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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST, SERIES 2006-S4, by HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee,

Plaintiff,

-against-

NOMURA CREDIT & CAPITAL, INC.,

Defendants.

INDEX NO. 653390/2012

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 June 26, 2014.

Dated: 6-26-2014

MARCY S. FRIEDMAN, J.S.C.

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

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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

NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST, SERIES 2006-S4, by HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee,

Plaintiff,

– against –

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

Index No.: 653390/2012

DECISION/ORDER

This action is brought by Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2006-S4 (Trust), by its Trustee suing on behalf of the holders of residential mortgage backed securities (RMBS) Certificates, against defendant Nomura Credit & Capital, Inc. (Nomura), the seller of the mortgage loans that were securitized. The action arises out of Nomura's alleged breach of contract, based on its failure to repurchase defective loans from the Trust. Nomura moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7).

The process by which mortgages are securitized has previously been discussed by this court and will not be repeated here. (See HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289 [Mar. 3, 2014] [HSH Nordbank].) The securitization at issue involved 4,712 mortgage loans with an aggregate principal balance of approximately $254 million. (Compl., ¶ 23.) On September 28, 2006, Nomura sold the mortgage loans to an affiliate, Nomura Asset Acceptance

Corp. (NAAC), the depositor for the securitization, pursuant to a Mortgage Loan Purchase Agreement (MLPA), dated September 1, 2006. (Compl., ¶ 23, Ex. B.) Nomura and NAAC, along with various servicers and the Trustee, entered into a Pooling and Servicing Agreement (PSA) with Wells Fargo Bank, N.A., the Securities Administrator, dated "as of September 1, 2006," by which Nomura and NAAC sold the loans to the Trust. (Compl., ¶ 24, Ex. A.)

The MLPA and PSA set forth numerous specific representations and warranties about the mortgage loans, including representations about their quality and characteristics. The representations recited in Section 8 of the MLPA (Mortgage Representations) include that the information provided to the rating agencies is true and correct; no fraud has taken place in the origination of the loans; all requirements of federal and state law have been complied with in all material respects; there are no material defaults in the mortgages or mortgage notes; the mortgage file contains an appraisal by a qualified appraiser which satisfied the standards of Fannie Mae and Freddie Mac; and no loan has a combined loan-to-value ratio exceeding 100%.

MLPA § 9 provides that the representations and warranties contained in Section 8 "shall inure to the benefit of any assignee, transferee or designee of the Purchaser [NAAC], including the Trustee for the benefit of the Certificateholders." The PSA expressly incorporates the representations of MLPA § 8. Section 2.03 (b) of the PSA thus provides: "The Seller [Nomura] hereby represents and warrants . . . as of the Closing Date: . . . (vii) The representations and warranties set forth in Section 8 of the Mortgage Loan Purchase Agreement are true and correct as of the Closing Date."

The PSA also sets forth a repurchase protocol in the event of breach of a representation or warranty set forth in Section 8 of the MLPA. Section 2.03 (c) of the PSA (repurchase provision) provides in pertinent part:

> "Upon discovery by any of the parties hereto of a breach of a representation or warranty set forth in . . . Section 8 of the Mortgage Loan Purchase Agreement that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt written notice thereof to the other parties. The Seller hereby covenants with respect to the representations and warranties set forth in . . . Section 8 of the Mortgage Loan Purchase Agreement,[1] that within 90 days of the discovery of a breach of any representation or warranty set forth therein that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, it shall cure such breach in all material respects and, if such breach is not so cured, (i) prior to the second anniversary of the Closing Date, remove such Mortgage Loan . . . from the Trust Fund and substitute in its place a Replacement Mortgage Loan . . . ; or (ii) repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price. . . ."[2]

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[1] The protocol also applies by its terms to representations and warranties set forth in Section 2.03 (b) (viii), (ix) and (x), to the effect that no mortgage loan is a "high cost," "covered," "high risk home" or "predatory" loan as defined by specified laws or sources, and that all requirements of law including usury, truth in lending, and fair housing laws have been complied with in all material respects.

[2] PSA 2.03 (c) further provides:

> "With respect to the representations and warranties in Section 8 of the Mortgage Loan Purchase Agreement that are made to the best of the Seller's knowledge, if it is discovered by any of the Depositor, the Seller, the Securities Administrator or the Trustee that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan, notwithstanding the Seller's lack of knowledge with respect to the substance of such representation or warranty, the Seller shall nevertheless be required to cure, substitute for or repurchase the affected Mortgage Loan in accordance with the foregoing."

MLPA § 9 (a) provides a similar repurchase protocol for breach of the representations and warranties contained in Section 8.

Both the PSA and the MLPA provide "sole remedy" provisions for breach of the MLPA § 8 representations. PSA § 2.03 (c) states: "It is understood and agreed that the obligation under this Agreement of the Seller to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedies against the Seller respecting such breach available to Certificateholders, the Depositor or the Trustee." MLPA § 9 (c) similarly provides: "It is understood and agreed that the obligations of the Seller set forth in this Section 9 to cure or repurchase a defective Mortgage Loan . . . constitute the sole remedies of the Purchaser against the Seller respecting a missing document or a breach of the representations and warranties contained in Section 8."

Section 7 of the MLPA also contains a provision (referred to as the No Untrue Statement provision) by which the Seller (Nomura) represents and warrants to the Purchaser (NAAC), "as of the date hereof and as of the Closing Date":

> "(v) This Agreement does not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained herein not misleading. The written statements, reports and other documents prepared and furnished or to be prepared and furnished by the Seller pursuant to this Agreement or in connection with the transactions contemplated hereby taken in the aggregate do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statement contained therein not misleading."

As alleged in the complaint, Nomura breached numerous "Mortgage Representations" set forth in MLPA § 8, as incorporated in PSA § 2.03 (b) (vii). (Compl., ¶ 2.) In particular, a

forensic investigation revealed breaches in 1369 of the 4712 loans in the securitization. (Id., ¶¶ 5, 38-57, 58-63.) The Trustee sent Nomura four repurchase demands or breach notices, identifying loans that materially breached representations made in MLPA § 8 or PSA § 2.03 (b) (viii) and (ix). (Id., ¶¶ 68-70.) Nomura's deadline to repurchase the loans passed without Nomura having repurchased even one of the identified loans. (Id., ¶ 71.) The complaint also alleges that "the Mortgage Loan Schedule did not contain true and accurate loan-level information regarding the Mortgage Loans," and that "[t]he pervasive nature of these breaches is in violation of the No Untrue Statement Covenant and constitutes a material breach of the MLPA." (Id., ¶ 89.)

The complaint pleads four causes of action. The first alleges breach of contract pursuant to PSA § 2.03 (c), based on Nomura's failure to cure or repurchase "any Mortgage Loans that violate the Mortgage Representations." This cause of action seeks specific performance of the repurchase obligation. (Id., ¶¶ 73-78.) The second, based on the same breach of contract, seeks "damages for Nomura's breach of its obligation to repurchase the Defective Loans" identified in the breach notices, "as well as any other Defective Loans in the Trust, which further investigation or discovery may uncover." (Id., ¶¶ 79-84.) The third seeks damages for breach of the No Untrue Statement provision in MLPA § 7 (v). This cause of action alleges that the "pervasive nature" of the breaches of the Mortgage Representations constitutes a material breach of the MLPA, and entitles the Trust to compensatory damages. (Id., ¶¶ 85-90.) The fourth, also based on breaches of the No Untrue Statement provision in the MLPA, alleges that the pervasive nature of the breaches "constitutes a fundamental breach of the MLPA." This cause of action alleges that the breaches give rise to a right of rescission or, if rescission proves to be impracticable, to rescissory damages. (Id., ¶¶ 91-96.)

This action raises a number of issues that regularly recur in what are commonly known as RMBS put-back cases – i.e., cases involving repurchase demands. These issues include the accrual date for the statute of limitations and, alternatively, the extent to which the sole remedy provision in the PSA limits the plaintiff to specific performance for breaches of Mortgage Representations, as opposed to damages; whether, if damages are allowable, they are limited to compensatory damages or may also include rescissory damages; whether, to the extent the plaintiff seeks specific performance, this remedy is available for loans that have been foreclosed or liquidated; and whether relief is available only for allegedly defective mortgage loans that have been the subject of a repurchase demand.

In moving to dismiss the complaint, defendant contends that plaintiff's claims are barred by the statute of limitations. In the alternative, defendant argues that plaintiff's second cause of action for damages should be dismissed because the parties' agreements limit plaintiff's remedy for breach of Mortgage Representations to specific performance. Defendant also seeks dismissal of the third and fourth causes of action on the ground that the alleged breaches are breaches of Mortgage Representations under MLPA § 8 and PSA § 2.03 (b) (vii), and not of the No Untrue Statements provision, and that plaintiff's remedy is accordingly limited to specific performance under the sole remedy provision of the PSA. Defendant further argues that plaintiff's specific performance claim fails, as plaintiff does not allege that the loans for which plaintiff seeks repurchase are capable of being repurchased, and that foreclosed loans are no longer part of the Trust and cannot be repurchased. Finally, defendant seeks dismissal of claims regarding all loans that were not specifically identified in certain repurchase demands.[3]

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[3] After the Appellate Division's issuance of ACE Secs. Corp. v DB Structured Prods., Inc., (112 AD3d 522 [2013]), this court authorized supplemental papers on the statute of limitations issue addressed there. In its supplemental papers, defendant also for the first time sought dismissal of claims regarding loans

Standard of Review

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88.)

Statute of Limitations

Nomura claims that the Trust's claims are barred under New York's six year statute of limitations for breach of contract. This action was filed on September 27, 2012. It is undisputed that the PSA was "[d]ated as of September 1, 2006," but was not executed until the closing date on September 28, 2006. Nomura claims that the breach of contract accrued on the "as of" date of the PSA, not the closing date, and that the statute of limitations therefore bars all claims.

In ACE Secs. Corp. v DB Structured Prods., Inc. (112 AD3d 522 [1st Dept 2013] [ACE]), this Department recently considered the date of accrual of a cause of action for breach

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that were not the subject of repurchase demands. This argument will, however, be entertained, as plaintiff had a full opportunity to address it.

of representations and warranties in connection with an RMBS securitization governed by an MLPA and PSA. Rejecting the plaintiff's claim that the cause of action accrued when the seller refused the Trustee's repurchase demand, the Court held that the cause of action accrued "when any breach of the representations and warranties contained [in the MLPA] occurred." (ACE, 112 AD3d at 523.) Although the Court stated that this date was the "closing date" of the MLPA, the Court was not called upon determine whether the representations were made on the "as of" date of the contract as opposed to the closing date.

Here, in contrast, an issue is presented as to whether the representations were made on the "as of" date or the closing date. Based on the terms of the contracts, the court holds that "the representations were made on the closing date."[4] PSA § 2.03 (b) expressly states that "the Seller [Nomura] hereby represents and warrants to . . . the Trustee as of the Closing Date" that the representations and warranties set forth in MLPA § 8 "are true and correct as of the Closing Date." The Closing Date is defined in PSA § 1.01, the definitions section, as September 28, 2006. The MLPA, which governs the sale of the mortgage loans by Nomura as "Seller" to its affiliate NAAC as "Purchaser" or "Depositor," specifically refers to NAAC's intent "to deposit the Mortgage Loans into a mortgage pool comprising the Trust Fund." (MLPA, Preliminary Statement.) MLPA § 2 recites that Nomura and NAAC "have agreed upon which of the mortgage loans owned by the Seller are to be purchased by the Purchaser pursuant to this

[4] The decisions since ACE which have considered whether the statute of limitations runs from the "as of" or closing date have generally held that the closing date governs. (See e.g. U.S. Bank Natl. Assn. [HEAT 2007-3] v DLJ Mtge. Capital, Inc., 2014 WL 1621046, * 4 [Sup Ct NY County Apr. 21, 2014] [Schweitzer, J.] [holding that "[a] contract claim cannot possibly accrue before the contract is executed"]; U.S. Bank Natl. Assn. [HEAT 2007-1] v DLJ Mtge. Capital, Inc., 2013 WL 6997183, * 2 [Sup Ct NY County Jan. 15, 2014] [Bransten, J.] [holding that breach of contract claim based on breach of representations and warranties accrued on the closing date, where PSA provided that the representations and warranties were made "as of the Closing Date"]; contra Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 20060-S2 v Nomura Credit & Capital, Inc., 2013 WL 6840128, *1 [Sup Ct NY County Dec. 23, 2013] [Sherwood, J.].)

Agreement." However, this section affords Nomura until the closing date to prepare a final schedule of the loans to be purchased, thus stating: "Seller will prepare or cause to be prepared on or prior to the Closing Date a final schedule (the 'Closing Schedule') that describes such Mortgage Loans and sets forth all of the Mortgage Loans to be purchased under this Agreement." Section 1 of the MLPA specifically provides that "[t]he Seller hereby sells, and the purchaser hereby purchases, on or before September 28, 2006 (the 'Closing Date')" specified mortgage loans having an aggregate principal balance of approximately $254 million.

As plaintiff correctly argues, and MLPA §§ 1 and 2 confirm, the "as of" date serves the purpose of memorializing the parties' agreement that Nomura will sell loans to NAAC for deposit in the trust in the $254 million amount. The other terms of the MLPA and PSA unambiguously and consistently provide that the loans will be transferred, and the representations and warranties made, as of the closing date. This action was therefore brought before passage of the statute of limitations.

Sole Remedy Provision

In moving to dismiss the complaint, defendant contends that the only remedy available for breaches of the Mortgage Representations is set forth in the sole remedy provision of the parties' agreements, MLPA § 9 (c) and PSA § 2.03 (c), and that this provision limits plaintiff's remedy to specific performance – i.e. repurchase of loans affected by the breaches (hereafter sometimes referred to as defective loans). Defendant further claims that plaintiff is not entitled to damages for liquidated loans because such loans are no longer subject to repurchase. (D.'s Memo. In Support at 12-14, 18-19.) Plaintiff argues that the sole remedy provision applies only to breaches of the Mortgage Representations set forth in MLPA § 8 and PSA § 2.03 (b), and does

not limit plaintiff's remedies if defendant fails to comply with its separate repurchase obligation. (P.'s Memo. In Opp. at 15.)

As a threshold matter, the court holds that the Appellate Division decision in ACE bars any claim by plaintiff here that failure to comply with the repurchase obligation under the sole remedy provision gives rise to an independent breach of contract. (112 AD3d at 522 [rejecting plaintiff's claim that its cause of action for breach of representations and warranties under the agreements governing the securitization "did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan"]; see also Walnut Place LLC v Countrywide Home Loans, Inc., 96 AD3d 684, 684-685 [characterizing similar PSA provision as one which "merely provides for a remedy in the event of a breach"]; Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 v Nomura Credit & Capital, Inc., 2013 WL 2072817, * 8 [Sup Ct NY County May 10, 2013] [Sherwood, J.] [pre-ACE case holding that the repurchase obligation is "merely a remedy. It is not a duty independent of the Mortgage Representation breach of contract claims"]; Lehman XS Trust, Series 2006-4N v Greenpoint Mtge. Funding, Inc., 2014 WL 108523, * 4 [SD NY Jan. 10, 2014] [Scheindlin, J.] [post-ACE case holding that failure to comply with repurchase obligation "does not give rise to a separate breach of contract at the time of refusal"].)[5]

The court rejects plaintiff's apparent contention (see P.'s Memo. In Opp. at 15-16) that a defendant's failure to repurchase allegedly defective loans relieves a plaintiff from the limits on recovery imposed by the sole remedy provision. (See Assured Guaranty Mun. Corp. v Flagstar Bank, 2011 WL 5335566, * 5 [SD NY Oct. 31, 2011] [Rakoff, J.] [Flagstar] [in light of "specificity" of sole remedy provisions similar to those at issue, rejecting plaintiffs' claim that

[5] All federal cases cited in this opinion apply New York law.

the "limitations on their remedies completely dissolve," or are forfeited, in the event of defendant's failure to repurchase the defective loans within the applicable period]; accord Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA1, 958 F Supp 2d 488, 504 [SD NY July 24, 2013] [Sweet, J.]; U.S. Bank Natl. Assn. [HEAT 2007-1] v DLJ Mtge. Capital, Inc., 2013 WL 6997183, * 3 [Sup Ct NY County Jan. 15, 2014] [Bransten, J.].)[6]

Defendant's blanket contention that damages are never available under the sole remedy provision (see D.'s Memo. In Support at 13) is also unpersuasive. The court concurs with the numerous Courts which, in determining motions to dismiss, have held that damages claims are maintainable under similar sole remedy provisions. These Courts have held that specific performance of repurchase obligations should first be directed, but that a claim for damages in an amount equal to the repurchase price of the defective loans is stated, where specific performance is impossible because repurchase of the loans is not or cannot be made. (See e.g. U.S. Bank Natl. Assn. [HEAT 2007-1], 2013 WL 6997183, at * 3 [Bransten, J.]; ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Prods., Inc., 2014 WL 1116758, * 8 [SD NY Mar. 20, 2014] [Nathan, J.]; Wells Fargo Bank, N.A., Series 2007-5 v Bank of Am., N.A., 2013 WL 1285289, * 10-11 [SD NY Mar. 28, 2013] [Oetken, J.]; MASTR Adjustable Rate

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[6] In support of its contention that the parties' agreements do not limit the Trust's remedies to specific performance in light of Nomura's failure to comply with its repurchase obligation, plaintiff cites MBIA Ins. Corp. v Countrywide Home Loans, Inc., 2013 WL 1845588, * 8-9 [Sup Ct NY County Apr. 29, 2013] [Bransten, J.]. (P.'s Memo. In Opp. at 15.)

MBIA, an action brought by an insurer against the originator of the loans, involved interpretation of different contract provisions than those at issue here and, specifically, determination of whether the sole remedy provisions of various transaction documents (e.g., the MLPA and PSA) were made applicable to the insurer by the particular terms of such documents or a separate insurance agreement. The Court concluded, based on its reading of the terms of the agreements, that the sole remedy provision was applicable to the representations in one paragraph of the agreements but to not those in other paragraphs. In Assured Guaranty Corp. v EMC Mtge., LLC (2013 WL 1442177 [Sup Ct NY County Apr. 4, 2013] [Ramos, J.]), the Court concluded, based on its reading of somewhat different terms in the agreements, that the sole remedy provision of the MLPA and the servicing agreement did apply to the insurer.

Mtges. Trust 2006-OA2 v UBS Real Estate Secs. Inc., 2013 WL 4399210 * 4 [SD NY Aug. 15, 2013] [Baer, J.]; Resolution Trust Corp. v Key Fin. Servs., 280 F3d 12, 18 [1st Cir 2002].)

This court's holding that damages are available under the sole remedy provision is supported by the express terms of the parties' agreements. The sole remedy provision expressly provides for repurchase of defective Mortgage Loans "at the Purchase Price." (PSA § 2.03 [c] [ii].) Although it does not also expressly provide for damages where repurchase is not or cannot be made, in setting forth a protocol for repurchase of defective loans (after a specified period) at a defined Purchase Price, the sole remedy provision effectively "establishes a contractual damages amount in the form of the Purchase Price." (Wells Fargo Bank, N.A., Series 2007-5, 2013 WL 1285289, at * 9 [Oetken, J.].)

The Purchase Price is defined in PSA § 1.01, the definitions section, as: "an amount equal to the sum of . . . 100% of the outstanding principal balance of the Mortgage Loan as of the date of such purchase," plus interest and costs of the Trust Fund in connection with any violation by the Mortgage Loan of certain predatory lending laws. The definition of "Mortgage Loan" specifically includes Mortgage Loans "identified in the Mortgage Loan Schedule, notwithstanding foreclosure or other acquisition of title of the related Mortgaged Property." The "Mortgage Loan Schedule" is in turn defined as the list of Mortgage Loans transferred to the Trustee as part of the Trust Fund, as amended to reflect the deletion of Deleted Mortgage Loans and the addition of Replacement Mortgage Loans. "Deleted Mortgage Loans" are defined as loans replaced or to be replaced by Replacement Loans. The definition of Deleted Mortgage Loans does not include liquidated loans.

As to liquidated loans in particular, defendant argues that the sole remedy provision does not provide for damages because the loans cannot be repurchased and have a purchase price of

zero. In claiming that the loans cannot be repurchased, defendant in effect claims that liquidated loans are not subject to the repurchase protocol. In light of the definition of Mortgage Loan, which includes loans on foreclosed properties, this claim is unpersuasive. Defendant's further claim that the purchase price of the loans is zero is unsupported by citation to any language in the PSA. (See D.'s Memo. In Support at 19.) The definition of Purchase Price is "outstanding principal balance," an undefined term, not "Stated Principal Balance," a term defined by PSA § 1.01. The definition of the latter term specifically includes a statement that "[t]he Stated Principal Balance of a Liquidated Loan equals zero." Defendant does not specifically argue that the Stated Principal Balance definition applies in calculating the repurchase price of liquidated loans. While defendant does explicitly make that argument in another RMBS case submitted on the same date (see Nomura Home Equity Loan, Inc., Series 2007-3 v Nomura Credit & Capital, Inc., Index No. 651124/13, D.'s Memo. In Support at 16-17), defendant fails to make any showing in either case that a defined term that is not referred to in the repurchase protocol (PSA § 2.03 [c] [ii]), or in the definition of Purchase Price incorporated in that protocol, has any applicability in calculating repurchase of Mortgage Loans that are subject to the protocol.

In arguing that damages are not available for liquidated loans, defendant relies on MASTR Asset Backed Secs. Trust 2006-HE3 v WMC Mtge. Corp. (2012 WL 4511065, * 5-6 [D Minn Oct. 1, 2012] [WMC]), one of the few cases that has dismissed a damage claim for liquidated loans based on the finding that the loans cannot be repurchased. The Court reasoned that although the Purchase Agreement defined the term "Mortgage Loan" as including liquidation proceeds, "[i]t would be a tortured reading of the provision, . . . to equate the loan's constituent parts with the loan itself, and hold that merely because the Trustee can produce

certain parts of the 'Mortgage Loan' – the Mortgage File, foreclosure proceeds, etc., – the Mortgage Loan as a whole remains to be repurchased."

The WMC decision was made on the record of a summary judgment motion in which the Trustee had "admitted that specific performance is 'not available . . . where a loan has been liquidated and is no longer available for repurchase.'" (Id. at *4.) Moreover, the Court's reasoning has been rejected by other Courts considering the availability of damages for liquidated loans under various repurchase provisions. (See e.g. ACE Secs. Corp., Series 2006-HE4 v DB Structured Prods., Inc., 2014 WL 1384490, * 5 [Sup Ct NY County Apr. 4, 2014] [Bransten, J.]; U.S. Bank Natl. Assn. [HEAT 2007-1], 2013 WL 6997183, at * 3 [Bransten, J.]; ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3, 2014 WL 1116758, at * 8 [Nathan, J.] [declining to follow District Court's reasoning in the WMC Mortgage Litigation "in light of persuasive in-Circuit precedent permitting money damages where repurchase is or may be impossible"]; MASTR Adjustable Rate Mtges. Trust 2006-OA2, 2013 WL 4399210, at * 5 [Baer, J.] [distinguishing WMC, and holding that complaint stated a claim under sole remedy provision based on liquidated loans]; Trust for the Certificate Holders of the Merrill Lynch Mtge. Pass-Through Certificates Series 1999-C1 v Love Funding Corp., 2005 WL 2582177, * 8 [SD NY Oct. 11, 2005] [Scheindlin, J.] [holding that repurchase of liquidated loan was possible under MLPA provision identical to that in WMC, which defined Mortgage Loan as including "Liquidation Proceeds"].) Still other Courts have concluded that although repurchase of a liquidated loan is not possible, damages may be awarded under similar sole remedy provisions, with repurchase provisions containing varying definitions of purchase price. (See Wells Fargo Bank, N.A., Series 2007-5, 2013 WL 1285289, at * 10 [Oetken, J.] [in case involving PSA for commercial mortgage backed securities, holding that specific performance of liquidated loans

was impossible because repurchase was impossible, but that claim was stated for damages]; Lehman Bros. Holdings, Inc. v Key Fin. Corp., 2011 WL 1296731, at *11-12 [M.D. Fla Mar. 31, 2011] [Kovachevich, J.] [stating that "[i]t is not clear to the Court how a loan that has been liquidated could be repurchased," but setting breach of contract claim under repurchase provision down for a hearing on damages].)

Whether or not a liquidated loan is capable of being repurchased, in interpreting the parties' contract, the court must effectuate their intent in light of the language they employed. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995].) As the Courts have repeatedly noted in construing sole remedy provisions, "[t]he whole point of how the MLPA and PSA were structured was to shift the risk of noncomplying loans onto [the Seller]." If the defendant were correct that liquidated loans are not subject to repurchase "it would be perversely incentivized to fill the trust with junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made." (ACE Secs. Corp., Series 2006-SL2 v DB Structured Prods., Inc., 40 Misc 3d 562, 567, 569 [Sup Ct NY County May 13, 2013] [Kornreich, J.], revd on other grounds 112 AD3d 522 [1st Dept 2013]; see also Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA1, 958 F Supp 2d at 504 [Sweet, J.] [approvingly quoting the ACE trial court's reasoning]; Flagstar, 2011 WL 5335566, at * 7 [Rakoff, J.] [reasoning that if damages were not available under sole remedy provision for charged off loans – defined as loans as to which further payments were not expected – seller "would have the unilateral ability to insulate itself from damages . . . by simply charging off the offending loan," and concluding: "That cannot have been what the parties intended when they entered into their agreements"]; Resolution Trust Corp., 280 F3d at 18 [upholding award of

damages for liquidated loans under repurchase provision, the Court finding that "[a] repurchase provision is designed to shift the risk to the selling party in the event that a dispute arises"].)

This court's holding that the complaint pleads a claim for damages under the sole remedy provision for defective loans that are not or cannot be repurchased is consistent not only with the terms of the parties' agreements but also with long-standing equitable precepts. As explained by the Court of Appeals:

> "[I]f . . . the plaintiff succeeds in proving that he is entitled to equitable relief, equity may grant damages in addition to or as an incident of some other special equitable relief or, where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy. 'It is a familiar principle that a court of equity, having obtained jurisdiction of the parties and the subject-matter of the action, will adapt its relief to the exigencies of the case. It may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor, when that form of relief becomes necessary in order to prevent a failure of justice, and when it is for any reason impracticable to grant the specific relief demanded.'"

(Doyle v Allstate Ins. Co., 1 NY2d 439, 443 [1956], quoting Valentine v Richardt, 81 Sickels 272, 277 [1891]; Lusker v Tannen, 90 AD2d 118, 125 [1st Dept 1982] [quoting Doyle]. See ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3, 2014 WL 1116758, at * 8 [Nathan, J.] [citing Doyle for proposition that where specific performance is impossible, Courts have awarded damages under sole remedy provisions in amounts "equivalent to what the defendant would pay were performance possible"]; ACE Secs. Corp., Series 2006-HE4, 2014 WL 1384490, at * 5 [Bransten, J.] [same, citing Nathan decision]; MASTR Adjustable Rate Mtges. Trust 2006-OA2, 2013 WL 4399210, at * 3 [Baer, J.] [declining to dismiss damages claim under sole remedy provision because "when specific performance of the agreement is not possible, the parties are left to whatever legal or equitable remedies they may have" [internal quotation marks and citation omitted].)

The court accordingly holds that the branch of defendant's motion to dismiss the first and second cause of action, seeking specific performance and damages for breach of Mortgage Representations, should be denied.

No Untrue Statement Provision and Rescission or Rescissionary Damages

Defendant also moves to dismiss plaintiff's third and fourth causes of action which seek compensatory damages and rescission or rescissionary damages, respectively, based on the No Untrue Statement provision, MLPA § 7. In particular, defendant contends that the complaint pleads allegations about the characteristics of the loans which, even if true, would only amount to breaches of the Mortgage Representations in MLPA § 8 and PSA § 2.03 (b) (vii), to which the sole remedy provisions of MLPA § 9 (c) and PSA § 2.03 (c) apply. (D.'s Memo. In Support at 14.) Defendant further contends that plaintiff cannot be permitted to circumvent the sole remedy provision by recasting the alleged breaches of the Mortgage Representations as breaches of the No Untrue Statement provision which is governed by MLPA § 13, a provision that does not impose a contractual limitation on remedies for the breach. (Id. at 13.) Plaintiff counters that the sole remedy provisions "were designed to remedy the discovery of an occasional Defective Loan; they were not designed for pervasive breaches and misrepresentations in the Mortgage Files or the MLS [Mortgage Loan Schedule]." (P.'s Memo. In Opp. at 18.)

Plaintiff does not point to any ambiguity in the MLPA or PSA sole remedy provision that would warrant this court's resort to extrinsic evidence in interpreting the contract. Nor does plaintiff cite any language in any provision of the MLPA or PSA that supports its contention that the sole remedy provision of the MLPA and PSA is applicable only to occasional breaches of the Mortgage Representations, and that pervasive breaches violate the No Untrue Statement provision.

It is well settled that in interpreting a contract, the court may not add to or remove terms of the contract "under the guise of interpreting the writing." (Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 [internal quotation marks and citation omitted]; Maxine Co., Inc. v Brink's Global Servs. USA, Inc., 94 AD3d 53, 56 [1st Dept 2012].) Here, based on the unambiguous terms of the MLPA and PSA, the court holds that the sole remedy provision is applicable to claims for breach of Mortgage Representations set forth in MLPA § 8 and incorporated in PSA § 2.03 (b) (vii). (See e.g. U.S. Bank Natl. Assn. v Countrywide Home Loans, Inc., 2013 WL 2356295, * 2 [Sup Ct NY County May 29, 2013] [Bransten, J.] [holding, based on interpretation of parties' agreements, that "pervasive breach" of representations and warranties provisions similar to those at issue here, did not breach similar No Untrue Statement provision]; Assured Guaranty Corp., 2013 WL 1442177, at * 4 [Ramos, J.] [based on interpretation of parties' agreements, rejecting the plaintiff's claim that sole remedy provision was not intended to address pervasive breaches of representations about characteristics of mortgages].)

The complaint does not allege any breach of the No Untrue Statement provision that was not also a breach of the Mortgage Representations to which the sole remedy provisions apply. Rather, the complaint pleads that pervasive breaches of the Mortgage Representations breached the No Untrue Statement provision. (Compl., ¶ 89.) The only other alleged breach of the No Untrue Statement provision is that "the Mortgage Loan Schedule did not contain true and accurate loan-level information regarding the Mortgage Loans." (Id.) As described in the complaint, however, the Mortgage Loan Schedule "identifies and provides detailed information about the characteristics of each Mortgage Loan, including the loan-to-value ratio, occupancy status, and borrower's credit score." (Id., ¶ 36.) The statements in the Mortgage Loan Schedule

about the characteristics of the mortgage loans thus duplicate the Mortgage Representations about the characteristics of the loans.

It is a settled precept of contract interpretation that "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1st Dept 2001] [internal quotation marks and citations omitted].) Here, the sole remedy provision establishing the repurchase protocol for breaches of Mortgage Representations would be rendered meaningless if the duplicative representations in the Mortgage Loan Schedule were not subject to that protocol, and could support an independent breach of the No Untrue Statement provision. (See Assured Guaranty Corp., 2013 WL 1442177, at * 5 [Ramos, J.].)

The court accordingly holds that the third and fourth causes of action of the complaint, to the extent based on breach of the No Untrue Statement provision of the MLPA, should be dismissed as duplicative of the first and second causes of action for specific performance and damages for breach of the Mortgage Representation provisions of the MLPA and PSA. The claim for rescission or rescissionary damages based on breach of the No Untrue Statement provision therefore fails.

To the extent that the third and fourth causes of action may be construed as pleading an independent claim for rescission or rescissionary damages for pervasive breaches of Mortgage Representations, that claim must also fail. Rescission is available only when an adequate remedy at law is lacking and the status quo "may be substantially restored." (Rudman v Cowles Communications, Inc., 30 NY2d 1, 13 [1972].) Rescissory damages are available only when the

requirements for rescission are met, but rescission is "impracticable." (See MBIA Ins. Corp. v Countrywide Home Loans, Inc., 105 AD3d 412, 413 [1st Dept 2013].) Moreover, a "[p]laintiff should not be permitted to utilize this very rarely used equitable tool to reclaim a right it voluntarily contracted away." (Id. at 413 [internal citation omitted].)

As held above, the sole remedy provision is not restricted to occasional breaches of Mortgage Representations, and provides a damages remedy where specific performance cannot be ordered. The court accordingly holds that by agreeing to the sole remedy provision, plaintiff voluntarily contracted away, or waived, a right to rescission.[7]

This holding is consistent with the decisions of the New York State Courts dismissing rescission claims based on the plaintiffs' waiver of the rescissory remedy or the adequacy of damages provided by the sole remedy provision. (See U.S. Bank Natl. Assn. [HEAT 2007-3] v DLJ Mtge. Capital, Inc., 2014 WL 1621046, * 5-6 [Sup Ct NY County Apr. 21, 2014] [Schweitzer, J.]; SACO I Trust 2006-5 v EMC Mtge. LLC, 2014 WL 2451356, * 6 [Sup Ct NY County May 29, 2014] [Bransten, J.]; ACE Secs. Corp., Series 2006-HE4, 2014 WL 1384490 [Bransten, J.].) It is noted that a number of federal Courts have declined to dismiss rescissory damages claims at the pleading stage. (See e.g. ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3, 2014 WL 1116758, at * 10 [Nathan, J.] [declining to determine whether sole

[7] Defendant argues that the Appellate Division's decision in the above MBIA case held that a plaintiff voluntarily gives up the right to seek rescission by agreeing to a sole remedy provision that does not include rescission. (See D.'s Memo. In Support at 17.) The Court in MBIA did hold that rescission was "legally unavailable" because the plaintiff "voluntarily gave up the right to seek rescission." (Id.) However, the MBIA Court did not specifically hold that plaintiff gave up the right to seek rescission by agreeing to a sole remedy provision. The decision that was appealed in MBIA was a January 3, 2012 decision by Justice Bransten of this Court (34 Misc 3d 895). As explained by Justice Bransten in a later decision in the same action (2013 WL 1845588, * 8), the claim that the sole remedy provision barred rescission was not raised in the motion that resulted in the January 3, 2012 decision, and was not addressed in that decision. Nor did the Appellate Division opinion set forth the basis on which the Court concluded that the plaintiff had given up the right to seek rescission. This court accordingly reaches the issue de novo.

remedy clauses barred plaintiff's rescissory damages claims]; Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA1, 958 F Supp 2d at 506 [Sweet, J.] [holding that the issue of rescissory damages was "premature"].) This court finds, in contrast, that the sole remedy provision bars the rescissory claim.

Repurchase Demands

The Appellate Division's recent decision in ACE included an alternative holding that dismissed claims for repurchase of allegedly defective loans based on failure to timely serve repurchase demands. The holding was as follows: At the time the action was commenced, "the 60- and 90-day periods for cure and repurchase had not yet elapsed. The certificate holders' failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity." (ACE, 112 AD3d at 523.) Based on this holding, defendant contends that plaintiff may not maintain claims for any loans that were not specifically identified in repurchase demands made at least 90 days before commencement of this action. (D.'s Supplemental Memo. In Support at 2.) In ACE, however, the plaintiff did not make any repurchase demand more than 90 days before the complaint was filed. In addition, the plaintiff itself argued that the cause of action accrued not at the time the representations and warranties regarding the loans were made but, rather, when the defendant breached its independent obligation to repurchase the loans in response to the plaintiff's demand for repurchase. (Brief for Plaintiff-Respondent at 3, 20-21 ["As the Supreme Court properly recognized, and as DBSP conceded below, under the Agreements, the 'Trustee is not entitled to sue' until the Trustee demands that DBSP repurchase the Defective Loans, by written notice, and DBSP fails or refuses to so cure or repurchase within the contractually-prescribed time periods"].)

In the instant action, in contrast, plaintiff seeks "[a] declaration that Nomura's obligation to repurchase or otherwise cure defective Mortgage Loans is triggered upon its discovery of breaches, as set forth in Section 2.03 (c) of the PSA, and that formal notice from the Trustee is not required." (Compl., Prayer for Relief, ¶ 2.) The repurchase protocol provides that "[u]pon discovery by any of the parties" to the Agreement of a breach of a representation or warranty, "the party discovering such breach shall give prompt written notice thereof to the other parties," and that the Seller shall cure the breach "within 90 days of the discovery of [the] breach." (PSA §2.03 [c] [quoted in full, supra at 3].) The complaint alleges that Clayton Holdings, Inc. a major provider of third-party due diligence services for various mortgage loan securitizers, performed due diligence for Nomura, 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. (Compl., ¶ 65.) The complaint further alleges that as a result of this due diligence Nomura "may have had notice of breaches of the Mortgage Representations from the inception of the Trust," but failed to comply with its obligation under PSA 2.03 (c) to notify the Trustee of its discovery. (Id., ¶ 66.)

These allegations as to Nomura's discovery of the breaches of the Mortgage Representations are sufficient, at the pleading stage, to support plaintiff's claims in this action. (See ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3, 2014 WL 1116758, at * 12-13 [Nathan, J.] ["By alleging that [seller] conducted due diligence on loan pools that suffered from obvious and widespread breaches, Plaintiff has adequately alleged that [seller] discovered those breaches, and therefore that its cure-or-repurchase obligations were triggered independent of any notices"]; Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA 1, 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]; SACO I Trust 2006-5, 2014 WL 2451356, at * 8 [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].)

In addition, this action differs from ACE in that the Trustee served at least one repurchase demand, which defendant acknowledges is timely, specifically identifying loans as to which Mortgage Representations had been breached and requesting that Nomura "address the alleged breaches referenced in the [Certificateholder's] Notice of Breach." Here, the Notice of Breach in turn requests that Nomura repurchase not only the specifically identified loans but "any loans that did not comply with the representations and warranties made by" it. (May 8, 2012 and April 27, 2011 demands [Fay Aff. In Opp., Ex. A].)

In interpreting similar repurchase protocols, the Courts have generally held that the contractual notice requirement that triggers the seller's repurchase obligation is satisfied by a plaintiff's breach notice that refers to specific allegedly defective loans identified by a statistical sampling of the loan pool, or other loan-level investigation, at least where the notice also demands repurchase of all other defective loans. (Morgan Stanley Mtge. Loan Trust 2006-14SL v Morgan Stanley Mtge. Capital Holdings LLC, 2013 WL 4488367, * 3 [Sup Ct NY County Aug. 16, 2013] [Bransten, J.] [finding notice sufficient where plaintiff sent demand letters, referencing allegedly defective sampled loans, and requiring that defendant repurchase "every other Defective Loan"]; ACE Secs. Corp., Series 2006-HE4, 2014 WL 1384490, at * 3-4 [Bransten, J.] ["[C]ourts have held that notice to the sponsor that a sample of loans breach

representations and warranties provides sufficient notice for claims against the entire loan pool"]; Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge. Capital, Inc., 2014 WL 317838, * 5-6 [Sup Ct NY County Jan. 27, 2014] [Schweitzer, J.] [holding that compliance with contractual notice provision was sufficiently alleged where breach notice identified specific loans, notified seller of pervasive breaches, and demanded that seller repurchase all breaching loans]; Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA 1, 958 F Supp 2d at 496-497 [Sweet, J.] [holding that sufficiency of plaintiff's breach notices is issue of fact not appropriate for resolution on a motion to dismiss and, alternatively, that under repurchase provision similar to that at issue, complaint which alleged that defendant discovered breaches not specifically identified in the breach notices through its own due diligence, adequately pleaded breach of the repurchase provision]; Flagstar, 2011 WL 5335566, at * 7 [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].)

Allegations as to Breach of Specific Mortgage Representations and Particularity of Loan-Level Claims

Defendant also argues that the complaint fails to state a claim for breaches of four specific Mortgage Representations.

First, defendant contends that the complaint fails to plead a breach of MLPA § 8 (xiv), which sets forth the requirements for amortization of interest only and balloon loans. The complaint pleads that the inclusion of "interest-only Balloon Loans" in the securitized loan pool breached the representation. (Compl., ¶¶ 39-40.) MLPA § 8 (xiv) provides that for interest only loans, the remaining monthly payments following the expiration of the interest-only period "shall

be sufficient to fully amortize the original principal balance over the remaining term of the Mortgage Loan." Plaintiff contends that this requirement is violated because a Balloon Loan, as defined in the PSA, is a Mortgage Loan which "by its terms, does not fully amortize the principal balance thereof by its stated maturity and thus requires a payment at the stated maturity larger than the monthly payments due thereunder." (PSA § 1.01, quoted in Compl., ¶ 39.) As defendant correctly argues, however, the Balloon Loans in the securitization pool, as represented in MLPA § 8 (xiv), have a "final monthly payment substantially greater than the preceding monthly payment which is sufficient to amortize the remaining principal balance of the Balloon Loan. . . ." There is nothing in the MLPA that prevents the final monthly payment of the Balloon Loan from serving as the payment that "fully amortize[s] the original principal balance over the remaining term" for interest-only loans. (MLPA § 8 [xiv].) The court finds that there is no material inconsistency between the definition of the Balloon Loan in the PSA and the amortization requirements of the MLPA. The complaint accordingly fails to state a claim for breach of MLPA § 8 (xiv).

Second, defendant contends that the complaint fails to plead a breach of MLPA § 8 (xii), which provides that as of the Closing Date, "[t]here is no material default . . . under the Mortgage or the Mortgage Note." The complaint pleads that a certificateholders' investigation showed that borrowers of 81 Mortgage Loans were delinquent as of September 2006. (Compl., ¶ 42.) As defendant correctly argues, a delinquency, without more, is not a material default. As the complaint pleads a breach of MLPA § 8 (xii) solely on the basis of delinquencies of a limited number of loans, the complaint fails to state claim under this section.

Third, defendant contends that the complaint fails to plead a breach of MLPA

§8 (xxvii), which represents that the Mortgage File "contains an appraisal of the related Mortgaged Property which satisfied the standards of Fannie Mae and Freddie Mac." The complaint pleads instances of public reports, including a January 2011 Report of the Financial Crisis Inquiry Commission, regarding manipulation of appraisers by subprime lenders. (Compl., ¶¶ 45-46.) In addition, the complaint alleges that the Certificateholders' use of Automated Valuation Models (AVMs) showed that sampled loans had a value materially lower than the appraised value. (Id., ¶¶ 50-51.) In determining the sufficiency of fraud pleadings in the RMBS litigation, this court has upheld the use of AVMs to support allegations that the originators inflated appraisals. (HSH Nordbank, 2014 WL 841289, at * 18.) The AVMs are similarly sufficient to support pleading of a breach of contract claim, which is not required to be pleaded with the particularity required for a fraud claim. (See CPLR 3016 [b].)

Fourth, defendant claims that the complaint fails to plead a breach of MLPA § 8 (xxxiv) that no Mortgage Loan had a combined loan-to-value ratio of greater than 100%. Defendant argues that this claim must be dismissed because it is based on improper reliance on AVMs and because appraisals are inactionable opinions. This court has also rejected the latter argument in the RMBS fraud cases. (See HSH Nordbank, 2014 WL 841289, at * 18.)

The claims in the complaint regarding alleged breaches of the Mortgage Representations in MLPA §§ 8 (xiv) and (xii) will be dismissed. Although plaintiff requests leave to replead any insufficiently pleaded claims, plaintiff sets forth no basis for repleading the claims under these sections. The request for leave to replead will accordingly be denied.

Finally, defendant argues that the complaint is not pleaded with sufficient particularity as it fails to describe the breached loans with particularity. Courts have repeatedly upheld pleadings alleging misrepresentations about loan characteristics notwithstanding the absence of

allegations identifying specific nonconforming loans, as the complaints alleged widespread abandonment of underwriting guidelines. (See Allstate Ins. Co. v Credit Suisse Secs. (USA) LLC, 2014 WL 432458, * 9 [Jan. 24, 2014] [and authorities cited therein].) Here, similarly, the complaint alleges pervasive breaches of the Mortgage Representations. The complaint accordingly satisfies the lesser pleading standards for breach of contract claims.

It is accordingly hereby ORDERED that defendant's motion to dismiss the complaint is granted only to the extent of dismissing with prejudice the claims alleging breaches of the Mortgage Representations in MLPA §§ 8 (xiv) and (xii), and dismissing the third and fourth causes of action based on breach of the No Untrue Statement provision, and is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 26, 2014

MARCY FRIEDMAN, J.S.C.