LaSalle Bank National Association v Nomura Asset Capital Corp.

2006 NY Slip Op 33876(U)

September 6, 2006

Supreme Court, New York County

Docket Number: 0603339/2003

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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LASALLE BANK NATIONAL ASSOCIATION (f/k/a LASALLE NATIONAL BANK), as Trustee for the Certificateholders of ASSET SECURITIZATION CORPORATION COMMERCIAL MORTGAGES PASS-THROUGH CERTIFICATES SERIES 1997-D5,

Plaintiff,

- against -

NOMURA ASSET CAPITAL CORPORATION and ASSET SECURITIZATION CORPORATION,

Defendants.

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Index No. 603339/2003

POST-TRIAL DECISION AND ORDER

RICHARD B. LOWE, III, J.:

This is the decision of the court after a four-week bench trial (between November 9, 2005 and December 9, 2005) in this dispute over alleged breaches of several representations and warranties in connection with the sale and securitization of a pool of 155 commercial mortgage loans (totaling approximately $1.8 billion). Plaintiff LaSalle Bank National Association (LaSalle), as Trustee for the Certificateholders of Asset Securitization Corporation Commercial Mortgages Pass-Through Certificates Series 1997-D5 (the "Trust"), has alleged that defendants Nomura Asset Capital Corporation (Nomura) and Asset Securitization Corporation (ASC) (collectively, "the defendants") breached representations and warranties under the Mortgage Loan Purchase and Sale Agreement (the "MLPSA") and the Pooling and Servicing Agreement (the "PSA"), and seeks to recover damages for those breaches.

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Though the plaintiff first asserted breaches of representations and warranties for all 155 loans in its October 23, 2003 Complaint, the court through its decisions winnowed down the number of loans at issue. In Motion Sequence 001, in a decision dated March 23, 2004, 145 of

the 155 mortgage loans at issue were dismissed for failure to provide specific allegations of breaches as to those loans. In Motion Sequences 008 and 009, the court, in a decision dated October 27, 2005, further removed from consideration three additional loans from the remaining ten loans. As such, the seven loans at issue in this trial are the following:

- Loan #37: Super Kmart-San Antonio (2015 S.W. Loop 410, San Antonio, TX 78227);
- Loan #42: Builders Square - Daytona (2400 International Speedway Blvd., Daytona Beach, FL 32114);
- Loan #47: Builders Square - El Paso (11751 Gateway West, El Paso, TX 79936);
- Loan #50: Builders Square - San Antonio (6001 N.W. Loop 410, San Antonio, TX 78238);
- Loan #64: Lancers Center (SC Highway 9 Bypass, Lancaster, SC 29720);
- Loan #105: Banzhoff Mobile Home Park (Valencia, Wattsburg, Punxsutawney, and Corry, PA);
- Loan #120: Best Western - Old Hickory Inn (1849 Highway 45 Bypass, Jackson, TN 38035).

(*See* October 27, 2005 Decision, at 3).[1]

There are also four outstanding discovery motions made by the parties which the court held in abeyance pending the conclusion of this trial. In motion sequence 012, the defendants moved to preclude the expert report of plaintiff's expert David W. Swiney. In motion sequence 013, the plaintiff moved to exclude evidence concerning the defendants' "prompt notice" argument. In motion sequence 015, the plaintiff moved to exclude evidence as to whether, pursuant to the contractual agreements at issue, the plaintiff is obligated to prove that the defendants' breaches caused the subject loans to default. In motion sequence 016, the plaintiff moved to exclude evidence concerning due diligence and investments by investors in the trust certificates. The court consolidates and disposes of these motions in this decision.

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[1] Hereinafter, Loan Numbers 37, 42, 47, and 50 are referred to as "Credit Lease Loans."

Finally, the plaintiff moves to amend its pleadings to conform to the evidence adduced at trial. Specifically, the plaintiff moves to amend Count II of its Complaint, which alleges that the defendants failed to create, maintain, and/or deliver complete files to the plaintiff as well as failed to create, maintain, and/or deliver all other files that relate to the mortgage loans to the plaintiff. The court, in its March 23, 2004 decision, granted in part and denied in part the defendants' motion to dismiss as to Count II, specifically dismissing 145 out of 155 loans, but denied the motion as to the remaining ten loans. The court further discounted three other mortgage loans in its October 27, 2005 decision which dealt with the defendants' motion for summary judgment. Here, the plaintiff seeks leave to amend Count II of the Complaint, and moves to revive that part of the cause of action where the court dismissed 148 of the 155 mortgages loans and the files thereto, again arguing that the defendants failed to create, maintain, and/or deliver files that relate to the mortgage loans.

Having considered all the trial testimony, evidence, depositions, the pre-trial submissions, extensive post-trial memoranda, and various arguments propounded by the parties, this court makes the following findings of fact and determinations of law.[2]

FACTS

I. The Parties and their Respective Duties

On October 24, 1997, the Trust was established pursuant to the MLPSA (PX 300) and the PSA (PX 704), and is expected to expire on February 14, 2043 (*see* Tr. 1747: 20-22). The

[2] For ease of reference, hereinafter the citations utilized by the court are as follows: the trial transcript will be cited as "Tr. ####," and, at relevant times will indicate the particular witness by including that witness' name in brackets and/or parentheses. Deposition testimony will be cited as "[Deponent] Dep. ####." Plaintiff's trial exhibits will be cited as "PX" and Defendant's trial exhibits will be cited as "DX."

MLPSA was entered into between Nomura, the seller of the loans, and ASC (PX 300), while the PSA was entered into among ASC, as the transferor of the loans into the Trust, LaSalle as Trustee, AMRESCO Services, L.P. (AMERSCO), as Servicer, and AMRESCO Management, Inc. (AMERSCO Management), as Initial Special Servicer (PX 704).

Prior to this litigation, CapMark Services, L.P. (Capmark) and then GMAC Commercial Mortgage Corporation (GMAC) succeeded AMRESCO as Servicer. Lend Lease Asset Management, L.P. (Lend Lease) succeeded AMRESCO Management as Special Servicer. In October 2002, ORIX Capital Markets, LLC (ORIX) invested approximately $19.3 million in D5 Securitization certificates (*see* DX 1083). ORIX then bought a majority of the B grade Certificates in the D5 Securitization (DX 1214; DX 1441).[3] After acquiring such additional certificates, in March 2003, ORIX, due to its purchases of B grade Certificates, became Special Servicer. Later, in November 2003, ORIX purchased $39 million worth of Class A-3 Certificates (DX 1080). Through these purchases, ORIX became Servicer in August 2004.

Pursuant to MLPSA and PSA, loans are normally administered on behalf of the Trust by an entity known as the "Servicer," which include answering questions regarding the loan and handling receipt of funds. However, under certain circumstances, including where a borrower defaults in his or her payment, servicing of a loan is transferred to a "Special Servicer," whereby the servicing of loans are within the "broad authority" provided by the Trust to "do or cause to be done any and all things in connection with such servicing and administration which it may deem consistent with the Servicing Standard and, in its reasonable judgment, in the best interest

[3] There are a number of class of certificates in this D5 Securitization: Class A-1A; Class A-1B; Class A-1C; Class A-1D; Class A-CS1; Class PS-1; Class A-1E; Class A-2; Class A-3; Class A-4; Class A-5; Class A-6; Class A-7; Class A-8Z; Class B-1; Class B-2; Class B-3; Class B-3SC; Class B-4; Class B-5; Class B-6; Class B-7; Class B-7H; Class V-1; Class V-2; Class R; and Class LR certificates (*see* PX 704).

of the Certificateholders" (PX 704, § 3.01 [a]; *see also LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 14 AD3d 366, 366-67 [1st Dept 2005]).

In Special Servicing, the Special Servicer of a questionable loan does all in its authority to rehabilitate a loan and/or to minimize and mitigate harm to the Trust. Within ORIX, if a loan cannot be rehabilitated, all avenues of recovery are explored in an effort to maximize recovery (*see* Tr. 836:22-838:22 [Dinan]). Thereafter, ORIX utilizes the following procedures to maximize recovery and minimize harm to the Trust: where there is a foreclosing on a property, broker opinions and appraisals are requested and received prior to that foreclosing (*see* Tr. 840:7-841:9). An internal analysis is performed and a business plan is developed to obtain the highest price for the property, under the best terms that the market would bear (*see* Tr. 841:10-16). Following foreclosure, ORIX transfers the property to the ORIX's Real Estate Owned Sale Committee, which is responsible for all aspects of the marketing of the property, including the hiring of brokers (*see* Tr. 841:22-842:17). While there are limitations and delays in the sale of property due to property structures and maintenance (*see* Tr. 845:26-846:19), nonetheless it is important for the property to be sold at the highest price possible in order to provide for the highest return to the Trust (*see* Tr. 842:22-843:14). ORIX receives a fee upon disposition, based on the price of the sale (*see id.*).

II. General Terms and Definitions

Certain definitions, not found in the terms of the MLPSA and PSA, but which are important in the court's discussion of the facts and circumstances as to this decision, bear mentioning at this point.[4]

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[4] The court reviews the definition of "origination" and "customary industry standards" under Section 2 of the Analysis, as these definitions are the court's interpretation based upon the evidence adduced during trial.

A. Loan-to-Value Ratio

A loan-to-value ratio ("LTV") is the percentage of the property value that the loan constitutes (Tr. 72:15-73:4). LTV is one of the key components considered in the origination of commercial mortgage loans (Tr. 72:14-20 [Greenspan]; 2559:17-21 [Esquivel]; *see also* Harrison Dep. 82:20-83:15). LTV is a benchmark in the industry because the difference between the value of the property and the amount of the loan provides an incentive for the borrower to take care of the property, as well as represents a "cushion" in the event of a loan default (*see* Tr. 74:2-25). The lower the LTV, the less the loss severity will be in the event of default (Tr. 360:23-361:14; 2555:21-22).

In 1997, LTV standards varied depending upon the type of property that was the subject of the loan. For multifamily properties, such as mobile home parks, the standard maximum LTV was between 75% and 80% (Tr. 119:19-24, 133:10-22, 240:3-8; Harrison Dep. 60:11-13, 84:22-85:3; *see also* PX 300 [Nomura Guidelines]; PX 649 [PaineWebber Guidelines], PX 377A [ORIX Guidelines]). For retail properties, such as shopping centers, the standard maximum LTV was between 75% and 80% (Tr. 119:25-120:6; Harrison Dep. 86:9-16; *see also* PX 649 [PaineWebber Guidelines]; PX 377A [ORIX Guidelines]). For hospitality properties, such as hotels, the standard maximum LTV was between 70% and 75% (Tr. 120:7-13; *see also* PX 649 [PaineWebber Guidelines]; PX 377A [ORIX Guidelines]).

B. Debt Service Coverage Ratio

The debt service coverage ratio ("DSCR") is another reference point in the origination of commercial mortgage loans (Tr. 2559:17-21 [Esquivel]; *see also* Harrison Dep. 82:20-83:11). DSCR measures the amount by which the income that is being produced by the property compares to the loan payments (Tr. 121:4-14 [Greenspan]). Basically, in terms of the numbers,

the higher the DSCR, the greater the likelihood and ability of the borrower to make payments on the loan and to avoid default (*id.*).

In 1997, standards for DSCR also varied with property type. For multifamily properties, the standard minimum DSCR was between 1.20 and 1.25 (Tr. 122:12-18 [Greenspan]; 2976:8-17 [Esquivel]; Harrison Dep. 92:11-24; *see also* PX 300 [Nomura Guidelines]; PX 649 [PaineWebber Guidelines]; PX 377A [ORIX Guidelines]). For retail properties, the standard minimum DSCR was between 1.20 and 1.30 (Tr. 122:19-24; Harrison Dep. 93:8-12; *see also* PX 649 [PaineWebber Guidelines]; PX 377A [ORIX Guidelines]). The standard minimum DSCR for hospitality properties was generally between 1.40 and 1.50, but could be higher (Tr. 123:13-17; 2976:2-7; Harrison Dep. 92:11-93:7; *see also* PX 649 [PaineWebber Guidelines]; PX 377A [ORIX Guidelines]).

C. LTV and DSCR Relating to Credit Lease Loans

Credit lease loans are loans where the financing and repayment terms thereof are based on the credit of the lessee instead of the value of the property. Standards as to LTV and DSCR are relaxed for credit lease loans where the rent to be paid by the tenant is expected to cover the loan payments (*see* Tr. 355:6-356:15 [Greenspan]). The loan may be prudently originated with a LTV approaching 100% and a DSCR as low as 1.0 (*see* Tr. 356:8-357:2). Whether it is proper to treat a loan as a credit tenant lease loan depends on the security of the property's rental stream. This depends, in turn, on the likelihood that the tenant will file for bankruptcy and, should bankruptcy occur, whether the debtor will assume the lease and continue to pay the rent (Tr. 355:6-356:7). The likelihood of a tenant filing for bankruptcy is measured by its credit rating. Credit ratings are a scale of grades assigned to companies by credit rating agencies, such

as Moody's, Standard & Poor's (S&P), and Fitch Ratings (Fitch), in order to determine the risk lenders undergo in extending credit to a particular company.[5]

Though a lender looks at the credit rating in deciding whether to extend a loan and in determining the size of the loan, the lender could nonetheless extend a loan to a company with a high LTV or a low DSCR based on whether the tenant is more likely to assume a lease in the event of bankruptcy (*see* Tr. 361:21-362:3). Reasons for extending the loan include whether the rent of the property was below market, which would make the lease valuable to the bankrupt company, or if the retention of the property would be important to the debtor's reorganization (Tr. 362:4-20). In a reorganization, the retention of the property would generally happen where the property was "integral" to the business of the tenant or guarantor (*id.*).

Nonetheless, in extending a credit lease loan, a company need not have a particular credit rating. There is no particular guideline as to a minimum or maximum credit rating a company must have in order to receive such a loan (*see* Tr. 766:2-5 [Greenspan]; *see also* PX 649 [PaineWebber Guidelines]; PX 377A [ORIX Guidelines]; DX 1222 [S&P Manual]). While

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[5] The court notes the various credit scales utilized by the named companies. As to Moody's, the credit rating scale is as follows (in order from lowest risk to highest risk):

Investment Grade: Aaa, Aa1, Aa2, Aa3, A1, A2, A3, Baa1, Baa2, Baa3
Speculative Grade: Ba1, Ba2, Ba3, B1, B2, B3, Caa1, Caa2, Caa3, Ca, C

As to S&P, the credit rating scale is as follows (in order from lowest risk to highest risk):

Investment Grade: AAA, AA, A, BBB
Non-Investment Grade (also known as junk bonds): BB, B, CCC, CC, C, CI, R, SD, D, NR
Intermediate ratings are offered at each level (e.g., BB+, BB, BB-)

As to Fitch, the credit rating scale is as follows (in order from lowest risk to highest risk):

Investment Grade: AAA, AA, A, BBB
Non-Investment Grade (also known as junk bonds): BB, B, CCC, CC, C, D, NR
Intermediate ratings are offered at each level (e.g., BB+, BB, BB-)

(*see* Credit Rating Agency <en.wikipedia.org/wiki/Credit_rating_agencies>).

credit tenants should have investment grade credit ratings (Tr. 3167:18-26 [Esquivel]), no actual requirement existed in 1997 (Tr. 2615:10-2616:3 [Esquivel]). Indeed, there were a number of credit lease loans made to companies with a low credit rating (Tr. 772:21-26; 2618:20-2620:13). In summary, the extension of any funds to these companies is based on whether these companies would be able to repay its debt if such a loan was extended. Furthermore, in credit lease loan transactions, the buyer, and not the mortgage loans seller, generally bears the credit risk inherent in such a transaction (*see* Tr. 2466:6-24; 2467:11-2468:14 [Bussel]; *see also* 764:19-765:4 [Greenspan]).

D. Warm-Body Guarantees

Commercial mortgage loans are typically non-recourse loans, meaning that in the event of default, the lender cannot recover from the borrower personally, but only by foreclosing on and selling the property (Tr. 125:17-126:3). A warm-body guarantee is a guarantee or indemnity by a financially responsible person or entity other than the borrowing entity (Tr. 124:25-127:15). A warm body guarantor does not guarantee payment of the loan (*see* Tr. 2697:18-2701:13). Instead, a warm body guarantor will guarantee that the lender can look to the guarantor for recourse in the event there are defaults on a contract based on a "bad act," such as fraud, conversion, waste, and gross negligence (*id.*). Though optional (Tr. 2552:11-18; 3239:20-25 [Esquivel]), waiving the requirement of a warm-body guarantee is a "weak practice" (Tr. 3243:19-3244:5).

III. The Seven Loans

A. The MLPSA and PSA

Pursuant to the MLPSA and PSA, Nomura made a number of representations and warranties to the Trust as to the loans at issue. Section 2 of the MLPSA provides that:

> (A) With respect to each Mortgage Loan originated by the Seller [Nomura] . . . the origination, servicing and collection of each Mortgage Loan is in all respects legal, proper and prudent in accordance with customary industry standards and
>
> (B) With respect to each Mortgage Loan originated by CFSB [Credit Suisse First Boston Capital LLC] or Bostonia [Bostonia America Lending Group-I], to the best of the Seller's knowledge . . . the origination, servicing and collection of each Mortgage Loan is in all respects legal, proper and prudent in accordance with customary industry standards (PX 300, § 2 [b] [xix]).

As well, the defendants made the following representations and warranties to the plaintiff:

> (A) With respect to each Mortgage Loan originated by [Nomura], no fraudulent acts were committed by [Nomura] during the origination process of such Mortgage Loan and the origination, servicing and collection of each Mortgage Loan is in all respects legal, proper and prudent in accordance with customary industry standards and (B) with respect to each Mortgage Loan originated by Bloomfield, CSFB or Bostonia, to the best of [Nomura's] knowledge [the same]. . . (*id.*, § 2 [b] [xix]);
>
> With respect to each Mortgage Loan secured by a Credit Lease . . . (F) The Tenant cannot terminate the Credit Lease for any reason, prior to payment in full of or the payment of funds sufficient to pay in full: (a) the principal balance of the loan; (b) all accrued and unpaid interest on the loan; and (c) any other sums due and payable under the loan, as of the termination date, except for a default by the Landlord under the Credit Lease. . . (*id.*, § 2 [b] [xli] [F]);
>
> [Nomura] has no knowledge that the representations and warranties made by each related Borrower in such Mortgage Loan are not true in any material respect (*id.*, § 2 [b] [x]); and
>
> [N]either [Nomura] nor any affiliate thereof has any obligation or right to make any capital contribution to any Borrower under a Mortgage Loan, other than contributions made on or prior to the Closing Date (*id.*, § 2 [b] [xxxvii]).

Each of these representations and warranties are the subject of this litigation as to the loans at issue.

B. Credit Lease Loans - Loan Numbers 37, 42, 47, and 50

These four loans are composed of a Super Kmart and three Kmart subsidiaries known as Builders Square. Loan Number 37 involves Super Kmart, while Loan Numbers 42, 47, and 50 involves Builders Square, a subsidiary of Kmart. Loan Number 37 is for Super Kmart-San Antonio, located at 2015 S.W. Loop 410, San Antonio, Texas 78227. Loan Number 42 is for Builders Square - Daytona, located at 2400 International Speedway Blvd., Daytona Beach, Florida 32114. Loan Number 47 is for Builders Square - El Paso, located at 11751 Gateway West, El Paso, Texas 79936. Loan Number 50 is for Builders Square - San Antonio, situated at 6001 N.W. Loop 410, San Antonio, Texas 78238.

These loans were originated by Bostonia (PX 351-54). The borrowers of these loans were Buffalo Investors, LLC for the Super Kmart, and San Builder Company L.C. 1997-1, Paso Builder Company, L.C. 1997-1, Square I-1 as to the Builders Square properties (*see* PX 351-54). Nomura bought these loans from Bostonia's affiliate CFSB on October 22, 1997 for inclusion in the Trust (PX 144).

1. *Disclosures*

At the time the loans were made, it was known through Kmart's public filings with the US Securities and Exchange Commission that Kmart was exiting the Builders Square business, calling it a "discontinued operation" (*see* PX 468). Similarly, Nomura disclosed that the various rating agencies had given Kmart a BB- rating (*see* PX 116 at 207; Tr. 775:24-777:16).

The LTV for each of these Credit Lease Loans was disclosed in a Prospectus Supplement, which was provided to all buyers into the securitization as well as to the Servicer

and Special Servicer (*see* PX 116 at 311; Tr. 777:17-22). Prior to the close of the securitization of these loans, Nomura also disclosed the LTV for each Credit Lease Loan in a "Funding Memorandum" dated October 22, 1997, sent to both LaSalle and AMRESCO (*see* PX 144 at 329-31; Kollin Dep. 37:16-40:24). The LTVs as to these loans ranged between 96% and 98% and DSCRs of approximately 1.0 (PX 144). All four of these loans were also originated without warm body guarantees (Tr. 391:5-15), though Kmart guaranteed the loans (*see* PX 116; DX 1073).

Further, the lease documents as to these loans provided that the tenants could file for bankruptcy (*see* PX 57; PX 178; PX 188; PX 326). AMERSCO, the original Servicer, had knowledge of the disclosures made by Nomura, though AMERSCO did not necessarily review such disclosures (*see* Kollin Dep. 20:12-21:12; 37:16-40:24; 64:4-65:13). As well, Nomura disclosed to AMERSCO and LaSalle in the Prospectus that the Bankruptcy Code and related state laws "may interfere with or affect the ability of a lender to realize upon collateral and/or to enforce a deficiency judgment" (*see* DX 1093). All pertinent information was disclosed in these documents, and such documents were provided to AMERSCO and the Trust (*see* PX 116, PX 144, PX 57; PX 178; PX 188; PX 326; *see also* Kollin Dep. 20:12-21:12; 37:16-40:24; 64:4-65:13).

2. *Builders Square (Loan Numbers 42, 47, 50)*

As noted above, Kmart had disclosed to the public that Builders Square was a "discontinued operation" (*see* PX 468). Indeed, Builders Square ceased operations in 1999 and vacated their properties soon thereafter (*see* DX 1073). Kmart, however, continued to pay for the loans on Builders Square until it filed for Chapter 11 bankruptcy protection on January 22, 2002 (PX 330). When it filed for bankruptcy, Kmart sought to reject 475 unexpired, commercial

real property leases, including the Builders Square leases (*id.*). If granted by the bankruptcy court, Kmart would have declined keeping these commercial leases, and, in turn, would have given up holding onto these properties. The bankruptcy court granted the motion on January 25, 2002 (*see* PX 331), and, as such, Kmart rejected the leases for Builders Square. Based on these rejections, in January 2002, the loans were transferred from Servicing to Special Servicing (*see* DX 1073).

In February 2002, Kmart sent notices regarding the bankruptcy court's approval of Kmart's rejection of the leases to the affected landlord-borrowers (*see* PX 321, 332). Kmart formally surrendered the properties soon thereafter (*see id.*). The Builder Square properties in El Paso (Loan Number 47) and in San Antonio (Loan Number 50) were foreclosed in May 2002 (*see* PX 342, 344, 345). The property for Builders Square - Daytona (Loan Number 42) was foreclosed in February 2003 (*see* DX 1073). However, defendants were never provided notice of Kmart's rejections of these leases and the foreclosures thereto until after June 2, 2003, when the plaintiff noticed breach of warranties or representations pursuant to the MLPSA and PSA on these loans (*see* PX 350; Tr. 1451:6-17; 1456:19-1457:4).

The property for Builders Square - Daytona (Loan Number 42) was liquidated and sold in March 2004 for $6 million (*see* DX 1073). The original loan amount was for $9.630 million, with an appraised value of the property at $9.8 million (*see* PX 689). On May 27, 2003, a bidder made a $7.25 million offer on the property (*see* DX 1094). However, ORIX delayed the consummation of that sale due to a June 2, 2003 letter to Nomura (*see id.*). In September 2003, the offer by the prospective bidder was terminated (*id.*). The property was eventually sold in March 2004 for $6 million (*see* DX 1073).

The property for Builders Square - El Paso (Loan Number 47) was liquidated in December 2002 for $3.5 million (*see* DX 1073, PX 406). The original loan amount was $8.6 million, and the appraised value of the property was $9 million (*see* PX 195).

The property for Builders Square - San Antonio (Loan Number 50) was liquidated and sold in October 2003 for $3.8 million (*see* DX 1073). The original loan amount was for $8.393 million, with the appraised value of the property at $8.75 million (*see* PX 180). By April 2002, when the loan was transferred into Special Servicing, the value of the property had declined to $5.75 million (*see* PX 710). Kmart had offered to pay the loan at the reduced amount of $5 million (*see* PX 346), but it was rejected by the original Special Servicer Lend Lease, which argued that it was insufficient (*id.*). Nonetheless, in March 2003, Lend Lease recommended that a $3.6 million offer be accepted in order to avoid continuing costs, because it was the highest and best bid to date, and because it did not expect a higher offer (*id.*). While ORIX agreed with the recommendation, in May 2003, it put a potential sale of the property for $3.8 million on hold to pursue this claim against Nomura and ASC (*see* PX 710). Eventually, the property was sold in October 2003 for $3.8 million, with additional fees and expenses (*see* DX 1073).

3. *Super Kmart - Loan Number 37*

The loan for Super Kmart was made in the amount of $11.1 million, with the appraised value of the property at $11.6 million (*see* PX 688). On August 31, 2002, the Super Kmart loan was transferred to Special Servicing based upon the bankruptcy proceedings (*see* DX 1073). By that date, the property was appraised at $4.7 million (*see* DX 1089). On March 26, 2003, the bankruptcy court issued an additional order approving procedures for the rejection of certain additional leases, including the Super Kmart (*see* PX 333). The bankruptcy court provided for

the surrender of the property, ruling that the rejection of the lease had the "*effect* of a termination" (*id.* [emphasis added]).

By April 2003, the effective date of the notice of rejection (*see* PX 334), Kmart vacated the property and the property was foreclosed (*see* DX 1073). The value of the property had fallen and was, by April 2004, worth only $3.8 million (*see* DX 1089). The property was eventually sold in May 2005 for $2.7 million (*see* DX 1348). The property value was heavily impacted by the relocation of retailers (*see* Tr. 898:20-899:11; *see also* DX 1348), as well as by vandalism and graffiti (*see* PX 707).

4. *Sale of Property*

On July 30, 2002, during the midst of the Kmart bankruptcy, LaSalle filed proofs of claim totaling approximately $89 million for damages arising from the lease terminations and upon the cost of the loans (*see* PX 335-38). However, the Bankruptcy Code capped the recovery available following a rejection of a lease (*id.*). There was eventually a sale of all the properties (*see supra*). Taking into account the net sale of the collateral and other amounts received, $16.1 million was recovered out of the $33.3 million in unpaid principal balance on the loans (*see* PX 401A, 403A, 405A, 407A). The plaintiff then filed notices of breach as to these loans (*see id.*).

C. Lancers Center Loan - Loan Number 64

Loan Number 64 was made to Cobblestone, LLC for the purchase of Lancers Center, a shopping center located at SC Highway 9 Bypass, Lancaster, SC 29720 (PX 98). The shopping center was anchored by a traditional Wal-Mart store, which occupied 52% of the shopping center and had a lease which was to expire in 2007 (Tr. 141:11-13; *see also* PX 153, PX 121). The Lancers Center loan had a maturity date of September 11, 2027 and an optional prepayment date of December 11, 2009 (*id.*). This meant that, when the loan was made to Cobblestone, LLC, in

1997, there were ten years remaining on Wal-Mart's lease at a fixed rent of $3.35 per square foot, with the right to renew "for six consecutive periods of five years" at the same base rent (*id.*). The Lancers Center loan was underwritten at an LTV of 74% (*see* PX 98) and at a DSCR at 1.22 (*id.*). There was also no warm body guarantee provided (*see id.*).

Wal-Mart had implemented a publicly-announced nationwide strategy of converting traditional Wal-Mart stores which did not sell groceries to a larger "Supercenter" format, which did sell groceries (Tr. 141:23-142:13; 143:6-16). Wal-Mart's 1997 Annual Report featured this strategy (PX 470) and Wal-Mart's Form 10-K, filed for the year ending January 29, 1997, detailed this strategy (PX 469). The 10-K reported that Wal-Mart had converted ninety-two traditional Wal-Marts into Supercenters for the year ending January 29, 1997, and it was planning to open 100 new Supercenters in the coming year, with seventy of these Supercenters resulting from relocations or expansions of existing traditional Wal-Mart stores (Tr. 148:9-17; *see also* PX 469). As well, the 10-K reported that Wal-Mart was planning to open fifty traditional stores (*see* PX 469; *see also* Harrison Dep. 162:24-164:20).

Wal-Mart was prevented from expanding into the grocery sector at Lancers Center because there was already an existing grocery store there, Bi-Lo, which had a term in its lease preventing the landlord from renting any space to another store that sold groceries (*see* PX 319). The mortgage note for Lancers Center required that each of the center's leases have continuous operations clauses and non-competition clauses, "[u]nless otherwise approved by Mortgagee [Nomura]" (*see* PX 93; *see also* Harrison Dep. 136:21-138:3). However, Wal-Mart's lease had neither, which was also approved by Nomura (*see id.*). Wal-Mart's lease also did not have a "continuous operations" clause, which would have prevented Wal-Mart from "going dark," that is, vacating the property, and would have required Wal-Mart to continue operations at the

Lancers Center (Tr. 167:15-23 [Greenspan]; 3111:19-3112:2 [Esquivel]). Further, Wal-Mart's lease did not have a non-competition clause which could have prevented Wal-Mart from opening another store within a certain radius of the Lancers Center (Tr. 173:23-174:12). Finally, Wal-Mart's lease had an exclusivity provision that prevented the landlord from leasing the vacated premises to another discount department store (*see* PX 153).

Prior to the approval of the loan, defendants were aware of the possibilities of Wal-Mart going dark. Lancer Center's manager sent Nomura's due diligence contractor, more than a month before the loan closed, a leasing and marketing plan whose first page described the possibility that Wal-Mart would go dark at Lancers Center and the resolution of that problem was of "paramount importance" (PX 172). Though Nomura did, through its mortgage broker, call Wal-Mart to inquire about the status of that Wal-Mart (Thomason Dep. 15:12-16), Nomura received the response that Wal-Mart "currently was not working on a new store for this area, and the relocation of this particular unit was not on any priority or definitive list" (*see* DX 1228).

However, the Wal-Mart at Lancers Center was not performing well by Wal-Mart standards (Tr. 227:16-229:7 [Greenspan]; 2675:26-2676:18 [Esquivel]). By April 15, 1996, prior to the securitization of this loan, Wal-Mart began constructing a new distribution center twenty-five miles from Lancers Center (*see* PX 737), which was indicative of a relocation of a traditional Wal-Mart to a Wal-Mart Supercenter. Nonetheless, Nomura assumed that Wal-Mart would renew the lease for another term of five to ten years (PX 120), at a 100% probability. The appraisal by CB Commercial Real Estate Group, Inc. (CB) also used a 100% probability in its determination that Wal-Mart would renew its lease (PX 121). However, in the same appraisal, CB utilized a 75% probability of renewal rate for other stores (*id.*), while Nomura assigned a 60% probability to those stores (*see* PX 120). As well, for another anchor store at Lancers

Center, Revco, while the CB's appraisal utilized a 100% probability in its determination regarding lease renewal, Nomura assigned to it only a 60% probability of renewal (*see* PX 121; Tr. 3005:7-3006:8 [Esquivel]).

As well, in the appraisal, CB concluded that the expansion performed by Wal-Mart at its own expense and its strong sales indicated that Wal-Mart would continue to exercise its options (*see* PX 121). However, CB, in determining sales, calculated Wal-Mart's sales using rental square footage as opposed to the occupied square footage (*see id.*). In using rental square footage as the basis of determining sales, CB did not take into account the increased size of the store (*see id.*; *see also* Tr. 226:20-227:15 [Greenspan]), which would have demonstrated that Wal-Mart was not performing as well as once thought.

In September 1999, Wal-Mart ceased operations at the Lancers Center, vacated the premises and opened a Supercenter approximately a mile away (PX 157). Wal-Mart's action triggered other tenants' co-tenancy clauses, which reduced their rent and permitted them to terminate their leases if Wal-Mart ceased operations (*see* PX 318, 681, 682, 683). The borrower stopped making payments and the property was foreclosed on September 3, 2002 (*see* Tr. 865:3-11 [Dinan]). The Trustee did not provide notice of this foreclosure to the defendants until July 24, 2003 (*see* PX 365; *see also* Tr. 1478:2-11; 1487:6-12).

During this period, the Lancers Center property decreased substantially in value. In 1997, the property was appraised at $8 million (*see* PX 121). Each appraisal thereafter reflected a diminution in value, from $4.75 million in May 2002 to $3.2 million in September 2003 (*see* DX 1106, DX 1109, DX 1111, DX 1112, DX 1119, DX 1232, DX 1315; *see also* Tr. 1491:4-1492:9). Partially that diminution in value was due to the deteriorating condition of the property (*see* PX 121, PX 157, DX 1106). There were several offers made for the purchase of the

property (see DX 1120, DX 1121), but such offers were rejected for various reasons (*see* Tr. 849:15-22, 866:10-14, 900:6-13 [Dinan]). The property was eventually sold in April 2004 for $3.15 million (*see* Tr. 1485:3-19).

D. Banzhoff Mobile Home Park Loan - Loan Number 105

Loan Number 105 was made to Sandy Hill Estates Partnership and related borrowers in order to refinance earlier loans secured by five mobile home parks in western Pennsylvania - Sandy Hill Estates, Mahoning Manor, Parsons Mobile Home Park (also known as Hilltop), Shawnee Village, and Sciota Village (*see* PX 101, 126, 720). These mobile home parks are situated in Valencia, Wattsburg, Punxsutawney, and Corry, all towns in the Commonwealth of Pennsylvania. The partnership was controlled by Gordon Banzhoff and son Gordon Banzhoff, Jr. (Tr. 232:7-15 [Greenspan]).

The DSCR for the loan was 1.29 (PX 116). The LTV for the Banzhoff Mobile Home Park loan was 87% (PX 101). Four weeks prior to the closing of the loan, Nomura had underwritten the loan at $2.715 million, with a LTV of 73% (PX 99). However, on October 3, 1997, Nomura increased the loan from $2.715 million to $3.24 million (a $525,000.00 increase), in turn raising the LTV from 73% to 87% (PX 101). Such information was disclosed in the Prospectus Supplement (*see* PX 116).

Pursuant to Nomura's Manufactured Home Community Mortgage Conduit Program Summary (the "Program Summary") (*see* PX 300), Nomura's maximum LTV was set at 75%, which is lower than those found in other guidelines, though higher than other property types.[6]

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[6] As indicated above, ORIX's guidelines as well as PaineWebber's guidelines allowed for a maximum LTV of 80%, as well as allowed for modification (*see* PX 649, PX 377A).

That is because mobile home parks are considered one of the safest types of collateral (*see* PX 383). Nonetheless, the summary also enumerated a series of requirements for mobile home parks, including that of having curbs and gutters, paved streets, adequate and reliable utilities, a minimum of fifty home sites per property, and a minimum occupancy rate of 90% (*see* PX 300). The occupancy rate could be calculated at a blended rate rather than looking at each mobile home park separately (Tr. 761:16-25 [Greenspan]). However, neither the ORIX guidelines nor the PaineWebber guidelines provide for as detailed requirements as Nomura's Program Summary (*see* PX 377A, PX 649).

The original loan amount was based upon an appraisal of the various properties as well as Property Condition Surveys on the properties. The appraisal found that the borrowers had a good track record (*see* Tr. 3759:23-2760:5; *see also* PX 713). As well, the loan was diversified because these properties were found in various counties of Pennsylvania (*see* Tr. 2760:6-23). The occupancy level of the Banzhoff Mobile Park home areas was at 89% (Tr. 461:26-762:14).

In determining the size of the loan and the net cash flow, Nomura utilized vacancy rates that were higher than that used in the appraisal. As for Sandy Hills, Nomura used a 5% vacancy rate, when the actual vacancy rate was 4% (PX 713). As for Mahoning, Nomura utilized a 5% vacancy rate, when the actual vacancy rate was 3% (*see id.*). As to the Shawnee Village and Sciota Village mobile park areas, Nomura utilized the vacancy rate of 21.5% to determine the size of the loan, instead of the 6% rate used by the appraisal (*see id.*), though, if the repairs were made as indicated by the appraisal, the vacancy rate of 6% would have been a reasonable assumption to use. Further, with regards to Shawnee Village and Sciota Village, the defendants used a rental rate of $160 per pad per month instead of $140 per pad per month because there

was a rent increase effective August 1, 1997 (*see id.*). Overall, Nomura, in calculating net cash flows, was generally more conservative than the appraisal (*see id.*).

However, the Parsons mobile park area had a limited and sporadic water supply, based upon the original Property Condition Survey (*see* PX 125). The original survey called for a reserve in the amount of $195,691.00 to provide for a water filtration system, a modified water intake valve, a chlorine regulator, liner repair, a system operator, and an electrical panel upgrade (*see id.*). However, there was a modified survey concerning the water supply submitted (*see* DX 1397), which included substitutions that did not correspond with the original Property Condition Survey (*compare* PX 125 *with* DX 1397). The original Property Condition Survey found that the utilities provided were not adequate (*see* PX 125, at OCM-ASC 83752), but the revised survey found it to be adequate (*see* DX 1397, at OCM-ASC 93232). The revised survey's cover bears the same date received stamp and the same signature page as the original Property Condition Survey (*compare* PX 125 *with* DX 1397). Further, the revised survey is missing a heading that appears at the bottom of the corresponding page of the original survey (*see id.*). Nonetheless, Nomura based its decision to extend the loan on the newer Property Condition Survey instead of the original survey. As well, Nomura based its decision to extend the loan to the Banzhoffs on a letter from the Department of Health which stated that the water capacity at Parsons was sufficient (*see* DX 1087).

Nomura noted that $136,000.00 of the loan proceeds would be used to cover the costs of certain repairs at the Shawnee and Sciota Village mobile park areas (*see* PX 99; PX 390). Repairs included paving work, sewage pipes, and electrical work (*see id.*). However, the proceeds were not used for repairs at these areas, but were instead used for Sandy Hills and

Parsons (*id.*), based upon engineering reports as to the repairs that were purportedly made at Shawnee Village (*see* PX 380, PX 383).

Based on the available information, as well as the increasing occupancy rate (*see* PX 713) and the commitment by the borrower of its own funds to effectuate certain repairs prior to the closing of the loan (*see* PX 380), Nomura increased the loan to Banzhoff from $2.715 million to $3.24 million (*see* PX 101), which was provided in the Prospectus Supplement (*see* PX 116). As well, Nomura required Banzhoff to enter into a Capital Improvement Agreement addressing all repairs recommended by the engineers (*see* PX 390). Nonetheless, in January 1999, the borrower began making late payments, claiming insufficient cash flow due to the cost of delivering drinking water. The Banzhoff loan was transferred to Special Servicing in February 1999 (*see* Floyd Dep. 7:8-7:14; *see also* Wheeler Dep. 8:7-8:10). The borrower later ceased making payments (*see* PX 391, 398), and filed for bankruptcy in February 2000 (*see* PX 365). In March 2003, ORIX foreclosed on three of the parks and sold the parks in 2004-2005 for net proceeds of approximately $3 million. The fourth park, Parsons, was closed by the Pennsylvania Department of Environmental Protection.

Between February 1999, when the loan was transferred to Special Servicing, and this trial, the Special Servicer allowed the borrowers to convert funds due the Trust and allowed the mobile home park areas to deteriorate (*see* DX 1090, DX 1129). On April 13, 2000, the Pennsylvania Department of Health notified the borrowers that a filtration system needed to be installed at Parsons Mobile Home Park (*see* DX 1404), but that was not done (*id.*). Parsons Mobile Home Park became environmentally contaminated (*see* DX 1236, DX 1266, DX 1129). As to Sciota Village, ORIX also allowed conditions to deteriorate (*see* DX 1129). The mobile home park areas decreased in value from $3.725 million in 1997 to $2.54 million in 2004 (*see*

DX 1092). There were offers for the mobile home parks, but such offers were placed on hold (*see* DX 1128, DX 1129, DX 1321, PX 712). Though the remaining parks were eventually sold, the combined proceeds were less than that of the combined offers made.

E. Best Western - Old Hickory Inn Loan - Loan Number 120

Loan Number 120 was made to Tennessee Hospitality Limited Partnership for the purchase of Best Western - Old Hickory Inn, located at 1849 Highway 45 Bypass, Jackson, TN 38035. Nomura made a $2.555 million first-mortgage loan to borrower Fahmi Yousif (Yousif) (*see* PX 1). A second loan in the amount of $450,000.00 was further made to the partnership (*see* PX 252 at ASC 8010). The loan was made, even though additional hotels were planned in the area, which projected to reduce the property's occupancy levels (*see* PX 3). As well, there was low equity provided by the borrower. The borrower filed for bankruptcy in September 1998, and shortly thereafter stopped making payments (*see* Yousif Dep. 60:1-5; PX 399). The property was foreclosed on February 2, 2001 and was sold on December 12, 2001 (PX 476).

The LTV utilized by the defendants was 76.3% based on the appraisal, 77% based on the purchase price (*see* PX 128; Tr. 726:19-727:12). This amount is based upon the first-mortgage loan of $2.555 million. While normally a LTV for hotels are between 70% and 75%, there were a number of strengths in the lending of this loan, including the fact that the hotel was the only full service hotel located at the largest of the four highway interchanges in Jackson, Tennessee (*see* PX 128), that the hotel had been renovated three years earlier (*see* Tr. 738:5-17), that the hotel had a capital improvement expenditure program in place (*see* DX 1198), that the borrower had a contract with a local trucking company to supply 500 rooms per month (*see* PX 128), that the owner was experienced as a hotel operator (*see* PX 128), and that the DSCR was 1.63 (*see* Tr. 2707:8-2708:2). The LTV ratio was also disclosed in the Prospectus Supplement (*see* PX

116). Further, Best Western, the parent company, required that its franchisees have a score of 800 or better in order to allow the franchise to be transferred upon a sale of the hotel (*see* PX 128). Here, this Best Western obtained scores in excess of 900 (*id.*).

However, Nomura made a second loan to the borrower in the amount of $450,000.00, which increased the LTV. Pursuant to that agreement between Nomura and the borrower, the hotel owner would make preferred equity payments to Nomura only after all required payments had been made under the first-mortgage loan (*see* PX 364). This amount was also disclosed in the Prospectus Supplement (PX 116). These preferred equity payments are required to be made monthly from available cash flow from the property, which generally prevents the borrower from making capital improvements to the property because it becomes a drain on the cash resources of the borrower (*see* Tr. 308:7-19, 310:10-24, 708:6-709:17 [Greenspan]; *see also* Tr. 3136:13-19; 3161:23-3162:3 [Esquivel]). The loan was converted into preferred equity on April 22, 1998, six months after the closing date of the securitization (*see* PX 258). Normura would use this preferred equity status in vetoing the sale of the Best Western property (*see* PX 4).

The total amount of the two loans accounted for $3.005 million, with a combined LTV ratio of 91% (PX 252; *see also* Harrison Dep. 95:3-14; Tr. 783:23-785:10 [Greenspan]). The remaining amount was paid from other sources: Fahmi Yousif (Yousif), the borrower's principal, contributed only about 7% of the equity (Tr. 291:22-292:4; *see also* PX 128 [Yousif had cash and liquid assets of about $180,000.00]), with the remainder funded by additional debt acquired by the principal in the form of a $104,682.00 loan termed "P/Note" and a $12,000.00 loan termed "P/N Patton" (*see* PX 8; Tr. 288:11-290:2). All of this was known to Nomura prior to the extension of the second loan (*see* PX 128). Indeed, in the Deed of Trust between Nomura and the borrower (*see* PX 374), the borrower represented and warranted that it would not incur

any indebtedness other than the debt to Nomura, trade and operational debt, and equipment and personal property debt (*id.*).

Nomura was also given information that no fewer than four new hotels were being planned to open near the Best Western - Old Hickory Inn. The appraisal identified the AmeriHost Inn and the Microtel Inn as serious new competitors of the Best Western (*see* PX 3). However, Nomura utilized an occupancy projection of 72% for every year after 1997 instead of taking into consideration the number of hotels which would have impacted the occupancy rate (*see id.*).[7] Indeed, the appraisal noted that the new hotels would bring down the occupancy rate from 72% in 1997 to 62% in 1999 to 69% by 2003 (*id.*), though Nomura did not utilize these numbers. Nomura also assumed that the net cash flow would be around $468,659.00 every year, though the appraiser projected that the hotel would not achieve this result in any year from 1998 to 2002. Nomura underwrote the loan at a constant DSCR of 1.63 instead of varying the DSCR based upon the projections of various occupancy rates and net cash flows (*see* PX 128; PX 726; Tr 320:2-325:7).

As well, given that the borrower only made about a 7% equity contribution into the property, Yousif had little incentive to take the steps necessary to make crucial investments in the property once the value of the property dipped (*see* Tr. 293:21-295:6 [Greenspan]). After all, when there is less than 10% equity provided by the borrower, if the value of the property dips, the owner has zero incentive to make any improvements on the property (Tr. 294:14-18).

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The defendants note that plaintiff's expert Ronald Greenspan's testimony as to this issue was ruled inadmissible by the court because he failed to address the issue of how hotels impacted the occupancy rate regarding Best Western in his expert report. While the court takes heed of its ruling regarding the inadmissibility of the expert's opinion as to this issue, the court also notes that it is common sense that, with a number of hotels in the area competing for guests, hotel occupancy would inevitably fall.

Indeed, Yousif incurred additional debt in order to purchase the property and had problems paying on those debts. Further, the second loan and the conversion thereof into preferred equity also caused the cash flow to be trapped after servicing the various debts (*see* Tr. 3161:23-3162:3 [Esquivel]). This happened even though the partnership agreement signed between Yousif and Nomura required the borrower to make payments towards the first mortgage and to cash expenses prior to making payments to preferred equity (*see* PX 364).

Yousif's prior experience included owning a 155-room Days Inn in Fort Wayne, Indiana, and a 102-room Ramada Inn in Lima, Ohio (*see* PX 128). Yousif had first informed Nomura prior to the extension of the loan that the hotel would be managed by Julius Wilson, who had more than fifteen years of hotel management experience (*see id.*). However, Yousif installed his cousin Arkan Abbo (Abbo), who had limited experience in managing hotels, as manager (*see* Yousif Dep. 59:1-23). Yousif's installation of Abbo was made before the loan was sold to the Trust (Yousif Dep. 11:16-19:14).

Problems in repaying the loan began almost immediately after the second loan was converted into preferred equity on April 22, 1998 (*see* PX 258). The borrower filed for bankruptcy protection on September 23, 1998, and the loan was transferred to Special Servicing on November 23, 1998 (*see* DX 1073). In January 1999, the Bankruptcy Trustee took over management and marketing of the property subject to operating budget approval from AMRESCO (*see* DX 1201). As of March 1999, the property was valued at approximately $3 million, about half a million dollars more than the outstanding loan balance (*see* PX 413A; DX 1202). However, the hotel failed the Best Western inspection due to badly-needed repairs that had not been done (*see* DX 1203). The Trustee sought to make $200,255.55 in repairs, but AMRESCO authorized only $32,000.00 in hotel renovations (*see* DX 1205). On June 2, 1999,

the Trustee requested $5,000.00 to replace malfunctioning air conditioning units (*see* DX 1209), but was denied. In a September 1999 memorandum, AMRESCO noted that net operating income was impacted by rooms being out of service for the summer due to the lack of air conditioning (*see* DX 1212).

In March 2000, the hotel again failed the Best Western inspection (*see* DX 1257). As of April 2000, the appraised value of the hotel had declined to $2.75 million (*id.*). While there were offers for the hotel made as well as requests made by the Bankruptcy Trustee for repairs of the property, neither was accomplished (*see* DX 1097, DX 1257). In January 2001, due to the lack of renovations and repairs made, the property lost the Best Western franchise (*see* DX 1258). The property was soon foreclosed thereafter (*see* DX 1073). In December 21, 2001, the property was sold for $1.3 million (*see* DX 1073).

IV. Demand for Loan Origination and Underwriting Documents

A. The MLPSA and PSA

Pursuant to Section 2.01 of the PSA,

> [ASC] does hereby deliver to, and deposit with, the Custodian (on behalf of the Trustee), with copies to the Servicer and the Special Servicer, the following documents or instruments with respect to each Mortgage Loan so assigned . . . . All original documents relating to the Mortgage Loans which are not delivered to the Custodian are and shall be held by [ASC], the Trustee or the Servicer, as the case may be, in trust for the benefit of the Certificateholders. In the event that any such original documents is required pursuant to the terms of this Section to be a part of a Mortgage File, such document shall be delivered promptly to the Custodian (PX 704).

The "mortgage file" is defined as

> With respect to any Mortgage Loan, the mortgage documents listed in Section 2.01(i) through (xv) pertaining to such particular Mortgage Loan and any additional documents required to be added

> to such Mortgage File pursuant to the express provisions of this Agreement (*id.*, § 1.01).

Pursuant to PSA § 2.02, LaSalle has forty-five days to ensure that all of the documents enumerated in Section 2.01 are delivered (*id.*). If the documents did not conform to the requirements of Section 2.01, notice could be given pursuant to PSA §2.01 (e) requiring that non-conforming documents be corrected or the affected loans repurchased. There is no definition of "original documents," but PSA § 2.01 makes reference to "original executed" documents, copies of such agreements, and the recording and filing of many of these same documents (*id.*).

Pursuant to Section 1 of the MLPSA:

> [ASC] hereby directs [Nomura], and [Nomura] hereby agrees, to deliver to the Trustee all documents, instruments and agreements required to be delivered by [ASC] to the Custodian on behalf of the Trustee under the [PSA] and such other documents, instruments and agreements as [ASC] or the Trustee shall *reasonably request* (PX 300 [emphasis added]).

Each of these representations and warranties are the subject of this litigation as to the second cause of action in this litigation.

B. Documents and Usage

After ORIX assumed the role of Special Servicer for the Trust in March 2003, it undertook a forensic review of the files to determine the status of each loan, the actions taken by the predecessor Special Servicer, and any new actions that would need to be taken consistent with the Servicing Standard, with the goal of rehabilitating the loan into a performing or non-distressed status (*see* Tr. 835:19-836:21, 839:14-26 [Dinan]).

LaSalle articulates the types of documents typically in a file when a loan is originated. These documents include a loan application, initial loan sizing documents, operating statements,

tax returns, credit checks, financial statements, borrower organization documents, public records searches relating to the borrower or the sponsor, borrower business information, environmental reports, appraisals, sponsor documents, cash flow analyses, DSCRs, LTVs, summaries of key documents or issues relating to the loan drafted by the underwriter, and the loan documents themselves (Tr. 1404:3-1408:15 [Johansson]; *see also* PX 307; PX 308; PX 309).

For instance, financial statements and tax returns may be used as evidence of misrepresentations on the part of borrower (*see* Wurst Dep. 102:2-19). As well, rent rolls and operating statements have been used to exhibit inaccuracies made by borrowers (*id.*). These documents have been used to assert liability by a Servicer or Special Servicer, as well as to demonstrate various exceptions to exculpation which would be contained in these loan agreements (*id.*).

The plaintiff notes many ways in which origination and underwriting documents helped to maximize recoveries. The plaintiff alleges that these documents have helped establish fraud on the part of a borrower (*see* Tr. 925:2-18, 927:23-929:7 [Dinan]). These documents have also led to the discovery that the originator of a loan knew that the loan was going to default even prior to its being placed in a trust (*see* Tr. 931:19-934:7). Finally, in terms of this securitization, documents led ORIX to the determination to not pursue a claim against Wal-Mart as related to the Lancers Center loan (*see* Tr. 868:4-869:10).

C. The Demand

On February 16, 2000, LaSalle made a demand for documents pursuant to PSA § 2.03 (e), providing that certain documents set forth in an attached "Exceptions Report" were missing from the Mortgage Files. LaSalle demanded that, pursuant to section 2.03 (e), the defendants either cure the problem or repurchase those loans with document defects (DX 1052).

Accordingly, Nomura undertook to clear the exceptions (*see* Tr. 2282:19-26). On October 22, 2002, after receiving documents for files it identified as missing or incomplete, LaSalle confirmed that the securitization was cleared of all exceptions (Tr. 2259:17-2260:18; *see also* DX 1018; DX 1053).

In May 2003, ORIX sought "origination" and "underwriting" files with respect to the loans then in Special Servicing (PX 366; PX 368). On July 7, 2003, ORIX provided the defendants a notice of breach pursuant to PSA § 2.03 (e) (*see* PX 369). In that letter, ORIX demanded all "loan origination documents" relating to the loans then in Special Servicing, as well as "evidence of compliance" as to the other loans pursuant to MLPSA § 1 (*id.*). Specifically, ORIX demanded

> [A]ll loan origination documentation[] generated by or at the request or for the benefit of ASC, NACC [Nomura], or their respective correspondent loan originators (if any), existing on or at any time before October 24, 1997 and relating in any way to the loans in Special Servicing as of the date hereof []. [ORIX] further demands that ASC and NACC provide CapMark and [ORIX] with *evidence of compliance* with the obligations of ASC and NACC as set forth in Paragraph 1 of the MLPA [sic] with respect to all other loans (i.e., those loans not yet in Special Servicing) (*id.* [emphasis added]).

No prior demands had been made for origination documents for performing loans (Tr. 1059:18-1060:15 [Dinan]). Further, the defendants, in a letter to ORIX dated August 2003, informed ORIX that its July 7, 2003 letter was defective, noting that the letter failed to identify any document missing from the file that was required to be included in the mortgage file (*see* PX 690). The defendants invited ORIX to identify the documents that were absent from the mortgage file, but ORIX never responded (*see id.*; *see also* Tr. 2284:4-2285:11).

On July 24, 2003, ORIX sent Nomura and ASC another letter, giving notice to the defendants that there were breaches of representations and warranties with respect to other mortgage loans (*see* PX 365). The letter demanded defendants repurchase all loans in the D5 Securitization or cure all alleged breaches within ninety days of the date of the letter (*id.*). After ninety dates, on October 23, 2003, LaSalle filed its Complaint, alleging a breach of Section 2.01 of the PSA and Section 1 of the MLPSA (*see* Complaint ¶¶ 36-39).

In August 2004, about ten months after the filing of the Complaint, the plaintiff further requested all documents for all loans, whether in Servicing or in Special Servicing. Pursuant to an order of the Special Master assigned to this litigation, an undertaking of thirty loans was made by the plaintiff in reviewing the loan files of different loans in the D5 Securitization for a review of the documents in these files (*see* Tr. 1411:19-1412:3 [Johansson]). However, while prior to this litigation the defendants refused access to files, it was only after this litigation was filed that documents were provided (*see* Tr. 2250:10-2251:9, 2253:5-16, 2260:19-2261:9 [Prahofer]; *see also* PX 367, DX 1395). During the course of the litigation and the production of documents, the defendants articulated to the plaintiff that they were unable to provide the plaintiff with complete files for the loans in the securitization (*see* Tr. 2327:12-15; DX 1450).

The defendants provide four reasons for their inability to provide LaSalle with complete documents. First, they point out that they had closed down as a business and were in the process of "winding-down" (Tr. 2248:18-2249:13). Second, they note that many of their documents are in New Jersey, but that they were unable to find these documents (Tr. 2384:11-2385:11 [Prahofer]). Thirdly, they articulated that many documents were destroyed in the World Financial Center after the September 11, 2001 attacks, even though the defendants do not know exactly what documents were in the World Financial Center (*see* Tr. 2329:9-25, 2332:18-

2333:21 [Prahofer]). Finally, the defendants concede that they commingled documents relating to the D5 Securitization and were not careful in holding onto documents as the winding down process continued (*see* Tr. 2408:4-21 [Prahofer]).

Nonetheless, while there were documents missing (*see* Tr. 1772:14-1775:13 [Johansson]), there were many documents already in ORIX's file (*see* DX 1092). As well, many of the documents purported to be missing were already part of the Mortgage Files that LaSalle had confirmed were complete in 2002 (*see* Tr. 1798:8-1804:14; *see also* DX 1018, DX 1053, PX 704). Finally, Nomura had loan summaries provided which contained the information expected to be found in documents determined to be missing (Tr. 2859:6-16; *see* also PX 94, PX 713, DX 1272).

V. Expert Witnesses

Five expert witnesses testified over the course of this trial. In general, their reports and testimony met the minimum standards for admissibility and were generally helpful to the court in determining and interpreting the factual questions that are of central importance in this trial. The court discusses each expert who testified at trial in turn. Each conclusion and characterization of an expert is based upon an objective evaluation of the witness and the strength and relevance of the evidence presented both in the report and at trial.

A. Ronald F. Greenspan

LaSalle offered Mr. Ronald F. Greenspan (Greenspan), a senior managing director at the firm of FTI Consulting, Inc., as an expert "to evaluate the loans that are at issue as to whether the origination underwriting of those loans was proper and prudent and in accordance with industry standards" (Tr. 20:12-15). Throughout his testimony Greenspan noted that, while there are flexible guidelines throughout the industry in terms of origination and underwriting standards,

nonetheless there are limitations. Greenspan, in both his report and in his testimony, argues that Nomura should have adhered to these limitations, pursuant both to industry standards as well as its own standards, but failed to do so as to these loans.

The court found Greenspan's testimony relatively credible and consistent with his expert report, and, further, that the evidence at times supported the conclusions he expounded. However, Greenspan's testimony is limited only to whether the defendants failed to originate these loans in accordance with customary industry standards. While his testimony was generally thorough and consistent, there were questions that Greenspan could not answer, given the other issues such as prompt notice and mitigation of damages. The court weighs his conclusions accordingly in making its determinations regarding the ultimate issues in this case.

B. Ronald Johansson

LaSalle offered Mr. Ronald Johansson (Johansson), a member of the firm of New Horizon Corporate Advisors, as an expert to "provide an opinion with respect to whether the defendants in this case provided the origination documents that they were supposed to provide in accordance with the MLP[S]A and PSA" (Tr. 1350:24-1351:2), "to determine whether the documents [sic], the origination documents, were necessary for the [S]pecial [S]ervicer and [S]ervicer to effectively and efficiently perform its functions" (Tr. 1351:3-6), and, "with respect to the request by the [S]pecial [S]ervicer, [M]aster [S]ervicer, and the [T]rustee in this matter, whether [the document] request was reasonable" (Tr. 1351:7-10).

The interpretation of a contract is for the court (*see Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986]). However, given the complexity of this litigation, the court found Johansson's observations somewhat useful in determining the intent and meaning of the MLPSA and PSA, especially regarding the issue of what constituted "origination documents." Nonetheless, the

court does note the lack of experience Johansson has in this area (*see* Tr. 1756:25-1757:11), and, further, notes that many of the documents Johansson articulates as missing were, in actuality, provided to the plaintiff. As such, the court provides some, but very little, weight to Johannson's testimony.

C. David Swiney

LaSalle offered Mr. David Swiney (Swiney), a senior managing director at FTI Consulting, Inc., as an expert to "assess and quantify the economic impact associated with the allegations and causes of action contained in count two of the plaintiff's complaint" (*see* Tr. 2003:4-12), which alleged that Nomura and ASC breached their obligations in the MLPSA and PSA regarding their obligations to create, maintain and deliver complete origination documents (*see* Complaint ¶¶ 36-39). Swiney's testimony and export report were the subject of a motion in limine by the defendants, whereby the defendants sought to exclude his testimony for his lack of knowledge and lack of experience (*see* Motion Sequence Number 012). The court held this motion in abeyance pending the completion of the trial.

The court had already excluded certain documents utilized by Swiney in his expert opinion as inadmissible evidence because the documents were not produced to the defendants in a timely fashion and also because the documents used were not related to the issues at hand (Tr. 2022:24-2040:8). Nonetheless, the expert couched his testimony in terms of numbers submitted by the plaintiff that are "comparable" (Tr. 2035:23-2036:21). The court requested a briefing as to the admissibility of Swiney's testimony (Tr. 2040:10-2041:4).

Swiney opined the economic impact associated with the defendants' failure to create, maintain and deliver complete origination documents to the plaintiff by taking five "comparable" loans and the numbers provided by the plaintiff, finding the average cost, and

multiplying that amount by the number of files needed to be recreated in this case (Tr. 2065:19-2066:5). It is undisputed that the expert based his analysis of these numbers on the "cost approach" (Tr. 2066:6-13; 2070:16-2071:8).

That the defendants had the opportunity to cross examine Swiney as well as the information utilized by the Swiney in his expert opinion, the court finds that the admission of such testimony did not in any manner hinder the defendants from their cross examination of Swiney, gaining contrary testimony from the expert, and furnishing a well-articulated defense. Accordingly, to the extent the defendants seek in its motion in limine to preclude the testimony and expert report of Swiney from consideration, such motion is denied.

Even so, the court also finds that, in admitting Swiney's testimony and report, the analysis provided was of very little value and benefit to the court. While the court finds the various general analyses and definitions thereto helpful, the actual calculation made by the expert does not in any way help the court in determining the damages caused by the alleged loss of materials and documents by the defendants. Indeed, without the benefit of the excluded documents and with only testimony by ORIX's representative, Swiney's analysis was superfluous at best. Accordingly, to the extent Swiney's testimony and report are utilized in this court's determination of the ultimate issues in this matter, the court finds Swiney's report and testimony are of little value and will be weighted as such.

D. Daniel Bussel

The defendants offered Mr. Daniel Bussel (Bussel), a professor of law at the University of California Los Angeles School of Law, as an expert "with regard to the custom and practice of allocating insolvency risks in commercial mortgage backed securitizations" and "with regard to the terminology and procedure in bankruptcy practices regarding tenants who file for

bankruptcy" (Tr. 2435:3-15). Specifically, Bussel testified as to the Credit Lease Loans and the bankruptcy issues that were involved with the bankruptcy of Kmart.

That the defendants seek to provide an interpretation to the MLPSA and PSA as it relates to the Bankruptcy Code, the court finds Bussel's testimony helpful. Where Bussel's testimony violates the parties' stipulation that the parties would not introduce extrinsic evidence to interpret the MLPSA or PSA (*see* PX 317), such testimony shall be discounted. Further, as noted *supra*, the final interpretation of the various contracts is for the court (*see Chimart Assoc.*, 66 NY2d at 572), and any explanation as to the terms of the MLPSA and PSA shall be weighed accordingly. The court overall finds that while Bussel's testimony did not answer all the questions the court had as it related to these contractual agreements, the testimony expounded by Bussel was still helpful and will be weighed accordingly.

E. Teresa F. Esquivel

The defendants offered Ms. Teresa F. Esquivel (Esquivel), principal of her own consulting firm, as an expert to "render an opinion as to whether the origination and servicing and collection of the loans were under customary industry standards, were proper and prudent in conformance with customary industry standards" (Tr. 2498:8-13), "to render an opinion . . . [on] the reasonableness of ORIX's request for origination and underwriting files, the necessity of obtaining these origination underwriting files, as well as the costs" (Tr. 2498:19-23), and "to render an opinion as to whether the current CMBS, which has the B buyer also servicing as a Special Servicer, poses conflicts that are being taken advantage of in this case" (Tr. 2499:5-8).

The essence of Esquivel's argument is that there were no particular standards the industry had at that time and, accordingly, what was proper and prudent was a matter of interpretation. Further, Esquivel makes the blanket statement that all of Nomura's origination of the loans at

issue was in accordance with customary industry standards at the time. However, Esquivel's argument regarding customary industry standards is contradicted by her own testimony as well as by Nomura's own chief underwriter (*see* Harrison Dep. 60:11-13; *see also* Tr. 3379:4-3380:6 [Esquivel]).

In addition, the defendants use Esquivel's testimony to show how rating agencies utilize information garnered from a pool of loans in a securitization to determine the rating of the securitization. Though interesting, the court questions the relevancy of this testimony. The job of a rating agency is to rate the certificates issued in connection with the securitization, and not to rate the loans themselves (*see* Tr. 466:13-467:3 [Greenspan]). The court does note Esquivel's experience in reviewing underwriting processes (*see* Tr. 2751:9-13). However, that a rating agency reviews the securitization of a group of loans in order to provide a rating to the securitization is irrelevant since a rating agency's task is to rate the pool of loans, no matter what is within them and without regard to whether a loan seller's origination or underwriting was prudent or proper (*see* Tr. 2957:5-17, 2964:4-11[Esquivel]).

Finally, as to Esquivel's opinion regarding potential conflicts because ORIX, as buyer of the B certificates in this D5 Securitization, is both Servicer and Special Servicer (Tr. 2499:5-8), the court finds that, while again interesting, the issue of potential conflicts is inapposite to this litigation. The fact is, the plaintiff is suing the defendants for purported breaches of representations and warranties. That ORIX may have institutional reasons for its own motives which may be contrary to the Certificateholders is nonetheless irrelevant to this litigation. After all, the issue is whether the defendants breached the representations and warranties contained in the MLPSA and PSA, and not whether ORIX had a motive to bring this action against the defendants.

The court found Esquivel at times to be brusque and confrontational. The court also found Esquivel's testimony and expert report to be at times consistent and persuasive. Overall, Esquivel's testimony and expert report are valuable in determining the ultimate matters of this litigation, and the court accordingly weighs her analysis carefully in its decision.

LEGAL STANDARDS

The outcome of this case is determined by whether the defendants breached the MLPSA and PSA by failing to comply with the representations and warranties made to the plaintiff, based on evidence as presented to the court. Accordingly, the court must read the agreements among the parties and give a fair interpretation to the contracts' provisions thereto. As well, the court must determine whether the plaintiff's motion to amend the complaint ought be allowed. Finally, the court must determine the outstanding motions in limine that the court held in abeyance pending the end of this trial.

I. Motions in Limine

"The function of a motion in limine is to permit a party to obtain a preliminary order . . . excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use" (*see State v Metz*, 241 AD2d 192, 198 [1st Dept 1998]). Its purpose is to prevent the introduction of such evidence to the trier of fact (*id.*). As such, if the court should find that the evidence produced by the parties is otherwise inadmissible, immaterial, or prejudicial, the court will exclude such information. If the court finds otherwise, such evidence is admissible and will be utilized accordingly.

II. Interpretation of Contractual Agreements

"It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1999]; quoting *Breed v Insurance Co.*, 46 NY2d 351, 355 [1978] [internal quotations omitted]). After all, there is a "heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties" (*Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). As such, where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of the writing alone (*Chimart Assoc.*, 66 NY2d at 572, citing *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56 [1979]). Conversely, where there is ambiguity in a contractual provision, the court interprets that provision based on the evidence propounded by the parties (*Teitelbaum Holdings, Ltd.*, 48 NY2d at 56).

Here, the court's goal is to accord the words of the contract their "fair and reasonable meaning" (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982], quoting *Heller v Pope*, 250 NY 132, 135 [1928]). A written contract will be read as a whole, with every part interpreted with reference to the whole, and, if possible, it will be interpreted to give effect to its general purpose (*Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003], quoting *Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 248 [1942] [internal citations omitted]). The "aim is a practical interpretation of the expressions of the parties [and] to the end that there be a realization of [their] reasonable expectations" (*id.*, quoting *Brown Bros. Elec. Contrs. v Beam Constr. Co.*, 41 NY2d 397, 400 [1977] [internal quotations omitted]). Not "merely literal language, but whatever may be reasonably implied therefrom must be taken into account" (*id.*;

see also Madison Ave. Leasehold, LLC v Madison Bentley Assoc., LLC, __ AD3d ___, ___, 811 NYS 2d 47, 53 [1st Dept 2006]).

Unless there are reservations to the contrary, embraced in the interpretative result should be "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*id.*, quoting *Rowe v Great Atlantic & Pacific Tea Co.*, 46 NY2d 62, 69 [1978] [internal quotations omitted]). The court abides by the First Department's guidance that "care must be taken [in the interpretation of an ambiguous provision] . . . particularly where . . . [an] interpretation sought . . . would produce an unreasonable result" (*see Telemundo Group, Inc. v Alden Press, Inc.*, 181 AD2d 453 [1st Dept 1992] [citations omitted]).

III. The Motion to Amend

The court may, pursuant to CPLR 3025 (c), permit a party to amend its pleadings before or after a judgment is made in order to conform the pleadings to the evidence. Such a motion is addressed to the "sound discretion of the court" and "should be determined in the same manner and by weighing the same considerations as upon a motion to amend" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *see also Equitable Life Assur. Soc. of U.S. v Nico Const. Co. Inc.*, 245 AD2d 194, 196 [1st Dept 1997]). "The operative factor considered upon a motion to conform pleadings is *prejudice to the nonmoving party*" (*Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992] [emphasis added]), and not just mere lateness of the motion (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22 [1st Dept 2003]).

ANALYSIS

The plaintiff must now rely on the evidence presented at trial to demonstrate by a preponderance of the evidence that the defendants violated Sections 1 and 2 of the MLPSA and

Section 2.01 PSA by breaching the various representations and warranties made by the defendants to the plaintiff in terms of the loans at issue as well as in the maintenance of documents. The court first reviews the three outstanding motions in limine submitted by the plaintiff,[8] then turns to the applicable standards and definitions at issue in this litigation, then deals with each loan at issue, and finally concludes with the plaintiff's second cause of action and motion to amend.

I. Plaintiff's Motions in Limine

A. Motion in Limine to Exclude Evidence Concerning Prompt Notice (Motion Sequence 013)

The plaintiff first moves to exclude any and all evidence which concerns the defendants' argument that the plaintiff failed to provide "prompt notice" to the defendants. The plaintiff argues that, pursuant to the PSA, there is no "prompt notice" requirement, and, accordingly, the argument is irrelevant and unnecessary. The defendants argue that there is a "prompt notice" requirement, especially when it comes to the issues of damages and what are considered customary industry standards. The court agrees with the defendants.

As indicated above, the court interprets the contracts "so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace*, 86 NY2d at 548). Here, the issue is the interpretation of Sections 2.01 and 2.03 (e) of the PSA. Section 2.01 provides:

> The Servicer, Special Servicer or the Trustee *shall notify* the Mortgage Loan Seller and the Depositor *upon such party's*

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[8] As noted above, while there are in actuality four outstanding motions in limine, namely, Motion Sequence Numbers 012, 013, 015, and 016, the court disposed of Motion Sequence Number 012 regarding the testimony of David Swiney, discussed *supra* in Section V(C) of the Facts.

> *becoming aware* of any breach of the representations and warranties contained in this [PSA] Agreement or the Mortgage Loan Purchase and Sale Agreement that gives rise to a cure or repurchase obligation; provided, that the failure of the Servicer, the Special Servicer or Trustee to give such notification shall not constitute a waiver of any cure or repurchase obligation (PX 704, Art. II, § 2.01 [emphasis added]).

Section 2.03 (e) notes:

> *Upon discovery* . . . of a breach of any representation or warranty . . . or that any document required to be included in the Mortgage File does not conform to the requirements of Section 2.01, such Person *shall give prompt notice thereof* to the Mortgage Loan Seller and the Mortgage Loan Seller shall, to the extent the Mortgage Loan Seller is obligated to cure or repurchase the related Mortgage Loan under the terms of the Mortgage Loan Purchase and Sale Agreement, either cure such breach or repurchase said Mortgage Loan at the Repurchase Price within 90 days of the receipt of notice . . . it being understood and agreed that none of the Custodian, the Service, the Special Servicer, and the Trustee has an obligation to conduct any investigation with respect to such matters (*id.*, Art II, § 2.03 [e] [emphasis added]).

The plaintiff argues that because the PSA provides that there is no duty on the part of the Trustee, the Servicer, or the Special Servicer to investigate the truth of the defendants' representations and warranties and because notice of breach must only be given upon "becoming aware" of the breach, there is no "prompt notice" requirement and, therefore, defendants' arguments to the contrary are irrelevant. The court disagrees and finds that the "prompt notice" requirement is relevant to the issues at hand, and, further, provides a justifiable defense for the defendants.

This is especially the case where there is an issue of timing. Here, there is no disagreement that certain loans had already defaulted prior to the commencement of this litigation. Further, there can be no dispute that the plaintiff had the opportunity to not only discover the breaches of representations and warranties the plaintiff alleges prior to this

litigation, but, indeed, had the ability to provide "prompt notice" to the Mortgage Loan Seller, pursuant to Sections 2.01 and 2.03 (e) of the PSA. That the plaintiff did not have the duty to investigate is not the same as providing notice to the defendants of their breaches of representations and warranties.

As well, there is no dispute that there is waiver on the part of the plaintiff to bring litigation against the defendants for curing a breach or for repurchasing the mortgage loan. However, that is different from the underlying fact that the PSA requires that "*upon discovery* . . . [LaSalle] *shall* give prompt notice" to the defendants of any purported breach of representations and warranties (emphasis added). If, for nothing else, notice of such breaches would have given the defendants at least an opportunity to cure or repurchase the loans, especially those that the plaintiff knew were potentially problematic (*see* Greenspan Expert Report). Indeed, the court agrees with the defendants when the defendants wonder how they could have cured such a breach if they never were given proper notice thereof or that notice was not provided until after the loan defaulted. The fact that the plaintiff knew about these breaches indicates that the plaintiff had the opportunity to provide information to the defendants sooner. As such, the prompt notice requirement will undoubtedly weigh into the court's decision as to plaintiff's damages and whether there were indeed actual breaches of representations and warranties.

Accordingly, the plaintiff's motion in limine to exclude evidence regarding "prompt notice" is denied.

B. Motion in Limine to Exclude Evidence as to Whether the Defendants' Breaches Caused the Subject Loans to Default (Motion Sequence 015)

The next motion in limine sought by the plaintiff is to exclude evidence regarding defendants' actions. Specifically, the plaintiff seeks to exclude evidence that would limit the defendants' affirmative defense that it was the plaintiff which caused the subject loans to default, not because of defendants' breaches.

That the court interprets the contracts "so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace*, 86 NY2d at 548), at issue is section 3 of the MLPSA, which provides:

> (b) Within 90 days of the receipt of the notice . . . of a breach provided for in clause (a), the Seller shall either (i) repurchase the related Mortgage Loan at the Repurchase Price or (ii) promptly cure such breach in all material respects . . . (*see* PX 300, § 3 [b]).

The defendants argue that the plaintiff is seeking, as a matter of law, to make the defendants liable for damages without having to demonstrate causation, and, as such, is not proper under contract law. Indeed, in a claim for breach of contract and a breach of the underlying representations and warranties, a plaintiff must establish that the breach "would not have occurred but for the activities of the defendant" (*see Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 [1st Dept 2002]). However, in giving full credence to the purposes of the parties in the formation of the contract, there is nothing in the MLPSA that requires the plaintiff to show a causal link between the breach and the requirement that the defendants (the Sellers of the Mortgage Loans) either repurchase the loans at the Repurchase Price or to cure the breach in all material aspects. Indeed, the MLPSA specifically and unambiguously requires that the defendants either the repurchase the loans or cure any defects

when and where the plaintiff provides notice of a default. The contract is clear in that aspect, and the court accordingly gives the contract its full interpretation.

For the reasons set forth above, the court grants the plaintiff's motion in limine to exclude evidence as to whether the defendants' breaches caused the subject loans to default. As such, the court excludes from its determination any evidence regarding causation.

C. Motion to Exclude Evidence Concerning Due Diligence and Investments by Investors in the Trust Certificates (Motion Sequence 016)

The plaintiff's final motion in limine is to exclude evidence concerning due diligence and investments by the investors in the trust certificates. The plaintiff argues that the defendants are trying to introduce evidence of due diligence, or "re-underwriting," undertaken by third parties before the plaintiff purchased certificates in the lower-rated aspects of the Trust as well as to introduce documents concerning later investments in various aspects of Trust certificates. LaSalle argues that such information is irrelevant because these investments and due diligence were decisions made and done not pursuant to the MLPSA or PSA, and, as such, are irrelevant. The defendants argue that this evidence is relevant not only as to what constitutes "customary industry standards," but also is relevant to the issue of "prompt notice."

The court finds that this information is relevant, as it goes to the issues of when the plaintiff discovered defendants' breaches and whether "prompt notice" could have been provided to the defendants. As indicated above, the court finds that, had the plaintiff knew of the likelihood of default as to these loans and, in turn, provided "prompt notice" to the defendant, the questions regarding the repurchasing or curing of the loan defaults and the amount in damages the defendants may be liable to the plaintiff for could have been resolved sooner.

Similarly, this information is relevant to the issue of when and whether the plaintiff actually discovered, through its "re-underwriting" and due diligence, that the loans were likely to default.

The court finds that the plaintiff's arguments that such information is hearsay and that the information is five years after the fact are unpersuasive. As to the five year difference, the evidence may be less of an impact on the court's decision, but nonetheless the information is relevant. Further, it is relevant to the issue of "prompt" notice and knowledge on the part of the plaintiff as to whether these loans would have defaulted. As to the issue of hearsay, the court is not utilizing the evidence for the truth of the matter asserted; indeed, as the court has done in its rulings from the bench regarding admission of the evidence, the court will limit its use to the issues at hand.

Accordingly, the plaintiff's motion in limine to exclude evidence concerning due diligence and investments by investors in the trust certificates is denied.

II. Contractual Definitions

A. Origination

The court must next decide what the definition of "origination" means to the parties. Though it is a matter of law for the court to interpret the contractual agreement between the parties as to what "origination" means to the parties, here, both disagree as to the extent and elasticity of this term's definition. While the defendants argue that "origination" means a set of procedures, the plaintiff avers that "origination" includes not only the procedures, but also the measures and standards encompassing the process. The court agrees with the plaintiff.

The defendant's expert articulates that origination "means the outsourcing of a loan. It is a certain set of procedures that one follows to gather all the facts . . . [to] [g]et the most accurate facts so that they you can do a proper job of passing [sic] that information" (Tr. 2536:6-12

[Esquivel]). Indeed, the court agrees with the defendant's expert that prudent and customary origination standards include obtaining an appraisal by a certified appraiser, engaging environmental experts and engineers with the proper experience to perform environmental and property condition surveys, reliance on such reports, obtaining current and accurate financial information from the borrower, obtaining a credit history with respect to the borrower's principal, underwriting the net cash flow of the borrower, and disclosing relevant information with respect to each loan to all interested third parties (*see* Tr. 2543:4-2546:15 [Esquivel]).

However, as aptly demonstrated by plaintiff's expert as well as from the defendant's own documents and testimony, origination does not only include the procedural aspect, but also includes the functions of underwriting, which is the analysis of the loan itself. For instance, as Keith Harrison, Nomura's own chief underwriter in 1997, noted, underwriting is part and parcel of the origination process (*see* Harrison Dep. 23:18-24:3). Further, defendant's own expert contradicts herself where her expert report provides that the loan "originator underwrites the loan" and "undertakes its own underwriting processes" (*see* Tr. 2907:9-2919:9 [Esquivel]). Finally, the issue of origination segues well into the issue of what constitutes customary industry standards, since the origination of the loan requires intimate knowledge of the standards thereto.

Accordingly, the court finds by a preponderance of the evidence that the term "origination" includes not only the procedural aspects of the formation of a mortgage loan, but also the underwriting and creation of the loan itself.

B. Customary Industry Standards

The next question the court must answer is what "customary industry standards" means to the parties. The defendants argue that there were no standards that were within the industry

that were also customary. The defendants aver the only standards available were procedural standards in the origination and underwriting process, such as the engagement of a reputable independent appraiser for the property and the usage of that appraiser's valuation of the property for LTV purposes unless there is a question regarding the appraisal (*see id.*). The plaintiff counters that there were "customary industry standards," even if just a set of guidelines, in which members of the community utilized in the origination of such mortgage loans. The court finds by a preponderance of the evidence that the term "customary industry standards" includes ranges, guidelines, and other characteristics set forth in the community in the origination of a mortgage loan, not only procedural aspects.

Here, while the defendants argue that there are no set standards to which one can point to, the court notes that there are at least guidelines by which the industry itself utilized and continues to use in the origination of such mortgage loans. Indeed, as provided by the plaintiff's expert and not contradicted by the defendant's expert, organizations, including Nomura, used a range of guidelines in the origination of loans (*see e.g.*, PX 649 [PaineWebber guidelines]; PX 377A [ORIX guidelines]; PX 300 at ASC 4273-82 [MHC/Nomura guidelines]). While there are upper and lower levels, these ranges provide at least an indicia of what are the customary standards within the industry as well as what the defendants, in their origination process, used as guidelines for the origination of such loans. In addition, though there are differences in the ranges among the various organizations in terms of their origination guidelines as well as elasticity in terms of prudent underwriting, nonetheless most were generally consistent and uniform (*see* Tr. 43:6-45:16; 83:21-84:10; 101:2-9 [Greenspan]).

Finally, the court notes that, if the court were to utilize the testimony of the defendant's expert to find that there were no set rules in the industry, the court would provide no meaning to

a term that is otherwise important to this litigation (*see Mionis v Bank Julius Baer & Co., Ltd.*, 301 AD2d 104, 109 [1st Dept 2002] ["Courts are obliged to interpret a contract so as to give meaning to all of its terms"]). Here, the term "customary industry standard" would otherwise have no meaning if there was no such "standard" which loan originators used; that would, in turn, call into question the reason by which the parties used such a term in this agreement. Even if there were no "hard and fast rules" and the standard for the origination of the loan was made on a "case by case basis" (Tr. 3563:8-12), nonetheless the fact remains that there were industry standards, that there were rules set and used by the industry, and that these terms were used, if only on a "case by case basis." Indeed, if the court uses the standard-less argument propounded by the defendants, that would produce an "unreasonable result" (*see Telemundo Group, Inc.*, 181 AD2d at 453), and the court is unwilling to do so.

Accordingly, the court finds by a preponderance of the evidence that the term "customary industry standards" means a set of standards within the industry as defined by guidelines and ranges for the origination of a mortgage loan, as used on a "case by case" basis.

III. The Loans at Issue

A. Credit Lease Loans - Loan Numbers 37, 42, 47, and 50

The plaintiff argues that the defendants breached not only Section 2 (b) (xix) (B) of the MLPSA, which required the defendants to originate these loans in accordance with customary industry standards, but further breached Section 2 (b) (xli) (F) of the MLPSA because the credit lease tenants terminated the loan, which is contrary to the representation made by the defendants that the "Tenant cannot terminate the Credit Lease for any reason" (*see* PX 300). The court reviews the customary industry standards argument prior to deciding the question of whether the defendants breached the bankruptcy provision of the MLPSA as to these credit lease loans.

1. *Customary Industry Standards*

The plaintiff argues that the defendants breached the representations and warranties made under the MLPSA, specifically breaching Section 2 (b) (xix) (B), because the plaintiff claims that these loans were not made in accordance with customary industry standards. LaSalle avers that the defendants knew or "should have known" that these loans were not made in accordance with customary industry standards, and, as such, should be held liable for breaching their representations and warranties to the plaintiff. By a fair preponderance of the evidence, the court finds otherwise.

First of all, while the plaintiff has established that these set of loans were not necessarily originated in the best manner, the court finds that it was not imprudent for these loans to be made. The court finds that there is nothing that necessarily prohibited CFSB and/or Bostonia from making these loans to Kmart and the Kmart-related entities, even given Kmart's rating and the fact that the Kmart-related entities were "discontinued operations." Here, the plaintiff argues that the defendants "should have known" that these loans were imprudent. However, this court does not believe that this "should have known" standard is applicable to these sets of loans. For the plaintiff to argue that these defendants "should have known" that these particular loans were questionable would have required the defendants to basically perform secondary due diligence and to re-investigate these loans, even after CSFB and/or Bostonia completed their due diligence obligations to Nomura, and, in turn, to LaSalle. Here, the court finds, and the plaintiff does not dispute, that CSFB and/or Bostonia had already provided all relevant information regarding the origination of these loans to the defendants. In turn, all of this information was provided to the plaintiff in various documents and through its own origination procedures and work on these loans, as Trustee. Indeed, even AMERSCO, the original Servicer of these loans and the

organization responsible for answering questions concerning the D5 Securitization and receiving payments on these loans, concedes, at the very least, that it had these documents and was involved in the negotiation of the PSA.

The argument plaintiff makes that Nomura "should have known" that the loan was not made in accordance with customary industry standards could go both ways. If the defendants "should have known" that these loans were not made in accordance to customary industry standards, then the plaintiff too should have known that these loans were at best questionable at the beginning, prior to the securitization of these loans. This is especially the case where all available information was not only provided by CSFB and/or Bostonia, but also by Nomura through the various sale documents and agreements.

In addition, the court finds that the plaintiff had more than adequate notice that Kmart and its "integral" business was in serious trouble when the Trust decided to purchase this set of loans. Indeed, as pointed out in various documents, including the selling documents by which LaSalle received this information, the fact that these loans were not necessarily the best loans in the pool was already noted in these documents for the Certificateholders and to LaSalle. It would be quite different if LaSalle was not provided any information as to the rating of Kmart or the fact that Builders Square was a discontinued operation. If this information was not given to LaSalle, the standard of "should have known" would have been more relevant to this litigation and more aptly applied. However, whereas here the plaintiff was provided with all the information necessary for it to reach this decision to purchase these particular loans, the plaintiff cannot now complain that the defendants owe the plaintiff damages.

The plaintiff resorts to the argument that the defendants have not actually met their burden of proof demonstrating that LaSalle (or any of the prior Servicers) was actually aware of

the disclosed information, or, at a minimum, that the defendants actively disclosed this information to the plaintiff. Accordingly, the plaintiff avers, there was no waiver on the part of the plaintiff as to this representation and warranty. Here, after reviewing the evidence, the court disagrees. It is true that a waiver occurs when a party intentionally relinquishes a known and existing right with full knowledge of all relevant facts and circumstances surrounding the party's entitlement to that right (*see Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 968 [1988]). However, as the New York Court of Appeals has also noted, "precision requires the qualification 'or where it was his bounden duty to know them'" (*S.&E. Motor Hire Corp. v N.Y. Indem. Co.*, 255 NY 69, 73 [1930] [internal citation omitted]). "Where the person is under a duty to inquire before he takes action, he may be said to be under a 'bounden duty to know' those facts which a reasonable inquiry would disclose" (*id.*). This is just such a case. The court finds that, by a preponderance of the evidence, the defendants provided information regarding these loans in the Prospectus Supplement to the plaintiff (PX 116), as well as in other documents produced by the defendants. Here, it would be fundamentally contrary to basic principles of contract formation where the plaintiff, who sought to purchase these loans from the defendants, failed to otherwise gain knowledge as to those material subjects "which a reasonable inquiry" would have disclosed (*N.Y. Indem. Co.*, 255 NY at 73).

Finally, the defendants aver, and the court finds by a preponderance of the evidence, that LaSalle had more than enough time to request that the loan be repaid and/or serviced. As the MLPSA provides, "[t]he Servicer, Special Servicer or the Trustee *shall notify* the Mortgage Loan Seller and the Depositor *upon such party's becoming aware* of any breach of the representations and warranties" (PX 704, Art. II, § 2.01 [emphasis added]). As noted above, the plaintiff had prior notice of the various issues regarding these particular loans, including the BB- rating, the

fact that bankruptcy was looming in the foreground, the fact that Builders Square was a discontinued operation, and that these loans were not up to the plaintiff's standards and/or to customary industry standards. Indeed, it is a stretch for the plaintiff to argue that it had no awareness of the breach, especially where, in writing, the defendants provided such information to the plaintiff. While Section 2.01 of the PSA also provides that the failure to notify the Mortgage Loan Seller to give notification "upon such party's becoming aware of any breach" does not constitute a waiver of any cure or repurchase obligation, nonetheless these circumstances only demonstrate that the plaintiff failed to mitigate its damages as well as failed to provide prompt notice to the defendants.

Given the circumstances, where the plaintiff had from the closing of the loan on October 24, 1997 up until Kmart declared bankruptcy on January 22, 2002 to request the repayment or servicing of these Credit Lease Loans by the defendants, the court finds that there was no breach of this representation and warranty. As well, the plaintiff had plenty of further opportunities to request that the defendants cure or repurchase these sets of loans. That the plaintiff failed to do so, it cannot now seek such repurchase.

For the reasons stated above, the court finds that plaintiff LaSalle has not, by a preponderance of the evidence, demonstrated that the defendants breached Section 2 (b) (xix) (B) for the Credit Lease Loans, Loan Numbers 37, 42, 47, and 50.

2. *Bankruptcy*

The second breach involves Section 2 (b) (xli) (F) of the MLPSA. As noted above, Section 2 (b) (xli) (F) provides that the tenant would not "terminate the Credit Lease for any reason, prior to payment in full of or the payment of funds sufficient to pay in full" the principal balance, interest, and any other sums due and payable under the loan (*see* PX 300). Two issues

abound this purported breach: one involves the phrase "for any reason" and the other revolves around which entity actually "terminated" the leases. The plaintiff argues that because Kmart "terminated" these loans pursuant to the Bankruptcy Code, and because the article in which LaSalle avers the defendants owe it damages does not provide for termination pursuant to the Bankruptcy Code, Nomura is liable for the damages LaSalle seeks. By a fair reading of the evidence and of the contracts at issue, this court does not read this provision to apply in this instance, where the tenant did not terminate the leases in question.

For one, the court finds that there is a distinction between terminations as made by a tenant versus a termination made by a bankruptcy court. Indeed, a termination must be made by the bankruptcy court after a request is made, pursuant to the Bankruptcy Code (*see* 11 USC § 101 *et seq*). Even at the behest of the bankrupt tenant, a request is a request; it is not for the tenant, in a bankruptcy, to terminate the lease, but rather for the bankruptcy court.[9] While the plaintiff argues that, at the end of the day, the credit lease tenant has the ultimate authority to reject a loan since it is "administrative," the court finds that whether or not the tenant usually receives its request to terminate a lease is irrelevant. The fact remains that the bankruptcy court, which retains the ultimate authority to approve or reject a bankrupt corporation's request, must approve that request pursuant to the Bankruptcy Code (11 USC § 365 [a]).

Furthermore, as noted above, the court's goal in interpreting the MLPSA and PSA is to accord the words of the contract their "fair and reasonable meaning" (*Sutton*, 55 NY2d at 555), to interpret the words of those contracts to realize the practical expectations of the parties and

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[9] For the bankruptcy court to even take action, it is up to the Trustee for the Debtor to move for the termination of the lease (*see* 11 USC § 365). As such, the tenant may not even have a say as to which properties to forfeit and which to keep.

"whatever may be reasonably implied therefrom" (*id.*). While the plaintiff argues that any ambiguities should be construed against the defendants as drafters of the agreement, the court here is persuaded by a fair reading of the contracts as well as by the evidence presented to this court that the representation states what it states - "that *the tenant* cannot terminate the Credit Lease for any reason" (PX 300, § 2 [b] [xli] [F] [emphasis added]). Here, this is just not the case, where it is not the tenant terminating the leases, but the bankruptcy court. Even if, as the plaintiff argues, Kmart retained the unilateral decision as to whether to reject the loans at issue or not, it is still for the bankruptcy court to determine the request thereof.

The plaintiff argues that this court, in its decision denying the parties' summary judgment motions, had determined that the Credit Lease loans were "terminated" and not merely breached, and that the leases were terminated "through the acts of both Kmart and the Kmart Bankruptcy Court" (*see* October 25, 2005 Decision at 19). The court disagrees with plaintiff's assertion. Indeed, the court noted that "it *appears* that the Kmart Bankruptcy Court held that the rejection . . . resulted in a complete termination of the leases" (*id.* [emphasis added]), not that, as a matter of law, this court determined that the bankruptcy court's orders *constituted* a termination. If that were the case, this would not be an issue requiring this court to make a determination based upon the evidence adduced at trial. Even if the bankruptcy court's orders, as a matter of law, constituted a termination, the bankruptcy court's orders stand for the fact that it was the bankruptcy court which ordered the termination of the leases, and not the tenant.

The plaintiff next argues that the MLPSA and PSA did not provide for protection to the defendants when a tenant went into bankruptcy, pointing to a number of carefully and specifically tailored bankruptcy provisions which allowed sellers and borrowers to file for bankruptcy, but not tenants. These "carve outs" allowed sellers and borrowers, but not tenants,

to enter into bankruptcy. In turn, these same "carve outs" protected the defendants from any alleged breaches of representations and warranties due to a seller or borrower filing for bankruptcy. Here, LaSalle reasons that Section 2 (b) (xli) (F) of the MLPSA does not contain this specifically worded bankruptcy "carve out" for tenants, unlike those found in other sections and provisions. As such, LaSalle argues, any interpretation should be construed against the defendants, and avers that the parties plainly contemplated that there would be no protection for the defendants as to breaches of representations and warranties in an event of a tenant bankruptcy (*see e.g.*, PX 300 §§ 2 [a] [iii]; 2 [b] [iv]; 2 [b] [xli]). In turn, LaSalle avers that the allocation of the risk as to a bankruptcy falls upon the defendants, since the defendants failed to provide such a bankruptcy "carve out."

The plaintiff is correct to note that, in terms of the allocation of risk in this transaction and contrary to defendants' arguments, this is not about the tenant and it is also not about the tenant's legal right to bankruptcy protection. Further, contrary to the defendants' assertions, here, the court finds that there was no tenant bankruptcy "carve out" provision provided (*see id.*). If the allocations were as the defendants articulated, the MLPSA should have reflected that bankruptcy "carve out" within Section 2 (b) (xli) (F) as the parties did in other parts of the agreement (*accord Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 [2001] [courts will not imply terms into a contract to adjust the allocation of risk of a foreseeable contingency when the contract can be enforced according to its terms]). Nonetheless, as noted above, because the court finds that it was the bankruptcy court, and not the tenants, which ordered the rejection of the leases and, accordingly, the loans, plaintiff's arguments regarding the allocation of risk or the intent of the parties are irrelevant. Here, if the court were to utilize plaintiff's arguments to its fullest extent, the court would have to imply into the agreement that the bankruptcy court is the

same as the tenant for purposes of Section 2 (b) (xli) (F). This would be contrary to the agreement between the parties and would add terms that the court is not willing to imply (*id.*; *see also Nissho Iwai Eur. v Korea First Bank*, 99 NY2d 115 [2002]).

In addition, as noted above, the court finds that the plaintiff received information that bankruptcy was likely as to not only these loans, but also to every loan in this securitization. Indeed, as provided in the Prospectus that was provided to the plaintiff, the defendants acknowledged that there was a chance that bankruptcy could happen (*see* DX 1093). As well, the lease documents provided that the tenants could file for bankruptcy and were in the possession of the plaintiff (*see* PX 57; PX 178; PX 188; PX 326).

Finally, the court finds by a preponderance of the evidence that the plaintiff failed to give prompt notice to the defendants pursuant to PSA § 2.01, which would have otherwise given the defendants an opportunity to cure the alleged breach of this representation and warranty (*see* PX 704). For instance, as to Loan Number 47, the Builders Square - El Paso Loan, the property was liquidated five months before Nomura was provided notice (*see* PX 350). As well, the plaintiff had knowledge that the Builders Square - Daytona Loan (Loan Number 42) and the Builders Square - San Antonio Loan (Loan Number 50) were in trouble when the loans were transferred into Special Servicing in March 2002 (*see* PX 407A). Finally, with regards to the Super Kmart loan (Loan Number 37), had the plaintiff provided notice as late as August 2002, defendants would have had at least an opportunity to cure the alleged breach (*see* PX 401A). Because the plaintiff did not provide such notice to the defendants until after the lease rejections and after the sale of the loans and of the property, the defendants did not have the opportunity to cure or to repurchase the loans. As such, the plaintiff cannot at this point take recourse against the defendants as to these loans.

Therefore, the court finds that the plaintiff has not, by a preponderance of the evidence, demonstrated that the defendants violated Section 2 (b) (xli) (F) of the MLPSA. Accordingly, the court directs judgment as to these loans in favor of the defendants.

B. Lancers Center Loan - Loan Number 64

The plaintiff avers that the defendants breached Section 2 (b) (xix) of the MLPSA by failing to prudently originate the Lancers Center Loan. LaSalle argues that the defendants knew that there was a high chance that Wal-Mart would vacate its lease and premises at Lancers Center. In turn, the plaintiff avers that the defendants caused the whole shopping center to fall due to their failure to make adequate assurances of the continuation of Wal-Mart at that location. The defendants aver that it used the correct procedure and origination documents in their loan to Lancers Center, and accordingly, there was no breach of representations and warranties. By a fair preponderance of the evidence, the court finds that while the defendants breached Section 2 (b) (xix) of the MLPSA in failing to prudently originate the Lancers Center Loan, the court also finds that the plaintiff failed to provide prompt notice to the defendants and to mitigate damages.

Here, the main issue is whether one could have foreseen Wal-Mart leaving Lancers Center in order to go to a larger location under the circumstances. Indeed, the defendants argue that, based on the evidence it had at the time, there was no evidence that Wal-Mart was going to leave Lancers Center. Even where annual reports indicated that Wal-Mart would more likely than not move to a larger location and open Supercenters, Nomura continued to abide by CB's appraisal report, which it argues it prudently relied upon in the origination of the loan. The court, by a preponderance of the evidence, finds otherwise. While there is certainly a question of whether Nomura should have used the report in its entirety to determine whether to extend such

a loan, nonetheless there were obvious signs that the loan was imprudently made, even though the LTV and DSCR were within the acceptable boundaries of prudent origination.

For instance, the court finds that it was obvious that there was an issue regarding the percentage probability the defendants used in determining whether Wal-Mart would continue to stay at Lancers Center. That the defendants used 100% as the likelihood of Wal-Mart renewing its lease, was unreasonable given the circumstances. Indeed, the court agrees with the plaintiff that there is nothing with a 100% probability; indeed, the defendants should have taken a closer look at the percentage probability and should have made a more reasonable inquiry thereto. This is especially the case where Nomura utilized a 60% lease renewal rate for stores that were not anchor stores like Wal-Mart, even though CB utilized a 75% probability. As well, Nomura used a 60% lease renewal probability rate for Revco, another anchor store at Lancers Center, even where CB used a 100% probability for renewal. Indeed, there is no dispute that Nomura utilized different probabilities to rate the likelihood of lease renewal. Here, the court finds, by a preponderance of the evidence, that it was imprudent for the defendants to use the 100% probability of likelihood for renewal as to Wal-Mart, especially given that the defendants used the appraisal as it saw fit.

Furthermore, there is the added question of whether prudent underwriting was performed where Wal-Mart, the integral tenant at Lancers Center, did not have a guarantee or any provision indicating that it would stay at Lancers Center. This was especially imprudent given that the other tenants had co-tenancy clauses basically allowing these tenants to leave if and when Wal-Mart decided not to renew on its lease. Contrary to the defendants' arguments concerning the prudence of this loan in regards to this guarantee, the court finds that, similar to defendants' expert's admission, the lack of these guarantees was a "red flag" patently warranting a review of

the underwriting (Tr. 3111:19-3112:3 [Esquivel]). As well, the court finds that the plaintiff demonstrated that the defendants knew about the "paramount concern" (*see* PX 172) and the inevitable consequences that would have happened due to the lenient Wal-Mart lease, but failed to receive adequate guarantees and assurances from the Wal-Mart lease. Accordingly, the court finds, by a preponderance of the evidence, that the defendants breached the Section 2 (b) (xix) (B) of the MLPSA, the origination representation and warranty (*see* PX 300).

Nonetheless, the court finds that the plaintiff failed to mitigate its damages when it did not inform the defendants of their breach of Section 2 (b) (xix) of the MLPSA. In arguing the affirmative defense of mitigation, the defendant bears the burden of proving a lack of diligent effort to mitigate damages (*see Golbar Props., Inc. v N. Am. Mortg. Investors*, 78 AD2d 504 [1st Dept 1980]). Here, the court finds by a preponderance of the evidence that the defendants adequately bore this burden. Specifically, the court finds that the plaintiff failed to provide prompt notice of the breach to the defendants as articulated pursuant to PSA § 2.01 (*see* PX 704).

Indeed, it is undisputed that Wal-Mart "went dark" and vacated Lancers Center on September 15, 1999, that the loan went into Special Servicing on March 11, 2002, and that the property was foreclosed on September 3, 2002 (*see* DX 1073, PX 157). Yet, it can also not be disputed that the plaintiff failed to provide prompt notice to the defendants so that they could either cure or repurchase the loan at issue. Indeed, the court finds that the plaintiff had since at least September 15, 1999, when Wal-Mark went dark and vacated Lancers Center, to provide notice of this breach to the defendants. Further, the plaintiff had the opportunity to provide notice of breach when this loan entered Special Servicing on March 11, 2002. Finally, the court notes that this breach was noticed to the defendants only on July 7, 2003, some eleven months

after the property was foreclosed (*see* PX 369). If the plaintiff had given the defendants notice any time prior to the foreclosing on the property, at least the defendants would have had the opportunity to cure or repurchase the loan. Here, that was just not the case. As such, the plaintiff failed to provide prompt notice pursuant to PSA § 2.01.

The plaintiff argues that, whether or not the plaintiff brought to the attention of the defendants the alleged breaches of representations and warranties, it would be irrelevant since the defendants would have acted no differently (*see* Tr. 2414:24-2415:2 [Prahofer]). While the court finds defendants' statement and argument to be distressing, nonetheless the onus is on the plaintiff, pursuant to PSA § 2.01, to provide the requisite prompt notice to the defendants in order to give the defendants the opportunity to repurchase or otherwise cure the default. The plaintiff had more than enough time to give notice to the defendants, in light of the fact that the plaintiff, in providing Special Servicing to these loans, sought to insure that all avenues of recovery would be explored in an effort to maximize the Trust's overall recovery (*see* Tr. 836:22-838:23 [Dinan]). If that were the case, obviously seeking the repurchase of the loan by the seller would have been an avenue that the plaintiff should have also explored. This is only exacerbated by the fact that the plaintiff provided notice of breach as to this loan only prior to the liquidation of the property in 2004. The court finds that the plaintiff had at least since 1999 to seek recovery on this loan with the closure of Wal-Mart at Lancers Center, and definitely had enough information by 2002 regarding the defendants's breach of this representation and warranty (*accord US Pack Network Corp. v Travelers Prop. Cas.*, 23 AD3d 299 [1st Dept 2005] [finding that providing notice five months after the alleged incident did not constitute "prompt notice"]; *see also Pierson v Crooks*, 115 NY 539 [1889]).

Accordingly, by a fair preponderance of the evidence, the court finds that Lancers Center Loan, Loan Number 64, was imprudently made, in violation of MLPSA Section 2 (b) (xix). However, because the plaintiff failed to mitigate damages and failed to provide the requisite notice pursuant to PSA § 2.01, the court directs judgment in favor of the defendants.

C. Banzhoff Mobile Home Park Loan - Loan Number 105

The plaintiff argues that the defendants breached their representations and warranties under the MLPSA and PSA for Loan Number 105, specifically the origination representation and warranty, because they failed to adequately review the property to which this loan was attached. LaSalle notes that because one of the five mobile home parks had problems providing drinking water and that the engineering report provided findings that would have caused an originator of a loan to question the adequacy of the loan, LaSalle argues that the defendants failed to take into consideration such issues and imprudently extended this loan. Further, the plaintiff reasons that the defendants failed to provide an adequate reason for why Nomura increased the size of the loan. Accordingly, the plaintiff asserts, the defendants breached the origination representation and warranty (*see* PX 300, § 2 [b] [xix]). By a fair preponderance of the evidence, the court disagrees with the plaintiff and finds for the defendants.

There is no dispute that five mobile home parks secured the loan at issue, including Sandy Hills Estates, Mahoning Manor, Parsons Mobile Home Park (Hilltop), Shawnee Village, and Sciota Village. That the defendants found the diversity of the parks based upon the number of properties and the areas in which they were found and the fact that mobile home parks are the most secure of collateral, the court does not find that this constituted a breach of the origination representation. Furthermore, the LTV and DSCR of this loan was provided to the plaintiff at least in the Prospectus Supplement. As articulated *supra*, such information, if it indeed caused a

"red flag" to the plaintiff and required further analysis, was made available to the plaintiff prior to the securitization. If there were issues regarding the origination representation, the plaintiff had more than enough time to inquire about the loan's validity pursuant to the MLPSA and PSA. Even so, the plaintiff has not demonstrated to the court what were the deviations from the standards articulated by the defendants. Here, the defendants argue that it need not abide by its own standards as provided by Nomura's Program Summary (*see* PX 300), which provided a litany of criteria in assessing a mobile park home loan. While the court finds that the defendants' argument that it need not abide by its own Program Summary as unpersuasive, nonetheless the plaintiff has not shown that it was outside of those standards.

The defendants concede that the principal borrower of the loan was a "crook" who "stole funds" (*see* Tr. 3094:9-20, 3369:26-3370:4 [Esquivel]). Nonetheless, as to the origination of the loan itself, the court finds that there is nothing outside the boundaries of prudence. For instance, the defendants required the borrower to enter into a Capital Improvement Agreement which required the borrower to address all immediate repairs. As well, the defendants utilized more conservative numbers in its underwriting and origination of this loan. As to Shawnee Village and Sciota Village, to take as an example, the defendants used a 21.5% vacancy rate in its net cash flow determination instead of the 6% rate used by the appraisers (*see* Tr. 750:24-754:12). In addition, the defendants point out that there were repairs being made and the occupancy level was at 89%.[10] If anything, the court finds that this was a prudent measure on the part of the defendants in utilizing more conservative numbers as well as requiring the borrower to address immediate repairs prior to the extension of the loan.

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There is the fact that the Summary provides for a 90% occupancy rate (*see* PX 300). However, that in and of itself is not material, where there was a 89% blended occupancy rate.

While the court is troubled by the revised engineer's report regarding the Parsons Mobile Home Park, the court finds that Nomura did take into consideration the environmental problems at Parsons prior to extending the loan to Banzhoff. Indeed, it is established that Nomura required the borrowers to enter into a Capital Improvement Agreement and required the borrowers to complete work in accordance with the recommendations of the engineers. Granted that this agreement was made pursuant to the revised engineer's report, but nonetheless this demonstrated that the defendants were aware of such environmental issues and took affirmative steps to aid both itself and the plaintiff in the maintenance of the loan.

The court is also troubled by the additional amount of money the defendants extended to the borrowers, from $2.715 million to $3.2 million. In that sense, the court finds that the plaintiff's explanation regarding the borrower's lack of income as persuasive, since the defendants fail to provide a reasonable explanation as to why there was an $485,000.00 increase in the size of the loan to the borrower. After all, the defendants concede that the principal borrower was a "crook" (*see* Tr. 3094:9-20 [Esquivel]). Nonetheless, the court notes that there were a variety of factors which substantively aided the defendants in enlarging the amount of the loan, including the fact that there was diversity in the number of mobile home parks, that there was a good track record in the increase in the occupancy rates (*see* PX713), and that the borrower had committed its own funds to effectuate certain repairs prior to the closing of the loan (*see* PX 383). Given the overall process and substance of the loan, the court cannot, by a preponderance of the evidence, find that the defendants imprudently made such a loan to the borrowers.

Finally, the court notes that LaSalle had more than enough time to request that the loan be repaid and/or serviced. As noted *supra*, the MLPSA provides that "[t]he Servicer, Special

Servicer or the Trustee *shall notify* the Mortgage Loan Seller and the Depositor *upon such party's becoming aware* of any breach of the representations and warranties" (PX 704, Art. II, § 2.01 [emphasis added]). As noted above, the plaintiff had prior notice of the various issues regarding these particular loans. Indeed, it is a stretch for the plaintiff to argue that it had no awareness of the breach, especially where, in writing, the defendants provided such information to the plaintiff. Given the circumstances, the plaintiff had since at least October 24, 1997 to request this repayment on the loan. Furthermore, the borrower declared bankruptcy in February 2000 (*see* PX 365). Again, the court finds that the plaintiff could have, during the intervening years, requested repayment or service on this loan from the defendants. Lastly, there is no dispute that the Special Servicer allowed the borrowers to convert funds due the Trust and allowed the mobile home park areas to deteriorate (*see* DX 1090, DX 1129). That the plaintiff had the responsibility to mitigate damages, the court finds that, here, there was a lack of mitigation and, as such, the plaintiff cannot demand repayment on the loan.

Accordingly, the court finds that plaintiff LaSalle has not, by a preponderance of the evidence, demonstrated that the defendants breached the representations and warranties for the Banzhoff Mobile Home Park Loan, Loan Number 105. Nor does the court, by a preponderance of the evidence, find that the plaintiff mitigated damages or provided prompt notice to the defendants. Accordingly, the court directs judgment as to these loans in favor of the defendants.

D. Best Western - Old Hickory Inn Loan - Loan Number 120

LaSalle alleges that the defendants breached their representations and warranties pursuant to the MLPSA and PSA for Loan Number 120, the Best Western - Old Hickory Inn loan. Specifically, the plaintiff argues that not only did the defendants breach the origination representation (PX 300, § 2 [b] [xix]), but also the no-knowledge representation (*id.*, § 2 [b] [x])

and the capital contribution representation (*id.*, § 2 [b] [xxxvii]). The court reviews the customary industry standards argument prior to deciding whether the defendants breached the no-knowledge representation. The court then weighs the plaintiff's argument that the defendants breached the capital contribution representation. Finally, the court decides the argument of whether the plaintiff failed to provide prompt notice to the defendants and whether the plaintiff failed to mitigate its damages.

1. *Customary Industry Standards*

Here, the court finds, by a preponderance of the evidence, that the defendants breached the origination representation (*id.*, § 2 [b] [xix]). The particular problem the court has with this loan is the fact that Nomura provided a second loan to the owner of the Best Western - Old Hickory Inn, even though it knew that there were problems with the extension of a second loan to the borrower. While in and of itself there is no problem in extending a second loan to the borrower - indeed, many institutional lenders provide secondary loans to clients - in this instance the defendants knew that this loan undoubtedly aided in the loss of the profitability of the inn, and, in turn, any return on the loan. Here, there is no dispute that the defendants made a $2.555 million first-mortgage loan to the owner of Best Western - Old Hickory Inn. There is also no dispute that the defendants made a second loan in the amount of $450,000.00 to the owner. That the LTV ratio rocketed up from 77%, already an imprudent amount, to 91%, the defendants failed to provide further and adequate justification for such an extension. There is nothing from the facts presented or the evidence provided to give any rational reason why this second loan was made or extended.

The defendants argue that the borrower contributed $350,000.00 in funds and that amount was substantial. The court disagrees. The amount utilized by the defendants is belied by

the evidence demonstrating that Yousif only had assets of $180,000.00, with the remainder funded by additional debt acquired by him in the form of a $104,682.00 loan termed "P/Note" and a $12,000.00 loan termed "P/N Patton" (*see* PX 8; Tr. 288:11-290:2). Indeed, that the borrower, in reality, had only $180,000.00 in assets, the defendants failed to show how that was substantial in light of the loan amount actually extended.

In addition, while the defendants do make strides in articulating the strengths of the hotel, including the service, the trucking company contract, and the experienced manager that would manage the hotel, nonetheless, these strengths do not outweigh the evidence that the loan was imprudently enlarged without justification, especially given the size of the loan and the lack of factors that could have otherwise demonstrated prudence on the part of Nomura in extending this loan to the borrower. This is only exacerbated by the fact that the defendants failed to take into consideration the inevitable falling occupancy rates with the advent and introduction of new hotels in the area. Indeed, the court finds that the defendants, in taking a consistent occupancy projection rate of 72%, knowing that the arrival of the new hotels would impact the occupancy rate of the property, demonstrated imprudence in the origination of the loan. Though the defendants argue that they did take the appraisal into consideration in determining the size and extent of the loan, the court finds, by a preponderance of the evidence, that the defendants did not review the appraisal with "healthy skepticism" as required by prudent underwriting and origination standards (*see* Tr. 2937:22-2939:14 [Esquivel]).

The defendants finally argue that the management of the hotel was adequately taken into consideration by the defendants in the origination of the loan because the borrower led Nomura to believe that an experienced individual would manage the hotel. However, that is obviously belied by the evidence that the borrower's cousin Abbo was actually installed by the borrower as

manager of the hotel, and, as Yousif himself noted, was inexperienced and mismanaged the hotel (*see* Yousif Dep. 59:1-23). In addition, while the court agrees that the defendants did not have the necessity of reviewing once again a loan that was extended, nonetheless the fact remained that Yousif did not install the person he said he was going to install as manager, and, especially given the fact that there was not one, but two loans extended by Nomura, the court finds that the defendants had imprudently originated this loan by failing to review the qualifications of Abbo.

Accordingly, the court finds by a preponderance of the evidence that the defendants breached Section 2 [b] [xix] of the MLPSA by imprudently originating the Best Western - Old Hickory Inn Loan.

2. *No-Knowledge*

The plaintiff further contends that the defendants breached the MLPSA by misrepresenting the no-knowledge representation (*see* PX 300, § 2 [b] [x]). As noted *supra*, section 2 (b) (x) provides that Nomura had "no knowledge that the representations and warranties made by each related Borrower in such Mortgage Loan are not true in any material respect." In order to find a breach of section 2 (b) (x), the plaintiff must demonstrate that such a breach was material and adversely affected the loan or the Certificateholders (*see id.*, § 3 [a]).

As demonstrated by the plaintiff, borrower Yousif made a representation to the defendants that Yousif would not "incur any indebtedness . . . other than (i) the Debt [to Nomura], (ii) trade and operational debt incurred in the ordinary course of business . . . and (iii) debt incurred in the financing of equipment and other personal property used on the Premises (*see* PX 374, § 10 [d]). Where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of the writing alone (*Chimart Assoc.*, 66 NY2d at 572).

Here, the court finds by a preponderance of the evidence that the borrower breached this representation to the defendants. Indeed, there was additional debt acquired by Yousif, in the form of a $104,682.00 loan termed "P/Note" and a $12,000.00 loan termed "P/N Patton" (*see* PX 8; Tr. 288:11-290:2). That Yousif breached his representation to Nomura, the defendants actually had knowledge of this breach. In turn, the court finds that the defendants breached the representation pursuant to the MLPSA that it had no knowledge of false representations made by a borrower of a mortgage loan because the defendants knew that Yousif had only cash assets of $180,000.00 and had to borrow further funds (*see* PX 128). Finally, the court finds that the lack of funds on the borrower's part indeed had a material and adverse effect in the maintenance of the loans, especially since there was no incentive for Yousif to repay on the loans where there was a dip in the value of the property.

For the reasons stated, the court finds that the defendants breached section 2 (b) (x) of the MLPSA.

3. *Capital Contribution*

Finally, the plaintiff argues that the defendants breached section 2 (b) (xxxvii), the capital contribution representation, averring that the defendants breached this representation when it converted the second loan of $450,000.00 into "preferred equity" after the closing of the securitization. Pursuant to section 2 (b) (xxxvii), "neither the Seller nor any affiliate thereof has any obligation or right to make any capital contribution to any Borrower under a Mortgage Loan, other than contributions *made on or prior to* the Closing Date (*see* PX 300 [emphasis added]).

Here, the defendants concede that the second loan was converted into preferred equity, thereby causing Nomura to make a capital contribution to the Best Western property. Nonetheless, the defendants argue that there was no material or adverse effect because the

plaintiff conceded that the Trust did not suffer any harm. As well, the defendants disclosed this information to the plaintiff (*see* Tr. 2714:24-2715:10; *see also* PX 116). That the defendants disclosed this information to the plaintiff does not change the fact that section 2 (b) (xxxvii) provides that a capital contribution cannot be made *after* the closing of the securitization (*see* PX 300). Indeed, it would otherwise annul a representation made by the defendants to the plaintiff if the court were to interpret this section differently from what the representation reads (*see Westmoreland Coal Co.*, 100 NY2d at 358).

As to the issue of material and adverse effect, pursuant to section 3 (a) (B), in order to assert a claim for breach of section 2 (b) (xxxvii), the plaintiff must show that the breach materially and adversely affected the value of the mortgage loan or the interests of the Certificates (*see* PX 300). The court finds that the conversion of the loan into preferred equity materially and adversely affected the loan, especially where it directly affected the payment on the loan by the borrower. Indeed, the fact that the second loan was converted to preferred equity in and of itself materially and adversely affected the loan, as there was an imposition on the borrower to repay on that equity (*see* Tr. 708:6-709:17 [Greenspan]).

For the foregoing reasons, the court finds that the defendants breached section 2 (b) (xxxvii) of the MLPSA.

4. *Prompt Notice and Mitigation*

While the court finds that the defendants breached the origination representation (PX 300, § 2 [b] [xix]), the no-knowledge representation (*id.*, § 2 [b] [x]), and the capital contribution representation (*id.*, § 2 [b] [xxxvii]), nonetheless the court finds that the plaintiff failed to provide prompt notice to the defendants pursuant to PSA § 2.03 (e).

The first issue is whether adequate information was provided to the plaintiff, which could have indicated waiver (*see* Section III [A] *supra* [discussion regarding Credit Lease Loans]). The defendants argue that all relevant information as to this loan was provided in the Prospectus Supplement (*see* PX 116). However, in reviewing the Prospectus Supplement, the court finds that not all information was provided. For instance, information regarding the second loan was not provided in the Supplement, and was not calculated as part of the LTV (*see* Tr. 310:25-311:21 [Greenspan]). As well, information regarding the manager of the hotel was false (*see* Tr. 3164:14-3165:18 [Esquivel]). Though information was provided in other documents, nonetheless defendants' reliance on full disclosure as a defense to this loan is questionable at best. Accordingly, there was no waiver as to this loan.

The plaintiff, under PSA § 2.03 (e), as noted *supra*, is required to provide prompt notice to the defendants in order to give the defendants timely opportunity to cure or repurchase the loan (*see* PX 704). It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace*, 86 NY2d at 548). Here, there is no dispute that problems became prominent since the closing of the loan in 1997. Indeed, the borrower filed for bankruptcy in September 1998 and the loan was transferred to Special Servicing in November 23, 1998. Furthermore, the loan was liquidated in December 2001 (*see* DX 1073). That the plaintiff had since at least 1998 to provide notice to the defendants regarding this loan, the plaintiff failed to do so. This is especially problematic where actual notice was given to the defendants on July 24, 2003, eighteen months after the property was liquidated, that there was a breach of these representations and warranties (*see* PX 365).

In addition, the court finds by a preponderance of the evidence that the plaintiff failed to mitigate damages. As noted *supra*, the defendant bears the burden of mitigation of damages (*see*

Golbar Props., Inc., 78 AD2d at 504). The court finds by a preponderance of the evidence that the defendants have demonstrated that the plaintiff failed to mitigate damages. Not only did the plaintiff failed to provide prompt notice of any breaches of the above representations and warranties, but further allowed the property to lose value. For instance, while the plaintiff followed its own policies and procedures to mitigate some of the harm to the Trust, the plaintiff failed to explore all avenues of recovery, including filing this action when the breaches occurred.

As well, not only did LaSalle (or any predecessor Servicer or Special Servicer) fail to explore the cure and repurchase option, but it also allowed the property to deteriorate. Indeed, it is undisputed that the property languished without renovations or upkeep, to the point where the Best Western franchise license was lost as to this property (*see* DX 1002, DX 1202, DX 1205, DX 1257). The Bankruptcy Trustee in this matter even warned that the failure of the plaintiff to spend money would cause severe loss to the property (*see* DX 1097). This was aptly demonstrated by the amount the hotel and property was actually sold for (*see* DX 1073).

For the reasons stated, the court finds by a preponderance of the evidence that the plaintiff failed to provide prompt notice to the defendants and failed to mitigate damages. Accordingly, the court directs judgment as to this loan to the defendants.

IV. Count II: Creating, Maintaining and Delivering Complete Origination Documents

A. Motion to Amend

The first issue that must be resolved is whether to grant the plaintiff's motion to amend the Complaint to conform to the evidence supplied at trial. The defendants argue that the motion to amend is prejudicial to the defendants because LaSalle had ample opportunity to amend its Complaint before trial and chose not to, and also because the motion seeks to assert new events as a basis for liability rather than merely introducing facts or theories. Specifically, the

defendants point to the August 2, 2004 letter which referenced ORIX's request for documents as to all 155 mortgage files and to Nomura's failure to comply. The defendants claim that this request was made over a year after the Complaint was filed, and, as such, there is prejudice to the defendants in allowing this motion to amend. The court finds defendants' arguments unpersuasive.

Though it is undisputed that the plaintiff never requested the documents for all mortgage loans prior to the filing of its Complaint on October 23, 2003 (*see* Tr. 1115:2-1116:3), the court finds that the defendants would not be unduly prejudiced by this amendment. For one, in conjunction with the defendants' motion to dismiss, the court read the Complaint in its March 23, 2004 decision as though the plaintiff had alleged that the defendants failed to maintain complete mortgage files for *all* 155 mortgage loans (*see* Decision at 15-16), and dismissed the various causes of action as it pertained to 145 of the 155 loans for failure to "set forth the nature of the contractual obligation" and "the nature of the claimed breached" (*Sebro Packaging Corp. v S.T.S. Indus. Inc.*, 93 AD2d 785 [1st Dept 1983]). Further, the court, in its October 27, 2005 decision, dismissed three other loans and the causes of action related to those loans. Indeed, neither party made it a point to request that the court amend its ruling or correct its conclusions. That the court dismissed 148 of the 155 does not change the fact that the court found the Complaint to have made a failure to maintain allegation as to all 155 files at the commencement of this litigation.

More importantly, the defendants had ample opportunity to cross examine not only plaintiff's witnesses regarding the loan documents and files, but also had the possibility to bring forth its own witnesses and experts to testify accordingly. For one, as the plaintiff articulates, the defendants had more than a year since they received ORIX's August 4, 2004 letter to move

to exclude this information. The defendants even so much as brought this letter to the attention of the court in their motion for summary judgment, as well as in their appeal (*see LaSalle Bank N.A.*, 14 AD3d at 366-67). Further, it is undisputed that the defendants utilized Esquivel's testimony and expert report to render an opinion on the reasonableness of the plaintiff's request for origination and underwriting files, not only as to the loans at issue, but also to all loans. While the testimony and expert opinions of the plaintiff deals with the seven loans at issue, it is not outside the realm of possibility that the plaintiff would try to reinstate the second cause of action in its entirety. Indeed, Johannson's opined as to all the loans, not just the loans at issue in this litigation. The court finds that the defendants not only knew that the plaintiff was going to amend the Complaint, but further had ample opportunity to defend against these claims (*accord Gonfiantini v Zino*, 184 AD2d 368, 370 [1st Dept 1992] [allowing a motion to amend because there was ample opportunity to respond to the evidence and there was minimal prejudice to the defendants]).

Accordingly, the motion to amend the Complaint to conform to the evidence is granted, and the court reinstates Count II of the Complaint in its entirety to conform with that evidence.

B. The Missing Documents

As to the documents themselves, the court finds that the plaintiff has not, by a preponderance of the evidence, shown that the defendants have breached either Section 2.01 of the PSA or Section 1 of the MLPSA.

Pursuant to Section 2.01 of the PSA,

> [ASC] does hereby deliver to, and deposit with, the Custodian (on behalf of the Trustee), with copies to the Servicer and the Special Servicer, the following documents or instruments with respect to each Mortgage Loan so assigned . . . .

> All original documents relating to the Mortgage Loans which are not delivered to the Custodian are and shall be held by [ASC], the Trustee or the Servicer, as the case may be, in trust for the benefit of the Certificateholders. In the event that any such original documents is required pursuant to the terms of this Section to be a part of a Mortgage File, such document shall be delivered promptly to the Custodian (*see* PX 704).

First, as to the issue of the demand of "evidence of compliance" for the other loans not in Special Servicing, the court finds that no where in the MLPSA does the plaintiff have the authority to demand such evidence. Indeed, the MLPSA provides that the Trustee may *reasonably request* "all documents, instruments and agreements" (PX 300). There is nothing in this section that gives LaSalle authority to demand such a concept as "evidence of compliance."

Here, the defendants aver that plaintiff's interpretation of the contract is unreasonable because the plaintiff is requesting original origination and underwriting documents, which is not stated anywhere in this section. However, Section 1 of the MLPSA provides that Nomura would deliver all documents, instruments, and agreements required to be delivered as well as "such other documents, instruments and agreements as . . . the Trustee shall reasonably request" (*see* PX 300). Further, the PSA provides that "[a]ll original documents relating to the Mortgage Loans" shall be held in trust for the benefit of the Certificateholders (*see* PX 704). In this instance, the court does find that it was reasonable for the plaintiff to request documents that would have assisted in its servicing of the loans in this Securitization, as the defendants are required to hold in trust "[a]ll original documents," whether it be an agreement, an legal document, or a tax return.

The defendants argue that the plaintiff has a proprietary motive other than of the interests of the Certificateholders. While that may be true, the court rejects the argument as tangential. After all, it should have been obvious from the beginning that ORIX had a financial interest in

the D5 Securitization. If the plaintiff wants to maximize on its return of its investment, that is a business decision which is inapposite to this litigation. Though the court notes that ORIX may well receive a windfall to the detriment of other Certificateholders, the court finds that ORIX's motive to maximize profit is nonetheless irrelevant (*accord Bus. Capital Corp. v Premier Albums, Inc.*, 29 AD2d 522 [1st Dept 1967] [assertions as to plaintiff's ulterior motives does not constitute a defense]).

The court also finds that the plaintiff has failed to demonstrate what documents it is exactly seeking. Here, as required, the court must read section 2.01 in its entirety in order to give that section its "fair and reasonable meaning" and "a practical interpretation of the expressions of the parties" (*Sutton*, 55 NY2d at 555). In reading section 2.01, as well as reviewing the testimony of the parties, the court finds that a majority of these documents were provided to the plaintiff. For one, the 2002 letter provided that all the documents in the loans then in Special Servicing were complete (*see* DX1018, DX 1053). Moreover, it is undisputed that the defendants provided in their loan summaries all the information required in the documents the plaintiff's expert found missing. However, other than certain documents such as rent rolls and tax returns, the plaintiff fails to demonstrate what, if any, documents the defendants should have kept. As such, that the plaintiff seeks every original document in the origination process without first demonstrating what it seeks is unreasonable. The court finds that the plaintiff has, by a preponderance of the evidence, failed to demonstrate what documents were necessarily required to be turned over.

The court is not persuaded that the plaintiff has articulated just what documents it is looking for in servicing the loans in this Securitization. Indeed, while the plaintiff has noted that certain documents would have maximized returns to the Certificateholders, the court finds that

the plaintiff has not shown how it would benefit the returns for these loans. This is especially the case where, after reviewing the testimony and the evidence, the plaintiff basically has all the documents it readily needs in order to service the loan.

Finally, the court gives credence to the defendants' explanations that there were documents that have been destroyed with the advent of September 11, 2001 as well as carelessness in holding onto documents while during the winding down phase of the business. Here, the court does find it unreasonable for the plaintiff to require the defendants to recreate these missing documents, especially given that the loss was not due to their inability to keep such documents.

For the reasons set forth above, the court, by a preponderance of the evidence, finds that the plaintiff has not demonstrated a breach of Section 2.01 of the PSA or Section 1 of the MLPSA. Accordingly, the court grants judgment as to Count II for the defendants and against the plaintiff.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is hereby

ORDERED that the defendants' motion in limine to preclude the expert report of David W. Swiney (Motion Sequence 012) is denied; it is further

ORDERED that the plaintiff's motion in limine to preclude evidence concerning the defendants' "prompt notice" argument (Motion Sequence 013) is denied; it is further

ORDERED that the plaintiff's motion in limine to exclude evidence as to whether the defendants' breaches caused the subject loans to default (Motion Sequence 015) is granted; it is further

ORDERED that the plaintiff's motion to exclude evidence concerning due diligence and investments by investors in the trust certificates (Motion Sequence 016) is denied; it is further

ORDERED that the plaintiff's motion to amend Count II of the Complaint to conform to the evidence adduced at trial is granted; it is further

ORDERED that judgment as to Count I is hereby entered in favor of defendants Nomura Asset Capital Corporation and Asset Securitization Corporation and against plaintiff LaSalle Bank National Association, as Trustee for the Certificateholders of Asset Securitization Corporation Commercial Mortgages Pass-Through Certificates Series 1997-D5 as to all loans; it is further

ORDERED that judgment as to Count II of the Complaint is entered in favor of the defendants Nomura Asset Capital Corporation and Asset Securitization Corporation and against plaintiff LaSalle Bank National Association, as Trustee for the Certificateholders of Asset Securitization Corporation Commercial Mortgages Pass-Through Certificates Series 1997-D5; it is further

ORDERED that the clerk shall enter judgment in favor of defendants Nomura Asset Capital Corporation and Asset Securitization Corporation as to both causes of action; and it is further

ORDERED that both parties shall bear their own costs.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THIS COURT.

Dated: September 6, 2006

ENTER:

RICHARD B. LOWE III

RICHARD B. LOWE III J.S.C.

FILED

SEP 08 2006

COUNTY CLERK'S OFFICE
NEW YORK