

**Goldman Sachs Mtge. Co. v Natixis Real  
Estate Capital Inc.**

2008 NY Slip Op 31280(U)

April 30, 2008

Supreme Court, New York County

Docket Number: 0602359/2007

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 49

Goldman Sachs

INDEX NO. 602359607

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

Natixis

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED \_\_\_\_\_  
**FILED**  
MAY 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....**

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

Dated: 4/30/08

Alex Cahn  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

-----x  
GOLDMAN SACHS MORTGAGE COMPANY,

Plaintiff,

-against-

Index No. 602359/07

NATIXIS REAL ESTATE CAPITAL INC.,  
f/k/a IXIS REAL ESTATE CAPITAL INC.,

Defendant.

**FILED**  
MAY 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
**Herman Cahn, J.:**

Defendant moves to dismiss the complaint, CPLR 3211 (a) (1) and

This is a dispute over whether the defendant, a purchaser of mortgage loans, purchased 38 mortgage loans owned by plaintiff and failed to pay plaintiff for them, or whether defendant properly purchased these mortgages by wiring funds to another party, which plaintiff claims did not own the mortgage loans. The parties dispute whether bailment letters issued to a custodian of both parties regarding the loans bind defendant to their terms requiring a specified method of payment to an account designated by plaintiff, or whether defendant was a holder in due course without actual knowledge of plaintiff's interest in the loans.

**BACKGROUND**

Plaintiff Goldman Sachs Mortgage Company (GSMC) is engaged, inter alia, in the business of purchasing or financing the purchase of mortgages (Compl., ¶ 4). Defendant Natixis Real Estate Capital, Inc. (Natixis) is in the business of purchasing and securitizing pools of mortgage loans (*id.*, ¶ 5).

GSMC is involved in the residential warehouse lending industry in which it provides

financing to entities that originate or fund residential mortgage loans (Preisano 10/30/07 Aff., ¶ 3). GSMC would purchase mortgage loans and either retain them for the income they generated or bundle them into portfolios in connection with securitizations and/or sales to other parties (id.). As is typical for warehouse lenders, the responsibility for maintaining the files of the collateral documents for the residential mortgage loans it financed was outsourced to third-party entities called “custodians” (id., ¶ 4). There are four or five well-known custodians in the industry, including Deutsche Bank National Trust Company (Deutsche Bank), the custodian for the transactions at issue in this action (id., ¶ 5). Because there are more warehouse lenders than custodians, it is not uncommon for the same custodian to serve multiple parties (id.).

When a potential purchaser is interested in purchasing a residential mortgage loan, the standard practice is for the purchaser to conduct a due diligence review by reviewing the collateral documents for the loan (id., ¶ 6). Thus, the warehouse lender, which owns or has a security interest in the mortgage, will arrange for its custodian to deliver the original documents to the potential purchaser or to the purchaser’s custodian as its agent (id., ¶ 7). As is customary in the industry, the documents are delivered pursuant to the terms and conditions set forth in a “bailee letter,” which identifies the party that owns the security interest in the loan, how that interest should be released, provides a method to return the documents if the purchaser decides not to go forward with the purchase and specifies instructions to advise the purchaser where to send the purchase price if it decides to purchase the loan (id.). These bailee letters are standard practice in the warehouse lending industry to preserve the lender’s rights in the original collateral and are necessary because the underlying mortgages make no reference to the warehouse lenders that possess an interest in the loans (id., ¶¶ 8-9). The standard practice in the industry is not to

require a countersignature on the bailee letter by the potential purchaser, and that acceptance of the collateral documents constituted assent to the terms of the bailee letter, as stated in the bailee letters at issue (id., ¶ 10; see Preisano Aff., Exh. A).

GSMC acquired the mortgage loans at issue on various dates from New Century Warehouse Corporation d/b/a Access Lending through a repurchase agreement under which, in exchange for financing provided by GSMC, Access sold the mortgage loans to GSMC (Preisano Aff., ¶ 11). Access had acquired the mortgage loans from the originator, Maxim Mortgage Corp. (Maxim) (id.).

In February and March of 2007, Natixis expressed interest in purchasing the 38 mortgage loans at issue (owned by GSMC), and sought to conduct due diligence by reviewing the original notes and mortgage loan documentation (Mortgage Loan Documents) (Compl., ¶ 6; Preisano Aff., ¶ 12). GSMC's custodian, Deutsche Bank, provided the Mortgage Loan Documents to Natixis' custodian, also Deutsche Bank, pursuant to a bailee letter for each mortgage loan (the Bailee Letters) (Compl., ¶ 6). The Bailee Letters required Deutsche Bank, as Natixis's custodian, to hold the Mortgage Loan Documents in trust until Natixis either purchased the underlying mortgage loan or, upon GSMC's request, returned the Mortgage Loan Documents to GSMC or its custodian (id.; see Compl., Exh. A; Preisano Aff., Exhs. A-C).

Specifically, each Bailee Letter provided that Natixis's custodian, Deutsche Bank, agreed that the Investor (Natixis) would: (i) hold in trust, as bailee for GSMC, the Mortgage Loan Documents, until its status as bailee was terminated as set forth therein; (ii) not release or deliver, or authorize the release or delivery of any of the Mortgage Loan Documents to the applicable Seller (New Century Mortgage Corp. and Access) or any other person or take any other action

with respect to the Mortgage Loan Documents which would jeopardize GSMC's security interest in the underlying mortgage loans; (iii) remit the Purchase Amount, as that term is defined in each Bailee Letter, only to GSMC's account as set forth in each Bailee Letter; and (iv) return the Mortgage Loan Documents immediately to GSMC's custodian upon receipt of a written request from GSMC (Compl., ¶ 7, Exh. A). Each Bailee Letter states that GSMC's interest in the underlying mortgage loan is released, and the Investor's (Natixis's) responsibilities are terminated upon Natixis's irrevocable payment to GSMC of the Purchase Amount as defined in the Bailee Letter (Compl., ¶ 8). Further, each Bailee Letter provides that all payments shall be remitted via federal funds wired to a specific GSMC bank account (Compl., Exh. A). The Bailee Letters provided that if the Investor remits the payment to "any other entity or Person," GSMC will not consider the purchase amount to have been paid, and will not release its security interests or terminate the responsibilities of the Investor as bailee (*id.*). Natixis's name does not actually appear on the Bailee Letters.

Natixis claims that on March 9, 2007, it purchased 71 mortgage loans from Maxim Mortgage Corp., an originator of sub-prime mortgage loans, for \$14.6 million, pursuant to a Mortgage Loan Purchase Agreement (*Zakes 9/13/07 Aff.*, Exh. M). It asserts that it paid the purchase price directly to the warehouse lenders of Maxim Mortgage Corp. (*see Zakes Aff.*, Exhs. F, G), one of which was Access, which is now in Chapter 11 bankruptcy (*see Zakes Aff.*, Exhs. J, K). Natixis submits a Security Release Certification issued by Access Lending to Natixis on March 9, 2007 (*Zakes Aff.*, Exh. D) in which Access "relinquishes any and all right, title and interest it may have in all Mortgage Loans" described in the attached schedule pursuant to the Mortgage Loan Purchase Agreement between Natixis and Maxim Mortgage Corp. It

claims that its purchase included the 38 mortgages at issue here, and that it fully paid for those mortgages.

On April 5, 2007, GSMC, through its custodian, Deutsche Bank, issued to Natixis, through its custodian, also Deutsche Bank, a follow-up letter for each of the mortgage loans that had been sent to Natixis as bailee (Bailee Follow-up Letter). Each Bailee Follow-up Letter states that Natixis had received the Mortgage Loan Documents, and had them for more than 45 days without purchasing the mortgage loans (Compl., Exh. B). The letters requested the bailee to “[k]indly alert us to your decision to purchase the Mortgage Loans or return the Mortgage Files to our attention at your earliest convenience” (*id.*). Natixis neither purchased the mortgage loans by remitting payment as set forth in the Bailee Letter, nor returned the Mortgage Loan Documents to GSMC (Compl., ¶ 11).

On April 6, 2007, in an e-mail from Deutsche Bank to Natixis, after this dispute arose, Deutsche Bank stated that it had accepted the Mortgage Loan Documents as bailee pursuant to the various Bailee Letters dated February 20, 2007 and, as referenced in that letter, as Custodian for GSMC (Preisano Aff., Exh. D). Deutsche Bank further stated that it would continue to hold the mortgage loans until instructed by GSMC that its interest in the loans has been fully released (*id.*).

The Action:

On July 18, 2007, GSMC commenced this action asserting two causes of action. The first is for breach of the Bailee Letters, based on Natixis’s failure to remit payment or return the Mortgage Loan Documents for the underlying mortgage loans. The second is for conversion based on Natixis’s claimed unauthorized dominion over the mortgage loans.

The Motion:

In moving to dismiss the complaint, Natixis asserts several grounds. First, it argues that the Bailee Letter is not a valid contract. It points to the fact that it never signed the Bailee Letter, the Bailee Letter is missing terms such as the purchase price for the loans and that it lacks consideration. Second, Natixis urges that Deutsche Bank did not have the authority to enter into the Bailee Letter on behalf of Natixis. It contends that its name, or any indication that Deutsche Bank was acting on its behalf, does not appear on the Bailee Letter. It further contends that Deutsche Bank was acting beyond the scope of its authority in entering into the Bailee Letter on Natixis's behalf, submitting its Custodial Agreement with Deutsche Bank as proof supporting this argument. It also asserts that the Bailee Letter is voidable because Deutsche Bank had a conflict by acting as custodian for both GSMC and Natixis. Finally, it maintains that the contract was not breached because GSMC's designee, Access, was paid by Natixis.

With regard to the conversion claim, Natixis urges that it was a holder in due course, which defeats the claim. It argues that it had no actual knowledge of GSMC's interest in the loans, because the Bailee Letter makes no reference to Natixis, the mortgage notes give no indication of GSMC's interest, the Custodial Agreement and the Trust Receipt from Deutsche Bank to Natixis indicates that Deutsche Bank would be a custodian exclusively for Natixis, and the Security Release from Access fails to provide any notice of GSMC's interest.

In opposition, GSMC argues that the Bailee Letters are enforceable. It maintains that the Bailee Letters did not require a countersignature to be effective, because Natixis's conduct in accepting the Mortgage Loan Documents indicated its acceptance to the bailment contract, and the industry custom and practice is that bailee letters do not require countersignature. GSMC

asserts that Deutsche Bank's conduct in accepting the terms of the Bailee Letters, which it had done with prior bailee letters, in not rejecting those letters, and in confirming to Natixis, in an April 6, 2007 e-mail, that it was holding the Mortgage Loan Documents as bailee pursuant to the Bailee Letters, support its claim. Further, Natixis's conduct in receiving the Mortgage Loan Documents starting around February 20, 2007, and using them to conduct due diligence, indicates its acceptance of the terms of the Bailee Letters. GSMC asserts that all essential terms are present in the Bailee Letters. The lack of the purchase price figure does not make the contract unenforceable, because the Bailee Letter defines the blank number as "the full amount of all outstanding Transactions (as defined in the Repurchase Agreement) in respect of the Mortgage Loans" (Compl., Exh. A at 2). In addition, Natixis knew who the "Originator" of the loan was, and could determine the purchase price by reviewing the Repurchase Agreement, so the lack of those terms is immaterial to the bailment agreement. On the issue of consideration, GSMC asserts that the Complaint alleges consideration – in exchange for Natixis's promise to hold the Mortgage Loan Documents in trust and comply with terms of Bailee Letters, GSMC delivered the documents so that Natixis could conduct its due diligence.

With regard to Natixis's argument that Deutsche Bank lacked authority to accept the Bailee Letters, GSMC urges that Deutsche Bank did have such authority, as indicated in its Custodial Agreement with Natixis (Zakes Aff., Exh. B, § 2), which is consistent with the custom and practice in the industry, and with Natixis's prior practice in permitting Deutsche Bank to accept the terms of previous bailee letters delivered for GSMC's loans (Preisano Aff., ¶¶ 19-20). This is further demonstrated by Deutsche Bank's Certification and Trust Receipt letter dated March 9, 2007, in which it confirmed that it was acting as Natixis's agent in holding the

Mortgage Loan Documents, and in an e-mail on April 6, 2007, in which Deutsche Bank told Natixis that it was holding the Mortgage Loan Documents pursuant to the Bailee Letters (Preisano Aff. ¶ 18, Exh. D). In any event, Natixis's allegation of a lack of authority simply raises a fact issue which cannot be resolved on a motion to dismiss. GSMC further argues that any conflict Deutsche Bank had by acting as custodian for both sides of a transaction does not make the Bailee Letters void. Natixis's breach, according to GSMC, is material – it failed to wire the funds in payment for the purchase of the mortgage loans in accordance with the instructions in the Bailee Letters, that is, to a specific account owned by GSMC. Finally, with respect to the conversion claim, GSMC contends that Natixis is not a holder in due course because, as alleged in the Complaint, Natixis had actual notice of GSMC's interest in the mortgage loans by the delivery of the Bailee Letters to Deutsche Bank (Compl., ¶¶ 6, 17-18).

If there are any deficiencies in its pleading, GSMC seeks leave to replead.

#### **DISCUSSION**

The motion to dismiss is denied.

On a CPLR 3211 motion to dismiss, the test is whether the proponent of the pleading has a claim, not just whether a claim is stated (see Leon v Martinez 84 NY2d 83, 87-88 [1994]). The plaintiff's allegations must be accepted as true, liberally construed and afforded the benefit of every favorable inference (id.). Dismissal is warranted pursuant to CPLR 3211 (a) (1) only if the documentary evidence submitted “definitively dispose[s] of the claim” (Demas v 325 West End Ave. Corp., 127 AD2d 476, 477 [1<sup>st</sup> Dept 1987]; see 150 Broadway N.Y. Assocs., L.P. v Bodner, 14 AD3d 1 [1<sup>st</sup> Dept 2004]), or “conclusively establishes a defense to the asserted claims as a matter of law” (Leon v Martinez, 84 NY2d at 88; see also Fast Track Funding Corp. v Perrone,

19 AD3d 362 [2d Dept 2005]). GSMC has claims for breach of contract and conversion, and the documentary evidence does not definitively dispose of these claims or establish Natixis's defense as a matter of law.

The first cause of action is for breach of the bailment agreement set forth in the Bailee Letters. To state a claim for breach of contract, a plaintiff must allege an enforceable contract, performance by the plaintiff and a breach by the defendant. As the party seeking to enforce the contract, the plaintiff has the burden of pleading that a binding contract was entered into and to prove the terms of the contract (Allicd Sheet Metal Works, Inc. v Kerby Saunders, Inc., 206 AD2d 166, 169 [1<sup>st</sup> Dept 1994]; see also Croman v Wacholder, 2 AD3d 140 [1<sup>st</sup> Dept 2003]).

A bailment may be created by general business usage or accepted trade practices (see Tinplate Purchasing Corp. v Tutcur & Co., 10 NY2d 410 [1961]), or by contract, as in the instant case. In contracts of bailment, the bailor relinquishes exclusive possession, control and dominion over the property to the bailee (see Piyar v Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212, 213 [1<sup>st</sup> Dept 2002]; Martin v Briggs, 235 AD2d 192 [1<sup>st</sup> Dept 1997]; see also Leventritt v Sotheby's, Inc., 5 AD3d 225, 226 [1<sup>st</sup> Dept], lv denied 3 NY3d 605 [2004]). Here, GSMC, the bailor, relinquished exclusive possession, control and dominion over the Mortgage Loan Documents to Deutsche Bank, as agent for Natixis, the bailee, pursuant to the Bailee Letters. The express and implied terms of the bailment contract determine the rights, duties and liabilities as between the parties (see 9 New York Jur 2d, Bailment § 27).

Contrary to Natixis's contention, Natixis's failure to place its countersignature on the Bailee Letters does not make them unenforceable as a matter of law. The mere fact that a party to a contract has not signed it, does not make an agreement unenforceable, particularly if the

party has accepted the written agreement and has acted upon it (see Newburger v American Sur. Co., 242 NY 134, 143 [1926]). Moreover, it is not essential in a bailment relationship that the bailee expressly accept the goods. The acceptance may be implied from the circumstances (see Am Jur 2d Bailments § 48). According to GSMC's allegations, Natixis accepted the agreement through its agent, Deutsche Bank, and took possession of the Mortgage Loans Documents to conduct its due diligence in anticipation of purchasing the mortgage loans. The Bailee Letters themselves provide that they become effective "[b]y taking physical possession of this letter, the Mortgage Loan Documentation and the other Loan Documents" (Compl., Exh. A). In addition, GSMC has presented proof that the industry custom and practice is that bailee letters do not require a countersignature (see Preisano Aff., ¶ 10). This is not a case where the parties indicated in the documents that they did not intend to be bound until the agreements were signed (cf. Scheck v Francis, 26 NY2d 466, 470 [1970]).

Natixis's argument that the Bailee Letters lacked consideration is also rejected. Bailment contracts are supported by sufficient consideration where there is a transfer of possession of the property (see Johnson v Gumer, 149 AD2d 933 [4<sup>th</sup> Dept], appeal denied 74 NY2d 609 [1989]). Here, a consideration for the Bailee Letters was GSMC's transfer of possession of the Mortgage Loan Documents on the faith of Natixis either purchasing the mortgage loans and paying for them, or redelivering the Mortgage Loan Documents.

The Bailee Letters are enforceable notwithstanding the lack of a term for the purchase price for the underlying mortgage loans. A contract is not necessarily indefinite because it fails to specify a dollar figure for the purchase price, or leaves fixing that amount for the future (see Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, 483 [1989], cert

denied 498 US 816 [1990]). So long as the parties have manifested an intent to be bound, a price term may be sufficiently definite if it can be determined objectively without further expression by the parties (id.). For example, where there is a method set forth in the agreement for determining the missing term, or it can be ascertained by reference to commercial practice or trade usage, the price term is sufficiently definite (Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d at 483; see also Metro-Goldwyn-Mayer, Inc. v Scheider, 40 NY2d 1069 [1976] [where oral agreement on substantially all essential terms, and performance had begun with understanding that agreement on unsettled matter would follow, court finds and enforces contract]). In any event, this is a bailment contract which obligated the bailee Investor to return the Mortgage Loan Documents or remit the price for those mortgages. The mortgages are listed in the attached schedule, and the price could be determined by reference to that schedule. This is sufficient for a claim for breach of a bailment agreement.

Natixis's defense that the Bailee Letters failed to name it specifically as the "Investor," fails to definitively dispose of the claim. Deutsche Bank acted as Natixis's agent, accepted the Mortgage Loan Documents, and Natixis took the Mortgage Loan Documents from Deutsche Bank to review. It arguably came within the term "Investor" used in the Bailee Letters.

Natixis's contention that Deutsche Bank acted outside the scope of its agency, and did not have apparent authority to enter into the bailment relationship, cannot be determined on this pre-answer motion to dismiss. Examination of the Custodial Agreement between Deutsche Bank and Natixis does not definitively dispose of GSMC's claim that Deutsche Bank had actual or apparent authority to take possession of the Mortgage Loan Documents as bailee. The Custodial Agreement expressly authorized Deutsche Bank to act as Natixis's custodian, and to accept

delivery of mortgage loan documents that Natixis was purchasing ( Zakes Aff., Exh. B, § 2). Without the authority to accept the Bailee Letters, Deutsche Bank could not have served as Natixis's custodian (Preisano Aff., ¶¶ 9-10). GSMC has presented proof of the industry practice that a bailment contract is made when loan documents are accepted by the potential purchaser, and that Natixis had previously permitted Deutsche Bank to accept the bailee letters delivered for GSMC's loans (id., ¶¶ 19-20). This proof provides a basis for GSMC to claim that Deutsche Bank had implied actual authority to enter into the Bailee Letters (see Dark Bay Intl., Ltd. v Acquavella Galleries, Inc., 12 AD3d 211, 211-12 [1<sup>st</sup> Dept 2004], lv denied 4 NY3d 705 [2005] [for implied actual authority, plaintiff must show principal had some control over agent or some affiliation]). The provision in the Custodial Agreement that states that, with regard to the mortgage documents that come into Deutsche Bank's possession as custodian, Deutsche Bank is the custodian for the purchaser only, does not end the inquiry as to the scope of its agency. GSMC has presented proof that there are only a four or five well-known custodians in the industry, and that it is not uncommon for them to serve multiple parties in different capacities in residential mortgage loan transactions (Preisano Aff., ¶ 5). The issue of the scope of Deutsche Bank's authority cannot be resolved on these papers.

With respect to whether Deutsche Bank had the apparent authority to enter into the Bailee Letters, that issue is inherently a factual one not appropriately determined on a pre-answer, pre-discovery dismissal motion (see Arol Dev. Corp. v Whitman & Ransom, 215 AD2d 145, 146 [1<sup>st</sup> Dept 1995]). "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (Hallock v State of New York, 64 NY2d 224, 231

[1984]). Here, GSMC alleges that Natixis had Deutsche Bank act as its custodian for similar mortgage transactions with GSMC, and that Natixis had taken the Mortgage Loan Documents from Deutsche Bank to conduct its review of the GSMC loans at issue. This proof, at the least, requires denial of dismissal based on the defense of lack of apparent authority.

GSMC's claim for conversion similarly withstands dismissal. To state a claim for conversion, the plaintiff must assert that it owns or has the immediate superior right of possession to personal property, and that defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights (Republic of Haiti v Duvalier, 211 AD2d 379, 384 [1<sup>st</sup> Dept 1995]; Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 AD2d 384, 385 [1<sup>st</sup> Dept 1992]). GSMC has alleged the elements of conversion, that is, Natixis's wrongful taking of the Mortgage Loan Documents, to GSMC's exclusion, and that GSMC had the immediate, superior right to possession of them.

Natixis's defense that it was a holder in due course does not warrant dismissal on this record. Rather, there appears to be a factual issue as to Natixis's knowledge regarding GSMC's claims to the Mortgage Loan Documents. The object of the holder in due course doctrine is to encourage and facilitate the ready transaction of negotiable instruments (Hartford Acc. & Indem. Co. v American Express Co., 74 NY2d 153, 158-59 [1989]). Section 3-302 (1) of the New York Uniform Commercial Code defines a holder in due course as: "a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person" (UCC § 3-302 [1]).

Natixis argues that it is a holder in due course of the mortgage notes, pointing to the Trust Receipt it received from Deutsche Bank, certifying that Deutsche Bank was holding the mortgage

documents as agent and bailee, and custodian for the exclusive use and benefit of Natixis, and to the Assignment and Conveyance it received from Access, purportedly assigning any right, title and interest it may have in the mortgage loans as documentary proof of its status as holder. It contends that it had no notice of GSMC's claim to the loans. GSMC urges that Natixis had notice of GSMC's claim to the mortgage loans based, at the least, on Deutsche Bank's knowledge of the claim which is imputed to Natixis as Deutsche Bank's principal. "[T]o constitute notice of a claim or defense, the purchaser must have knowledge of the claim or defense or knowledge of such facts that his action in taking the instrument amounts to bad faith" (UCC § 3-304 [7]).

The issue of notice is subject to a subjective test of actual knowledge – that is, what the holder actually knew, not what it had reason to know (Hartford Acc. & Indem. Co. v American Express Co., 74 NY2d at 162-63). A principal may be bound by notice to or knowledge of its agent with regard to all matters within the scope of the agency (Farr v Newman, 14 NY2d 183, 187 [1964]). The principal is so bound even if in fact the information is never actually communicated to the principal (id.; see Christopher S. v Douglaston Club, 275 AD2d 768, 769-70 [2d Dept 2000]). Moreover, the knowledge is imputed even if the agent is acting under a conflict of interest or does not act primarily for the principal (In re Grumman Olson Indus., 329 BR 411, 425 [Bankr SDNY 2005], citing Center v Hampton Affiliates, Inc., 66 NY2d 782 [1985]).

Here, GSMC has presented proof that Deutsche Bank was acting as Natixis's agent and that Deutsche Bank had actual knowledge of GSMC's claims from the Bailee Letters. This proof is supported by GSMC's submission of Deutsche Bank's April 6, 2007 e-mail to Natixis

referring to GSMC's claim with regard to the mortgage notes. This is sufficient to raise an issue regarding Natixis's notice of a claim against the instruments on a motion to dismiss (see Abco Refrigeration Supply Corp. v T.G.S. Corner Enterprises, 161 AD2d 414, 414 [1<sup>st</sup> Dept 1990]; Key Bank, N.A. v Sanderson, 773 F Supp 641, 643-44 [SDNY 1991]). To the extent that Natixis raises the potential conflict in Deutsche Bank acting as custodian for both GSMC and Natixis, this conflict would not bar the imputation of Deutsche Bank's knowledge to Natixis (see Farr v Newman, 14 NY2d at 183; In re Grumman Olson Indus., 329 BR at 411). Issues raised by Natixis regarding the scope of Deutsche Bank's authority, as discussed above, will not be resolved on this motion to dismiss.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: April 29, 2008

**FILED**  
MAY 05 2008  
ENTER: *[Signature]*  
\_\_\_\_\_  
J.S.C.  
COUNTY CLERK'S OFFICE  
NEW YORK