

**MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC**

2014 NY Slip Op 31871(U)

July 17, 2014

Supreme Court, New York County

Docket Number: 603751/2009

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

**SHIRLEY WERNER KORNREICH**  
J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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MBIA INSURANCE CORPORATION,

Index No.: 603751/2009

Plaintiff,

**DECISION & ORDER**

-against-

CREDIT SUISSE SECURITIES (USA) LLC,  
DLJ MORTGAGE CAPITAL, INC., and  
SELECT PORTFOLIO SERVICING, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff MBIA Insurance Corporation (MBIA) moves to compel defendants (collectively, Credit Suisse) to produce further ESI that it alleges was improperly withheld as “non-responsive.” Credit Suisse opposes the motion. MBIA’s motion is denied for the reasons that follow.

Judge Cote, whose RMBS litigation experience is virtually unparalleled, recently issued a highly persuasive decision that resonates on this motion. Judge Cote explained:

[RMBS] cases are of importance to the plaintiff and each of the defendants, and they have been granted substantial discovery to permit them to prosecute and defend against the claims pressed here. Where there have been limitations imposed on the scope of discovery, those limitations have been imposed after careful consideration of the claims and defenses that the parties are litigating, the parties’ arguments, and the relevant factors ... courts [] consider in the management of discovery ... When documents are exchanged in discovery, the parties have an opportunity to examine them and take such additional discovery as is necessary to put them in context. The production of a category of documents, or even at times a single document, can add significantly to the burden on all parties to evaluate the documents and to undertake additional discovery as is necessary to meet the issues disclosed in the newly produced documents ... Parties in litigation are required to be diligent and to act in good faith in producing documents in discovery. The production of documents in litigation such as this is a herculean undertaking, requiring an army of personnel and the production of an extraordinary volume of documents. Clients pay counsel vast sums of money in

the course of this undertaking, both to produce documents and to review documents received from others. Despite the commitment of these resources, **no one could or should expect perfection from this process. All that can be legitimately expected is a good faith, diligent commitment to produce all responsive documents uncovered when following the protocols to which the parties have agreed, or which a court has ordered ...** The Court and parties have made an enormous investment of resources to define properly for this litigation the scope of document production. **That production has been vast.** It has demanded the parties to pay dearly for both the production and the review of produced documents. The Court is satisfied that the parties have received all of the documents necessary, **and more**, to litigate the merits of their claims and defenses at trial and to ensure that any jury verdict is based on a reliable factual record.

*FHFA v HSBC N. Am. Holdings Inc.*, 2014 WL 584300, at \*1-3 (SDNY Feb. 14, 2014)

(emphasis added). Here, as in *FHFA*, the court is confident that, based on the ESI produced to date, “the parties have received all of the documents necessary, and more, to litigate the merits of their claims and defenses at trial and to ensure that any jury verdict is based on a reliable factual record.”

Indeed, the premise behind MBIA’s discovery motion undercuts its arguments. MBIA protests that it lacks the full universe of responsive ESI documents that it needs to prove its case. The demanded documents, MBIA argues, demonstrate some of most egregious examples of the fraud MBIA alleges. Leaving aside the merits of that claim, MBIA is only in a position to confidently assert the existence of “smoking gun” evidence because it purports to have so much already. To be sure, much of the inflammatory email exchanges do not portray Credit Suisse’s RMBS employees in the best light. Such portrayal is not, at least from a public relations perspective, mitigated by the defense that the emails evidencing indefensible securitization practices did not expressly name the subject securitization.

Nonetheless, MBIA (or any plaintiff in complex litigation) cannot reasonably expect to uncover every single instance in which a Credit Suisse employee said something that makes its RMBS conduct, at a minimum, a public relations disaster. Again, the very reason that MBIA knows that so much inflammatory ESI exists is precisely because it has so much already. To be sure, in reviewing Credit's Suisse's itemized justifications as to what constitutes relevant ESI, it appears that Credit Suisse may well have been somewhat overaggressive in determining the scope of relevance.<sup>1</sup> That being said, the handful of examples proffered by MBIA, many of which are emails that post-date the transaction or speak to practices employed with other securitizations or other types of collateral, do not give rise to a reasonable inference that Credit Suisse's determinations as to what constitute responsive ESI were made in bad faith. Nor has MBIA convinced the court that Credit Suisse is hiding something materially worse than has already been produced that might tip the scales of this case in MBIA's favor. Indeed, while non-transaction specific inflammatory emails do not speak well of Credit Suisse, Credit Suisse's conduct with respect to the subject transaction is all that is at issue. This case is more likely to (and should) turn on the law (e.g., due diligence issues) and expert evidence (e.g., the non-conformance rate) rather than how many inflammatory emails MBIA can read to a jury. Accordingly, it is

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<sup>1</sup> It should be noted that MBIA's objections to the vigor of Credit Suisse's litigation stance rings hollow given the tenor of its own discovery posture. That being said, MBIA's own discovery conduct is not the basis for the denial of the instant motion.

ORDERED that MBIA's motion to compel is denied.

Dated: July 17, 2014

ENTER:



JSC  
**SHIRLEY WERNER KORNREICH**  
JSC