

**Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge.  
Capital, Inc.**

2013 NY Slip Op 32915(U)

November 8, 2013

Supreme Court, New York County

Docket Number: 156016/2012

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER  
*Justice*

PART 45

Home Equity Mortgage Trust  
Series 2006-5, et al.

INDEX NO. 156016/12

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

MOTION SEQ. NO. 004

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

- v -  
DLJ Mortgage Capital Inc., et al

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that <sup>this</sup> ~~this~~ motion by plaintiff To compel  
is ~~not~~ granted in part per the attached  
Decision and Order.

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

Dated: November 8, 2013

Melvin L. Schweitzer  
MELVIN L. SCHWEITZER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X	
HOME EQUITY MORTGAGE TRUST SERIES 2006-5,	:
By U.S. BANK NATIONAL ASSOCIATION, solely in	:
Its capacity as Trustee,	:
	:
Plaintiff,	:
	:
-against-	:
	:
DLJ MORTGAGE CAPITAL, INC., and SELECT	:
PORTFOLIO SERVICING, INC.,	:
	:
Defendants.	:
-----X	

Index No. 156016/2012  
DECISION AND ORDER  
Motion Sequence Nos. 004  
and 005

**MELVIN L. SCHWEITZER, J.:**

Plaintiffs, three residential mortgage-backed securitizations (Home Equity), have submitted a Motion to Compel Production of Documents from Defendant DLJ Mortgage Capital, Inc. (DLJ) (Mot. Seq. No. 004), and a Motion to Compel Production of Documents from Defendant Select Portfolio Servicing, Inc. (Select Portfolio) (Mot. Seq. No. 005). By letter submitted at the court’s request (10/11/13 letter from Erica P. Taggert, Esq.), Home Equity reduced and narrowed the requests.<sup>1</sup> DLJ and Select Portfolio opposed the motion to compel.

*The Discovery Requests*

The categories of documents Home Equity originally sought to compel from DLJ are:

- \* Communications with Originators regarding the Loans;
- \* Documents provided to the government concerning investigations into DLJ’s business of purchasing, selling and securitizing residential mortgage loans;

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<sup>1</sup>Home Equity did so without prejudice to pursuing the original discovery requests. In a responsive letter, DLJ characterized Home Equity’s narrowing of the original discovery requests as “false.” (10/16/13 letter from Richard A. Jacobsen, Esq.).

- \* Documents and communications with third parties concerning the credit quality of the Loans;
- \* Documents concerning the value of the Loans (e.g. any change in value since the Trusts' inception), including any payments made in connection with the purchase or repurchase of any Loan; and
- \* Documents concerning DLJ's policies and practices concerning its sale and securitization business, including its policies with respect to its repurchase obligations.

The limited categories included in the 10/11/13 letter are:

- \* Any settlement agreements between DLJ and any loan originators that apply to any of the mortgage loans at issue in the Trusts, whether or not individual loan numbers or some variant of the Trusts' names are referenced in the documents (e.g. HEMT 06-1).
- \* Correspondence between DLJ and originators relating to the settlement agreements (including, for example, identification of non-conforming loans and originators' fraud analyses conducted prior to settlement);
- \* Documents already produced by DLJ or its affiliates in response to government lawsuits and investigations into DLJ's mortgage loan sale and securitization business, during the same 2005-2007 time period that DLJ issued the securitizations in this case. In particular, Home Equity seeks any productions made in *People of the State of New York v Credit Suisse (USA) LLC* [...] and pursuant to the Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 [...] ; or
- \* In the alternative, should this Court decline to order productions already made in the aforementioned government investigations, Home Equity requests production of documents regarding DLJ's re-underwriting, due diligence and quality control practices and culture from 2005 through 2007.

The documents Home Equity seeks to compel from Select Portfolio are:

- \* All communications related to servicing of the Select Portfolio loans, including communications with third parties.
- \* Documents relating to Select Portfolio's general servicing policies and procedures.

## Discussion

CPLR § 3101(a) requires, in pertinent part, “full disclosure of all matter material and necessary in the prosecution or defense of an action.” However, the principle of “full disclosure” does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have “broad power to regulate discovery to prevent abuse.” *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 (2d Dept 2007), quoting *Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 874 (2d Dept 1980). Decisions regarding the terms, conditions and scope of disclosures are “within the sound discretion of the trial court.” *Id.*; see *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 (1968). The words “material and necessary” require disclosure “of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Id.* at 406.

DLJ argues that documents that post-date the transaction are not relevant. The court disagrees. Post-securitization communications and settlement agreements with Originators are relevant to the claims made by Home Equity. The Trusts collectively purchased thousands of mortgage loans from DLJ that DLJ had acquired from hundreds of mortgage originators. The Pooling and Servicing Agreements (PSAs) contained representations and warranties by DLJ as to the credit quality of the loans, *inter alia*,

- (iv) The Mortgage Loan complies with all the terms, conditions and requirements of the originator’s underwriting standards in effect at the time of origination of such Mortgage Loan.
- (v) The information set forth in the Mortgage Loan Schedule, attached to the Agreement as Schedule I, is complete, true and correct in all material respects as of the Cut-off Date.

What DLJ *and* the Originators knew about the Loans and when they knew it is highly relevant to determining if and when DLJ breached its obligation to repurchase Loans that violate the Representations and Warranties.

Just last year, in *Assured Guaranty Municipal Corp. v UBS Real Estate Securities Inc.*, a Magistrate-Judge granted a motion to compel similar discovery from UBS, the issuer of three RMBS certificates. 2012 US Dist LEXIS167981 (SDNY 2012). The motion had been brought by Assured, the company providing financial guaranty insurance to UBS. The explanation for allowing the discovery to proceed calls for the same result here:

Documents that post-date the transactions may nevertheless relate back to the state of affairs as it existed at the crucial time. For example, UBS's retrospective assessment of the subject mortgages, triggered by Assured's demands that UBS repurchase the loans, may well analyze the representations that UBS made at the time of closing. Similarly, UBS's own repurchase demands could indicate that it complained about the same representations that it passed along to Assured. Finally, UBS's monitoring of the transactions after closing may have included an assessment of representations previously made to Assured ...

*Id.*, \*6.

DLJ points out that fraud has not been pled, and the agreements did not include a fraud warranty or representation. Neither did the agreements in *Assured Guaranty*. Regardless, DLJ represented and warranted the truth and accuracy of the information in the Loan Schedule, and the Loan's compliance with the terms, conditions and requirements of the Originator's underwriting standards.

The fact that some of the documents sought by Home Equity are settlement agreements with Originators and related communications does not exempt DLJ from its obligation to produce "necessary and material" documents, especially if they disclose information showing that the Loans securitized in the transactions were not as represented. The sheer volume of

defaults, and the fact that DLJ entered into settlements with multiple Originators over these Loans indicate a possibility, if not a likelihood, of systemic problems with the Originators' underwriting, as well as the accuracy of their representations to DLJ. The relevance of these agreements, with respect to the loan included in the three securitizations, makes them discoverable. The Appellate Division, First Department said as much in *Mahoney v Turner Const. Co.*, 61 AD3d 101, 105 (1<sup>st</sup> Dept 2009):

[D]isclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are "material and necessary" to the nonsettling party's case (*Masterwear Corp. v Bernard*, 298 AD2d 249, 250, 750 NYS2d 5 [2002]; see Connors, Practice Commentaries, CPLR C3101:18A, at 35 ["The central inquiry in resolving ... disclosure requests (regarding settlement agreements) should focus on relevance"]).

However, the court denies Home Equity's request for production of all documents produced by DLJ in response to government investigations. The request is over-broad and unduly burdensome. If Home Equity wants to obtain documents from DLJ's "affiliates," it will have to identify them and then serve them with a subpoena. In addition, investigative agencies cast a wide net, and as plaintiff admits, not everything produced will turn out to be relevant to the claims in this litigation. However, Home Equity, in footnote no. 4 of its October 11<sup>th</sup> letter, has referred to specific documents and categories of documents identified in the Attorney General's complaint, which the court agrees should be produced by DLJ, e.g., including: an e-mail in June 2007 in which the Head of Due Diligence for Credit Suisse admitted that DLJ had "systemic problems" in their due diligence process; and documents, including internal e-mails, concerning an "incentives" program rewarding originators of loans in any and all securitizations in 2005-2007. The court also agrees that Home Equity is entitled to production of documents

regarding DLJ's re-underwriting, due diligence and quality control practices and culture from 2005 through 2007. Such practices would have directly affected the loans at issue here and are therefore discoverable.

Finally, the court rejects Select Portfolio's claim that the servicing related documents sought by Home Equity are irrelevant. Select Portfolio was obligated to notify the Trustee when it discovered a breach of the representations and warranties. Its servicing policies and procedures, as well as its communications with third parties concerning servicing of the Loans at issue here, are directly related to discovering what it knew, when it knew it, and what it did about it.

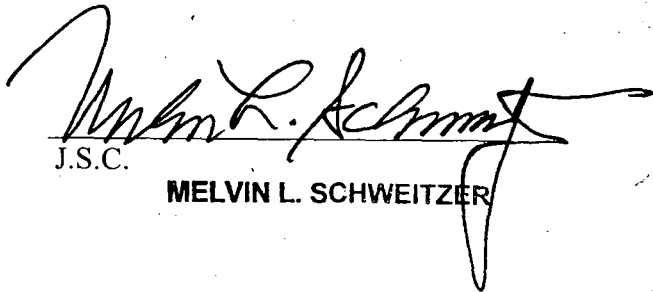
Accordingly, it is hereby

ORDERED that plaintiffs' motion to compel is granted in part and defendants shall produce documents as described above and consistent with this opinion; and it is further

ORDERED that defendants' production shall be completed, with a privilege log if necessary, by no later than January 11, 2014.

Dated: November 8<sup>th</sup>, 2013

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER