At Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of April, 2012.

P R E S E N T:
HON. CAROLYN E. DEMAREST,
Justice.

- X

HOTEL CAPITAL LLC,
Plaintiff,

- against -

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee for the Registered Holders of ML- CFC Commercial Mortgage Trust 2006-3, Commercial Mortgage Pass-Through Certificates, Series 2006-3, and TORCHLIGHT LOAN SERVICES, LLC,
Defendant.

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DECISION AND ORDER

Index No. 18319/11

The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	1
Opposing Affidavits (Affirmations)	3
Reply Affidavits(Affirmations)	5
Affidavits(Affirmations)	
Other Papers (Memoranda of Law) (Correspondence)	2,4,6 7,8,9

Defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint claiming a complete defense is based upon documentary evidence and for failure to state a cause of action.

BACKGROUND

Plaintiff commenced this action seeking the return of a $280,000 down payment that plaintiff placed into an escrow account for the purchase of a securitized loan, from the defendant, pursuant to a contract. The contract included provisions for closing within a specified period of time. After making the down payment, the plaintiff chose not to close on the contract as it alleges that, prior to the closing, plaintiff learned that the defendants had misrepresented the status of a hotel that secured the loan thereby making the loan worth significantly less than was expected at the time of the auction. In addition to seeking the recoupment of the down payment, plaintiff seeks alternative remedies including the reformation of the contract and specific performance under theories of breach of contract and fraudulent concealment.

Defendant Wells Fargo N.A. ("Wells Fargo") is the holder of a promissory note ("Note") dated August 4, 2006 from VMN Memphis, LLC ("VMN") in the original amount of $6,020,000. The complaint alleges that the Note is secured by, among other things, a hotel known as the Hampton Inn-Thousand Oaks at 2700 Perkins Road South, Memphis, Tennessee ("Hotel"), which was operating under a Hampton Inn franchise license agreement dated August 7, 2006 ("Franchise License Agreement") between VMN and Hilton.[1] On August 8, 2006, the original lender Countrywide, borrower VMN, and Hilton entered into a letter agreement ("the Comfort Letter"), which set forth the franchise terms and conditions with respect to the operation of the Hotel as a Hampton Inn. The Comfort Letter provided that if an entity other than the original lender acted as the lender, Hilton must be notified. Further, section 6 of the Comfort Letter notes that the Comfort Letter "may not be assigned by Lender without the written consent of Licensor" and lists the entities that would be permitted to act as assignee of the Comfort Letter including, "a finance company . . . or other financial institution engaged in the business of making loans". A second letter agreement, dated October 1, 2010 and signed by Hilton and Wells Fargo ("the Second Comfort Letter"), indicated that the Hampton Inn's franchise at the Hotel would continue even though the loan

[1] The Franchise License Agreement was entered between the borrower, VMN Memphis, LLC ("VMN") and Promus Hotels, Inc. ("Promus"), a subsidiary of Hilton Hotels Corporation ("Hilton"). Although "Hilton Hotels Corporation", "Hilton Worldwide", and "Hilton" are interchangeably referenced in the papers and accompanying documents and correspondence, they appear to refer to the same business entity and are, except where noted, referred to as "Hilton."

had been transferred to Wells Fargo[2] without Hilton "receiv[ing] notice of the securitization of the loan or the subsequent change in trustees as required by the terms of the Comfort Letter."

In September of 2010, Wells Fargo, acting through its servicer, defendant Torchlight Loan Services, Inc. ("Torchlight"), advertised that the Note was for sale through an auction. Torchlight made certain information and documents regarding the Note available to plaintiff, as well as other potential auction participants, in on an online digital "vault" ("Online Vault"). Among the documents included in the Online Vault for the potential buyer's review prior to the sale were the Note, the Franchise License Agreement, the Comfort Letter, and the Second Comfort Letter.[3]

Plaintiff purchased the Note at the auction for $2,550,000 and made a down payment of $255,000 into an escrow account pursuant to the note sale agreement between plaintiff and Torchlight dated November 3, 2010 ("Note Sale Agreement"). Torchlight accepted the bid on November 10, 2010.[4] The Note Sale Agreement identified a date by which the closing was to take place. The plaintiff subsequently paid a $25,000 fee for a 10 day extension of the closing date pursuant to the Note Sale Agreement.

After entering into the Note Sale Agreement, plaintiff alleges it learned for the first

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[2] The original lender of the Note was Countrywide Commercial Real Estate Finance, Inc. ("Countrywide"). According to the Second Comfort Letter, Countrywide transferred the loan to LaSalle Bank National Association as Trustee for the Registered Holders of ML-CFC Commercial Mortgage Trust 2006-3, Commercial Mortgage Pass-Through Certificates, Series 2006-3 who in turn transferred the loan to Wells Fargo.

[3] It is not clear when the Online Vault became available to potential buyers and whether the documents included in the Online Vault changed, as the Second Comfort Letter was not written until after Torchlight purportedly began advertising the sale of the Note.

[4] It appears that although the bid was accepted on November 10, 2010, the "effective date" of the Note Sale Agreement was November 3, 2010.

time that, prior to the auction, Torchlight had hired a company[5] to develop a plan to convert the Hotel into a Holiday Inn Express because Hilton was in the process of terminating the Franchise License Agreement for the Hotel upon closing of the sale of the Note to plaintiff. Included in opposition to the motion is a property improvement plan ("PIP"), dated October 8, 2010, which estimates the cost of converting the Hotel from a Hampton Inn to a Holiday Inn Express between a low estimate of $1,424,750 and a high estimate of $2,032,200.[6] According to the PIP, it was prepared after a September 30, 2010 inspection of the Hotel. Plaintiff alleges that neither the PIP, nor any other documents indicating that Torchlight was exploring the conversion of the Hotel into a Holiday Inn, were included in the Online Vault. The Comfort Letter indicates that Hilton would not withhold its consent to assign the Comfort Letter to an entity meeting certain qualifications, which plaintiff appears to meet.

On November 22, 2010, the president of the plaintiff indicated in an e-mail to the auction company that plaintiff had just learned, "that upon the sale of the note to [plaintiff] Hilton is terminating the Hampton Inn franchise", "this materially affects the value of the property, the value of the underlying mortgage and [plaintiff's] related interest", and that plaintiff "would not have bid on the note knowing there was going to be no franchise associated with the [H]otel." The plaintiff also asked, "what are our options here?" On November 24, 2010, the plaintiff's president e-mailed an attorney for the defendants, who was apparently in communication with the president, and noted that plaintiff "will not be able to close on the note if the Hilton franchise is going to be terminated upon sale and no consideration given for that fact from your seller and [plaintiff] will be forced to demand a refund of our deposit and extension fees." On December 8, 2010, plaintiff's counsel apparently sent a "demand letter" to Torchlight demanding the return of the deposit and

[5] Plaintiff alleges that Torchlight hired InterContinental Hotels Group ("IHG") which appears to be the parent company of Holiday Inn Express.

[6] The PIP is not addressed to any specific party, however, plaintiff asserts that the PIP was submitted to Torchlight, at their request, and the defendants have not denied this assertion.

extension fee.[7] On December 14, 2010, Torchlight's attorney[8] sent a letter to plaintiff's counsel indicating that the deposit and extension fee would not be returned as the plaintiff did not close pursuant to the Note Sale Agreement. The letter specifically stated:

> [Plaintiff's] assertion that [Wells Fargo] in some way failed to disclose material facts related to the sale of the Loan is unfounded. Prior to bidding in the auction conducted by REDC, [plaintiff] was afforded ample opportunity to review the Loan Documents, which were posted in the data vault on www.auction.com, in order to make an informed decision regarding whether or not to purchase the Loan from [Wells Fargo].

The letter also cites § 8.3 of the Note Sale Agreement which includes a waiver that:

> [Plaintiff's] decision to purchase the Loan is based upon [plaintiff's] own independent evaluation. **The [plaintiff] has made such independent investigation as the [plaintiff] deems to be warranted into the nature, validity, enforceability, collectability, and value of the Note and all other facts it deems material to its purchase, and is entering into this transaction herein provided for, solely on the basis of that investigation and the [plaintiff's] own judgment, and is not acting in reliance on any representation of, or information furnished by Wells Fargo** and acknowledges that no employee or representative of Wells Fargo has been authorized to make any statements or representations other than those specifically contained in this [Note Sale] Agreement. [Plaintiff] hereby waives any right or cause of action it might now or in the future have against [Wells Fargo] as a result of its purchase of the Note. (Emphasis added by author of letter).

It is not clear from the papers before this court how plaintiff obtained a copy of the PIP or learned that the Hotel was in danger of losing its franchise license. However, defendants, notably, have not denied the assertions that, upon the sale of the Note to plaintiff, the Hampton Inn franchise license would be terminated and that the defendants had

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[7] This December 8, 2010 "demand letter" was not submitted in support or opposition to the motion. However, based upon the context of the December 14, 2010 letter, it appears that plaintiff's counsel demanded the return of the deposit and extension fee.

[8] Both defendants are currently represented by the same law firm that issued the December 14, 2010 letter.

knowledge of this prior to the sale of the Note.

Defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint asserting a complete defense based upon documentary evidence and that the complaint therefore fails to state a cause of action. Defendants argue that they were under no duty to disclose information regarding the Hampton Inn Franchise License Agreement and that the terms of the Note Sale Agreement preclude the plaintiff from relying on any alleged misrepresentation or omission and any such reliance was waived.

Plaintiff opposes the motion and argues that each claim states a cause of action, no document submitted in support of the motion bars this action, and that plaintiff requires the opportunity to conduct discovery regarding its claims as the defendants had exclusive knowledge of the facts prior to entering the Note Sale Agreement.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Campaign for Fiscal Equity, Inc. v State of New York,* 86 NY2d 307, 318 [1995]; *Sokoloff v Harriman Estates Dev. Corp.,* 96 NY2d 409, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87 [1994]; *see 511 W. 232nd Owners*, 98 NY2d at 152). Therefore, the complaint must be declared legally sufficient if the court determines that plaintiffs would be entitled to relief on any reasonable view of the facts stated (*Campaign for Fiscal Equity, Inc.,* 86 NY2d at 318). "When a motion to dismiss is made pursuant to CPLR 3211(a)(7), . . . we assume the truthfulness of the factual allegations of the pleading and determine simply whether the allegations make out any cognizable cause of action. However, when such motion is supported by evidence extrinsic to the petition/complaint, the inquiry becomes whether the petitioner indeed has a cause of action, not simply whether he or she has stated one in the petition/complaint, and the petitioner no longer can rely only on the unsupported factual allegations of the pleading, but must submit evidence demonstrating the existence of a cause of action" (*Matter of La Barbera v Town of Woodstock*, 29 AD3d 1054, 1055 [3rd Dept 2006](citations omitted)).

The first three causes of action in the complaint allege a breach of contract by defendants seeking three alternative remedies. Plaintiff seeks rescission of the Note Sale Agreement, monetary damages, and "specific performance . . . with an appropriate adjustment in the price" in the first, second, and third causes of action, respectively.

Defendants move to dismiss the first three causes of action as to Torchlight as those causes of action do not make any allegations as to Torchlight. The Note Sale Agreement was entered between Wells Fargo and plaintiff, Torchlight signed the Note Sale Agreement as the "Special Servicer and not personally." The first three causes of action do not reference Torchlight nor do they make any allegation regarding a contractual relationship between plaintiff and Torchlight on its own behalf. Accordingly, to the extent that the complaint alleges the first, second and third causes of action against Torchlight, those causes of action are dismissed as to Torchlight for failure to state a cause of action (*see* CPLR 3211[a][7]).

As to Wells Fargo, the first three causes of action for breach of contract must be dismissed as it is undisputed that the plaintiff did not perform under the Note Sale Agreement. To establish the essential elements of a cause of action for breach of contract, the complaint must allege the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and the resulting damages (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). The complaint clearly alleges that the parties entered into the Note Sale Agreement, the plaintiff performed its obligations under the Note Sale Agreement, the defendant breached the Note Sale Agreement, and the plaintiff was damaged as a result. However, in support of the motion, defendants provided an affidavit from Torchlight indicating that the plaintiff did not close on the sale of the loan pursuant to the Note Sale Agreement. In opposition to the motion, the plaintiff did not contest this and only stated in an affidavit that "plaintiff would not close until [the issue of the alleged concealment] was resolved." However, plaintiff has not cited any provision in the Note Sale Agreement permitting it to unilaterally adjourn the closing. Accordingly, as defendants have established that the plaintiff did not perform by closing pursuant to the terms of the Note Sale Agreement, and plaintiff has not disputed this fact or otherwise demonstrated that the plaintiff performed under the Note Sale Agreement, the plaintiff's first, second and third causes of action for breach of contract must be dismissed (*see Matter of La Barbera*, 29 AD3d at 1055).

Further, the first cause of action for rescission must also be dismissed as plaintiff has not demonstrated that it could not be adequately compensated by damages. Defendants argue that, under a cause of action for breach of contract, an action at law, the equitable remedy of rescission of the Note Sale Agreement is improper where damages are adequate and, therefore, the first cause of action must be dismissed. "As a general rule, rescission of a contract is permitted 'for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but . . . only for such as are material and willful, or, [if] not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract'" (*RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005]; *see Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984]). Although parties are permitted to plead in the alternative, even if the court accepts all of the allegations in the complaint as true, the plaintiff did not allege that the breach was willful in the first cause of action or that the breach would be so substantial and fundamental as to necessarily defeat the very purpose of the parties' contract (*see Babylon*, 101 AD2d at 215). As plaintiff has not demonstrated that it could not be adequately compensated by damages in this action (*see MBIA Ins. Corp. v Lynch*, 81 AD3d 419, 420 [1st Dept 2011]), the first cause of action seeking rescission under a breach of contract claim is dismissed.

Similarly, the plaintiff's third cause of action must also be dismissed as the relief sought is not an available remedy in this action. Defendants move to dismiss the third cause of action that alleges "Wells Fargo breached its obligations under the Note Sale Agreement by failing and refusing to close and transfer the Loan to plaintiff." The complaint further alleges that plaintiff "has been and is ready, willing and able to close under the Note Sale Agreement with an appropriate adjustment in the price" and the relief sought is the "specific performance by Wells Fargo of the Note Sale Agreement with an appropriate adjustment in the price." It is undisputed that the plaintiff did not close on the Note Sale Agreement once it learned of the PIP and the alleged loss of the franchise license and there is no allegation that Wells Fargo refused to close at the price agreed upon in the Note Sale Agreement. Accordingly, the third cause of action actually seeks a reformation of the Note Sale Agreement to establish a different sale price and plaintiff does not actually seek specific performance. "[I]t is clear that reformation of a contract should be allowed only where mutual mistake or fraud is clearly established, particularly when the negotiations were conducted by sophisticated, counseled business people" (*Briand Parenteau Assocs. v HMC Assocs.*, 225 AD2d 874, 876 [3d Dept 1996], *citing Chimart Assocs. v Paul*, 66 NY2d 570, 573-574 [1986]). As the third cause of action for reformation relates solely to the breach of contract, and does not include any allegations of mutual mistake or fraud, the third cause of action must be dismissed (*see Briand*, 225 AD2d at 876). Further, to the extent that plaintiff does seek specific performance, "in general, specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party'" and it "is a proper remedy . . . where 'the subject matter of the particular contract is unique and has no established market value'" (*Sokoloff*, 96 NY2d at 429, internal citations omitted). In this action, money damages would have been a sufficient remedy based upon the allegations, the Note was not a not a unique item, and the market value of the Note may be established. Accordingly, specific performance is not available as a remedy in this action (*see Id.*).

The fourth through seventh causes of action allege fraud by the defendants in the inducement and by concealment, seeking four alternative remedies. Plaintiff seeks monetary damages, rescission, recoupment of unjust enrichment and equitable estoppel in the fourth, fifth, sixth and seventh causes of action, respectively.

Defendants argue that all of the fraud causes of action must be dismissed as the defendants did not owe a fiduciary duty to the plaintiff and the plaintiff was not entitled to rely on any misrepresentation or omission by the defendants. Further, defendants argue that the Comfort Letter provided to plaintiff, made "clear that Plaintiff had no reason to believe that the Hilton Hotel Group would keep the franchise in place following the Trust's assignment of the Loan Documents." Plaintiff argues that the complaint sufficiently alleges causes of action for fraud and that, pursuant to the "special facts doctrine," there is a duty to disclose, even where there is no fiduciary duty, "where one party's superior knowledge of essential facts render a transaction without disclosure inherently unfair."

"To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation. A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003], citing *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [2d Dept 2009]; *see Barrett v Freifeld*, 64 AD3d 736, 738 [2d Dept 2009] (holding, "[s]ince the fraud claim here is based on an omission or concealment of material fact, the plaintiff must also allege that [the defendant] had a duty to disclose material information and failed to do so")). "Even in the absence of a fiduciary relationship, a duty to disclose may arise when one party's superior knowledge of essential facts renders nondisclosure inherently unfair (*Barrett*, 64 AD3d at 738, *citing Swersky*, 219 AD2d at 327; *see P.T. Bank*, 301 AD2d at 378). The "[special facts] doctrine requires satisfaction of a two-prong test: that the material fact was information 'peculiarly within [the] knowledge' of [the defendants], and that the information was not such that could have been discovered by [the plaintiff] through the 'exercise of ordinary intelligence'" (*Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005], *citing Schumaker v Mather*, 133 NY 590, 596 [1892]).

The fourth cause of action alleges that due to the defendants' "superior and exclusive knowledge prior to November 3, 2010 concerning the Hotel, the Loan, the PIP and the Hilton Hotel Group's intention to terminate the Hotel's Hampton Inn franchise", defendants were under a duty to disclose the foregoing information to plaintiff. The allegations of fraud are based, in part, on the inclusion of the First and Second Comfort Letters in the Online Vault without any reference to the PIP. Section 6 of the Comfort Letter, dated, August 8, 2006, states:

> This letter agreement may not be assigned by Lender without the written consent of Licensor. **Licensor will consent to the assignment to any subsequent holder or holder of the Loan ("Assignees"); provided that the Assignee** (i) is a commercial bank, investment bank, pension fund, finance company, insurance company, or **other financial institution engaged in the business of making loans and any fund managed by any of the foregoing**, (ii) is not a competitor of Licensor, and (iii) does not own, directly or indirectly, any equity interest in Licensee or its constituents owners; provided further that promptly upon the sale or transfer of the Loan to assignee, Lender, Assignee and Licensee shall execute and deliver to Licensor a Lender Comfort Letter Agreement Assignment and Assumption substantially in the form attached hereto as Exhibit A (the "Assignment") . . . (emphasis added).

The Second Comfort Letter is dated October 1, 2010, approximately one month prior to the sale of the Note Sale Agreement and after Torchlight purportedly began advertising the sale of the Note. According to the Second Comfort Letter, it was sent to Wells Fargo, care of Torchlight, "in connection with the notice sent by Joel D. Eckert as counsel for [Wells

Fargo].”[9] The Second Comfort Letter indicated that Hilton was “willing to recognize [Wells Fargo] as the “Lender” under the [First] Comfort Letter on the terms set forth in this letter agreement.” The relevant additional terms in the Second Comfort Letter are contained in paragraph numbered 2:

> [Wells Fargo] agrees that it will either exercise the rights as “Lender” under the Comfort Letter directly or through a wholly-owned subsidiary, and that it will not transfer or assign the Comfort Letter to any other party without [Hilton’s] consent.

The complaint alleges that defendants both misrepresented material facts, by inclusion of the Second Comfort Letter which implied that the franchise license would continue even though the Loan had previously been transferred to Wells Fargo improperly, and omitted known material facts, such as the existence of the PIP and Hilton’s actual intention to terminate the franchise license, which affected the value of the loan. Accordingly, plaintiff has sufficiently alleged a cause of action for fraudulent concealment in the fourth cause of action (*see P.T. Bank*, 301 AD2d at 376; *Swersky*, 219 AD2d at 326; *Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 663-664 [2d Dept 2011]; *Barrett*, 64 AD3d at 738; *Jana*, 22 AD3d at 278).

However, defendants argue that the voluminous disclaimers in the Note Sale Agreement prohibited the plaintiff from relying upon the documents in the Online Vault or any alleged omissions or misrepresentations by the defendants and that the plaintiffs affirmatively warranted that they had conducted their own inquiry into the investment. Section 5 of the Note Sale Agreement states:

> Furthermore, [plaintiff] acknowledges and agrees that [Wells Fargo] holds some documents that pertain to the Note, which [Wells Fargo] will not disclose or transfer any rights to, including without limitation,

[9] Although the Second Comfort Letter does not identify the date of Mr. Eckert’s notice, it appears to have been received by Hilton on August 19, 2010 as the Second Comfort Letter identifies that as, “the date [Hilton] received evidence of [Wells Fargo’s] interest in the loan referenced in the [First] Comfort Letter.”

> certain internal correspondence, internal analysis, internal memoranda, internal assessments of value, correspondence between [Wells Fargo] and its attorneys, which [Wells Fargo] deems to be confidential within the generally accepted definition of attorney/client privileged communications, and all documents related to any prior efforts of [Wells Fargo] to sell the Note.

Wells Fargo also cites to a portion of section 9 of the Note Sale Agreement:

> [Plaintiff] FURTHER ACKNOWLEDGES AND AGREES THAT [Wells Fargo] AND SELLER PARTY HAVE NOT UNDERTAKEN TO CORRECT ANY MISINFORMATION OR OMISSIONS OF INFORMATION WHICH MIGHT BE NECESSARY TO MAKE ANY INFORMATION DISCLOSED TO [Plaintiff] NOT MISLEADING IN ANY RESPECT. [Plaintiff] AGREES CLOSING UNDER THIS AGREEMENT SHALL CONSTITUTE AN ACKNOWLEDGMENT THAT THE LOAN WAS PURCHASED, AND WILL BE ACCEPTED AT CLOSING, WITHOUT REPRESENTATION OR WARRANTY EXPRESS OR IMPLIED AND OTHERWISE IN AN "AS IS", "WHERE IS", AND "WITH ALL FAULTS" CONDITIONED BASED SOLELY ON [Plaintiff's] OWN INSPECTION . . .

Courts have repeatedly grappled with the issue of whether a fraud cause of action can survive a motion to dismiss where the contract at issue, entered into by two sophisticated parties, contains broad disclaimers or warranties, and the plaintiff alleged facts in support of the "special facts" doctrine.

Where sophisticated parties have negotiated specific disclaimer provisions and the court has determined that the defendant did not have superior knowledge exclusively in the possession of the defendant, courts have dismissed fraud causes of actions upon a motion to dismiss (*see MBIA Ins.*, 81 AD3d at 419 (rejecting plaintiff's argument of a peculiar knowledge exception where it was an "undisputed fact that the information was not exclusively in the defendants' possession"); *UST Private Equity Investors Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 89 [1st Dept 2001] (holding, "plaintiffs have not alleged any facts from which it could logically be inferred that defendants' access to the relevant information was superior to the access afforded to plaintiffs during their due diligence"); *HSH Nordbank AG v UBS AG*, 2012 NY Slip Op 2276, *5-6 [1st Dept 2012] (dismissing fraudulent inducement cause of action where it was alleged that the defendant knew published ratings of securities were not "entirely reliable guides to the risk of [the] assets [at issue]", but the unreliability of credit ratings "was common knowledge among participants in that market")).

Defendants argue that the broad disclaimers in the Note Sale Agreement conclusively bar the plaintiff's fraud causes of action, citing *Danann Realty Corp. v Harris* (5 NY2d 317 [1959]) for the proposition that the plaintiff is bound by the disclaimer language. "In Danann, the New York Court of Appeals held that plaintiff's claim of fraud in the inducement could not stand because plaintiff had 'in the plainest language announced and stipulated that it [was] not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations ....'" (*MBIA Ins. Corp. v Royal Bank of Can.*, 28 Misc 3d 1225A [Sup Ct, New York County 2010] citing, *Danann Realty Corp.*, 5 NY2d at 320-321).

Both state and federal courts have repeatedly addressed the level of specificity of disclaimers necessary to bar allegations of fraud and have held that "[a] disclaimer is generally enforceable only if it 'tracks the substance of the alleged misrepresentation . . ..'" (*Caiola v Citibank, N.A., NY*, 295 F3d 312, 330 [2d Cir 2002], quoting *Grumman Allied Indus., Inc.*, 748 F 2d 729, 735 [2d Cir 1993]; *see MBIA Ins. Corp.*, 28 Misc 3d at 1225A; *Citibank, N. A. v Plapinger*, 66 NY2d 90 [1985] (finding that "the language of [the] disclaimer in the guarantee was sufficiently specific to foreclose as a matter of law the defenses and counterclaims based on fraud" and the waivers were not "generalized boilerplate exclusion"); *HSH Nordbank*, 2012 NY Slip Op 2276 at *29-30 (holding, "the substance of the relevant disclaimers and disclosures, far from being merely a 'generalized boilerplate exclusion' of reliance on statements outside the transactional documents, covers the subject matter of the alleged misrepresentation with sufficient specificity to bar the fraud claim" (internal citation omitted)). "Cases since *Plainger* and *Dannan* have made clear that the disclaimer must show 'a clear indication that the disclaiming party has knowingly disclaimed reliance on the specific representations that form the basis of the fraud claim'" (*MBIA Ins. Corp.*, 28 Misc 3d at 1225A, citing *JPMorgan Chase Bank ex rel. Mahonia Ltd. v Liberty Mut. Ins. Co.*, 189 F Supp 2d 24, 27 [SD NY 2002]; *see HSH Nordbank*, 2012 NY Slip Op 2276 at *29-30; *Caiola*, 295 F3d at 330).

Although the Note Sale Agreement was entered into by two sophisticated parties, the disclaimers in the Note Sale Agreement appear to be general boilerplate disclaimers that are not sufficiently specific to foreclose, as a matter of law, the claims of fraud alleged in the complaint. Other than the first, second and signature pages of the Note Sale Agreement, in which the date, sale amounts, and parties were modified, the Note Sale Agreement appears to be a boilerplate contract with extremely broad disclaimers, so broad, at points, to be contradictory. It is noted that section 9 of the Note Sale Agreement states that plaintiff "HAS BEEN GIVEN THE OPPORTUNITY TO REVIEW THE LOAN DOCUMENTS" but that they are not relying "ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER OR ANY SELLER PARTY." It appears that this language was designed to insulate defendant from actual fraud that could be perpetuated by supplying unspecified information known to be false or incorrect, knowing that it would be used by the prospective purchaser. Moreover, defendants' reliance on section 5 of the Note Sale Agreement regarding its acknowledged "withholding" of "internal" documents is misplaced as the recitation of those documents not disclosed suggests they are internal to defendants and may be protected by attorney-client privilege; there is no mention of third-party communications between defendants and Hilton or the PIP. The Comfort Letter, which was disclosed, gives the impression that Hilton would not withhold its consent to the sale to plaintiff, in direct contravention of the information allegedly known to defendants, at least prior to the closing.

The allegations of fraud in this action stem from the plaintiff's claim that the defendants were aware that Hilton was terminating the franchise license for the Hotel prior to entering into the Note Sale Agreement. As the Note Sale Agreement does not make any reference to the franchise license, or otherwise indicate that the plaintiff was knowingly disclaiming any information with respect to the status of the franchise license, the general disclaimers contained in the Note Sale Agreement will not bar the fraud claim (*see MBIA Ins. Corp.*, 28 Misc 3d at 1225A, citing *JPMorgan*, 189 F Supp 2d at 27; *see HSH Nordbank*, 2012 NY Slip Op 2276 at *29-30; *Caiola*, 295 F3d at 330).

Although the Note Sale Agreement contained numerous disclaimers, where the plaintiff has alleged sufficient facts to suggest that the defendant had superior knowledge that was exclusively in the possession of the defendant, and there are issues of fact as to the level of disparity of information that was available to the parties, courts have declined to dismiss fraud causes of action at the pleading stage (*see Swersky*, 219 AD2d at 321, 327-328 (reinstating a cause of action for fraudulent concealment where there were issues of fact as to the disparity in the level of information available to defendant); *Barrett*, 64 AD3d at 738 (denying a motion to dismiss because plaintiff alleged sufficient facts to suggest that the defendant, when selling a pharmacy business, was aware of information material to the sale of the business but failed to disclose that information to the plaintiff buyer); *see also Barrett v Freifeld*, 77 AD3d 600, 602 [2d Dept 2010] (although motion to dismiss was previously denied, the court ultimately dismissed the fraud claim on summary judgment where the plaintiff failed to raise a triable issue of fact after the defendant demonstrated prima facie evidence that defendant did not have superior knowledge and that the issue "was a matter of public record which could have been discovered through the exercise of ordinary diligence and, thus, the plaintiff did not justifiably rely on the [defendant] to disclose that information"); *MBIA Ins. Corp.*, 28 Misc 3d at 1225A (holding, "[w]hile the evidence might ultimately demonstrate that the Defendants did not have any special knowledge upon which they relied or which Plaintiffs could not have ascertained by exercising reasonable diligence, 'these are issues which are inappropriate to determine as a matter of law based solely on the allegations of [the] complaint'", quoting *P.T. Bank*, 301 AD2d at 378); *Schooley v Mannion*, 241 AD2d 677, 678 [3d Dept 1997] (even where specific disclaimer present, exclusive knowledge of the defendant was sufficient to salvage plaintiff's fraud cause of action); *Madison Apparel Group Ltd. v Hachette Filipacchi Presse, S.A.*, 52 AD3d 385 [1st Dept 2008]).

The plaintiff has sufficiently alleged that the defendants had superior and exclusive knowledge of facts that materially affected the value of the Note when the parties entered into the Note Sale Agreement. It is not clear at this stage of the litigation how the plaintiff became aware of the PIP or the franchise license issue. Most significantly, it is not clear whether the plaintiff would have been able to determine the existence of the PIP or the alleged loss of the franchise through its own due diligence prior to entering into the Note Sale Agreement. While the evidence might ultimately demonstrate that the information regarding the PIP and the franchise license was available to the plaintiff with the exercise of reasonable due diligence, and it was, therefore, unreasonable for plaintiff to rely on the defendants' alleged misrepresentations and omissions, it is inappropriate to determine those issues as a matter of law based solely on the allegations in the plaintiff's complaint at this point in the proceeding (*see P.T. Bank*, 301 AD2d at 378; *MBIA Ins. Corp.*, 28 Misc 3d at 1225A).

Defendants also argue that the fraud causes of action must be dismissed based upon the plaintiff's knowledge of the Comfort Letter. Defendants argue that the plaintiff "was well aware that [Hilton] retained the final decision making authority as to whether it would terminate the franchise if Plaintiff was the successful bidder" and plaintiff "had no reason to believe that the Hilton Hotel Group would keep the franchise in place following the Trust's assignment of the Loan Documents." The court finds this argument unavailing as the plain language of section 6 of the Comfort Letter states that Hilton, "will consent to the assignment to any subsequent holder or holders of the Loan" provided that the assignee meets certain other criteria. Defendants have not established that the plaintiff would not meet that criteria and, accordingly, it would be premature to dismiss the causes of action at this stage of the litigation (*see* CPLR 3211[a][1]). Accordingly, the defendants' motion to dismiss the fourth cause of action is denied.

Defendants move to dismiss the fifth cause of action for "rescission of the Note Sale Agreement and restitution with respect to the Downpayment plus interest" which is based upon the defendants' alleged fraudulent inducement. However, plaintiff has not demonstrated that they could not be adequately compensated by damages in this action (*see MBIA Ins. Corp.*, 81 AD3d at 420). To the extent that plaintiff seeks restitution based upon its fraudulent concealment claims, this cause of action is duplicative of the fourth cause of action for damages. Accordingly, the fifth cause of action for rescission is dismissed.

Defendants move to dismiss the sixth cause of action for unjust enrichment and argue that the existence of a valid and enforceable contract governing the subject matter precludes recovery in quasi contract. Plaintiff argues that, pursuant to *Schwartz v Pierce* (57 AD3d 1348, 1353 [3d Dept 2008]), the cause of action for unjust enrichment is not subject to dismissal at the pleading stage. However, *Schwartz* is inapposite to this matter as that case dealt with a claim for quantum meruit for work performed outside of a written contract. "To prevail on a claim of unjust enrichment, a plaintiff must show that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution" (*Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 115 [2d Dept 2009]). "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005]). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987], internal citations omitted; *see Goldman*, 5 NY3d at 572; *Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695 [2d Dept 2009]). Although plaintiff did not fully perform under the terms of the Note Sale Agreement, the contract is enforceable by defendant and governs the subject matter of this action. Accordingly, the sixth cause of action is dismissed as the existence of a valid and enforceable contract precludes equitable recovery for events arising out of the same subject matter (*see Clark-Fitzpatrick*, 70 NY2d at 388; *Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 752 [2d Dept 2011]).

Defendants move to dismiss the seventh cause of action for equitable estoppel but do not make a specific argument with respect to this cause of action other than that the disclaimers and exculpatory language in the Note Sale Agreement are enforceable. Plaintiff argues that there are issues of fact regarding the allegations and a motion to dismiss should not be granted at this stage of the litigation. The plaintiff's seventh cause of action alleges that based upon the alleged fraudulent concealment, the defendants "are equitably estopped from relying on any purported disclaimers and/or exculpatory language in the Note Sale Agreement." "The essential elements of an equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would reasonably induce reliance, and reliance by the party seeking estoppel to his or her detriment" (*CCCLF, Inc. v Bonin*, 24 Misc 3d 1221A [Sup Ct, Kings County 2009], *affd* 83 AD3d 759 [2d Dept 2011]; *see Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82 [1980]; *O'Malley v Department of Energy*, 537 A2d 647, 651 [1987]). As the plaintiff has alleged that defendants intentionally misrepresented the status of the franchise license, it was reasonable for the plaintiffs to rely on that misrepresentation, and that the plaintiffs did rely on the misrepresentation when entering into the Note Sale Agreement to their detriment, the plaintiffs have sufficiently alleged a cause of action for equitable estoppel and the defendants' motion to dismiss the seventh cause of action is denied.

Defendants argue that the eighth cause of action for mutual mistake must be dismissed as it is contradictory to the claims in the complaint. Defendants argue that the complaint claims that the defendants were aware that Hilton intended to terminate the Hotel's franchise license prior to entering the Note Sale Agreement and, accordingly, were not mistaken as to whether the franchise would continue when entering into the Note Sale Agreement. Plaintiff argues that they have sufficiently alleged that both parties were mistaken as to the status of the franchise and plaintiff is permitted to plead in the alternative. Pursuant to CPLR 3107(a), plaintiff is entitled to demand relief in the alternative. As there are numerous issues of fact as to whether the defendants were aware that the franchise license would be revoked and plaintiff is entitled to plead in the alternative, the motion to dismiss the eight cause of action must be denied (*see* CPLR 3107[a]).

Defendants move to dismiss the ninth cause of action for attorney's fees. Pursuant to section 21 of the Note Sale Agreement, the prevailing party is entitled to "all costs and expenses" including "reasonable attorneys' fees and disbursements" in the event a party defaults or "if any dispute arises between the Parties . . . concerning the meaning or interpretation of any provision of the [Note Sale Agreement] . . .." However, as discussed above, it is uncontested that plaintiff did not fully perform under the terms of the Note Sale Agreement and the plaintiff's ability to recover legal fees is based solely upon this breach of contract claim. Accordingly, as plaintiff did not perform under the terms of the Note Sale Agreement, plaintiff's cause of action for attorney's fees must be dismissed.

CONCLUSION

Accordingly, defendants' motion to dismiss is granted as to the 1^{st}, 2^{nd}, 3^{rd}, 5^{th}, 6^{th} and 9^{th} causes of action and denied as to the remaining causes of action. Defendants are directed to serve and file an answer within 30 days. This matter is adjourned to June 20th, 2012 for a preliminary conference.

The foregoing constitutes the decision and order of the court.

E N T E R :

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J.S.C.