the representations and warranties in the sales agreements. Further, the insurers were not permitted to claim third party beneficiary rights on the basis of provisions in agreements and documents executed at a later time.

The Sale Agreement, dated November 1, 2005, grants enforcement rights to "the Purchaser, and its successors and assigns" only (Luskin Affirm. ¶ 4, Ex. "B", § 7.03). It does not include CIFG. Section 3(a) of the M&T AAR, dated February 28, 2007, close to the effective date of the I&I Agreement, amends the Sale Agreement and adds a third party beneficiary. CIFG is not listed as a third party beneficiary, but it is recognized in that the M&T AAR provides in section 15 for the written consent of CIFG of any amendment of the Sale Agreement. Section 15 of the M&T AAR does not constitute "clear contractual language evidencing [an intention to confer third party beneficiary status]" *LaSalle Natl. Bank v Ernst & Young LLP*, 285 AD2d 101, 108-109 (1st Dept 2001)]. If M&T Bank and Goldman intended to confer such status on CIFG, they could have achieved that purpose at the time they provided in the M&T AAR for modification of the Sale Agreement which identified Wells Fargo as an intended third party beneficiary. Instead, sections 3 and 15 taken together reveal an intention of the parties to recognize limited interests of CIFG, interests that do not extend broad third party beneficiary rights in the Sale Agreement to CIFG. Finally, the indemnification provision in ProSupp (which was created in February 2007, long after

the Sale Agreement) merely describes obligations to indemnify CIFG and others against third-party claims in certain circumstances. It does not grant rights not provided for in the Transaction Documents.

The third cause of action must be dismissed.

2. Breach of Contract (M&T AAR)(Sixth Cause of Action)

M&T Bank contends that although CIFG is a named third party beneficiary to the M&T AAR (*see* M&T AAR section 14), that document does not give CIFG standing to assert a claim directly against M&T Bank. M&T Bank contends that CIFG's rights are limited by section 8 (b) of the M&T AAR which provides, in relevant part, that:

> Upon discovery or notice of any breach by the Assignor [GSMC] of any representation, warranty or covenant under this Assignment Agreement that materially and adversely affects the value of any Mortgage Loan or the interests of the Assignee, the Trustee or the Certificate Insurer therein . . . the Assignee [GS Mortgage] promptly shall request that the Assignor [GSMC] cure such breach and, if the Assignor does not cure such breach in all material respects within sixty (60) days from the date on which it is notified of the breach, the Assignee [GS Mortgage] may, and at the direction of the Depositor or the Certificate Insurer, the Trustee shall enforce the Assignor's [GSMC's] obligation hereunder to purchase such Mortgage Loan from the Assignee [GS Mortgage] at the Repurchase Price as defined in the Sale Agreement . . .

(Luskin Affirm. Ex. "C" § 8[b], pp. 5-6). Thus, M&T Bank argues that there is no provision whereby CIFG may enforce directly any of M&T's obligations under the M&T AAR.

CIFG responds that M&T Bank gives too narrow a reading to section 8 (b), both within the four corners of that document and in the context of the drafting history of the M&T AAR. CIFG notes that section 8 (b) does not reference section 14 of the M&T AAR which does confer third party beneficiary rights upon CIFG. It adds that under the broad language of section 14, CIFG has a general right to enforce all of M&T's obligations under the M&T AAR.

CIFG's reliance upon the drafting history of this document is misplaced. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). "Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous" (*Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*,

60 AD3d 61,66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Here, there is no obvious ambiguity in the M&T AAR. Section 14 designates CIFG as "a third party beneficiary of [the AAR]," not of the Sale Agreement. Section 8 (b) provides the manner in which M&T Bank's obligations may be enforced. It does not confer upon CIFG any direct right to enforce M&T Bank's obligations. Rather, it provides that CIFG give notice of the breach to GS Mortgage, which must then ask GMSC to cure any breaches and after the cure period has expired, it may direct the Trustee to enforce GS Mortgage's obligation to repurchase. The sixth cause of action shall be dismissed.

3. Fraudulent Inducement (First Cause of Action)

In order to state a claim of fraudulent inducement, plaintiff must allege with particularity that defendant made a material misrepresentation of an existing fact, which defendant knew to be false, with the intent and for the purpose of inducing the plaintiff's reliance thereon, that plaintiff justifiably relied upon such misrepresentations and suffered damages as a result (*see e.g., Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 [2009]; CPLR § 3016 [b]).[3]

M&T Bank asserts that CIFG's fraudulent inducement claim must fail (1) for failure to state the alleged fraud with the requisite particularity; (2) because the fraud claim is duplicative of the breach of contract cause of action; and (3) for failure to adequately allege scienter. M&T Bank contends that CIFG cites to only one of the loans to support its fraud claim and provides no details as to how any of the other 97 loans violated any of M&T Bank's underwriting guidelines at the time of origination. In addition, M&T Bank contends that none of the allegations of fraud arise out of facts collateral to the contracts. It claims that the only alleged fraudulent misrepresentations are the contractual warranties. M&T Bank also contends that CIFG does not assert sufficient facts to show

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[3]By letter dated March 29, 2012, counsel for Goldman sought to bring to the court's attention a decision of the Appellate Division, First Department, issued March 27, 2012. In *HSH Nordbank AG v UBS AG, et al.*, 2012 WL 997166, the court dismissed a fraud cause of action on the ground that the plaintiff, a sophisticated institutional investor dealing at arms length with defendants, could not demonstrate justifiable reliance where the true nature of the alleged misrepresentations would have been readily ascertainable through its own efforts. CIFG's counsel responded by letter dated March 30, 2012, to the effect that the Goldman letter is improper, but in any event *HSH Nordbank* was distinguishable from this action. Commercial Division Rule 19 provides that sur-reply papers, including correspondence is not permitted absent express advance permission by the court. No such permission was sought here. Accordingly, these submissions have not been considered.

that M&T Bank knew that any of the borrowers of the loans had misrepresented their income or other information. In fact, because most of the loans M&T Bank originated were no documentation or limited documentation loans, which did not require income verification, M&T Bank had no obligation to verify a borrower's income and so there is no basis to infer M&T Bank knew that any particular borrower had misstated his or her income. M&T Bank contends that this fact also undermines any inference of justifiable reliance because as a sophisticated entity, CIFG cannot establish this essential element of its fraud claim where it failed to review M&T Bank's underwriting guidelines or any of M&T Bank's underlying loans.

CIFG responds that it provided a computer disk with its June 16 Notice which identified 98 breaching loans along with detailed narratives of the misrepresentations made with respect to each. The Complaint identifies one of those loans where the borrower inflated her income by a factor of five (Complaint ¶ 74). This allegation states a claim of fraud with sufficient particularity. Moreover, based upon the allegations of the Complaint, including the pervasive breaches identified in 98 out of a sample of 124 loans, the facts are sufficient to support a claim that M&T Bank knew that its representations were false. CIFG contends that M&T Bank had an obligation to know if a borrower had misstated his or her income as it expressly warranted that individual mortgagors had not committed fraud and that it had followed "prudent" origination practices.

Because CIFG cannot show detrimental reliance, its fraud-related claim against M&T Bank must fail. CIFG acknowledges in its complaint that while it conducted due diligence as to certain aspects of the transaction, it made a decision not to conduct a review of the underlying loans as a cost avoidance measure. However, as M&T Bank notes, if the misrepresentations in such loans was as pervasive as CIFG asserts, then CIFG would have discovered the misrepresentations had it conducted a review of sample loans, similar to what CIFG later hired Opus to do.

The applicable rule is stated by the Court of Appeals in *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.* (17 NY3d 269, 278-79 [2011]) as follows:

> If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations (internal quotation marks and brackets omitted).

(*see also Cantor Fitzgerald Inc. v Cantor Fitzgerald Secs.*, 268 AD2d 324, 326 [1st Dept 2000], *affd* 95 NY2d 919 [2000] ["A party will not be relieved of the consequences of his own failure to proceed with diligence or to exercise caution with respect to a business transaction."]).

As a sophisticated party involved in an arms length transaction, CIFG had a duty to undertake an independent due diligence review of the risks associated with the guaranty it sold, including, at the very least, a review of a sample of the underlying mortgage loans which would have revealed the problems in such loans. Having failed to do so, CIFG cannot now be heard to claim that it justifiably relied to its detriment on M&T Bank's representations.

4. Punitive Damages/Attorney's Fees

M&T Bank contends that in the event CIFG's fraud claim against it is dismissed, CIFG's claim for punitive damages should also be dismissed. However, M&T Bank asserts that even if CIFG's fraud claim survives, the claim for punitive damages should be dismissed as its conclusory allegations that M&T Bank acted "maliciously, wantonly and oppressively" and that its conduct "knowingly affected the public" are insufficient to sustain a demand for punitive damages (Complaint ¶ 108). CIFG does not dispute that the punitive damages claim fails if the fraud cause of action is dismissed.

The prayer for punitive damages must be dismissed as the conduct alleged here occurred in the context of a commercial transaction between sophisticated parties and did not involve the type of egregious, morally reprehensible tortious conduct directed at the public generally for which an award of punitive damages is appropriate (*see Rocanova v Equitable Life Assur. Socy. of the U.S.*, 83 NY2d 603, 613 [1994]; *Rivas v Amerimed,* 34 AD3d 250, 251 [1st Dept 2006]).

CIFG's claim for attorneys' fees should also be dismissed on the ground that the only basis cited for such claim is the indemnification provision at section 7.03 of the Sale Agreement. In the first instance, CIFG is not a third party beneficiary of the Sale Agreement. In addition, as M&T Bank points out, the right to indemnification was specifically excluded under the M&T AAR.

B. <u>Goldman's Motion to Dismiss (Motion Sequence Number 002)</u>

1. Fraudulent Inducement

In support of its motion to dismiss the first cause of action alleging fraudulent inducement Goldman advances essentially the same argument raised by M&T Bank. This cause of action must be dismissed for the reasons discussed above.

Goldman aver that CIFG's fraud claim against them is based on alleged misrepresentations made by Goldman entities concerning the quality and origination of the loans, including that the underlying loans were originated in accordance with the appropriate underwriting guidelines and were not fraudulently or negligently made (Complaint ¶ 103). They note that the R&W Agreement specifically provides that in the event of any breach of a representation or warranty, GSMC would either "cure such breach in all material respects" or "repurchase such Mortgage Loan at the Repurchase Price" (Complaint ¶ 59, quoting R&W Agreement § 3[a]). Goldman contend that this "'either/or' formulation defines the nature of the representation, and negates any purported 'representation' that all loans would comply." On this basis, Goldman claim that the fraudulent inducement claim overlaps and is redundant of the breach of contract claims and therefore should be dismissed. Goldman also contend that because of the repurchase obligation in the event of breach, it would not be foreseeable that CIFG would suffer losses as a result of its reliance on Goldman's alleged misrepresentations regarding the mortgage loans when CIFG was warned about the possible noncompliance of the loans and agreed to a specific contractual remedy.

CIFG contends that its fraud claim against Goldman is not predicated simply on breach of representations and warranties made as to individual loans, but also on misrepresentations and omissions in direct communications, security filings, contracts and drafts.

CIFG relies principally on the decision of the Appellate Division, First Department in *MBIA Ins. Corp. v Countrywide Home Loans* (87 AD3d 287 [2011]) where the court held under similar circumstances that the plaintiff there had sufficiently pleaded a fraud independent of the contract claim as the plaintiff had alleged "misrepresentations of present facts, and not future intent, made with the intent to induce [plaintiff] to insure the securitization" (*id.* at 294). The court also held that "[i]t is of no consequence that some of the allegedly false representations are also contained in the agreement as warranties and form the basis of the breach of contract claim" (*id.*). CIFG also notes that contrary to Goldman's argument, the insurer in the *MBIA* case had the exact same remedy as CIFG here, namely, either cure the breach or repurchase or substitute eligible mortgage loans.

The fraudulent inducement claim must be dismissed for failure to adequately plead justifiable reliance. Had CIFG conducted proper due diligence prior to writing the insurance, it would have uncovered the alleged misrepresentations about which it now complains.

2. Breach of Contract (Second, Fourth and Fifth Causes of Action)

To sustain a breach of contract cause of action in New York, plaintiffs must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiffs as a result of the breach (*see Kraus v Visa Intl Serv Assn,* 304 AD2d 408 [1st Dept 2003;] *Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]).

The Goldman defendants argue that these causes of action must be dismissed for failure to meet basic notice pleading requirements under the CPLR. They contend that the representations and warranties at the core of this action are assurances about the characteristics of individual loans and, therefore, CIFG can only state a claim by alleging that Goldman breached a contractual obligation as to a particular loan. They further contend that CIFG's blanket, conclusory allegations of non-specific breaches of a range of representations and warranties by unidentified loans are not sufficient. Moreover, CIFG has failed to identify a single non-conforming loan that Goldman refused to replace or repurchase.

Given the liberal notice pleading standards applicable to claims of breach of contract, these causes of action may not be dismissed. At this juncture, the complaint gives sufficient notice of the claim. In the second cause of action, CIFG alleges breach of the R&W Agreement due to breaches of representations and warranties pertaining to the practices pursuant to which the Loans were underwritten, originated and serviced, that CIFG served notice of the breaches and Goldman failed to cure the breaches or repurchase the breaching loans. The fourth cause of action alleges breach of the I&I Agreement due to breaches of representations and warranties in that agreement. The fifth cause of action alleges breach of the AARs due to breaches of representations and warranties contained in the AARs pertaining to the Loans and the practices pursuant to which the Loans were underwritten, originated and serviced and the failure of GSMC to repurchase breaching loans or cure the breaches in response to demands made by CIFG and the Trustee. CIFG rightly contends that it provided enough support for the claimed breaches by providing a statistical sampling with documentation demonstrating the pervasive nature of the collective breaches in the underlying loans. The complaint need not make specific representations as to each of the individual loans (*see generally, Ambac Assurance Corp. v DLJ Mortgage Capital, Inc.,* 30 Misc3d 1208 [A] [Sup Ct. N.Y. Co. 2011] [Kornreich, J.]).

3. Inspection of Books and Records (Seventh Cause of Action)

This cause of action is based on section 2.02 (e) of the I&I Agreement which provides, in pertinent part:

> Access to Records; Discussions with Officers and Accountants. If the Certificate Insurer reasonably believes that a Material Adverse Change may have occurred, the Depositor shall, upon the reasonable Request of the Certificate Insurer permit the Certificate Insurer or its authorized agents . . . to inspect the books and records of the Depositor as they may relate to the Certificates, the obligations of the Depositor under the Operative Documents to which it is a party and the Transaction.

"Material Adverse Change", as defined in the I&I Agreement, "means . . . a material adverse change in the ability of such Person to perform its obligations under any of the Operative Documents to which it is a party" (Hickey Affirm. Ex. "F", § 1.01).

The Goldman defendants contend that CIFG has made no allegations concerning their ability to perform their obligations under the agreements at issue. CIFG responds that all that is required for it to exercise the right to inspect the Goldman records is a reasonable belief that Goldman have suffered a material adverse change as defined in the I&I Agreement. CIFG asserts in its memorandum of law in opposition that it has a reasonable belief based upon the Senate Subcommittee Report finding that Goldman's wrongdoing was a substantial cause of the 2007 financial crisis exposing them to substantial potential liability.

In support of its cause of action, CIFG alleges simply that "[a] 'Material Change' has occurred pursuant to the I&I Agreement". This conclusory allegation is not sufficient to support a claim of inspection. The statement made in CIFG's memorandum of law is not sufficient to remedy the pleading defect as it is not presented in the form of an affidavit by an individual with personal knowledge. Therefore, the seventh cause of action for inspection of books and records pursuant to the I&I Agreement shall be dismissed.

4. Accounting (Eighth Cause of Action)

"To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distribution Corp. v Nunez,* 90 AD3d 568 [1st Dept 2011]). A plaintiff must also show a fiduciary relationship with defendants involving the entrustment of money or property, that no other remedy exists, and that plaintiff has demanded and was refused an accounting (*see In re Mary XX,* 33 AD3d 1066, 1068 [3d Dept 2006]).

CIFG does not allege nor does it appear that it has the requisite fiduciary relationship with Goldman that is a predicate to an equitable claim for an accounting (*see Sirico v F.G.G. Productions, Inc.*, 71 AD3d 429 [1st Dept 2010]). Further, CIFG has a complete and adequate remedy at law.

Accordingly, it is hereby

ORDERED that the motion of defendant, M&T Bank, to dismiss the complaint (motion sequence number 001) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant;

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption, as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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CIFG ASSURANCE NORTH AMERICA, INC.,

Plaintiff,

-against- **Index No. 652286/2011**

GOLDMAN, SACHS & CO., GOLDMAN SACHS MORTGAGE COMPANY, and GS MORTGAGE SECURITIES CORP.

Defendants.

----------X

and it is further

ORDERED that the motion to dismiss of the Goldman defendants (motion sequence number 002) is GRANTED to the extent of dismissing the first, seventh and eighth causes of action and is DENIED as to the second, fourth and fifth causes of action; and it is further

ORDERED that the counsel for M&T Bank party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that counsel for the remaining parties shall appear at a preliminary conference at Part 49, Courtroom 252, 60 Centre Street, on Wednesday, June 27, 2012 at 9:30 AM.

This constitutes the decision and order of the court.

DATED: May 1, 2012

ENTER,

O. PETER SHERWOOD
J.S.C.