SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: J.S.C. **PART** 3

Justice

Index Number : 652388/2011
U.S. BANK NATIONAL
vs.
COUNTRYWIDE HOME LOANS, INC.
SEQUENCE NUMBER : 003
OTHER RELIEFS

INDEX NO. 652388/2011
MOTION DATE 11/1/2013
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3 **, were read on this motion to/for** resettlement of order

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ **No(s).** 1

Answering Affidavits — Exhibits ____ **No(s).** 2

Replying Affidavits ____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2-13-14

Eileen Bransten J.S.C.

1. **CHECK ONE:** ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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U.S. BANK NATIONAL ASSOCIATION, as Trustee, for HarborView Mortgage Loan Trust, Series 2005-10,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC. (d/b/a BANK OF AMERICA HOME LOANS), BANK OF AMERICA CORPORATION, COUNTRYWIDE FINANCIAL CORPORATION, BANK OF AMERICA N.A., AND NB HOLDINGS CORPORATION,

Defendants.

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Index No. 652388/2011
Motion Date: 11/1/2013
Motion Seq. No.: 003, 004

BRANSTEN, J.

This matter comes before the Court on two motions. In motion sequence 003, Plaintiff U.S. Bank National Association, as Trustee for HarborView Mortgage Loan Trust, Series 2005-10 ("U.S. Bank" or "Trustee") seeks "resettlement and/or clarification" of this Court's May 29, 2013 Order (the "Order"). In the Order, the Court granted Defendants Countrywide Home Loans, Inc. ("CHL"), Countrywide Financial Corporation, Bank of America Corporation, Bank of America N.A., and NB Holdings Corporation's (collectively "Defendants") motion to dismiss Count One of Plaintiff's Amended Complaint and denied the motion as to Count Two.

Following the Order, Plaintiff filed a Second Amended Complaint to replead the claim dismissed by the Court. In motion sequence 004, Defendants now seek dismissal of that repleaded claim.

For the reasons that follow, Plaintiff's motion for resettlement and/or clarification is denied, while Defendants' motion to dismiss Count One of the Second Amended Complaint is granted.

I. Background

The facts of this matter have been discussed extensively in the Court's May 29, 2013 decision. Thus, only details necessary to this motion are referenced herein.

This case arises from the pooling of 4,484 mortgage loans ("Loans") into the HarborView Mortgage Loan Trust 2005-10 ("Trust"). The Trust was comprised of Loans originated by Defendant CHL. After origination, CHL sold the Loans to non-party Greenwich Capital Financial Products, Inc. ("GFCP"), the transaction Sponsor, pursuant to the Master Mortgage Loan Purchase and Servicing Agreement (the "Servicing Agreement"). GFCP then sold the Loans to the Depositor, non-party Greenwich Capital Acceptance, Inc., through the Mortgage Loan Purchase Agreement ("MLPA"). Finally, pursuant to the Pooling Agreement, the Depositor conveyed the Loans to the Trust, which issued approximately $1.75 billion in certificates.

In addition to conveying the Loans the Trust, the Pooling Agreement granted the Trustee, *inter alia*, the right to exercise all of GFCP's rights under the Servicing Agreement against Countrywide. *See* Second Amended Complaint ("SAC") Ex. C

("Pooling Agreement"), § 2.01(a). Through this action, the Trustee seeks to assert these rights, claiming breach of the Servicing Agreement and the Pooling Agreement. Specifically, the Trustee asserts that the Loans in the Trust breach the representations and warranties made by Countrywide[1] in Sections 7.01 and 7.02 of the Servicing Agreement.

Section 7.01 is captioned "Representations and Warranties Respecting the Seller" and provides in relevant part that:

> (ix) No written statement, report or other document prepared and furnished or to be prepared and furnished by the Seller pursuant to this Agreement or in connection with the transactions contemplated hereby contains any untrue statement of material fact or omits to state a material fact necessary to make the statements contained therein not misleading.

SAC Ex. A ("Servicing Agreement") § 7.01(ix). The Second Amended Complaint refers to Section 7.01(ix) as the "Seller Representation." (SAC ¶¶ 25-26.)

Under Section 7.03 of the Servicing Agreement, "[i]n the event that a breach shall involve any representation and warranty set forth in Section 7.01 and such breach cannot be cured within ninety (90) days of the earlier of either discovery by or notice to [Countrywide] of such breach, all of the Mortgage Loans shall, at the [Trustee's] option, be repurchased by [Countrywide] ..." *Id.* § 7.03.

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[1] "Countrywide" is a defined term in the Second Amended Complaint and includes both CHL and Countrywide Financial Corporation.

Section 7.02 contains what Plaintiff terms the "Mortgage Representations." This Section provides fifty specific representations and warranties regarding the Loans, including, among other things, that the Mortgage Loans complied with specified underwriting guidelines; that Countrywide's origination practices were "in all respects legal, proper, prudent and customary in the mortgage origination ... business"; and that the information conveyed about the Loans was complete, true, and correct. *See* Servicing Agreement §§ 7.02(i), (xx), and (xxiii).

In the event that a loan breaches one of the Mortgage Representations in Section 7.02, Section 7.03 provides that Countrywide "shall have a period of ninety (90) days from the earlier of its discovery of a breach or the receipt by [Countrywide] of notice of such a breach within which to correct or cure such breach." *Id.* § 7.03.

Plaintiff pleads that it discovered breaches of Sections 7.01 and 7.02 as a result of a loan review performed at the behest of certain Certificateholders. Following the "severe deterioriation in the performance of the Trust," these Certificateholders requested the loan documentation for 786 non-performing Loans and engaged a mortgage underwriting consultant to examine the Loans for compliance with Defendants' representations. (SAC ¶ 49.) The underwriting consultant's examination purportedly revealed that 520 of the 786 Loans, or 66%, examined contained breaches of representations and warranties. *Id.* ¶ 51.

The Trustee states that it received notice of these breaches "based on the investigation of the re-underwriting consultant." *Id.* ¶ 52. The Trust then notified Countrywide of these 520 allegedly breaching Loans through written notices, demanding that Countrywide cure the defects stated or repurchase the Loans within ninety days. *Id.* ¶¶ 52, 68. Plaintiff asserts that "[t]o date, Countrywide has refused to repurchase 495 out of the 520 Loans identified through the Breach Notices and has failed to provide any explanation for this failure despite repeated requests from the Trustee." *Id.* ¶ 70. In addition, the Trustee asserts that it requested that Countrywide repurchase all Loans in the Trust on August 29, 2011, and that the ninety-day period for doing so under the Servicing and Pooling Agreements has expired. *Id.* ¶ 73.

A. *The Court's May 29, 2013 Order*

Plaintiff's Amended Complaint asserted two breach of contract claims. The first claim sought repurchase of all Loans in the Trust, based on the allegation that Countrywide pervasively breached the "representations and warranties in the documentation prepared and furnished in connection with the Servicing Agreement and related transactions." (Am. Compl. ¶ 47.) The second claim requested repurchase of those allegedly breaching Loans identified by Plaintiff in breach notices sent to Countrywide. In support, Plaintiff alleged that Countrywide refused to repurchase 495

such Loans despite receiving notice that the Loans breached the Section 7.02 Mortgage Representations. *Id.* ¶¶ 121-26. Plaintiff also stated that Defendants' failure to "abide by their contractual obligation to repurchase these Loans, and any other Loans that Defendants know or have reason to know contain breaches" will result in irreparable harm to the Trust. *Id.* ¶ 126.

On May 29, 2013, this Court granted Defendants' motion to dismiss the first count, concluding that the language of the Servicing Agreement did not support Plaintiff's pool-wide repurchase claim. As the Court explained, "[t]here is no language upon which Plaintiff can hang its argument that 'pervasive breach' of Section 7.02 [the Mortgage Representations] violates Section 7.01(ix) [the Seller Representation]." (Order at 8.) Therefore, since Plaintiff's pool-wide repurchase claim hinged on its allegation that Defendants violated the Seller Representation, the Court held that Plaintiff's claim failed and granted Defendants' motion to dismiss.

While the Court dismissed the first claim, it denied Defendants' motion to dismiss the second claim. Defendants asserted that Plaintiff's second claim was conclusory since it did not list the breaches found in the 495 loans for which breach notices were sent. The Court disagreed and held that Plaintiff's claim was sufficiently pleaded under CPLR 3103. *See* Order at 11.

B. *Plaintiff's Second Amended Complaint*

Shortly after the Court's decision on Defendants' motion to dismiss, Plaintiff filed a Second Amended Complaint, again asserting two breach of contract claims against Defendants. Similar to Plaintiff's First Amended Complaint, Count One alleges breach of contract and seeks repurchase of all Loans in the Trust. Plaintiff grounds its breach claim this time, however, in the allegation that "Countrywide's material misrepresentations and omissions in, among other things, the Prospectus Supplement, the Mortgage Loan Files, and the Officer's Certificate" breached the Seller Representation. (SAC ¶ 123.) Accordingly, Plaintiff seeks repurchase of all the Loans, pursuant to Section 7.03 of the Servicing Agreement.

Count Two likewise asserts breach of contract. Count Two of the Second Amended Complaint is identical to Count Two of the Amended Complaint, which was addressed in the Court's May 29, 2013 Order.

II. Discussion

There are two motions presently before the Court: (1) Plaintiff's motion for "resettlement and/or clarification" of the Court's May 29, 2013 Order as to Count Two of the Amended Complaint and (2) Defendant's motion to dismiss Count One of the Second Amended Complaint. Each motion will be addressed in turn.

A. *Plaintiff's Motion for "Resettlement and/or Clarification"*

First, Plaintiff seeks "resettlement and/or clarification" of the Court's May 29, 2013 Order, insofar as it denied Defendants' motion to dismiss Count Two of the Amended Complaint. This motion for "resettlement and/or clarification" of the Court's Order was filed nearly two months after the Notice of Entry of the Order. Moreover, the motion was brought over one month after Plaintiff filed its Second Amended Complaint.

While labeled a motion for resettlement and/or clarification, Plaintiff's motion is neither. Plaintiff seeks a substantive change in the Order. The gravamen of Plaintiff's request is that the Court should expand the scope of its previous Order to conclude that Plaintiff stated a breach of contract claim not only as to the 495 Loans specifically referenced in Count Two but also as to a larger universe of non-conforming loans for which no breach allegations are made.[2] This is outside the bounds of a motion for resettlement or clarification. Resettlement, often sought with clarification, is "a procedure designed solely to correct errors or omissions as to form ... that *may not be used to effect a substantive change in or to amplify the prior decision of the court.*"

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[2] Although Plaintiff attempts to draw comparisons between the Amended Complaint here and the complaint in *Morgan Stanley Mortgage Loan Trust 2006-14SL v. Morgan Stanley Mortgage Capital Holdings LLC*, Index No. 652763/2012 (Sup. Ct. N.Y. Cnty.), such comparisons fall flat because the *Morgan Stanley* complaint specifically alleges that defendant is required to repurchase loans in addition to those for which breach notices have been sent and has failed to do so. Plaintiff's complaint makes no breach allegation except as to those 495 Loans for which breach notices were sent.

Elson v. Defren, 283 A.D.2d 109, 113 (1st Dep't 2001) (internal citations omitted) (emphasis added). Here, Plaintiff seeks such a change and amplification of the Court's prior ruling, rendering resettlement and/or clarification unavailing.

Indeed, Plaintiff's request for relief is more appropriately construed as a motion for reargument, as Plaintiff seeks not clarification of the decision but instead to expand the reach of the Court's ruling. *See Arbor Realty Funding LLC v. E. 51st St. Dev. Co., LLC*, 67 A.D.3d 559, 559 (1st Dep't 2009) (deeming motion for clarification "essentially a motion to reargue"). When properly viewed as a motion to reargue, Plaintiff's motion fails as untimely. Under CPLR 2221(d)(3), a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, Plaintiff filed the instant motion nearly two months after the entry of the Order. Accordingly, Plaintiff's motion is denied.[3]

B. *Defendants' Motion to Dismiss*

Next, Defendants seek dismissal of Count One of Plaintiff's Second Amended Complaint. Defendants contend that Plaintiff merely has repleaded the same claim in its

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[3] Plaintiff's repeated invocation in its briefing that the Court "directed" the filing of this motion for clarification is incorrect. Neither the Court nor the court attorney at the preliminary conference "directed" that this motion, or any motion, be submitted. Instead, the Court's position in this matter – and for all matters – is that any litigant is free to file any motions it deems appropriate.

Second Amended Complaint that the Court already dismissed in the May 29, 2013 Order. The Court agrees.

In the Order, the Court rejected Plaintiff's claim for pool-wide repurchase based on a "pervasive breach" theory. Plaintiff then filed the Second Amended Complaint and attempted to reassert its claim for pool-wide repurchase. This repleaded claim, while dressed in different terms, substantively mimics the already-dismissed "pervasive breach" allegations.

Plaintiff contends that the Second Amended Complaint states a new theory, since it alleges that Defendants breached the Seller Representation by making untrue statements in certain documents provided in connection with the securitization, including Countrywide's underwriting guidelines, the Prospectus, the Prospectus Supplement, and the Officer's Certificate. In support of its assertion that these documents contain untrue statements, Plaintiff cites to Mortgage Representation breaches found by its loan review consultant. For example, Plaintiff contends that the consultant's analysis revealed that the Prospectus Supplement's representation that the Loans were originated in compliance with Countrywide's underwriting guidelines was false. *See* SAC ¶¶ 60-62. Plaintiff likewise alleges that the consultant's findings regarding the Loans' "true DTI (i.e., debt-to-income)" revealed that the Prospectus Supplement's disclosures were "false and misleading." *Id.* ¶ 62. At bottom, the repleaded claim contends that Loans are so rife

with Mortgage Representation breaches that the Seller Representation itself must be deemed breached:

> Countrywide's wholesale failure to comply with its underwriting guidelines and its Mortgage Representations - as reflected by the results of the forensic review of the Loans and continued discovery in this action - provides clear evidence of numerous misrepresentations and material omissions throughout the written statements and documents prepared and furnished by Countrywide in connection with the sale of the Loans. In turn, the presence of these untrue statements and omissions of material fact is a breach of Countrywide's Seller Representation and entitles the Trustee to demand that Countrywide repurchase all of the Loans in the Trust.

(SAC ¶ 67.)

Plaintiff's claim, while now presented in slightly different terms, was dismissed by the Court in its May 29, 2013 Order for the reasons set forth above, *see supra* Section I.A. The Loan defects cited by Plaintiff in the aggregate as breaches of the Seller Representation are also covered by the Mortgage Representations in Section 7.02.

Plaintiff's repleaded claim therefore simply parrots its dismissed "pervasive breach" theory. Accordingly, regardless of the number of documents repeating the alleged misrepresentations, the breach asserted in Count One is simply a "pervasive breach" of the Mortgage Representations. Count One is once again dismissed. *See DiPasquale v. Sec. Mut. Life Ins. Co. of N.Y.*, 293 A.D.2d 394, 395 (1st Dep't 2002) (affirming dismissal of amended pleading that was "mere repackaging of previously dismissed claims"); *Kassis Mgmt., Inc. v. Milstein*, 198 A.D.2d 51, 51 (1st Dep't 1993)

(rejecting amended pleading that "in essence, merely repleaded, in substantially identical terms, a cause of action which was previously dismissed, as a matter of law, by the same court.")

Moreover, even if Count One were not dismissed as a repackaging of the previously-rejected claim, the claim nonetheless merits dismissal on an alternate ground. Plaintiff's reading of the Servicing Agreement renders the remedies provided in Section 7.03 for Mortgage Representations breaches superfluous. Section 7.03 provides that the remedy for loan found to be in breach of the Section 7.02 Mortgage Representations is repurchase of the defective loan. Conversely, the remedy for breach of any representation and warranty provided in Section 7.01 – including the Seller Representation – is repurchase of all the Loans. By seeking pool-wide repurchase of loans in breach of the Section 7.02 Mortgage Representations and casting such breaches as violative of the Seller Representation, Plaintiff renders the loan-by-loan repurchase remedy for Section 7.02 breaches superfluous. Such a reading is unsupportable. *See RM 14 FK Corp. v. Bank One Trust Co., N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007) (rejecting contractual interpretation that "vitiates the principle that a contract should not be interpreted so as to render any clause meaningless"). Thus, Plaintiff's first claim merely restates its claim in Count Two for breach of the Mortgage Representations but

seeks a different and broader remedy unsupported by the plain language of Section 7.03. Accordingly, Plaintiff's claim fails on this basis as well.

III. Conclusion

For the foregoing reasons, Plaintiff's motion for "resettlement and/or clarification" is denied, and Defendants' motion to dismiss Count One of the Second Amended Complaint is granted. While Plaintiff requests leave to replead Count One, the Court notes that it already granted Plaintiff leave to replead this claim in the May 29, 2013 Order. As discussed above, Plaintiff's repleaded claim was substantively identical to claim dismissed in the Order. Therefore, in the absence of any showing by Plaintiff that its next attempt at repleading would fare differently, the Court denies Plaintiff's request for leave to replead.

Accordingly, it is

ORDERED that Plaintiff U.S. Bank National Association, as Trustee for HarborView Mortgage Loan Trust, Series 2005-10's motion for "resettlement and/or clarification" of this Court's May 29, 2013 Order is denied; and it is further

ORDERED that Defendants Countrywide Home Loans, Inc. ("CHL"), Countrywide Financial Corporation, Bank of America Corporation, Bank of America

N.A., and NB Holdings Corporation's motion to dismiss Count One of the Second Amended Complaint is granted; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on April 1, 2014, at 10:00 A.M.

Dated: New York, New York
February 13, 2014

Hon. Eileen Bransten, J.S.C.