

**CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC**

2015 NY Slip Op 32619(U)

June 26, 2015

Supreme Court, New York County

Docket Number: 654074/2012

Judge: Marcy Friedman

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

PRESENT: MARCY S. FRIEDMAN  
Justice

PART 60

CIFG ASSURANCE NORTH AMERICA, INC.,  
Plaintiff,

INDEX NO. 654074/2012

-against-

J.P. MORGAN SECURITIES LLC  
(f/k/a "Bear, Stearns & Co. Inc."),  
Defendant.

MOTION SEQ. NO. 001

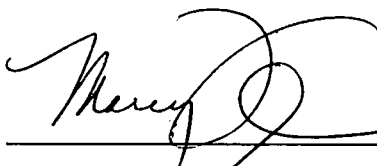
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to dismiss.

|   |               |
|---|---------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | No (s). _____ |
| Answering Affidavits — Exhibits _____                             | No (s). _____ |
| Replying Affidavits _____   | No (s). _____ |

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ORDERED that defendant's motion to dismiss is decided in accordance with the attached decision/order, dated June 26, 2015.

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

Dated: 6-26-15 , J.S.C.

**MARCY S. FRIEDMAN, J.S.C.**

1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:.....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

\_\_\_\_\_ X  
CIFG ASSURANCE NORTH AMERICA, INC.,

*Plaintiff,*  
- against -

Index No.: 654074/2012  
Motion Seq. 001

J.P. MORGAN SECURITIES LLC (f/k/a “Bear,  
Stearns & Co. Inc.”),

*Defendant.*

DECISION/ORDER

\_\_\_\_\_ X

In this action, plaintiff insurer CIFG Assurance North America, Inc. (CIFG) alleges that defendant J.P. Morgan Securities LLC, formerly known as Bear, Stearns & Co. Inc. (Bear Stearns), fraudulently induced CIFG to provide financial guaranty insurance on two credit default swaps (CDS) guaranteeing senior tranches of two collateralized debt obligations (CDOs). CIFG seeks to recover insurance payments made under the guaranties. Bear Stearns moves to dismiss the complaint for failure to state a claim and based upon documentary evidence, pursuant to CPLR 3211(a) (1) and (7). In the alternative, Bear Stearns moves to strike prejudicial allegations in the complaint pursuant to CPLR 3024 (b).

Background

The relevant facts, as alleged in the complaint, are as follows: A CDO is a “special purpose financial vehicle that purchases, or assumes the risk of, a portfolio of assets . . . and issues securities which then make payments to investors from the income generated by the assets in the portfolio.” (Complaint, ¶ 20.) A CDO’s portfolio can include commercial or residential mortgage-backed securities (CMBS and RMBS), “securities issued by other CDOs, or credit

default swaps [CDS] referencing those types of obligations.” (Id.) Typically, CDOs issue classes of notes and equity interests in “tranches’ representing different levels of risk (and therefore potential reward).” (Id., ¶¶ 21-22.) The more senior the tranche of the notes, the higher the rating, the lower the risk, and the lower the reward. (Id.) Generally,

“[w]hen a CDO performs as designed, the assets that form the CDO portfolio generate a stream of cash flows (e.g., from mortgage payments) that the CDO uses to pay its expenses and make interest and principal payments to the CDO’s note holders . . . . [F]or a CDO comprised primarily of RMBS, CDO noteholders will be more likely to receive promised payments of interest and principal if the rate of collection on the underlying individual mortgages is high. Obviously, the higher the credit quality of the mortgages in the portfolio, the more likely that payments to the CDO noteholders will be made.”

(Id., ¶ 20.)

Bear Stearns created two collateralized debt obligations, ACA ABS CDO 2006-2 Ltd. (“ACA 2006-2”) and Libertas Preferred Funding II, Ltd. (“Libertas II”), both of which closed in 2006. (Id., ¶¶ 1-2.) To “make these CDOs marketable, Bear Stearns had to find someone to insure the senior tranches of the CDOs. . . .” (Id., ¶¶ 4, 44.)

CIFG is a stock insurance company. (Id., ¶ 13.) In August 2006, Bear Stearns “approached CIFG to solicit financial guaranty insurance on the ACA 2006-2 Swap, a CDS which would guarantee \$400 million of Class A-1LA Senior Secured Floating Rate Notes issued by ACA 2006-2.” (Id., ¶ 49.) In November 2006, Bear Stearns “approached CIFG to solicit financial guaranty insurance on the Libertas II Swap, a credit default swap which would guarantee payment on \$325 million of Class A-1 Senior Secured Floating Rate Notes of Libertas II” (collectively, the Swaps). (Id., ¶ 61.) Credit default swaps are “commonly used forms of credit protection.” (Id., ¶ 29.) Generally,

“the buyer of credit protection has a ‘short’ position with respect to the specified security, since it will be entitled to a payment if the specified security defaults. Conversely, the seller—and through the seller, the guarantor—of credit protection has a ‘long’ position with respect to the specified security, since it bears the risk of default by the issuer on that security.”

(Id.)

Before agreeing to provide financial guaranty insurance on the ACA 2006-2 Swap and the Libertas II Swap, CIFG conducted “extensive due diligence” on both ACA 2006-2 and Libertas II, the underlying CDOs, including review of the offering circulars and pitchbooks. (Complaint, ¶¶ 52, 55, 62, 101.) With respect to ACA 2006-2, between early August 2006 and October 2006, CIFG had numerous communications and meetings with Bear Stearns and the collateral manager concerning the collateral manager’s “expertise and approach to portfolio selection. . . .” (Id., ¶ 52.) In October 2006, Bear Stearns provided CIFG with a portfolio, representing approximately 95% of the portfolio that would comprise ACA 2006-2. (Id., ¶ 54.) With respect to Libertas II, from December 2006 to January 2007, CIFG had numerous communications with Bear Stearns and the collateral manager, including five separate due diligence meetings, to evaluate the collateral manager’s expertise and investment strategies. (Id., ¶ 64.) In January 2007, Bear Stearns provided CIFG with a portfolio, representing 85% of the portfolio that would comprise Libertas II. (Id., ¶ 65.) CIFG reviewed both proposed portfolios “to determine its credit characteristics and how much loss the portfolio could bear. . . .” (Id., ¶¶ 54, 65.)

As further alleged in the complaint, to induce CIFG to provide the insurance on the Swaps, Bear Stearns misrepresented that the collateral for the CDOs would be selected by a collateral manager “acting independently and in good faith in the interests of long investors.”

(Complaint, ¶ 50 [ACA 2006-2]; see also ¶ 62 [Libertas II].) In fact, however, Bear Stearns directed the selection of the collateral and acted in its own interest. (Id., ¶ 70.) According to CIFG, Bear Stearns had substantial exposure to “toxic” RMBS both through defective loans that it had underwritten and through holdings in its own funds. (Id., ¶¶ 30-43.) Bear Stearns created ACA 2006-2 and Libertas II to “offload” these “toxic” RMBS and to short those positions. (Id., ¶¶ 44, 48, 72, 78, 92.) CIFG further alleges that the toxic nature of the offloaded RMBS could not be determined from publicly available information. (Id., ¶ 78.) In addition, CIFG alleges that Bear Stearns engaged in a bait and switch, removing \$25 million in collateral from ACA 2006-2 after CIFG had conducted due diligence and replacing it with \$65 million of more toxic collateral, one-third of which were Bear Stearns assets. (Id., ¶ 80.) Similarly, after CIFG concluded its due diligence on Libertas II, Bear Stearns added \$77 million of more toxic collateral, 25% of which were Bear Stearns assets. (Id., ¶ 81.)

The complaint pleads that in reliance on Bear Stearns’ representations and omissions, CIFG agreed to provide financial guaranty insurance on the ACA 2006-2 Swap and the Libertas II Swap, which referenced the securities issued by the ACA 2006-2 and Libertas II CDOs. (Id., ¶¶ 60, 69, 100-105, 110-114.) Had CIFG known of the misrepresentations, it would not have provided the insurance on the Swaps. (Id., ¶¶ 98, 105, 114.) Both CDOs failed approximately one year after closing. (Id., ¶ 82.) CIFG was allegedly “obliged to pay more than \$100 million to discharge its liabilities” under the guaranties for these Swaps. (Id., ¶ 98.)

CIFG pleads two causes of action. The first asserts “a claim for material misrepresentation in the inducement of an insurance contract, brought under common law as informed by New York Insurance Law Section 3105.” (Complaint, ¶ 100.) The second alleges

common law fraud. (Id., ¶ 109.) The two causes of action allege the same affirmative misrepresentations and omissions as the basis for CIFG's claim that Bear Stearns induced it to provide insurance on the Swaps. CIFG seeks damages "to restore it to the status quo ante," as well as compensatory and punitive damages. (Id., "Prayer for Relief.")

### Discussion

It is well settled that on a motion to dismiss addressed to the face of the pleading, "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88.)

### First Cause of Action for Fraud Informed By The Insurance Law

CIFG pleads that the credit default swaps are a form of credit protection "similar to credit insurance" (Complaint, ¶ 29), and that it provided financial guaranty insurance on the CDS. (Id.,

¶ 5.)<sup>1</sup> Insurance Law § 3105 provides in pertinent part:

“(a) A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.

(b)(1) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.”

The insurer bears the burden of establishing that the misrepresentation was material and that it would not have issued the policy had the misrepresentation not been made. (See Interboro Ins. Co. v Fatmir, 89 AD3d 993, 993-994 [2d Dept 2011]. See also Vella v Equitable Life Assur. Socy. of United States, 887 F2d 388, 391 [2d Cir 1989] [“New York courts have held that, where there has been a misrepresentation by an insured, the insurance company can avoid liability on the policy by showing that had it known the truth it would not have issued the exact same policy it did issue”].)<sup>2</sup>

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<sup>1</sup> CIFG refers to its obligations as “guaranties” and not as policies. (Id.) For the purposes of this motion, the court assumes without deciding that such guaranties are subject to Insurance Law § 3105. (See Insurance Law § 1101 [a] [1] [“‘Insurance contract’ means any agreement or other transaction whereby one party, the ‘insurer’, is obligated to confer benefit of pecuniary value upon another party, the ‘insured’ or ‘beneficiary’, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event”]; see also Insurance Law § 6901 [a] [1] [definition of “financial guaranty insurance”].)

<sup>2</sup> Indeed, “[e]ven innocent misrepresentations are sufficient to allow an insurer to ‘avoid the contract of insurance or defeat recovery thereunder.’” (128 Hester LLC v New York Marine and General Ins. Co., 126 AD3d 447, 447 [1st Dept 2015] quoting Process Plants Corp. v Beneficial Natl. Life Ins. Co., 53 AD2d 214, 216-217 [1976], affd 42 NY2d 928 [1977].)

At the oral argument of the motion to dismiss, CIFG's counsel framed plaintiff's causes of action as follows:

“CIFG brings two claims in its complaint. First, it alleges that Bear [Stearns] committed material misrepresentation in the inducement of an insurance contract under Section 3105 of New York Insurance Law. Second, it alleges that Bear [Stearns] committed fraud. This is essentially the same claim as the first claim and it's also governed by New York Insurance Law Section 3105. The only difference is that, unlike the first claim, it also incorporates an allegation of scienter or fraudulent intent and, therefore, supports a claim for punitive damages, which we have made in our complaint.”

(OA Tr. at 25.) As CIFG's counsel further explained: “So the CDO[s] entered into a swap with Bear Stearns. Bear Stearns entered into a swap with another entity and that entity was insured by CIFG. The effect was exactly the same as if CIFG had provided an insurance policy directly to Bear Stearns.” (OA Tr. at 29.)

Significantly, the complaint is devoid of any allegation that Bear Stearns (or an affiliate) was the counterparty to one or both of the Swaps. CIFG offers no legal authority in support of its purported expansion of section 3105 to cover the “effective” provision of insurance.

In order to bring its claims within the purview of section 3105, CIFG attempts to cast Bear Stearns as an “applicant” for insurance by alleging that Bear Stearns “persuade[d]” CIFG “to provide insurance on these CDOs—without which the CDOs would not have closed.” (Complaint, ¶ 1. See also P.'s Memo. of Law in Opp. at 17.) As set forth above, however, the complaint pleads not that CIFG insured the underlying CDOs, but rather that it insured secondary swap transactions. The complaint is silent as to the identity of the parties to the ACA 2006-2 Swap and the Libertas II Swap and as to the terms of the guaranties, including the identity of the insured(s) under the guaranties. Notably, CIFG does not plead that it had a

contractual relationship with Bear Stearns or that Bear Stearns was an insured party or received any insurance proceeds, although that information would have been within CIFG's knowledge. Similarly, CIFG merely alleges that Bear Stearns "solicited" insurance from it, without any detail as to when, by whom, on what terms, and for what purpose or in what manner such solicitation took place. CIFG does plead that it paid \$100 million "to discharge its liabilities," but does not identify to whom or to what entity those payments were made and under what circumstances.<sup>3</sup>

Moreover, CIFG's own allegations demonstrate that Bear Stearns was seemingly not dependent on the CIFG financial guaranty insurance on the Swaps to close the CDOs. As set forth above, the complaint pleads that both CDOs closed in 2006. Yet, CIFG pleads that it continued to conduct due diligence on Libertas II up to and including January 2007 and that Bear Stearns did not present CIFG with the prospective portfolio of Libertas II until January 2007. The complaint is silent as to when the guaranties were issued. CIFG, as the insurer, knows with whom it contracted, when the guaranties were issued and/or took effect, and what the terms of the guaranties were, and chose not to plead these facts. Finally, CIFG offers no authority for the proposition that a party that "benefits" from an insurance policy – no matter how indirectly – is bound by the provisions of section 3105.

CIFG's reliance on MBIA Insurance Corporation v Countrywide Home Loans, Inc. (34 Misc 3d 895, 899 [Sup Ct, NY County 2012], modified on other grounds, 105 AD3d 412 [1st Dept 2013]), is unavailing. There, the defendant originator/secritizer (originator) sought

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<sup>3</sup> The Offering Circulars for the CDOs contemplate entry by a Bear Stearns affiliate into CDS transactions. (Slocum Aff., Ex. B: ACA ABS 2006-2 Offering Circular at 3; Slocum Aff., Ex. C, Libertas Preferred Funding II, Ltd. Offering Circular at 16.) The complaint does not, however, allege that CIFG issued the financial guaranty insurance for the CDS referenced in the Offering Circulars.

insurance from the plaintiff insurer to cover any shortfall in the event the payments received from the mortgage loans were insufficient to cover the payments due to the investors under the securities. The plaintiff insurer issued a financial guaranty policy to the trusts. The court held that, for the purposes of Insurance Law §§ 3105 and 3106, the defendant originator acted as an “applicant” or “broker” for the securitization trusts. (*Id.* at 904-905.) Having thus found a direct relationship between the insurer and the originator, the court held the insurer could state fraud claims against the originator, as “informed” by the common law and Insurance Law §§ 3105 and 3106, based on the misrepresentations allegedly made by the originator regarding the mortgage loans in order to induce the insurer to insure the securitizations. (*Id.* at 905.) The Appellate Division affirmed this portion of the decision, holding that “the motion court was not required to ignore the insurer/insured nature of the relationship between the parties to the contract in favor of an across the board application of common law.” (105 AD3d at 412.)<sup>4</sup>

Other cases in the RMBS litigation have similarly applied Insurance Law § 3105 to an insurer’s fraud or misrepresentation claim against a sponsor of the securitization or other applicant for insurance issued to guarantee payments due on securities held by investors in the securitization. (See e.g. *CIFG Assur. N. Am., Inc. v Bank of Am., N.A.*, 41 Misc 3d 1203[A], 2013 WL 5380385, \*1, 6 [Sup Ct, NY County, Sept. 23, 2013, No. 654028/2012], appeal withdrawn 124 AD 3d 516 [1st Dept 2015] [assuming applicability of Insurance Law § 3105 to claim by plaintiff insurer against defendant sponsor and depositor, where plaintiff insurer issued financial guaranty policies on certain tranches of securities issued in two re-resecuritization

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<sup>4</sup> The Court, however, reversed the trial court’s grant of summary judgment on rescissory damages, reasoning that rescission was “legally unavailable.” (105 AD3d at 413.)

transactions]; Assured Guar. Mun. Corp. v DLJ Mtge. Capital, Inc., 44 Misc 3d 1206[A], 2014 WL 3288335, \*8-9 [Sup Ct, NY County, July 3, 2014, No. 652837/2011] [applying Insurance Law §§ 3105 and 3106 to plaintiff insurer in direct contractual relationship with defendant bank, and dismissing fraud claim based on finding that “a monoline [insurer] cannot recover for the very risk it assumed, no matter if one frames the matter as an issue of quasi-antisubrogation or basic proximate causation”]; Syncora Guar. Inc. v Countrywide Home Loans, Inc., 36 Misc 3d 328, 339-341 [Sup Ct, NY County 2012] [holding that plaintiff insurer could assert fraud claims “informed by” Insurance Law §§ 3105 and 3106 against defendant RMBS originator, where plaintiff insured five securitizations with loans originated by defendant, and defendant was the “applicant for insurance”]. See also MBIA Ins. Corp. v J.P. Morgan Secs. LLC, 43 Misc 3d 1221[A], 2014 WL 1797065, \*25-26 [Sup Ct, Westchester County, May 6, 2014, No. 64676/12] [granting defendant underwriter’s motion for summary judgment with leave to plaintiff insurer to replead a cause of action under Insurance Law § 3105 against Bear Stearns, the underwriter of the securitization, where plaintiff insurer issued financial guaranty insurance policy to the sponsor, but “[t]here [wa]s some evidence in this record that would suggest that, assuming [the sponsor] was the only ‘applicant’ for insurance, [the sponsor] may have given ‘authority’ to Bear Stearns to make statements on its behalf such that any statements made by Bear Stearns to [the insurer] were made ‘under the authority of’ the insurance applicant”]; MBIA Ins. Corp. v J.P. Morgan Secs. LLC, 45 Misc 3d 1202[A], 2014 WL 4797010, \*12 [Sup Ct, Westchester County, Sept. 18, 2014, No. 64676/12] [denying motion to amend, made subsequent to above May 6, 2014 decision, to add cause of action against Bear Stearns “for material misrepresentation in the procurement of an insurance contract, brought under common law as informed by New York

Insurance law Section 3105” based on finding, among others, “that assisting in seeking insurance, such as by soliciting and evaluating bids and serving as an intermediary,” was not “sufficient to turn the assistor into the functional equivalent of the applicant” for insurance, and that the proposed amended complaint was devoid of any allegations that Bear Stearns was acting as an agent for, or “by the authority of,” the insured].)

Here, CIFG does not allege that Bear Stearns acted as a broker and fails to plead allegations which, if proved, would establish that Bear Stearns was an applicant for insurance. Moreover, the financial guaranty insurance that CIFG issued did not directly insure the CDOs securitized by Bear Stearns. Rather, the guaranties insured separate credit default swaps with an unidentified party or parties. Under these circumstances, CIFG fails to plead a cause of action for material misrepresentation in the inducement of an insurance contract “as informed by New York Insurance Law Section 3105.” As CIFG fails to submit any legal authority that the issuance of the separate guaranties for the Swaps can support the application of the Insurance Law to Bear Stearns as securitizer of the CDOs, or to make any showing that facts exist that would support a claim that Bear Stearns was the applicant, or acted on the authority of the applicant, for the policies that insured the Swaps, the first cause of action will be dismissed with prejudice.

#### Negligent Misrepresentation or Fraudulent Concealment

Plaintiff appears to contend that even if Insurance Law § 3105 is not applicable to limit the elements of its fraud claim, it has adequately stated a cause of action for fraud based on its pleading of a “special relationship” with Bear Stearns. (See P.’s Memo. of Law in Opp. at 21 n 7.)

Pleading of a special relationship is an element of the torts of negligent misrepresentation and fraudulent concealment. A claim for negligent misrepresentation requires the plaintiff to allege: “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 180 [2011] [internal quotation marks and citations omitted]; accord Gomez-Jimenez v New York Law School, 103 AD3d 13, 18 [1<sup>st</sup> Dept 2012], lv denied 20 NY3d 1093 [2013].) A cause of action for fraudulent concealment requires proof of the elements of fraud based on a misrepresentation, as well as “an allegation that the defendant had a duty to disclose material information and that it failed to do so.” (P.T. Bank Cent. Asia, New York Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003].) A fraudulent concealment claim must be based on a “special relationship or fiduciary obligation.” (Gomez-Jimenez, 103 AD3d at 18.)

CIFG’s complaint by its terms pleads a fraud claim informed by Insurance Law § 3105 or a common law fraud claim, not a negligent misrepresentation or fraudulent concealment claim. CIFG does not allege the special or fiduciary relationship necessary to support either of the latter claims. Rather, it alleges that Bear Stearns provided CIFG with information to facilitate the CDS transactions between CIFG and an unidentified party or parties. In MBIA Insurance Corporation v Countrywide Home Loans, Inc. (87 AD3d 287, 297 [2011]), this Department held that the defendant’s superior knowledge of its own business practices was insufficient to sustain a negligent misrepresentation claim where the parties to the RMBS case were, as here, sophisticated entities engaged in an arm’s length transaction. This court similarly holds that a

special relationship is not pleaded in connection with the ordinary arm's length business transaction between the parties. (See id. at 296.)

#### Second Cause of Action for Common Law Fraud

The second cause of action that is pleaded in the complaint is for common law fraud.<sup>5</sup> To state a cause of action for fraud, a plaintiff must “prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” (Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996].) A fraud claim must be pleaded with particularity pursuant to CPLR 3016 (b). (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].)

To the extent that plaintiff is asserting a common law fraud cause of action in connection with its issuance of the guaranties, the cause of action is not pleaded with sufficient particularity. As discussed above, CIFG does not identify the party or parties insured by the guaranties, the terms of the guaranties, the parties to whom the \$100 million in alleged damages was paid, or the nature of that payment other than that it was a payment “to discharge [CIFG’s] liabilities.” CPLR 3016 (b) “should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.” (Eurycleia Partners, LP, 12 NY3d at 559 [internal quotation marks omitted], quoting Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491 [2008].) Here, however, as CIFG was the party to the guaranties and the payor, all of these facts were within CIFG’s knowledge. The common law fraud cause of action will therefore be dismissed.

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<sup>5</sup> As noted above, at the oral argument, plaintiff’s counsel stated that the second cause of action for fraud was “essentially the same claim as the first claim” and was “also governed by New York Insurance Law Section 3105.” (OA Tr. at 25.) If pleaded based on section 3105, this cause of action fails for the reasons stated above.

This dismissal will, however, be without prejudice to CIFG's right, if so advised, to move for leave to replead a cause of action for common law fraud setting forth evidentiary detail as to the insurance transaction and as to the basis for asserting a fraud claim against Bear Stearns. In so holding, the court notes recent authority that a fraud claim may be maintainable by an insurer directly against a party involved in the securitization, where the party is not the applicant for insurance but makes representations to the insurer regarding the management of collateral. (See Financial Guar. Ins. Co. v Putnam Advisory Co., LLC, 783 F 3d 395 [2d Cir 2015], revg 2014 WL 1678912, \*9 [US Dist Ct, SD NY, April 28, 2014, No. 12 Civ 7372 (RWS)] [in action brought against collateral manager by insurer that provided financial guaranty insurance for CDO, trial court dismissed Insurance Law § 3105 claim, on ground that collateral manager did not act "by the authority" of the applicant for insurance, and common law fraud claim, on ground that loss causation was not adequately pleaded. Without discussing Insurance Law claim, the Court reinstated the fraud claim, holding that loss causation was adequately pleaded based on collateral manager's representations to insurer].)<sup>6</sup>

#### Remaining Contentions

In light of the above holding that the complaint does not plead a fraud claim pursuant to Insurance Law § 3105 or a negligent misrepresentation claim, the court does not reach defendant's contention that such claims are barred by the statute of limitations. (See Ds.' Memo. of Law in Supp. at 21-22.) Nor, in view of the dismissal of the complaint, does the court reach defendant's remaining claims that the complaint fails to state a cause of action or that prejudicial matter should be struck.

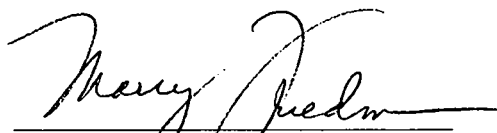
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<sup>6</sup> In this action, which also pleaded a negligent misrepresentation cause of action, the Court further held that the complaint adequately alleged a special relationship between the insurer and the collateral manager. (783 F3d at 405-406.)

It is accordingly hereby ORDERED that defendant J.P. Morgan Securities LLC's motion to dismiss is granted with leave to move to replead a cause of action for common law fraud, as set forth in the above decision.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 26, 2015

  
\_\_\_\_\_  
MARCY FRIEDMAN, J.S.C.